

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the Ministry) reconsideration decision dated June 26, 2017, which found that the Appellant did not meet four of the five statutory requirements of Section 2 of the *Employment and Assistance for Persons with Disabilities Act* for designation as a person with disabilities (PWD). The Ministry found that the Appellant met the age requirement. However, the Ministry was not satisfied that the evidence establishes that:

- the Appellant's impairment is likely to continue for at least two years;
- the Appellant has a severe physical or mental impairment;
- the Appellant's daily living activities (DLA) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and,
- as a result of these restrictions, the Appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

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 the time of the reconsideration decision included the PWD Application comprised of the applicant information and self report (SR) dated March 30, 2017, a medical report (MR) dated March 30, 2017 and completed by the Appellant's general practitioner (GP) who has known the Appellant since April 2016 and who has seen the Appellant once in the past year, and an assessor report (AR) dated March 30, 2017 completed by the GP.

The evidence also included the following documents:

- 1) Request for Reconsideration (RFR) signed on June 12, 2017 by the Appellant stating that her condition is getting worse, that she cannot afford surgery and that she depends on her family for help. Accompanying the RFR was:
 - a handwritten letter dated June 12, 2017 and signed by the Appellant (Appellant's Letter) providing information about her impairment, her recent surgery, the challenges her employer is having in accommodating her given her impairment, and details regarding the help she receives from her children;
 - a letter "to whom it may concern" dated June 8, 2017, signed by the GP and written at the request of the Appellant (GP's Letter) providing information about the Appellant's impairment; and,
 - a letter "to whom it may concern" dated March 16, 2017, signed by a podiatrist (Podiatrist's Letter) asking that the Appellant be provided with the forms necessary to apply for PWD.

Diagnoses

In the MR, the GP diagnosed the Appellant with "left foot pain", with the diagnostic code "Musculoskeletal system - other" circled in Section 1 of the MR and with an onset of July 2016.

Physical Impairment

In the MR and the AR, the GP reported that:

- in terms of health history, the Appellant has foot pains affecting her walking and standing;
- in terms of functional skills, the Appellant can walk less than 1 block unaided on a flat surface, can climb more than 5 steps unaided, and has no limitation with respect to how long she can remain seated (due to a typographical error in the MR form, lifting ability is not clear - see discussion below);
- due to her foot pain, the Appellant was operated on for Morton's Neuroma but that she "still has pain on a daily basis" that is "affecting her daily life. Now possibly having another operation"; and,
- the Appellant was independent with respect to all aspects of mobility and physical ability (walking indoors and out of doors, climbing stairs, standing, lifting and carrying and holding), adding "but gets pain in left foot (on a daily basis) when standing or walking (for) more than 15 (minutes)".

In the SR, the Appellant wrote that she has Morton's Neuroma in her left foot for which she had surgery on October 21, 2015, and that she has pain in her left foot on a daily basis.

In the Appellant's Letter she wrote that she has had surgery on her foot but requires another operation because the Podiatrist was not able to remove all of the tumor. In the meantime, her foot is getting worse and her activities are more restricted, and that she has difficulties standing or walking for more than 15 minutes.

In the GP's Letter, he wrote that the Appellant is having difficulty walking and "is getting more restricted". The letter states that the Appellant is diagnosed with Morton's Neuroma, has had one operation and is waiting for another operation which she cannot afford, and therefore it has not yet been scheduled.

In the Podiatrist's Letter, he wrote that the Appellant "has an ongoing problem with her foot".

Mental Impairment

The GP does not provide a diagnosis of a mental impairment in the MR.

In the AR, the GP indicates that the Appellant's level of ability in communication was good (speaking, reading, writing and hearing) and that there were no major impacts to cognitive and emotional functioning, moderate impacts to emotion, and minimal impacts to attention/concentration and motivation. In the comments section of the cognitive and emotional functioning section he wrote "pain daily interferes with her ability to function".

In the SR, the Appellant indicates that in the past 6 months she has been having trouble concentrating due to the pain.

