

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (ministry) reconsideration decision dated 9 November 2017, which determined that the appellant was not eligible for persons with disabilities designation (PWD) because she had not met all of the legislated criteria under section 2 the *Employment and Assistance for Persons with Disabilities Act*. The ministry determined that the appellant had demonstrated that she has reached 18 years of age and her impairment, in the opinion of a medical practitioner, is likely to continue for at least 2 years. The ministry further determined that the appellant had not demonstrated that she has a severe mental or physical impairment; the appellant's severe mental or physical 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 direct and significant restrictions, she requires help to perform those activities.

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

Evidence before the ministry at reconsideration consisted of the following:

1. The appellant's PWD Application

The Application contained:

- A Medical Report (MR) dated 27 July 2017, completed by the appellant's general practitioner (GP) who has seen the appellant 2-10 or more times in the past 12 months and has known the appellant since August 2005.
- An Assessor Report (AR) dated 27 July 2017, completed by the appellant's GP.
- A Self Report (SR) dated 22 June 2017, completed by the appellant with 2 additional handwritten pages entitled Addendum Disabling Condition.

The panel will first summarize the evidence from the PWD Application as it relates to the PWD criteria at issue in this appeal.

Diagnoses

In the MR, the GP specifies the following diagnoses as related to the appellant's impairment:

- Anxiety disorder – onset February 2014
- Anemia – onset November 2016
- Hypothyroidism – onset June 2017
- Diabetes – onset November 2016

In the Health History section of the MR, the GP provides the following commentary: *This patient is under severe stress due to a toxic divorce from her husband since 2014. Recently, this has been exacerbated by losing her rental home from which she ran a daycare. She c/o (complains of) fatigue and overwhelming anxiety. Her medical condition worsened in 2017 when she became anemic (Hb 93) due to menorrhagia and severe hypothyroidism (TSH 159). This worsened her fatigue and led to cognitive dysfunction. She has not addressed her relatively new diagnosis of diabetes due to her mental state.*

In the AR, the GP has responded to the question "What are the applicant's mental or physical impairments that impact his/her ability to manage Daily Living Activities?" with the comments: *severe anxiety, anemia and hypothyroidism [illegible] mild cognitive dysfunction and fatigue.*

Severity of mental impairment

MR:

The GP indicates that the appellant suffers from anxiety

The GP indicates that the appellant has no difficulties with communication.

The GP indicates that the appellant had significant deficits with cognitive and emotional functioning in the areas of executive, memory, emotional disturbance, motivation and attention.

AR:

The GP assesses the appellant's ability to communicate as "not affected".

The GP assess the appellant's cognitive and emotional functioning as having no impact in the areas of bodily functions, consciousness, impulse control, insight and judgement, motor activity, language, psychotic symptoms, other neuropsychological problem and other emotional or mental problems. The GP assesses minimal impacts on daily functioning in the area of attention/concentration and memory. Moderate impacts on daily functioning are assessed in the areas of executive and motivation. Major impacts are assessed in the area of emotion.

SR:

The appellant reports that she has severe anxiety due to a recent series of extremely traumatic events. She explains that she cannot complete tasks at a normal rate and has difficulty with prioritization; it takes a week to complete simple tasks and basic chores seem to take all day. She explains that she has to get up hours earlier to get her children ready for school. She states that she has difficulty focussing, she is continuously tearful and her body is excessively sore.

Severity of physical impairment

MR:

For functional skills, the GP indicates that the appellant can walk 4+ blocks unaided, climb 5+ steps unaided, lift under 7-16 kg. (15-35 lbs.), and remain seated without limitation.

The GP indicates that the appellant does not require any prostheses or aids for her impairment.

AR:

The GP does not assess the appellant's mobility and physical ability but provides the comment: *Full mobility but complains of fatigue.*

SR:

The appellant does not provide any information relating to a physical impairment.

Ability to perform DLA

MR:

The GP indicates that the appellant has not been prescribed medication that interferes with her ability to perform DLA.

AR:

The GP indicates that the appellant is independent in daily living activities in the following listed areas: personal care; basic housekeeping; shopping; meals; pay rent and bills; and transportation.

The GP has not assessed the appellant's abilities in relation to the medications activities (filling/refilling prescriptions, taking as directed, safe handling and storage) but provides the following commentary: *did not take thyroid replacement medication due to financial constraints.*

SR:

The appellant does not provide any information relating to the specific DLA listed in the PWD application but states, as noted above, that it takes her longer to complete tasks and she has difficulty with prioritization.

