

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (“ministry”) reconsideration decision dated June 6, 2017 in which the ministry found the appellant was not eligible for designation as a Person With Disabilities (“PWD”) because she did not meet all of the criteria in Section 2(2) of the *Employment and Assistance for Persons with Disabilities Act* (“EAPWDA”). The ministry was satisfied that the appellant has reached 18 years of age and that her impairment will continue for at least 2 years. However, based on the information provided in the PWD Designation Application (“PWD application”) and Request for Reconsideration (“RFR”), the ministry was not satisfied that the following criteria were met:

- The appellant has a severe mental or physical impairment.
- The impairment, in the opinion of a prescribed professional, directly and significantly restricts her ability to perform daily living activities (“DLA”) either continuously or periodically for extended periods; and
- As a result of these restrictions, she requires help to perform DLA through an assistive device, the significant help or supervision of another person, or the services of an assistance animal.

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Act - EAPWDA - section 2

Employment and Assistance for Persons with Disabilities Regulation - EAPWDR - section 2

PART E – Summary of Facts

The evidence before the ministry at reconsideration consisted of the following:

1. A PWD application comprised of:

- The *Applicant Information - Self Report* (“SR”) signed by the appellant on February 16, 2017 with a 5-page handwritten submission.
- A *Medical Report* (“MR”) completed by a general practitioner (“the physician”) on March 1, 2017. The physician has known the appellant since 2015 and has seen her 11 or more times in the past 12 months.
- An *Assessor Report* (“AR”), also completed by the physician on March 1, 2017. The physician completed the report via an office interview with the appellant and file/chart information.

The PWD application included the following information:

Diagnoses

MR

The appellant is diagnosed with Chronic pain syndrome [date of onset unknown]; Lumbar disc Disease [date of onset approximately 2009]; query Fibromyalgia [date of onset unknown], Migraine [date of onset Sept. 2016], and Chronic fatigue syndrome [date of onset Feb. 2016]. Under *Health History*, the physician stated that the appellant’s chronic pain has worsened in the past few years. Under *Additional Comments*, the physician added that “this patient suffers chronic anxiety (her whole life really), depression for at least several years which is associated with chronic pain; and her pain levels have increased over several years.”

Functional Skills

The physician provided the following information regarding any functional limitations:

MR

Under *Health History*, the physician stated that the appellant’s pain, stiffness, and weakness limit her ability to do things day to day. In *Additional Comments*, he added that her main functional disabilities are related to her pain, weakness, and stiffness.

In assessing the appellant’s functional skills per Part D of the report, the physician indicated that:

- the appellant can walk 4+ blocks unaided on a flat surface [comment, “She can walk but she is very slow due to pain and weakness”].
- climb 5+ steps unaided [comment, “but causes pain and is very slow”];
- lift 5 to 15 pounds [comment, “but causes extreme pain so she avoids it”];
- how long she can remain seated is unknown [comment, “gets pain and stiffness”];
- she has no difficulties with communication; and
- she has significant deficits with 3 out of the 12 areas of cognitive and emotional function: Memory, Emotional disturbance, and Motivation [comment, “she is depressed due to chronic pain. She has long-standing chronic anxiety - as far back as she can remember”].

AR

The physician provided the following information for Part B, *Mental or Physical Impairment*:

Ability to Communicate

- The appellant has a good ability in all of the listed areas: Speaking, Reading, Writing, and Hearing [comment, “these are not applicable”].

Mobility and Physical Ability

- She is independent with 1 of the 6 functions: Standing [comment, “usually ok”].
- 3 of the 6 functions take her significantly longer than typical: Walking indoors, Walking outdoors, and Climbing stairs [comments, “takes longer due to pain...She estimates it will take approximately 10 minutes to walk 1 block”].
- She requires periodic assistance with 2 functions: Lifting [comment, “gets others to lift things”]; and Carrying and holding [comment, “sometimes gets others to do this”].
- Under *Comments*, the physician wrote, “she has severe chronic pain. 5 steps to get in the house, 2 steps to kid’s room”].