Restrictions in the Ability to Perform DLA

In the MR, the GP indicated that the Appellant does not take any medication or treatments that would interfere with her ability to perform DLA.

In the AR, the GP indicates that the Appellant is independent with respect to all personal care DLA, basic housekeeping DLA ("but is slower than before"), shopping (except for going to and from stores "because of the pain", and as a result she gets help with shopping), meals, paying rent and bills, medication, getting in and out of a vehicle and arranging transportation (with the qualification that she needs to be transported as she is not able to drive because of the pain), and all aspects of social functioning.

Need for Help

In the MR and the AR, the GP indicates that the Appellant lives alone and does not have an assistance animal or require any prosthesis or aids for her impairment. As mentioned above, the GP also states that the Appellant needs help with shopping and needs to be transported because she cannot drive.

In her SR, the Appellant wrote that she relies on her children sometimes for help and that her daughter drives her on errands and when she goes shopping.

In the Appellant's Letter she says that her daughter has been helping her with most of her chores, including driving her when she goes shopping or that her daughter shops on her behalf. She states that her daughter helps her with housework "and everything else that requires more effort", and that every day her daughter comes over to help her with her bath. She also states that even though she does not use any walking aids "she is restricted from doing all the things that (she) used to do".

Additional Information submitted after reconsideration

In her Notice of Appeal dated July 10, 2017, the Appellant stated that she disagreed with the Ministry's reconsideration decision because her physical impairment will last for the rest of her life.

At the hearing, the Appellant's Representative (Representative) spoke on behalf of the Appellant. The Representative said that the Appellant's impairment is worsening by the week. The Representative explained that the Appellant's previous general practitioner had been her family physician for 17 years but was no longer practicing family medicine, and as a result the Appellant had been forced to find another family physician (the GP) whom she has only seen once prior to completing the MR and the AR, which was shortly before "the problem came up" and the initial operation occurred on her left foot. The Representative said that the GP is very busy and doesn't know what the Appellant goes through on a daily basis.

The Representative also said that the GP rushed through the MR and the AR and contradicted himself several times. As a result the MR and the AR were not accurate. As an example, the Representative stated that, even though the GP said in the MR that the duration of the impairment is not likely to last for at least 2 years, it will last for the rest of the Appellant's life because she cannot afford another operation. The Representative and the Appellant both asserted that the Podiatrist, who completed the initial operation under local anesthetic in his office, had assured the Appellant that the operation would not be covered by the provincial medical services plan (MSP). As a result, the Appellant had had to charge the \$2,000 cost of the operation to her credit card and could not afford another operation. The Appellant stated that the Podiatrist had removed a nerve in her leg during the operation which had exacerbated her impairment. The Appellant explained that she had to use crutches immediately following the operation, and wore a boot for 4 to 5 months. In addition, the Appellant explained that her right foot was starting to cause her pain because of the extra weight she was having to put on it due to the pain in her left foot. She stated that she worked for 8 years in a job which required a lot of walking and could no longer work due to the impairment.

The Representative explained that another operation was required because the Podiatrist had intended to remove a tumour during the operation but could not remove it all under local anesthetic, and that she would therefore need a second operation under general anesthetic in a hospital to remove the rest of the tumour. Unless and until a second operation was performed, the Appellant was convinced that the impairment would continue and become more severe.

Regarding help with DLA, the Representative stated that she assists the Appellant with most DLA, including keeping her house clean. With respect to mental impairments, the Representative stated that the Appellant is now stressed to the point where she doesn't sleep much.

At the hearing, the Ministry relied on its reconsideration decision and emphasized that the Ministry is guided by the legislation, and can only make a decision as to whether PWD benefits can be provided based on the information that they receive, which is provided by prescribed professionals. The Ministry pointed out that the AR states that the Appellant is independent in all DLA except going to and from stores.

The Ministry also explained that there are advocates and social agencies in the Appellant's community who can assist with issues relating to MSP qualifications and CPP options.

