

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (ministry) reconsideration decision dated 8 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 of 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 4 August 2017, completed by the appellant's general practitioner (GP) who has seen the appellant 11 or more times in the past 12 months and has known the appellant since 2015.
- An Assessor Report (AR) dated 4 August 2017, completed by the appellant's GP.
- A Self Report (SR) dated 16 June 2017, attached with which were 6 typed pages, describing generally the medical conditions the appellant has been diagnosed with and their general symptoms, and 18 pages handwritten by the appellant describing her childhood as well as her vocational, educational and medical history.

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:

- Fibromyalgia – onset unspecified
- Degenerative Disc Disease (DDD) – onset unspecified
- Osteoarthritis knee [illegible] – onset August 2015
- Depression/Anxiety – onset unspecified

In the Health History section of the MR, the GP provides the following commentary: *DDD causes her pain with sitting, trial of retraining requiring her to attend classes unsuccessful as back pain caused anxiety and could not continue. Did have good response when placed on [medication] for depression, was motivated to work. May 2017 stopped meds, but within 2 wks. – recurrence depression and anxiety.*

In the AR, the GP has not responded to the question "What are the applicant's mental or physical impairments that impact his/her ability to manage Daily Living Activities?"

Severity of mental impairment

MR:

The GP indicates that the appellant suffers from Depression/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 emotional disturbance and motivation.

AR:

The GP assesses the appellant's ability to communicate as good in all areas (speaking, reading, writing and hearing).

The GP assess the appellant's cognitive and emotional functioning as having no impact in the areas of bodily functions, consciousness, impulse control, attention/concentration, executive, memory, 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 insight and judgement and memory. Moderate impacts on daily functioning are assessed in the area of emotion.

SR:

The appellant reports that she suffers from depression that impacts her ability to live a full and happy life. She explains that she has tried many types of medication but has difficulty with the side effects and can end up feeling worse. She explains that she sometimes has difficulty with daily chores because she feels as if she has no energy to move. She states that depression has caused her to have many setbacks. The appellant also reports that she is dyslexic and this has caused difficulty since she was a child in school. She explains that she quit school just shy of Grade 10 and has had mostly physical jobs because it was too difficult to rely on her mind for a living.

Severity of physical impairment

MR:

For functional skills, the GP indicates that the appellant can walk 2-4 blocks unaided, climb 5+ steps unaided, lift under 2 kg. (5 lbs.), and remain seated for less than an hour.

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

AR:

The GP assesses the appellant's mobility and physical ability as independent with walking indoors and outdoors, climbing stairs and standing. The GP indicates that periodic assistance is required for lifting and carrying and holding.

SR:

The appellant reports that she suffers from chronic pain in her back, which she has learned is DDD, as well as pain in her knee and fibromyalgia. She reports that sitting hurts her back and driving hurts both her back and knee. She explains that she has inflammation throughout her body and she walks at a snail's pace. She reports that she has a difficult time with waiting in line at the banks or a store and tries to shop at less busy times to avoid lineups. She states that she can barely get up the stairs to her apartment but doesn't want to move because she wants stability for her son. She explains that to relieve her muscle spasms she sometimes has to lie on the floor. She explains that her condition has worsened in the past 3 years and she worries about the future. She explains that she took a course to become a care aid and loves the work but cannot continue safely in her part-time position. She explains that she is concerned about providing for her son and believes that PWD status would allow her to meet her financial needs without needing to constantly look for work, which she says is a nightmare because she knows she can't be a reliable worker. She explains that she would like to work but often has to recover after exerting herself.

Ability to perform DLA

MR:

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

The GP indicates that there are no restrictions to the appellant's ability to perform personal self care, meal preparation, management of medications, daily shopping, mobility inside the home, management of finances and social functioning.

The GP indicates that the appellant's ability to perform basic housework and mobility outside the home are continuously restricted and her ability to use transportation is periodically restricted. The GP provides the following explanation: *sometimes can't use car, public transport has to walk to stop, finds hard to sit, too bumpy.*

In response to the prompt "What assistance does your patient need with Daily Living Activities?", the GP comments: *often needs help from others re: housework, lifting, carrying.*

AR:

The GP indicates that the appellant is independent in daily living activities in the following listed areas: personal care; meals; pay rent and bills; and medications. The GP indicates that the appellant requires periodic assistance with basic housekeeping tasks (laundry and basic housekeeping). The GP indicates that the appellant is independent with the shopping activities of reading prices and labels and making appropriate choices but requires periodic assistance with going to and from stores, paying for purchases and carrying purchases home. In relation to transportation the GP indicates that the appellant is independent getting in and out of a vehicle and using transit schedules and arranging transportation but requires periodic assistance using public transit.

The GP provides the following additional comments:

Finances are of great concern.

Unable to lift and carry due to back and knee pain.

Finds it difficult to use public transit as hard to sit very bumpy, which exacerbates back pain.

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 reading labels and making appropriate choices; the meals activities of meal planning; food preparation, and safe storage; all pay rent and bills activities; all medications activities and the transportation activity of using transit schedules and arranging transportation.