Cognitive and Emotional Functioning

- In assessing to what degree a mental impairment restricts or impacts the appellant’s cognitive/emotional functioning, the physician indicated impacts for 2 of the 14 areas listed:
 - Bodily functions - Moderate and Major impact [comment, “moderate - major sleep disturbance, sometimes with pain, sometimes with nightmares”];
 - Motivation - Moderate impact [comment, “good intentions but can’t get things done”].

SR

The appellant described the following impacts to her function:

- Standing: She is restricted from standing in the shower to the point where she avoids taking showers as “it “hurts my lower back, hips, and legs.”
- Lifting: She cannot lift a coffee pot or a kettle full of water, and putting her coat on and taking it off her arms and shoulders feels like a heavy weight on her shoulders and even her housecoat “is too much weight to bear.” Reading is also difficult as her hands ache while holding the book; her neck begins to hurt after a few minutes, and pain travels through her arms, shoulders, and neck.
- Walking: Walking is painful and it “sometimes takes extreme physical and mental effort” to make her legs move very slowly. She has difficulty feeling her legs and is scared of falling. Her muscles also “lock” throughout her legs and feet causing extreme pain and sometimes when she is walking, the bones in her ankle “stick” and her foot cannot move as it gives out and she has to “catch herself” so that she does not fall down.
- Carrying and holding: She has not been able to carry a purse in more than a year, or a shopping bag, due to pain from her neck right down to her fingers.

- Climbing stairs: Stairs are very difficult due to the pain in her knees, but she cannot avoid stairs at home as there are 4 stairs at the entrance of her house. She tries to avoid stairs when she is out, even it means walking through deep puddles. Her headaches, dizziness, and poor balance also make stairs scary.

Daily Living Activities (DLA)

MR

• Under *Health History* the physician stated that the appellant has “quite severe chronic pain which impacts her ADL’s.” She has not been prescribed any medication that interferes with her ability to perform DLA [comment, “no intolerable side effects from current medications”].

AR

The physician provided the following information for DLA:

• The appellant’s DLA are impacted by her “increasingly severe levels of chronic pain” which “make it difficult for her to complete activities of daily living; also fatigue, weakness, stiffness” [Part B, *Mental or Physical Impairment*].

• For Part C, *Daily Living Activities*, the appellant was assessed as follows:

- She is independent with all areas for 3 of the 8 DLA: Pay rent and bills, Medications, and Social Functioning. However, for Social Functioning, [*Able to deal appropriately with unexpected demands*] she also requires continuous support/ supervision as she “gets stressed with excessive demands if not physical. She can’t cope with unexpected physical demands.” She was reported to have good functioning with her immediate and extended social networks and no significant help to help maintain the appellant in the community was reported. Under *Additional Comments*, including identification of any safety issues, the physician wrote, “she has chronic anxiety/depression.”

• She has restrictions in specified areas of the following DLA:

- **Personal Care:** She is independent with 1 of the 8 areas listed [Regulating diet]. She takes significantly longer than typical with 7 areas: Dressing [comment, “getting dressed takes 10 minutes”]; Grooming, Bathing, and Toileting [comments, “takes longer due to pain/stiffness...weakness, fatigue”]; Feeding self [comment, “sometimes takes longer”]; Transfers [Bed and Chair] “causes pain”
- **Basic housekeeping:** She requires continuous assistance from another person for all areas: Laundry and Basic housekeeping [comment, “almost always requires help from others”].
- **Shopping:** She is independent with 3 [out of 5] areas of Shopping: Reading prices and labels, Making appropriate choices, and Paying for purchases. She takes significantly longer than typical in Going to and from stores [comment, “pain...so takes longer”]. She requires continuous assistance with Carrying purchases home [comment, “gets others to do this”].
- Under *Additional comments* the physician wrote: *She has bad pain, stiffness, and weakness all which results in her taking longer for ADLs and avoiding some activities (i.e., showering) because of pain increases from getting in and out of the shower and the physical act of washing. She has chronic fatigue which slows her down even more.*”
- **Meals:** The appellant is independent with 2 of 4 areas: Meal planning, and Safe storage of food. She requires periodic assistance and takes significantly longer than typical with Food preparation and Cooking [comment, “usually her kids do most of the cooking and food prep.”].
- **Transportation:** She is independent in 1 of 3 areas [Using transit schedules/ arranging transportation]. She takes significantly longer than typical with Getting in/out of a vehicle [comment, “takes longer due to pain, weakness, stiffness”]; and Using public transit [comment, “avoids due to pain”].