Admissibility of Additional Information

Section 22(4) of the *Employment and Assistance Act* (EAA) provides that panels may admit as evidence (i.e. take into account in making its decision) the information and records that were before the minister when the decision being appealed was made and “oral and written testimony in support of the information and records” before the minister when the decision being appealed was made, i.e. information that substantiates or corroborates the information that was before the minister at reconsideration. These limitations reflect the jurisdiction of the panel established under section 24 of the EAA: to determine whether the Ministry’s reconsideration decision is reasonably supported by the evidence or a reasonable application of the enactment in the circumstances of an Appellant. That is, panels are limited to determining if the Ministry’s decision is reasonable and are not to assume the role of decision-makers of the first instance. Accordingly, panels cannot admit information that would place them in that role.

The Ministry did not object to the admissibility of the information in the NOA.

The panel considered the information in the NOA to be argument.

The panel did not admit the oral information provided by the Representative at the hearing regarding the help she provides the Appellant with most DLA, including housekeeping, because the GP had indicated in the MR and the AR that the Appellant was independent in all DLA except for being transported to and from stores. In addition, the Appellant stated in the SR that, while she “relies on (her) children sometimes for help (with household maintenance)”, she does the housekeeping herself when she can. As the GP states that she is independent with respect to housekeeping, and because the Appellant does not indicate how often she gets help with household chores and that there are times when she can complete those activities herself, the panel finds that the Representative’s oral evidence indicating that the Appellant needed regular help with housekeeping was in support of the information that was before the minister when the decision being appealed was made.

PART F – Reasons for Panel Decision

The issue on the appeal is whether the Ministry's reconsideration decision, which found that the Appellant is not eligible for designation as a PWD, was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the Appellant. The Ministry found that the evidence does not establish that the Appellant has a severe mental or physical impairment that, in the opinion of a prescribed professional, is likely to continue for at least 2 years and that her DLA are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods. Also, as a result of those restrictions, it could not be determined that the Appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

The criteria for being designated as a PWD are set out in Section 2 of the EAPWDA as follows:

Persons with disabilities

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;

"daily living activity" has the prescribed meaning;

"prescribed professional" has the prescribed meaning.

(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.

(4) The minister may rescind a designation under subsection (2).

The EAPWDR provides as follows:

Definitions for Act

2 (1) 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.

(2) For the purposes of the Act, "**prescribed professional**" means a person who is

- (a) authorized under an enactment to practise the profession of
- (i) medical practitioner,
 - (ii) registered psychologist,
 - (iii) registered nurse or registered psychiatric nurse,
 - (iv) occupational therapist,
 - (v) physical therapist,
 - (vi) social worker,
 - (vii) chiropractor, or
 - (viii) nurse practitioner ...

Duration of Impairment

In its reconsideration decision, the Ministry was not satisfied that the information provided establishes an impairment which was likely to continue for two years. In its reconsideration decision, the Ministry states that the GP had indicated in the MR that the Appellant's impairment is not likely to continue for 2 years or more. The Appellant, through her Representative, stated that the Appellant's impairment would last for the rest of her life because she could not afford the operation necessary to ameliorate it.

Panel Decision

Section 2(2)(a) of the EAPWDA requires that a person applying for a PWD designation must have a severe impairment which, *in the opinion of a medical practitioner or nurse practitioner*, is likely to continue for at least 2 years. In this case, the prescribed professional is the Appellant's GP. In the MR, the GP indicates that the Appellant's impairment is not likely to continue for 2 years from the date of the assessment, adding the comment "*Having pain and possibly having another operation. To be evaluated after (the second operation)*".

Therefore, the panel finds that the Ministry's determination that there is not sufficient evidence to establish that an impairment which was likely to continue for two years was reasonably supported by the evidence before the Ministry at reconsideration.

