

PART C – DECISION UNDER APPEAL

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

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

PART D – RELEVANT LEGISLATION

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

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

PART E – SUMMARY OF FACTS

Evidence at Reconsideration

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

(1) A Request for Reconsideration dated December 5, 2017 in which the appellant states she can barely take care of herself let alone her household needs and she is unable to hold a job. She notes there are days she sleeps 18 hours and struggles to get up to feed herself; there are times when her brain fog is so bad she cannot remember how to do things; and if she tries to get small things done she suffers for days after.

(2) A letter from the appellant's physician dated November 24, 2017 in which he notes the appellant is "obviously completely disabled and cannot work at ANY job even part-time" and provides general information about Myalgic Encephalomyelitis/Chronic Fatigue Syndrome (ME/CFS) and Fibromyalgia (FM). More specifically with respect to the appellant, the physician writes that she has "a very low activity tolerance," "struggles to cope day to day," and "is often housebound or bed-bound."

(3) The ministry's denial letter of October 17, 2017 with *Persons with Disabilities Designation Denial Decision Summary*.

(4) The PWD application, comprised of:

- The *Applicant Information - Self Report* ("SR") signed by the appellant on June 8, 2017.
- A *Medical Report* ("MR") completed by an internal medicine specialist (the "physician") on August 10, 2017. The physician has known the appellant for three years and has seen her 11 or more times in the past 12 months.
- An *Assessor Report* ("AR"), completed by a Registered Psychiatric Nurse on June 28, 2017 (the "assessor"). The assessor has known the appellant for 8 months and has seen her 11 or more times in the past 12 months. She completed the report based on an office interview with the appellant and file/chart information.

The PWD application contained the following information.

Diagnoses

The physician diagnosed the appellant with chronic fatigue syndrome, fibromyalgia, eating disorder, addictions, and ADHD. He commented in the MR that the appellant's energy is not consistent or reliable, that she has significant pain and cognitive symptoms, and that she does not deal well with stress. He also reported that the appellant was, "Maintaining sobriety of addictions. Working on Eating Disorder. Very sensitive to stress. At high risk of relapse for both conditions. Also dealing with disabling fatigue and chronic pain."

Both the AR and the SR refer to the appellant's "depression" but the MR does not provide this diagnosis.

Functional Skills

The physician reports that the appellant is able to walk unaided 4+ blocks, climb 5+ stairs, remain seated 2 to 3 hours, and lift 5 to 15 pounds (with the comment "not repeatedly"). The physician also states the appellant has no difficulties with communication, but does have significant deficits with cognitive and emotional function in the areas of memory, emotional disturbance, motivation and attention or sustained concentration. The assessor also notes the appellant has a good ability to communicate.

Similarly, the assessor reports independence in most areas of mobility and physical ability, with periodic assistance required for lifting and carrying and holding, adding comments that for walking and climbing stairs the appellant is “independent unless experiencing a flare up” and that “any physical activity cannot be sustained without experiencing a flare up of symptoms.” In terms of cognitive and emotional functioning, the assessor reports a moderate impact in bodily functions, emotion, impulse control, and memory; major impact in attention/concentration and motivation; and no impact in all other areas (consciousness, insight and judgment, executive, motor activity, language, psychotic symptoms, other neuropsychological problems, and other emotional or mental problems). The assessor explains that when the appellant “is not in a flare up she is capable of functioning well both cognitively and emotionally for short periods of time” but that “when experiencing a flare up of her fibromyalgia or in extreme emotional distress, the impairment of her cognitive and emotional function increases to varying degrees.”

In the SR, the appellant describes how she has good days and bad days, but if she does too much on a good day, she pays for it days afterwards. If she stays in one position for too long, her joints get stuck. She needs to take naps once or twice a day and sleeps up to 18 hours per day.

Daily Living Activities

The physician reported a “continuous” restriction in the area of “personal self care.” The physician also indicates restrictions in meal preparation, basic housework, and daily shopping. He does not indicate whether the restrictions are continuous or periodic, but added a written comment: “takes longer and periodically needs assistance.” He reports that the appellant is not restricted in management of medications, mobility inside the home or outside the home, use of transportation, or management of finances; he did not answer whether the appellant had any impairment in social functioning.

The assessor reports the appellant is independent in 4 areas of personal care (dressing, toileting, feeding, and regulating diet) but takes significantly longer in grooming, bathing, and transfers. The assessor also describes the appellant as needing periodic assistance with housekeeping, going to and from stores and carrying purchases (though she is independent in reading price labels, making appropriate choices and paying). While the appellant is independent in safe food storage, she takes significantly longer than typical in meal planning, food preparation, and cooking (with the note “impact is episodic”). The appellant is independent paying rent and bills, handing and storing medications, using public transit and arranging transportation, but takes significantly longer to fill/refill prescriptions and take them as directed, and to get in or out of a vehicle. The assessor does not provide any detail about how much longer tasks take, or the support/supervision required for those requiring periodic assistance. The assessor left the page of the application related to social functioning blank.