- Under *Additional Comments* the physician wrote, “Her pain, weakness, stiffness remain her main barriers; also fatigue. Her mental function regarding bills, shopping, etc. are ok.”
- Under *Additional Information* the physician wrote: *This patient’s ADLS; i.e., grooming, bathing, cooking, cleaning are all impacted by her pain, weakness, and stiffness. Her pain levels may fluctuate but she always has some BASELINE pain. Her pain levels have generally gotten worse in past few years. She has chronic fatigue now as well.*

SR

- The appellant described restrictions with washing, hair combing [“really painful”], getting dressed, cooking [she described her difficulty with whipping cream due to pain stating that she is “fighting back tears by the time the cream is whipped”]. Her children now do laundry and dishes for her, and carrying a shopping bag with even one lightweight item is very painful.

Need for Help

MR

- The physician check marked *No*, the appellant does not require any prostheses or aids for her impairment.

AR

- Under *Assistance provided by other people* the physician indicated that the appellant’s family provides the help she requires with DLA [comment, “She relies on her family for support”].
- The physician wrote “N/A” for the section on *Assistance provided through the use of assistive devices*.
- He also wrote “N/A”, and checked *No* when asked to indicate if the appellant has an assistance animal.

SR

- The appellant reported needing help with several activities including laundry, dishes, food preparation, and showering and indicated that her children assist her.

2. A Request for Reconsideration (“RFR”) signed by the appellant on May 25, 2017 in which she provided a 5-page type-written submission with her argument as well as information including statistics on her specific medical conditions. She described “unbearable pain” with sitting and stated that she needs assistance with showering [“help in and out of the shower”] and her anxiety level increases “at the thought of falling in the shower.” She stated that she *can’t do much without the help of her family or friends...can’t stand to do much without going and laying down. The simplest tasks such as cooking or doing the laundry I can’t seem to do any more. I have to go and lay down and rest.*

3. The ministry’s denial letters of June 5, 2017; and April 25, 2017 with *Persons with Disabilities Designation Denial Decision Summary*. The ministry indicated the appellant applied for PWD designation on March 10, 2017, was denied on April 25, 2017, and requested reconsideration on May 3, 2017.

Additional submissions

With the consent of both parties, the appeal proceeded as a written hearing pursuant to section 22(3)(b) of the *Employment and Assistance Act*. Subsequent to the reconsideration decision the appellant filed her *Notice of Appeal* dated June 13, 2017 in which she stated her argument and indicated that she would like the opportunity to review and clarify her situation with the physician who was away until June 29, 2017. The panel will consider the arguments of both parties in the next section - Part F. The panel notes that no additional submissions from the appellant or the physician were provided on appeal and the ministry indicated in an e-mail to the Tribunal that its submission on appeal would be the reconsideration summary.

PART F – Reasons for Panel Decision

The issue on appeal is whether the ministry's reconsideration decision of June 6, 2017 in which the ministry found the appellant was not eligible for designation as a PWD because she did not meet all of the criteria in Section 2(2) of the EAPWDA was reasonably supported by the evidence or was a reasonable application of the legislation in the circumstances of the appellant. The ministry was satisfied that the appellant has reached 18 years of age and that her impairment will continue for at least 2 years. However, based on the information provided in the PWD application and RFR, the ministry was not satisfied that the appellant has a severe mental or physical impairment that in the opinion of a prescribed professional, directly and significantly restricts her ability to perform DLA either continuously or periodically for extended periods; and as a result of these restrictions she requires help to perform DLA through an assistive device, the significant help or supervision of another person, or the services of an assistance animal.