Severity of Impairment

A diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a “severe” impairment. Section 2(2) of the EAPWDA requires that in determining whether a person may be designated as a PWD the Ministry must be satisfied that the individual has a severe physical or mental impairment. An “impairment” is a medical condition which results in restrictions to a person’s ability to function independently or effectively. With respect to assessing the severity of an impairment, Section 2(2)(b)(i) of the EAPWDR requires that a mental or physical impairment *directly and significantly* restricts the person’s ability to perform DLA either *continuously*, or *periodically for extended periods*. Therefore, to assess the severity of an impairment, the Ministry must consider both the nature of the impairment and the extent of its impact on daily functioning as evidenced by functional skill limitations and the degree to which the ability to perform DLA is restricted. In making its determination the Ministry must consider all the relevant evidence, including that of the Appellant. However, the legislation is clear that the fundamental basis for the analysis is the evidence from a prescribed professional – in this case the Appellant’s GP.

Physical Functioning

In its reconsideration decision, the Ministry was not satisfied that the information provided establishes a severe physical impairment. The Ministry noted that the GP reported in the MR that the Appellant can walk less than one block unaided, climb 5+ steps unaided, had no limitation with remaining seated, while in the GP’s letter he stated that she had pain in her foot when standing or walking more than 15 minutes. The Ministry argued that the ability to walk for up to 15 minutes is not considered to be indicative of a severe impediment to physical functioning. In addition, the Ministry points out that in the GP’s letter he does not describe limitations to the Appellant’s abilities to climb stairs, lift, remain seated or remain standing. The Ministry also noted an apparent contradiction between the GP’s assessments regarding the Appellant’s ability to lift in the MR and the AR. In the MR, the Ministry states that the GP indicates that the Appellant cannot lift any weight whereas in the AR the GP indicates that the Appellant is independent with carrying, lifting and holding. The Ministry further noted that “(Section 2) of this printed version of the (MR) contains two entries for the option of “no (lifting)”, omitting the option of “no limitation for lifting”. The Appellant’s position is her foot is getting worse and her activities are becoming more and more restricted. As a result she has difficulties standing or walking for more than 15 minutes, and that unless she has a second operation, which she cannot afford, her physical functioning will continue to deteriorate.

Panel Decision

The panel notes that the Ministry provides no further explanation in its reconsideration decision as to why the typographical error appears in Part D of the Ministry’s printed version of the MR with respect to limitations in lifting. As it appears that a correct version of the form would have had “no limitation” printed as the first of the two entries where “no lifting” appears (as is the case in the following question on the form dealing with how long a person can remain seated), the panel finds that there is no way of being certain that the GP did not read “no limitation” for “no lifting” in response to that question, and thereby might have intended to indicate “no limitation” with respect to lifting in the MR, as he did in the AR. Therefore the panel finds that the Ministry was not reasonable in determining that there was a conflict between what the GP reported with respect to the Appellant’s ability to lift in the MR and what was reported in the AR.

As mentioned above, to assess the severity of an impairment, the Ministry must consider both the nature of the impairment and the extent of its impact on daily functioning as evidenced by functional skill limitations. Despite the difficulty in establishing the Appellant’s ability to lift based on information

provided in the MR and the AR, the panel notes that the GP, who is the Appellant's prescribed professional, reports that the Appellant has no restrictions with respect to 2 of the other 3 physical functional skills upon which she has been assessed (i.e. no limitations with respect to climbing stairs and remaining seated), and that the Appellant does not use any assistive devices.

Therefore, the panel finds that the Ministry's determination that there is not sufficient evidence to establish that the Appellant has a *severe* physical impairment which directly and significantly restricts the Appellant's ability to perform DLA either *continuously or periodically for extended periods* pursuant to Section 2(2) of the EAPWDA, was reasonably supported by the evidence before the Ministry at reconsideration.

Mental Functioning

In its reconsideration decision, the Ministry found that the GP did not provide a diagnosis of a mental impairment in the MR. In the AR, the Ministry noted that the GP indicated no major impacts to cognitive and emotional functioning, moderate impacts to emotion, and minimal impacts to attention/concentration and motivation. On balance the Ministry found that, based on the GP's assessment, the cumulative impact on cognitive and emotional functioning was not indicative of a severe impairment to mental functioning. The Appellant's position is that in the past six months she has had trouble concentration because of the pain.

