

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the Ministry) reconsideration decision dated November 16, 2017, which found that the Appellant did not meet two 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, the requirement that her impairment is likely to continue for at least two years, and the requirement that she has a severe impairment. However, the Ministry was not satisfied that the evidence establishes that:

- 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 August 2, 2017, a physician report (PR) dated May 1, 2017 and completed by the Appellant's general practitioner (GP) who has known the Appellant for more than 4 years and who has seen the Appellant 11 or more times in the past year, and an assessor report (AR) also dated May 1, 2017 and also completed by the GP.

The evidence also included the following documents:

1. Request for Reconsideration (RFR) signed on November 1, 2017 stating that the Appellant is asking for a reconsideration of the Ministry's decision because she now has additional information in support of her application for a PWD designation in the form of three medical reports which are identified in more detail below. In addition, the Appellant's RFR summarized the information in the three medical reports, argued that those reports establish her eligibility for a PWD designation, and provided a more detailed summary of her functional skills and ability to perform DLA than was contained in her original SR;
2. Fourteen page medical report prepared by a clinical psychiatrist (Psychiatrist), dated March 16, 2017 (MR #1), summarizing a diagnosis prepared by the clinical psychiatrist in April 2015 and providing an updated opinion, diagnosis, prognosis and treatment recommendations as of the date of the March 16, 2017 report;
3. Seventeen page medical report prepared by an orthopaedic surgeon (Surgeon), dated September 25, 2016 (MR #2), providing a health history of the Appellant, the results of a physical examination of the Appellant, the orthopaedic surgeon's conclusions and options, and a prognosis; and,
4. Eight page medical report prepared by a specialist in physical medicine and rehabilitation (Specialist), dated November 27, 2015 (MR #3), providing a medical opinion in relation to the nature and extent of injuries sustained by the Appellant in three motor vehicle accidents (MVA) which occurred in October 2013, January 2015 and October 2015, and the results of a physical examination of the Appellant, a diagnosis and a prognosis.

Diagnoses

In the PR, the GP diagnosed the Appellant with MVA-related chronic pain with an unspecified date of onset, and depression and anxiety "NYD (Not Yet Determined) by psychiatrist", with an unspecified date of onset. No additional comments were provided in the GP's assessment.

In MR #1, the Psychiatrist stated that the Appellant had a number of psychiatric disorders, including:

- Major Depressive Disorder;
- Posttraumatic Stress Disorder (PTSD);
- Possible Obsessive-Compulsive Disorder;
- Insomnia Disorder;

- Alcohol Use Disorder; and
- Tobacco Use Disorder

In MR #2, the Surgeon stated that the Appellant had suffered the following injuries as a result of four MVA:

- Myofascial injuries to the neck and back;
- Cervicogenic headaches;
- Stable wedge compression fracture of the 10th thoracic vertebra without any neurological compromise;
- Bilateral posttraumatic trochanteric bursitis;
- Left anterior knee pain syndrome following blunt contusion to the front of the left knee;
and
- Chronic pain

In MR #3, the Specialist stated that his physical findings were consistent with “widespread musculoligamentous injuries in the cervical, thoracic and lumbar regions ... a wedge compression fracture at T10 (with no evidence of nerve root or nerve injury) ... (and in addition, the Appellant) has numerous psychological issues, including depression, anxiety and (PTSD) symptoms”.

Severity of Impairment

The Ministry was satisfied that the information provided establishes that the Appellant has a severe mental impairment.

Restrictions in the Ability to Perform DLA

In the PR, the GP reported that the Appellant has not been prescribed any medication or treatments that interfere with her ability to perform DLA and that the Appellant does not require any prostheses or aids for her impairment. In addition, the GP stated that the Appellant has no difficulties with communication, but that she did have significant deficits with cognitive and emotional function in the areas of executive function, emotional disturbance, motivation, impulse control, motor activity and attention or sustained concentration, without providing any further commentary.

In the AR, the GP stated that the Appellant’s mental impairment was “Depression/anxiety NYD”, but wrote “N/A” and did not complete the section of the AR regarding impacts on daily functioning for an applicant with an identified mental impairment. While indicating that the Appellant was independent in all aspects of personal care, the GP wrote “lacks motivation - at times will not (perform the DLA) due to poor mood/motivation - will isolate herself” with respect to dressing, grooming and bathing, and wrote “poor diet, makes poor choices - financially unable to maintain healthy diet. Current weight issues” with respect to feeding herself and regulating her diet. Regarding the meals DLA, the GP indicated that the Appellant needed periodic assistance from another person, without identifying the type or frequency of assistance, but adding “makes unhealthy choices due to finances”. With respect to the pay rent and bills DLA, the GP also indicated that the Appellant needed periodic assistance from another person,

without identifying the type or frequency of assistance, and added “Financially unstable. Bills behind”. The GP assessed the appellant as independent for all tasks of basic housekeeping, transportation, medications, and shopping. Regarding social functioning, the GP indicated that the Appellant was independent and required no support in any of the listed activities (making appropriate social decisions, developing and maintaining relationships, interacting appropriately with others, ability to deal appropriately with unexpected demands and ability to secure assistance from others). In addition the GP indicated that the Appellant had good functioning with respect to both her immediate and extended social networks.