The eligibility criteria for PWD designation are set out in section 2(2) of the EAPWDA as follows:

2(2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act if the minister is satisfied that the person is in a prescribed class of persons or that the person has a severe mental or physical impairment that

(a) in the opinion of a medical practitioner or nurse practitioner is likely to continue for at least 2 years, and

(b) in the opinion of a prescribed professional

(i) directly and significantly restricts the person's ability to perform daily living activities either

(A) continuously, or

(B) periodically for extended periods, and

(ii) as a result of those restrictions, the person requires help to perform those activities.

(3) For the purposes of subsection (2),

(a) a person who has a severe mental impairment includes a person with a mental disorder, and

(b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires

(i) an assistive device,

(ii) the significant help or supervision of another person, or

(iii) the services of an assistance animal.

The "daily living activities" referred to in EAPWDA section 2(2)(b)(i) are defined in section 2 of the EAPWDR:

Definitions for Act

2 (1) In this section:

"**assistive device**" means a device designed to enable a person to perform a daily living activity that, because of a severe mental or physical impairment, the person is unable to perform;

For the purposes of the Act and this regulation, "**daily living activities**" ,

(a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following activities:

(i) prepare own meals;

(ii) manage personal finances;

(iii) shop for personal needs;

(iv) use public or personal transportation facilities;

(v) perform housework to maintain the person's place of residence in acceptable sanitary condition;

- (vi) move about indoors and outdoors;
- (vii) perform personal hygiene and self-care;
- (viii) manage personal medication, and
- (b) in relation to a person who has a severe mental impairment, includes the following activities:
 - (i) make decisions about personal activities, care or finances;
 - (ii) relate to, communicate or interact with others effectively.

Analysis

The panel provides the following analysis and decision for the legislative criteria the ministry determined were not met.

Severe mental impairment

While the focus of the appellant's submissions is her pain and physical limitations, she described fear, anxiety, crying spells, and an inability to rest, related to her physical impairments and her fear of falling. In her Notice of Appeal, she argued that the physician omitted "integral information" about her "severe anxiety disorder" as he asked her questions that she did not fully understand.

The ministry argued that a severe mental impairment was not established as there was inconsistent information between the MR and AR. For example, the physician indicated significant deficits with Memory and Emotional disturbance in the MR but in the AR, he did not indicate any impacts for these areas. The ministry further noted that while a significant deficit in the area of Motivation was reported in the MR, the appellant's anxiety/depression had only a Moderate impact on her Motivation in the AR. The ministry noted that the physician did not indicate any deficits for most areas of cognitive/emotional functioning arguing that the information, viewed cumulatively, does not establish a severe mental impairment. The ministry noted that the physician did not indicate any deficits with communication and he also marked the appellant as independent with social functioning. The ministry argued that "getting stressed" with excessive demands, as noted by the physician, does not indicate a restriction in social functioning. The ministry noted that the physician did not describe a need for support/supervision to maintain the appellant in the community.

Panel's decision - Severe mental impairment

The panel finds that the ministry reasonably concluded that the information provided in the PWD application does not establish a severe mental impairment. Although the physician reported that the appellant has longstanding anxiety and depression, these were described as related to her pain and physical limitations; as noted by the ministry, few deficits or impacts for cognitive and emotional functioning were reported. For the areas in which deficits/ impacts were indicated, in particular Memory and Motivation, the physician provided inconsistent information between the MR and AR on the degree of the deficit/ impact, and the only area in which a major impact was reported was Bodily Functions [AR - sleep disturbance] and no impact was reported for 12 out of the 14 functions listed in the AR. Furthermore, the appellant has no deficits with communication and aside from becoming stressed by excessive demands [in particular physical demands] the appellant is independent in all areas of social functioning and was in fact reported to have good functioning with her social networks.

The legislation requires evidence of a severe mental impairment that significantly impacts daily functioning. While the evidence indicates that the appellant has longstanding anxiety and depression associated with her physical condition, her cognitive and emotional functioning including communication and social functioning were marked as largely unrestricted and the information

regarding restrictions lacked sufficient detail and consistency to establish a severe mental impairment. Therefore, based on the information in its entirety, the panel finds that the ministry reasonably determined a severe mental impairment under section 2(2) of the EAPWDA was not established.