Section 2(1)(b) DLA

The following DLA are applicable to a person who has a severe mental impairment:

Make decisions about personal activities, care or finances

AR:

The GP indicates that the appellant is independent with the shopping activities of readings labels, making appropriate choices, and paying for purchases; activities of meal planning, food preparation, and safe storage; paying rent and bill; and the transportation activity of using transit schedules and arranging transportation. As noted above, activities dealing with medications have not been assessed.

Relate to, communicate or interact with others effectively

MR:

The GP indicates that the appellant has no difficulties with communication.

AR:

The GP assesses the appellant's ability to communicate is "not affected".

In assessing social functioning DLA, the GP indicates that the appellant is independent in all areas and has good functioning in her immediate social networks and extended social networks.

Help required

MR:

The GP indicates that the appellant does not require any prostheses or aids for her impairment.

AR:

The GP indicates that the help required for DLA is "not required".

In response to the prompt to specify what help is required but there is none available, the GP does not provide a response.

The GP indicates "N/A" in relation to assistive devices required by appellant.

The GP indicates that the appellant does not receive assistance from assistance animals.

2. Other documents:

- Lab report dated 19 July 2017;
- Lab report dated 23 June 2017; and
- Lab report dated 15 November 2016.

3. Request for Reconsideration

A Request for Reconsideration dated 01 November 2017, with which was included 5 pages (3 typed and 2 handwritten) from the appellant. In this Reconsideration Submission, the appellant explains that she has suffered from extreme anxiety for most of her life. She describes her previous abusive relationship. She explains the loss of her subsequent rental home and the business she operated from it. The appellant explains how her medical conditions have interfered with her ability to deal appropriately with her tenancy issues and the licensing issues that arose in relation to her business. She explains that she was unable to ask her new landlord to fix a running toilet, resulting in a \$1000 water bill. She says that her thyroid issues are improving. She states that she has had difficulty with the ministry (a different ministry) due to missing her children's appointments and has been in danger of losing custody because of her intense anxiety. She is easily distracted, has trouble focussing and misses deadlines all the time. She is afraid of people and avoids or cancels her social engagements. She says that she needs counseling and the right medication. She explains that her health has deteriorated because she was unable to afford her thyroid medication and she has become anemic and diabetic.

Additional information before the panel on appeal consisted of the following:

Notice of Appeal

In the Notice of Appeal dated 17 November 2017, the appellant wrote as reasons for appeal: *My disabilities should prove I should have PWD benefits.*

Appeal Submissions

Appellant

At the hearing, the appellant explained that she is not upset with the ministry and understands why the reconsideration decision was made. She has trouble following through and did not work on her appeal until 2 days before it was due. She has spoken to advocates and this is helping her to understand. She explained that her doctor is walking a fine line in the PWD paperwork because the appellant is concerned about losing her kids due to her anxiety. She stated that she has trouble with memory and dealing with things in day to day life. She explained that she is capable of doing daily activities, such as the dishes, but she struggles to make herself do these things and repeatedly forgets to do some things. She explained that her "teariness" is getting worse and it is hard for her to leave the house because she worries about this. She also worries about her children being with their father as he was very abusive. She explains that she was not taking medication at the time of the original application and now she is but she isn't sure if it's helping or making things worse.

Appellant's Witnesses

The appellant attended the hearing with 2 witnesses.

The first witness explained that she has known the appellant for 2 years; their daughters are in school together. She stated that the appellant has confided in her about the traumatic events around the appellant's divorce. She explained that the appellant is often emotional, teary, overwhelmed and worries about the safety of her children. She explained that the appellant used to operate a daycare but had to close it down suddenly. She stated that the appellant suffers from bouts of depression where she is overwhelmed and exhausted and doesn't know what to do; she gets paralyzed by fear. The witness explained that the appellant is taking medication but struggles with the side effects and also struggles to co-parent with her abusive ex. The witness explained that she worries about the appellant's ability to navigate the system and get support. She feels that for the appellant to work would be overwhelming at this point.

The second witness explained that she has known the appellant for 6 years and came to know the appellant because her son attended the appellant's daycare until it shut down. She explained that she could always tell the appellant suffered from anxiety but there were aspects of the appellant's life that she was not aware of until recently. The witness stated that the appellant is exceptionally good with children. Her son misses the daycare and asks if the appellant is OK. The witness explained that the appellant lives for her kids, but because she has some experience with anxiety she understands that it can be difficult for the appellant to be a good caretaker and parent. The witness expressed her surprise that the appellant is able to function as well as she does, given the circumstances.