In the SR, the appellant says that on bad days she has difficulty with memory, thinking, and staying on track; that she gets confused and falls asleep everywhere. She says she is unable to work, and that she struggles with daily tasks. Showering and self-care are also a struggle (such as drying her hair because she cannot hold the dryer for long enough). The more she tries to do, the worse she feels.

Assistance Required

The MR states the appellant does not require any prostheses or aids for her impairment. The AR notes that help is provided by family, friends, and Health Authority Professionals but provides no further comment about what sort of help is provided for DLA. The AR does not list any assistive devices and states that the appellant does not have an assistance animal.

Submissions and Evidence on Appeal

In her notice of appeal, the appellant notes that the frequency of her “crashes” varies based on how much she does, but generally occur 1-3 times per month and last anywhere from 4 days to a week. She writes that if she is forced to go back to work, then she will inevitably become bed ridden.

At the hearing, concerning her physical condition, the appellant described how she managed her crashes until about a year ago, when she had a bad crash that left her bed ridden for months, 22-23 hours per day. More recently, she is managing better, but only because her activity is minimal and she works at living within a limited “energy envelope”. Currently she crashes about once a week, with the crash lasting 3-4 days. Her joints get “stuck” when she holds positions. She lives with pain, but cannot take medication because she’s a recovering addict. Mentally, the appellant says the physical pain and fatigue that she suffers contributes to periods of “brain fog”; at least a couple of times per month, stress related to her physical condition threatens her sobriety and affects her eating disorder. Energy spent on dealing with her eating disorder or addictions takes away from her energy for other life tasks making her susceptible to a physical crash.

The appellant described that, while she can push herself physically and accomplish certain DLAs, doing so result in a crash, rendering her incapable of doing anything for days. The appellant described how her mother helps her with cooking and cleaning, (e.g., stocking her fridge with prepared meals). Her roommate also helps her by doing cooking, shopping and most of the household chores. With respect to her personal care, the appellant says she takes baths because they are easier than standing in the shower and that she washes her hair only once a week and her roommate has to do it for her.

The ministry relied on the reconsideration decision, emphasizing that its decision was based on the information that was before it, particularly the MR and AR.

The panel admitted the appellant’s evidence describing the assistance she receives from her mother and roommate as new evidence in support of information that was before the ministry at reconsideration—in particular, statements in the AR that the appellant receives help from family and friends.

PART F – REASONS FOR PANEL DECISION

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

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

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

- (a) in the opinion of a medical practitioner or nurse practitioner is likely to continue for at least 2 years, and
- (b) in the opinion of a prescribed professional
 - (i) directly and significantly restricts the person's ability to perform daily living activities either
 - (A) continuously, or
 - (B) periodically for extended periods, and
 - (ii) as a result of those restrictions, the person requires help to perform those activities.

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

- (a) a person who has a severe mental impairment includes a person with a mental disorder, and
- (b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires
 - (i) an assistive device,
 - (ii) the significant help or supervision of another person, or
 - (iii) the services of an assistance animal.

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

2 (1) In this section:

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

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

- (a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following activities:
 - (i) prepare own meals;
 - (ii) manage personal finances;
 - (iii) shop for personal needs;
 - (iv) use public or personal transportation facilities;
 - (v) perform housework to maintain the person's place of residence in acceptable sanitary condition;
 - (vi) move about indoors and outdoors;
 - (vii) perform personal hygiene and self-care;
 - (viii) manage personal medication, and
- (b) in relation to a person who has a severe mental impairment,

includes the following activities:

- (i) make decisions about personal activities, care or finances;
- (ii) relate to, communicate or interact with others effectively.

Analysis

Severe Impairment

The appellant disputes the finding of no severe physical impairment, noting that the limitations of her fibromyalgia and chronic fatigue result in frequent crashes where she is bed ridden for days at a time, and that her doctor says she has a very low activity tolerance and is completely disabled.

While the ministry accepts that the appellant has a severe mental impairment, it found no severe physical impairment based on the restrictions set out in the MR and AR. In particular, the ministry notes the appellant needs no aids or assistive devices; can walk 4+blocks unaided, climb 5+ stairs, lift 5 to 15 pounds and remain seated 2 to 3 hours; is independent in most areas of daily living, and there was no information on frequency of episodes or assistance needed.