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 good in all areas.

In assessing social functioning DLA, the GP indicates that the appellant is independent in all areas and has marginal 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 daily living activities is provided by family.

In response to the prompt to specify what help is required but there is none available, the GP writes: *she needs help with housecleaning, groceries and transportation.*

The GP leaves blank the section about assistance provided through the use of assistive devices.

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

2. Request for Reconsideration

A Request for Reconsideration dated 27 October 2017, with which was included 8 handwritten pages from the appellant (Reconsideration Submission). In this Reconsideration Submission, the appellant explains that she has taken the decision in to her GP and the GP has corrected her previous assessment in relation to the anticipated duration of the appellant's conditions. She reports that she is suffering pain and fatigue due to fibromyalgia and pain in her back and hips is interfering with her ability to sleep. She explains that she would much rather be pain free and working at a job she loves. She reports having pain and spasms in her hand when preparing vegetables and widespread pain when she walks. She says her daily struggles are worsening and it scares her; the pressure of searching for work adds more stress. She explains that she has already been suffering for 10 years. She says that she has always had physical jobs due to her dyslexia and now fibromyalgia symptoms are contributing to forgetfulness, mind fog and sleeplessness. The appellant states that she suffers daily and nightly and is not trying to take advantage of taxpayers. She reports that a pain clinic will help her to learn coping skills to improve her quality of life but that her condition will deteriorate with age.

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

Notice of Appeal

In the Notice of Appeal dated 20 November 2017, the appellant wrote as reasons for appeal: *Going back to doctor on Nov. 23. I do not feel I'm being heard by my doctor or the appeal process – Expressing self in written form or to my doctor is not getting through.*

Appeal Submissions

Appellant

At the hearing, the appellant restated much of the information she had previously provided in the SR and Reconsideration Submission. The appellant also explained that she does not want to be on welfare and is ashamed. She explained that she has had a lot of difficulty getting her doctor to listen and support her but cannot find a new one. She reported that because she has a doctor, no other doctor would take her on as a patient. She

further explained her employment history and her current struggles with employment because she is not a reliable worker and has some difficulty with mental job skills. She reports that she wants to go back to work part-time and loves her work as a home support worker, but this requires her doctor to fill out forms for the employer and her doctor doesn't want to fill out the forms. She spoke at length about different work possibilities and how her ability to perform them successfully and reliably might be impacted by her limitations. The appellant reported that she has had some counselling but feels embarrassed to talk to strangers. Her main issue is chronic pain but she had to stop taking medication because it made her tired and she gained weight, which amplified her degenerative disc disease. She explained that she has also been to the pain clinic but doesn't like that the sessions are group sessions rather than one on one. She takes pride in doing her housework on her own even though it may take 3 days until she is able to do her dishes. Cold and damp weather aggravates her pain and depression and prevents her from keeping up with her household chores. She believes that eating properly would be helpful to her mind and body, but explained that it is very expensive to do so. She reported that her pre-existing conditions have compounded over time and she has difficulty with both standing and driving. She stated that she has suffered from depression and dyslexia for as long as she can remember and also that she had a fall as a teen that resulted in a bad concussion.

The appellant brought the final 3 pages of a 6-page document (described below) to the hearing, which were read by the panel members and the ministry representative (copies of these documents were not submitted as evidence). The appellant stated that this document supports her need for disability and contains more detail than her current GP has on file. The appellant states that this document was addressed to her old GP.

Document:

The document consisted of pages 4-6 of a 6-page document. The document appears to have been from a 2010 workplace injury claim and consists of discussion of the appellant's medical conditions and conclusions relating to this claim. The injury claimed was neck and back strain from holding a resident on August 31, 2010. The report noted a lumbar scoliosis, multilevel DDD at L2/3, L4/5 and L5/S1 and narrowing at L4/5 and L5/S1. The report also noted early osteoarthritis of the right knee. The report also discussed a diagnosis of right trochanteric bursitis with hip, back and neck pain on August 23, 2010. The report concluded that the injury that was the subject of the claim was a pre-existing condition for which work was not sufficiently causative; therefore, the writer of the report was unable to consider wage loss or health benefits for the appellant's neck and back. The report also noted that the alleged injury had not been reported to the appellant's employer or the hospital when she visited the ER.

Ministry

The ministry relied on the reconsideration decision

Admissibility

The panel finds that the information provided in the Notice of Appeal is argument and will be considered as such. The panel finds that the information provided by the appellant at the hearing, including the material in the documents she presented, consists of some elaboration and primarily reiteration of information and records before the ministry at reconsideration and are admissible in accordance with section 22(4)(b) of the *Employment and Assistance Act*. The panel notes, in making this determination, that the ministry representative did not object to the admissibility of the information contained in the document as it was consistent with the information in the application.