Severe physical impairment

The appellant argued that her physical disabilities are severe as most aspects of her physical functioning, as well as her daily activities, are restricted by pain, stiffness, numbness, and related symptoms and her conditions have gotten worse over time. She submits that the physician omitted “integral information” on many of her physical disabilities as he asked her questions that she did not fully understand. In her submission for the reconsideration she stated that the complexity of her various disabilities makes her daily living extremely difficult and that the nature of her “overlapping barriers” makes it often impossible “to take a break or have a comfortable rest.”

The ministry acknowledged that the appellant experiences impacts to physical functioning due to chronic pain but argued that a severe physical impairment was not established by the physician’s information that indicated the appellant is able to walk several blocks and climb stairs unaided, and also lift some weight despite pain and slowness. The ministry noted that the physician did not detail how much longer than typical the appellant takes to walk any distance or climb stairs, and while the appellant reported to the physician that it takes her 10 minutes to walk 1 block, the ministry was not satisfied that the physician had made his own detailed medical assessment to confirm a severe impairment of physical functioning. The ministry noted that the physician did not describe the frequency or duration of the periodic assistance the appellant requires with lifting and carrying/holding, and as the appellant was reported as able to lift 5 to 15 pounds, the ministry argued that she would therefore be able to lift variety of shopping or household items.

Panel’s decision - Severe physical impairment

The panel finds that the ministry reasonably concluded that the information provided in the PWD application does not establish a severe physical impairment. While the physician’s information corroborates the appellant’s reports of pain with most physical movement, the physician has nonetheless assessed the appellant’s physical functions in the MR at the least restricted end of the scale for walking [4+ blocks unaided] and climbing stairs [5+ steps unaided]; and in the middle range of restriction for lifting [5 to 15 pounds].

While the appellant reported in her RFR submission that she “can be sitting in a chair and the pain will be unbearable”, and the physician noted “pain and stiffness” with sitting, he did not provide an assessment of how long she can remain seated. Further, despite the appellant’s description of back, hip, and leg pain upon standing in the shower to the point where she showers far less frequently than

she used to, the physician reported in the AR that “standing is usually ok.” In addition, as noted by the ministry, the information in the AR lacks a sufficiently detailed assessment by the physician regarding how much longer than typical the appellant takes when walking and climbing stairs. Despite her pain and other physical symptoms the appellant indicated that her house has a number of steps that she navigates.

The legislation requires evidence of a severe physical impairment that significantly impacts daily functioning. While the evidence indicates that the appellant experiences pain, stiffness, and fatigue with most physical functions, the physician’s information is that she performs these functions at less restricted points on the scale and without requiring any assistive devices. Therefore, based on the

information in its entirety, the panel finds that the ministry reasonably determined a severe physical impairment under section 2(2) of the EAPWDA was not established.

Restrictions in the ability to perform DLA

The appellant argued that her conditions make everyday living very difficult and she can no longer do simple tasks such as cooking or doing laundry. In her self-report she indicated that she is also restricted with grooming as washing/ combing her hair is very painful and taking her coat on and off aggravates her shoulder pain. Food preparation is difficult as she cannot lift a small coffee pot or kettle of water, open a screw-top jar or operate a blender due to pain in her hands and a lack of strength.

While the ministry accepted that the appellant experiences restrictions to DLA due to chronic pain, it found that there was not enough evidence to confirm that her impairment significantly restricts her ability to perform DLA either continuously, or periodically for extended periods. The ministry noted that she had not been prescribed medications that interfere with her DLA. The ministry argued that it is difficult to establish significant restrictions with Personal care, in particular with dressing, without knowing how long it took the appellant to get dressed prior to the onset of her medical conditions. The ministry argued that taking 10 minutes to get dressed [as noted in the AR] is not considered indicative of a significant restriction where it would typically take a person 3 to 5 minutes to get dressed.