Appellant's Documents

The appellant submitted 2 documents at the hearing:

1. Letter from a social worker (SW) at the Ministry of Children and Family Development dated 5 December 2017, in which the SW explained that he was been working with the appellant for 4 months. The SW stated that he has observed that the appellant's emotional health is fragile and she is deeply impacted by anxiety. The SW explains that he is not in a position to assess the appellant's employability but feels it would be impacted to some degree.
2. Email from the appellant's GP dated 7 December 2017. In this email, the GP provides an update regarding changes to the appellant's conditions as well as updates regarding the appellant's treatment plan. The GP also describes the appellant's inability to motivate herself to perform several daily living activities. She describes the appellant's social isolation and the depression and anxiety the appellant feels when her children are with their father. The GP states that the appellant requires assistance to function and is unable to seek employment for at least two years.

Ministry

The ministry relied on the reconsideration decision.

Admissibility

The panel finds that the information provided in the Notice of Appeal, appellant's submission and witness submissions to be admissible in accordance with section 22 (4)(b) of the *Employment and Assistance Act* because it consists of reiteration and elaboration in support of information and records before the ministry at reconsideration.

The panel also finds the SW letter to be admissible in accordance with section 22 (4)(b) of the *Employment and Assistance Act* because it consists of the SW's opinion, which supports the information and records before the ministry at reconsideration. The panel notes that the ministry did not comment on the admissibility of this document.

The panel finds that GP's email to consist partly of information that supports the information and records before the ministry at reconsideration and partly information that is new and was not before the ministry at reconsideration. As such, the panel finds that the information in the email providing updates regarding the appellant's medical conditions and the associated treatment plan is inadmissible because this information is significantly different from the information that was available at reconsideration. As well, the GP's indication that the appellant requires assistance to function is not admissible as it directly contradicts the GP's previous assessment. However, the GP's information about the appellant's difficulty with motivation and as the depression and anxiety she feels when the children are with their father is substantially the same as the information in the appellant's Reconsideration Submission and is therefore admissible in accordance with section 22 (4)(b) of the *Employment and Assistance Act*. The panel notes that the ministry objected to the admission of the GP's email on the basis that it is new information that was not before the ministry at reconsideration.

PART F – REASONS FOR PANEL DECISION

The issue in this appeal is whether the ministry decision that determined that the appellant did not meet three of the five statutory requirements of Section 2 of the *EAPWDA* for PWD designation is reasonably supported by the evidence or is a reasonable application of the legislation in the circumstances of the appellant. Specifically, the ministry determined that the information provided did not establish that:

- the appellant has a severe mental or severe physical impairment;
- that the appellant's severe mental or physical 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 those restrictions, she requires help to perform those activities.

The following section of the *EAPWDA* applies to this appeal:

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 following section of the *EAPWDR* applies to this appeal:

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, or

(b) acting in the course of the person's employment as a school psychologist by

- (i) an authority, as that term is defined in section 1 (1) of the *Independent School Act*, or
- (ii) a board or a francophone education authority, as those terms are defined in section 1 (1) of the *School Act*,

if qualifications in psychology are a condition of such employment.

Severity of impairment

The legislation requires that for PWD designation, the minister must be "satisfied" that the person has a severe mental or physical impairment. The legislation makes it clear that the determination of severity is at the discretion of the minister, considering all the evidence, including that of the appellant. Diagnosis of a serious medical condition or the identification of mental or physical deficits does not in itself determine severity of impairment.

Severity of physical impairment

In the reconsideration decision, the ministry determined that it was not satisfied that this criterion had been met. In making this determination, the ministry considered the functional skills assessment by the GP noting that the appellant is able to walk 4+ blocks unaided, climb 5+ unaided, is limited to lifting under 7-16kg and can remain seated without limitation. The ministry noted that the GP described the appellant as suffering from fatigue but concluded that the assessments provided did not reflect a physical impairment.

The panel finds that the ministry's determination was reasonable. The panel notes that the appellant has not argued in her reconsideration submission or at the hearing that she suffers from a severe physical impairment. The appellant states that she is capable of functioning physically but has difficulty with anxiety, memory and motivation, which makes her take longer to complete even the most simple tasks. The panel notes that the GP's assessments of the appellant's functional capacity and mobility and physical ability assessments reflect a physically independent individual who has some difficulty with anxiety and fatigue. The panel finds that the ministry's determination that a severe physical impairment has not been established is reasonably supported by the evidence.