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 the appellant does not have a severe physical impairment. In making this determination, the ministry considered the functional skills assessment by the GP noting that the appellant is able to walk 2-4 blocks unaided, climb 5+ unaided, is limited to lifting under 2kg and can remain seated for less than one hour. The ministry noted that the GP had not described how much less than 1 hour the appellant can remain seated and argued that walking 2-4 blocks and climbing 5+ steps is not indicative of a severe impairment. The ministry noted that the GP described the appellant as requiring periodic assistance with lifting, carrying and holding but does not provide details about the frequency or duration of assistance required. The ministry also considered that the GP has assessed the appellant as independent with walking indoors and outdoors, climbing stairs and standing.

The panel finds that the ministry's determination was reasonable. The panel notes that the appellant has argued in her reconsideration submission and at the hearing that she has difficulty with standing in lineups but does not provide further detail. The appellant states that she is able to push herself to get things done but will pay for it later and then requires time to recuperate, sometimes with a heating pad lying on the floor. The panel notes that in relation to her ability to stand, the appellant characterizes her limitations and impairment as being more severe than what is reflected in the GP's assessments. The panel also notes that the GP's assessments are not entirely consistent with one another (or the appellant's reports) in some areas. For instance, in the MR, the GP reports that the appellant is able to walk 2-4 blocks unaided but requires periodic assistance with mobility outside the home, while in the AR the GP indicates that the appellant is independent with walking outdoors. As well, the appellant reports that she has difficulty standing and walking on concrete floors but is able to go to the sports field and track to walk for exercise on those softer surfaces. The panel notes that the GP's assessments of the appellant's functional capacity and mobility and physical ability assessments reflect an individual who is independently able to manage, but has some restrictions with lifting and sitting for extended periods. 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 and has good functioning in all listed areas of communication. The ministry considered that in the MR the GP indicated significant deficits with cognitive and emotional functioning in the areas of emotional disturbance and motivation but in the AR the GP assesses moderate impacts to emotion and minimal impacts to motivation. The ministry also considered that there were no major impacts assessed to cognitive and emotional functioning, moderate impacts in one area (emotion), and minimal impacts in 2 areas (insight/judgement and motivation). The ministry noted that no impacts were assessed for the remaining eleven 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 marginal 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 that she suffers from long-standing depression that can be debilitating. She argued that she suffers from brain fog and has difficulty remembering appointments. The appellant argued that she is dyslexic and this impacts her ability to work in some types of jobs. 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 is functioning independently despite having some difficulty. The panel notes that the GP's assessment (in the MR and AR) of independence with social functioning seems to be somewhat inconsistent with the assessment that she has marginal functioning in her immediate and extended social networks; no explanation has been provided. The panel notes that the GP's assessments relating to the appellant's abilities in relation to decision-making indicate that the appellant is independently managing these activities and that the information provided by the appellant is consistent with this assessment. The panel also notes the absence of any major impacts to functioning, 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 in the MR that the appellant is continuously restricted with basic housework and mobility outside of the home but in the AR the GP indicates that the appellant requires periodic assistance with basic housework. The ministry considered that the GP indicated that the appellant is periodically restricted with transportation but does not provide information as to the frequency or duration of these restrictions. The ministry also noted that the GP indicated in the MR that the appellant is independent with all areas of personal care, meals, management of medications, daily shopping, management of finances and mobility inside of the home. The ministry considered that in the AR the GP indicates that the appellant is independent with all areas of personal care; readings prices and labels and making appropriate choices; all meals activities; all listed areas of pay rent/bills; all medications activities; getting in and out of a vehicle and using transit schedules/arranging transportation. The ministry noted that the GP indicated that periodic assistance is required for basic housekeeping; going to/from stores, paying for purchases and carrying purchases home; and using public transit; however, the ministry argued, the GP did not indicate the frequency or duration of periodic assistance required. Further, the ministry argued that the GP did not indicate any restrictions to the majority of listed areas of DLA.

The panel notes that the GP has assessed the appellant as independently able to perform most DLA. The panel notes that the appellant argued at the hearing that she is at a disadvantage because the GP was not supposed to complete both sections of the application; someone at the advocate's offices was supposed to complete the AR instead. As well, the panel notes that the appellant argued that she does not know where the GP's comments in relation to her difficulty with transportation came from. She argued that the GP didn't listen to her and did not write what the appellant expressed. The panel also notes that there are conflicts in the GPs assessments between the MR and the AR in relation to the assistance basic housekeeping and mobility. As well, the panel notes that periodic restrictions, according to the legislation, must be "for extended periods" and the GP has used the words "sometimes" and "often" to describe these periods rather than providing more specific detail about frequency. The panel finds that establishing a significant restriction "for extended periods" requires a consideration of frequency. As such, in circumstances where the information indicates that a restriction arises periodically, it is appropriate for the ministry to require evidence of the duration and frequency of the restriction in order to be "satisfied" that this legislative criterion is met. As such, the panel concludes that the ministry's determination on this criterion was reasonably supported by the evidence. 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.

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 was significantly restricted, it cannot be determined that significant help is required. The information provided by the GP is that family provides assistance and that assistance is needed for housecleaning, groceries and transportation. The appellant did not argue that she requires assistance to perform any DLA but reported that

she is too prideful to ask for assistance. The appellant stated that she feels that she might benefit from the use of a cane when she has to stand in lineups. 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.