The ministry also noted that the physician did not describe how much longer than typical the appellant takes in doing the remaining DLA that were assessed as taking longer [going to and from stores, food preparation and cooking, and getting in and out of vehicles]. Where the need for periodic assistance was identified [food preparation and cooking], the ministry noted that the frequency or duration of the periodic assistance was not described. The ministry argued that the appellant's independence with Standing [as reported in the PR] coupled with her ability to lift 5 to 15 pounds, makes it difficult to establish why she experiences restrictions with cooking and food preparation.

Panel's decision - Restrictions to DLA

Subsection 2(2)(b)(i) of the EAPWDA requires the ministry to be satisfied that in the opinion of a prescribed professional a severe impairment directly and significantly restricts DLA either continuously, or periodically for extended periods. In this case, the prescribed professional is the physician that filled out the forms. DLA are defined in section 2(1) of the EAPWDR and are also listed in the PR, with additional details in the AR. Therefore, a prescribed professional completing these forms has the opportunity to indicate which, if any, DLA are significantly restricted by the appellant's impairments either continuously or periodically for extended periods.

In analyzing the physician's information on restrictions to the DLA, the panel finds that the ministry was reasonable in concluding that the evidence was insufficient to establish that the appellant's DLA are directly and significantly restricted either continuously, or periodically for extended periods. While the physician indicated that pain, stiffness, and fatigue causes many activities to take longer than typical [most areas of Personal care, and Transportation, and some areas of Shopping and Meals as well]. The ministry noted that, aside from taking 10 minutes to get dressed, the physician did not describe how much longer than typical it takes the appellant to do any of the other activities. Similarly, while she requires periodic assistance with Meals, the physician did not provide any detail regarding the frequency and duration of the assistance needed which would have assisted the ministry in determining whether there are any periodic restrictions for extended periods of time under subsection 2(2)(b)(i)(B) of the EAPWDA.

Continuously restricted DLA

The physician indicated that the appellant's most serious restrictions were for Basic housekeeping [needs continuous assistance in all areas], and one area of Shopping [needs continuous assistance with Carrying purchases home]. However, as argued by the ministry, she was reported to have no significant restriction with Standing, and the physician indicated she is able to lift 5-15 pounds. The panel therefore finds that the ministry reasonably concluded that a continuous restriction with these DLA is not supported by the appellant's level of physical function and ability.

While most of the activities requiring physical movement were reported as restricted to a greater or a lesser degree, thereby corresponding with the appellant's symptoms of pain and stiffness, the physician provided insufficient information to confirm that her impairments directly and significantly restrict her ability to perform DLA continuously or periodically for extended periods as required by subsection 2(2)(b)(i) of the EAPWDA. The panel therefore finds that the ministry reasonably determined that a prescribed professional has not confirmed the requirement for significant restrictions to DLA as set out in the legislation.

Help to perform DLA

The appellant argued that on an "average day", she "can't do much without the help of (her) family and friends." The ministry's position is that as it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required from other persons. The ministry noted that the information provided did not indicate that the appellant requires any assistive devices.

Panel's decision - Help to perform DLA

Subsection 2(2)(b)(ii) of the EAPWDA requires a prescribed professional to confirm that as a result of significant restrictions to DLA, the person requires help to perform an activity. Where another person is providing the help, the level of assistance or supervision required must be significant as set out in subsection 2(3)(b)(ii). The physician's evidence confirms that the appellant does not use any assistive devices or an assistance animal but she does receive help and support from her family. However, the panel found that the ministry reasonably determined the information provided does not confirm significant restrictions to DLA that are the result of a severe impairment. As restrictions to

DLA are a precondition for needing help with DLA, and that precondition has not been met, the panel finds that the ministry reasonably determined the criterion under subsection 2(2)(b)(ii) of the EAPWDA was not met.

Conclusion

The panel finds that the ministry's reconsideration decision that determined the appellant is not eligible for PWD designation under section 2 of the EAPWDA was reasonably supported by the evidence. The panel confirms the decision pursuant to section 24 of the EAA and the appellant is not successful in her appeal.