Severity of mental impairment

In the reconsideration decision, the ministry found that the appellant does not have a severe mental impairment. The ministry noted that the GP's assessment indicates that the appellant has no difficulties with communication. The ministry considered that in the MR the GP indicated significant deficits with cognitive and emotional functioning in the areas of executive, memory, emotional disturbance, motivation and attention/sustained concentration, with the comment that these symptoms are caused by anxiety and profound hypothyroidism but in the AR the GP assesses moderate or minimal impacts in all but one of these areas. The ministry also considered that there were major impacts assessed in the area of emotion, moderate impacts with respect to executive and motivation and minimal impacts in the area of attention/concentration and memory. The ministry noted that no impacts were assessed for the remaining nine areas. As well, the ministry considered the GP's assessment of the appellant's social functioning abilities. In this consideration, the ministry noted that the GP has indicated that the appellant is independent with areas of social functioning and has good functioning in her immediate and extended social networks. The ministry also considered that the GP did not provide information in relation to the presence of any safety issues or support/supervision required to maintain the appellant in the community. The ministry concluded that the information provided did not establish a severe impairment in mental functioning.

The panel notes that the appellant has argued at reconsideration and on appeal that she suffers from severe anxiety that makes it difficult for her to remember and complete tasks. She argued that she is afraid to leave the house and often cancels her social engagements. She explains that she forgets appointments and worries about losing her children. The panel finds that the ministry's determination that a severe mental impairment has not been established was reasonable. The panel finds that the information provided in the PWD application and SR with respect to the appellant's mental impairment reflect an individual who has some difficulty but is functioning independently. The appellant's evidence at the hearing is consistent with this. The panel notes that the GP's assessments relating to decision-making indicate that the appellant is independent in all assessed areas. The panel also notes the absence of communication difficulties, safety concerns or a need for support or supervision to maintain the appellant in her community. The panel finds that the ministry's conclusion that the information provided does not establish a severe mental impairment was reasonably supported by the evidence.

Direct and significant restrictions in the ability to perform DLA

The legislation specifies that the minister assess direct and significant restrictions in the ability to perform DLA in consideration of the opinion of a prescribed professional. This does not mean that other evidence should not be considered, but it is clear that a prescribed professional's evidence is fundamental. At issue in this assessment is the degree of restriction in the appellant's ability to perform the DLA listed in section 2(1) (a) and (b) of the EAPWDR applicable to a person with a severe mental or physical impairment.

The ministry was not satisfied that the appellant has a severe impairment that, in the opinion of a prescribed professional, directly and significantly restricts her ability to perform DLA. In reaching this conclusion, the ministry noted that the appellant has not been prescribed medication or treatment that impacts her ability to perform DLA. The ministry considered the GP's assessment that the appellant is independent with all areas of personal care, basic housekeeping, shopping, meals, pay rent/bills and transportation. The ministry also considered that the GP did not indicate restrictions to medications activities, but did comment that the appellant was not taking medication due to financial constraints. The ministry also argued that not taking medication due to financial constraints is not indicative of restrictions to the listed medications activities. As well, the ministry argued that the GP has not indicated restrictions to any listed DLA.

The panel finds that the ministry's determination that the assessments provided by the GP do not establish that a severe impairment significantly restricts the appellant's ability to perform DLA continuously or periodically for extended periods was reasonable. The panel notes that the GP has not assessed any restrictions to any DLA. The panel also notes that the appellant did not argue at the hearing or at reconsideration that her ability to perform DLA is restricted. Rather, the appellant stated that she is capable of performing DLA but has some difficulty with motivation. As such, the panel concludes that the ministry's determination on this criterion was reasonably supported by the evidence.

Help Required

The legislation requires that, as a result of being directly and significantly restricted in the ability to perform DLA either continuously or periodically for extended periods, a person must also require help to perform those activities. The establishment of direct and significant restrictions under section 2(2) (b)(i) is a precondition of meeting the need for help criterion. Help is defined in subsection (3) as the requirement for an assistive device, significant help or supervision of another person, or the services of an assistance animal in order to perform a DLA.

In the reconsideration decision, the ministry determined that as it had not been established that appellant's ability to perform DLA were significantly restricted, it cannot be determined that significant help is required. The information provided by the GP is that assistance is not required. The appellant did not argue that she requires assistance to perform any DLA. As noted above, the panel finds that the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established. As such, the panel finds that the ministry reasonably concluded that under section 2(2)(b)(ii) of the EAPWDA it cannot be determined that the appellant requires help to perform DLA.

Conclusion

The panel finds that the ministry's reconsideration decision, determining that the appellant had not met all of the legislated criteria for PWD designation, was a reasonable application of the legislation in the circumstances of the appellant and reasonably supported by the evidence. The panel confirms the ministry's reconsideration decision. The appellant is not successful on appeal.