Panel's Decision:

The legislation provides that the minister has the discretion to make a PWD designation if satisfied that the person has a severe impairment, taking into account all of the evidence including that of the appellant. However, the legislation is also clear that the fundamental basis for the PWD analysis is the evidence from a prescribed professional about the nature of the impairment and its impact on daily functioning. Here, while the physician stated in the November Letter that the appellant is completely disabled, the specific evidence about the appellant that he gave in the MR does not reflect a severe impairment. Rather, it shows that she is capable of walking, climbing, lifting and sitting, with the only restriction being "not repeatedly" with respect to lifting. Further, as discussed below, both the MR and AR shows the appellant as being relatively independent in DLAs, with little to no information about what sort of assistance the appellant might require. While the appellant provided additional evidence on appeal about the extent of help she requires and the constraints she faces due to her energy limitations, that evidence was not corroborated with specific medical evidence about the appellant. It may be that the checklists on the PWD application are not well suited to capture the impact of episodic effects, but there is an opportunity for the prescribed professionals to explain impairments in their comments. Here, the MR and AR provided little in the way of comments to explain how the physical impairment was severe. In these circumstances, the panel finds the ministry's decision that the appellant did not have a severe physical impairment to be reasonably supported by the evidence.

Impairment's Affect on DLA

The appellant submits that she currently has episodes or "crashes" about once per week, which last anywhere from 3 to 4 days, and that during these crashes she cannot do much of anything. On better days, she is limited from doing too much for fear of crashing and becoming bed ridden.

The ministry acknowledges that the appellant's doctor refers to her as "completely disabled", but submits that the information provided in the PWD application and the November Letter is not detailed enough to fully understand how the appellant's medical condition impacts her day-to-day, how often her episodes occur, how restricted she is during those episodes, and for how long. The ministry concludes that based on the information in the application, the appellant functions primarily independently without assistive devices or regular or even periodic assistance from family and friends with DLAs.

Panel's Decision:

The legislative requirement respecting DLAs set out in section 2(2)(b) of the EAPWDA is that the minister be satisfied that as a result of a severe physical or mental impairment a person is, in the opinion of a prescribed professional, directly and significantly restricted in the ability to perform DLA either continuously or periodically for extended periods. While other evidence may be considered for clarification or support, the ministry's

determination as to whether or not it is satisfied, is dependent upon the evidence from prescribed professionals. DLAs are defined in section 2(1) of the EAPWDR and are listed in the PWD application with the opportunity for the prescribed professionals to check marked boxes and provide written comments.

The appellant states that her “crashes” currently occur about once a week for 3-4 days, but there is no medical evidence to corroborate this. While the MR, and AR both identify impacts to some DLAs, neither the physician nor the assessor provided information to establish the frequency or duration of the appellant’s episodes or crashes. At best, the assessor calls the impacts “episodic,” giving no sense of how often the episodes occur, and the physician says (in the November Letter) that the appellant is “often” housebound or bed-bound. Nor is it clear from the medical evidence the extent to which the appellant requires assistance during these episodes, or the extent to which she takes longer to perform tasks during those periods. While the appellant and the physician (in his November Letter) both say she struggles to cope day to day, the more specific evidence in the PWD application shows that she is independent for most DLA, and that for others where there is an episodic impact, she either takes significantly longer or needs periodic help. But without information about how much longer it takes the appellant to perform DLAs, or the frequency or duration of periodic help, it is difficult to assess whether DLAs are “directly or significantly” restricted. Based on the information that was before the panel, the panel finds that the ministry reasonably determined that the information did not establish that the appellant’s impairment directly and significantly restricts her DLA continuously or periodically for extended periods as required by section 2(2)(b)(i) of the EAPWDA.

Need for Assistance

The appellant submits that she receives help with DLAs from her mother and roommate for cleaning, cooking, shopping and some personal care. Without this help, she submits she would suffer greater frequency or duration of crashes.

The ministry states that as it has not been established that DLAs are significantly restricted, it cannot be determined that significant help is required.

Panel’s 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 establishment of direct and significant restrictions with DLA is a precondition of the need for help criterion because the need for help must be as a result of those restrictions. As the panel found that the ministry reasonably determined that direct and significant restrictions in the appellant’s ability to perform DLA have not been established, the panel also finds that the ministry reasonably concluded that it cannot be determined that the appellant requires help to perform DLA as required by section 2(2)(b)(ii) of the EAPWDA.

Further, other than the AR stating that help is provided by family, friends and Health Authority Professionals, there is no description of what sort of help the appellant needs or is provided, and no basis to conclude that help or supervision is significant.

Conclusion

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