Panel Decision

The panel finds that the evidence shows that the Appellant's cognitive and emotional functions are not significantly impacted by her impairment. Therefore the panel finds that the Ministry reasonably determined that a severe mental impairment was not established pursuant to Section 2(2) of the EAPWDA.

Restrictions in the ability to perform DLA

The Ministry's position is that the evidence, including the medical opinion expressed by the GP in the MR and the AR, the SR, the Podiatrist's Letter and the GP's Letter, is not sufficient to confirm that the Appellant has a *severe* impairment that *significantly* restricts her ability to perform DLA *continuously or periodically for extended periods*, and that therefore the legislative criteria have not been met. The Appellant's position is that she requires help from her daughter to perform most of her housekeeping DLA and many of her personal care and shopping DLA (in particular going to and from stores).

Panel Decision

Section 2(2)(b) of the EAPWDA requires that the Ministry be satisfied that a prescribed professional has provided an opinion that an applicant's severe impairment *directly* and *significantly* restricts her DLA, continuously or periodically for extended periods. In this case, the GP is the prescribed professional. DLA are defined in Section 2(1) of the EAPWDR and are also listed in the MR and, with additional details, in the AR. Therefore, the prescribed professionals completing these forms have the opportunity to indicate which, if any, DLA are significantly restricted by the Appellant's impairments either continuously or periodically for extended periods, and to further elaborate so that the nature and extent of the restrictions to DLA are clear. Prescribed professionals are further encouraged to elaborate on the nature and extent of the limitations or restrictions in the instructions provided in those sections of the forms. For example, in Part C of the AR the assessor is instructed to identify whether assistance is required in each case with respect to the full range of DLAs, and if the applicant is not independent, to describe the type and amount of assistance required.

The panel notes that the information provided by the GP indicates that the Appellant is independent with respect to all DLA except for going to and from stores, which he indicates takes significantly longer than normal and for which he reports that she needs help. However, he does not indicate what type of help she requires, nor whether she needs continuous assistance or periodic assistance, and if she needs periodic assistance, how often or for how long assistance is required. Despite the Representative reporting that the Appellant needs continuous assistance with going to and from stores, the panel finds that the ministry reasonably concluded that the evidence is insufficient to show that, in the opinion of a prescribed professional, the appellant's overall ability to perform her DLA is *significantly* restricted either continuously or periodically for extended periods, pursuant to Section 2(2)(b)(i) of the EAPWDA. The appellant's GP, the prescribed professional, indicates that she is independent with respect to all DLA except for going to and from stores, and for the going to and from stores DLA the GP's assessment of her condition fails to fully describe the impact on her ability to perform DLA.

Help with DLA

In its reconsideration decision, the Ministry states that it cannot be determined that significant help is required because it has not been established that DLA are significantly restricted. The Appellant's position is that, while she does not require any assistive devices, her daughter has been helping her with most of her chores, including driving her when she goes shopping and that her daughter helps her with her housework and personal care.

Panel Decision

Section 2(2)(b)(ii) of the EAPWDA requires that, *as a result of direct and significant restrictions* in the ability to perform DLA, a person requires help to perform those activities. Help is defined in subsection (3) as the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform a DLA.

The panel finds that the Ministry reasonably determined that, as direct and significant restrictions in the Appellant's ability to perform DLA have not been established, it cannot be determined that the Appellant requires help to perform DLA as a result of those restrictions, as defined by Section 2(3)(b) of the EAPWDA.

Conclusion

Having reviewed and considered all of the evidence and relevant legislation, the panel finds that the Ministry's reconsideration decision, which determined that the Appellant was not eligible for PWD designation under Section 2 of the EAPWDA, was reasonably supported by the evidence and was a reasonable application of the EAPWDA in the circumstances of the Appellant, and therefore confirms the decision. The Appellant's appeal, therefore, is not successful.