In her original SR, the Appellant wrote that the MVAs have had a mental impact of “taking over her life completely”. She also states that sometimes she can’t even get out of bed or dress herself but does not indicate whether this is due to depression, anxiety or chronic pain. In the SR section of her RFR she says that her anxiety increases as her financial concerns do.

In MR #1, the Psychiatrist reported that the Appellant has to wear a special bra due to constant pain resulting from a right upper back injury suffered in one of the MVA, and that she has trouble dressing herself, showering, and requires a toilet designed for handicapped individuals.

In the MR #2, the Surgeon noted that the Appellant “has difficulty looking after her living space and performing her household chores” and that she “continues to report some degree of impairment of her (DLA)” and indicated that she has “occasional pain which affects some of her (DLA) including personal care, grooming and hygiene”. In addition, he stated that “she finds it very painful to lift a vacuum cleaner and clean her living space” and that she also has problems cleaning the bathroom and “walking any distance”. However, the surgeon did not identify any DLA restrictions relating to a mental impairment, although he did report that “her anxiety levels, while riding in a vehicle, have increased tremendously”.

There was no discussion by the Psychiatrist in the MR #1 or by the Specialist in MR #3 regarding the impact of the Appellant’s mental impairment on her DLA.

Need for Help

In the AR, the GP indicated that the Appellant lives alone, that she receives the help required with her DLA from family and friends and that she does not have an assistance animal. No further information was provided.

Other than indicating in the second SR accompanying the RFR that she uses a cane or handrail when climbing more than 5 steps, the Appellant did not provide any information about any help she requires to perform any DLA.

In the MR #1, the Psychiatrist reported that the Appellant needs to use toilets designed for handicapped individuals (i.e. one with a grab bar for support).

In the MR #2, the Surgeon stated that the Appellant does not require any assistance with her DLA.

Additional Information submitted after reconsideration

In her Notice of Appeal dated November 23, 2017, the Appellant stated that she was appealing the Ministry’s reconsideration decision because in her opinion the Ministry only looked at the

evidence provide by her GP and did not take into account the information in the three medical reports which were provided to the Ministry with her request for reconsideration, and that she has a new assessment from September 2017 which should also be taken into consideration.

At the hearing, the Appellant said that she had not been able to obtain a copy of the September 2017 assessment. She stated that her DLA were directly and significantly restricted. She said that she has to deal with pain on a daily basis for most DLA: when she gets out of bed, in the shower, cleaning the bathroom, and doing her laundry and her housework. In addition, she stated that her mother can no longer help her financially. She said that she was upset that the Ministry had only considered the GP's assessment, and that, although she had given her GP the other prescribed professionals' reports (MR #1, MR #2 and MR #3), it was clear that the GP was not interested and had not even read them.

The Appellant also stated that life has been extremely difficult for her over the past few years. There are days when she just wishes the constant pain would go away. She feels there is no help available in the community, and while she used to rely on friends to help her with some household chores and moving furniture, she doesn't feel like leaving her house anymore, so she no longer socializes enough to be able to rely on her friends' help. In addition to suicide ideation she experienced in 2016, as referred to by the Psychiatrist in MR #1, she also considered suicide in the summer of 2017. She said that she suffers from night tremors. She doesn't remember her dreams, but she wakes up sweating and feeling disorientated. She stated that she experiences pain in her leg that feels like a hot iron and it's getting worse.

In describing a typical day, the Appellant said that it takes her about 10 minutes to get out of bed in the morning (or the afternoon, depending on when she wakes up), and she has to sit on the edge of the bed before she can make her way to the bathroom. She stated that she has the most difficulty using the bathroom first thing in the morning because she is so stiff. After using the bathroom she sits on the couch for a while and tries to wake up. Then she does household chores, but can only do this for about an hour at a time because of lower back pain. For meals she sometimes prepares her own food, but tends to rely on a crock-pot and makes food in batches which she then freezes for future use. She also often relies on fast food. She can only manage doing the laundry once every week or two because she has to lean over to put clothes into the washing machine, which is very painful. She usually visits her mother who lives next door, but she can't sit anywhere for very long because her hips hurt. She has to use the coffee table to stand up when she gets off the couch and her palms get sore from using her cane. She can't tie her shoes, so she relies on loose fitting footwear. When she goes to bed in the evening she has to use 10 to 12 pillows for support. She can't sleep on her side, so she sleeps on her stomach, and she wakes up with night tremors 4 or 5 times every night.

At the hearing, the Ministry relied on its reconsideration decision.

Admissibility of Additional Information

Neither the Appellant nor the Ministry introduced any new written or verbal evidence at the hearing.

PART F – REASONS FOR PANEL DECISION

The issue on 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 establishes that the Appellant has a severe mental impairment that, in the opinion of a prescribed professional, is likely to continue for at least 2 years. However, the Ministry was not satisfied that the information establishes that the impairment directly and significantly restrict her DLA either continuously or periodically for extended periods. Also, as a result of those restrictions, the Ministry found that 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).

Section 2 of 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, 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.

Restrictions in the Ability to Perform DLA

The Ministry's position is that some of the evidence in the prescribed professionals' reports is either inconsistent or does not provide sufficient detail to allow the Ministry to assess whether the Appellant is significantly restricted or whether she needs assistance periodically for extended periods. The Ministry notes that no information is provided to explain how much longer it takes the Appellant to manage her DLA. The Ministry also notes discrepancies between the assessments made by the GP in the PR and the AR. For example, the GP did not identify any impacts of cognitive and emotional functioning on daily functioning in the AR despite identifying significant deficits with cognitive and emotional functioning in the PR. The Appellant's position is that chronic pain and anxiety result in significant restrictions in her ability to perform DLA, and that the Ministry did not take into account the information by her medical specialists, particularly by the Surgeon, who explicitly states in MR #2 that the Appellant has difficulty looking after her living space and performing household chores.

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 his or her DLA, continuously or periodically for extended periods.

For a person who has **either** a severe physical impairment **or** a severe mental impairment, DLA are defined in section 2(1) of the EAPWDR to be any of the following eight activities: prepare own meals, manage personal finances, shop for personal needs, use public or personal transportation facilities, perform housework to maintain the person's place of residence in acceptable sanitary condition, move about indoors and outdoors, perform personal hygiene and self care, and manage personal medication. In addition, if a person is found to have a severe mental impairment, the following two activities are also specified in the EAPWDR as qualifying under the DLA definition: make decisions about personal activities, care or finances, and relate to, communicate or interact with others effectively. In this case, the Ministry has determined that the Appellant has a severe mental impairment and meets the age and duration of impairment tests. Where a severe mental impairment has already been established, it is not necessary for the Ministry to also establish that a severe physical impairment exists in order to assess an applicant's ability to meet the DLA criterion. However, in order to qualify for the PWD designation, the Ministry will consider the DLA identified in the EAPWDR and determine if it is satisfied that, in the opinion of a prescribed professional, an applicant's ability to perform DLA is directly and significantly restricted by a severe impairment, either continuously or periodically for extended periods.

In this appeal, the GP, the Psychiatrist, the Surgeon and the Specialist are prescribed professionals. DLA are listed in the PR and, with additional details, in the AR. Therefore, the prescribed professional completing these forms, in this case the GP, has 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. In the instructions provided in the relevant sections of the PR and the AR, the prescribed professional is further encouraged to elaborate on the nature and extent of the limitations or restrictions. 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 finds that the Ministry reasonably determined that the information provided by the prescribed professionals with respect to specific DLA is either inconsistent or not detailed enough. For example, the GP states that the Appellant requires periodic assistance for only two DLA (meals and paying rent and bills), but does not identify how often assistance is required or who provides it. In addition, the GP reports that the Appellant is independent in all aspects of personal care (although it takes her significantly longer than typical), whereas in MR #2 the Surgeon states that the Appellant "continues to report some degree of impairment of her (DLA)" and that "she ... has occasional pain which affects some of her activities relating to personal care, grooming and hygiene", but he does not say how often she experiences the pain or which specific activities are impacted.

Regarding one of the two DLA relating to a person who has a severe mental impairment, the Ministry states in its reconsideration decision that, while the GP writes in the AR “financially unstable. Bills behind” as an explanation as to why the Appellant requires help with paying rent and bills, it is unclear whether the assistance required to manage paying rent and bills is a result of a severe impairment or due to financial circumstances. The Panel finds that the Ministry was reasonable in determining that there was insufficient evidence provided to demonstrate that the Appellant has difficulty paying rent and bills due to a mental impairment,

Therefore, the Panel finds that the prescribed professionals have provided inconsistent and/or insufficient evidence in terms of the nature, frequency and/or duration of the assistance required to perform DLA and/or which specific DLA are impacted. The Panel finds that the Ministry also reasonably determined that taking longer to perform a task without specifying how much longer does not allow the Ministry to determine whether a restriction is significant.

For these reasons the Panel finds that the Ministry reasonably concluded that the evidence is insufficient to show that 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.

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 she has to rely on her mother to help her with some of the housework.

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. That is, 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, 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.