

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the “ministry”) reconsideration decision dated December 12, 2017, which found that the appellant did not meet three 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 and that the appellant’s impairment is likely to continue for at least two years. However, the ministry was not satisfied that the evidence establishes that:

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

PART D – RELEVANT LEGISLATION

Employment and Assistance for Persons with Disabilities Act (EAPWDA), Section 2

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR), Section 2

PART E – SUMMARY OF FACTS

Information before the ministry at reconsideration

- PWD application comprised of the appellant's Self-Report (SR) dated September 13, 2017, a Medical Report (MR) dated September 15, 2017 completed by the appellant's general practitioner (GP) who has known the appellant for 10 + years and seen her 2-10 times in the past 12 months and an Assessor Report (AR) dated September 17, 2017 completed by a registered nurse (RN) who has known the appellant for 17 years, completed the form with a home assessment and seen the appellant 11 or more times in the past 12 months as a friend who assists if needed.
- Support Letter (SL#1) dated November 16, 2017 from someone who has known the appellant since she was a teenager and describes her as someone who was always active, could look after a family, home and work at an outside job to a woman who on some days cannot get dressed because of pain or do chores or even go for a walk. SL#1 indicates that the appellant needs help with shopping, housework, snow removal and simple maintenance.
- Support Letter (SL#2) undated from the appellant's close friend of over 20 years who describes the appellant as always on the go, helping out at her kid's school, baking, gardening, and working until her car accident. SL#2 indicates that sweeping the floor brings tears to the appellant's eyes and some days she can't get out of bed because of pain and now relies on her friends to help out with even the simple tasks, when she used to be the one always there ready to help.
- Support Letter (SL#3) dated November 17, 2017 from someone who has known the appellant 5 years and speaks to her daily and confirms what has been addressed in the SR and SL#1 and SL#2.
- Support Letter (SL#4) undated from the RN clarifying that the appellant can carry about 5 lbs. for less than 3 - 4 feet without putting them down, meaning that only small loads of laundry can be taken and washed without numerous rests in-between. It is also indicated that the appellant is very unsteady doing stairs and requires a handrail to assist her, when carrying groceries from the car (only light items) she has to stop on her way to the house and if larger items are bought she relies on friends to load them into her car and carry them into her house. Her medical conditions cause her embarrassment and pain which impairs her social function severely at times.
- A prescription note by the appellant's GP dated November 20, 2017 indicating that the appellant is "PHYSICALLY AND MEDICALLY UNABLE to WORK".
- Appellant's Request for Reconsideration (RFR) dated November 28, 2017 in which she states that her physical health will never get better only worse and that she does not know when or why or how long her attacks happen or her bowels let go. She states that she has to cancel or not plan many things because she cannot leave the house or get out of bed or wear any clothing. She further adds that there is not one day that goes by that she is not in a lot of pain from her stomach or shoulder.

Diagnoses

In the MR, the GP diagnosed the appellant with pancreatic/diverticulitis, right hemicolectomy – onset 2013, emergency surgery for intestinal blockage and bowel leak - 2008, chronic obstructive pulmonary, (COPD) and right shoulder adhesive capsulitis - onset 1999.

In the AR where asked to describe the appellant's mental or physical impairments that impact her ability to manage daily living activities, the RN wrote diverticulitis, pancreatic, COPD, right shoulder injury and surgery.

Physical Impairment

In the MR, the GP reported that:

- In terms of health history, the appellant had a right shoulder injury – 1999 - motor vehicle accident (MVA), because of deterioration she had surgery in 2003. She had emergency surgery in 2008 - intestinal blockage and bowel perforation, due to diverticulitis and then a reoccurrence in 2013 with a twisted bowel. She has since had severe abdominal pain and bowel problems. The appellant does not require any prostheses or aids for her impairment.
- For functional skills, the appellant can walk 2- 4 blocks unaided, climb 2-5 steps unaided, lift 2 to 7 (5 to 15 lbs.) and can remain seated less than an hour.

In the AR, the RN reported that:

- The appellant is independent with walking indoors/ outdoors and standing, with climbing stairs she uses an assistive device and takes significantly longer with lifting, and carrying and holding (very small 5-10 lbs.).

In her Self-Report and Request for Reconsideration, the appellant wrote that not a day goes by that she doesn't have a lot of pain from her stomach or shoulder. Many days she cannot lift her arm and drops things as her hand goes numb and she can't grasp anything. When her fingers swell, she cannot bend them. Due to her COPD, walking and stairs are difficult, she has to keep stopping to catch her breath, it takes her 30 minutes to walk a block. When going up stairs she has to stop part way.

Mental Impairment

In the MR, the GP reported:

- The appellant' has no difficulties with communication.
- The appellant does not have any significant deficits for her cognitive and emotional function.

In the AR, the RN reported:

- The appellant has a good level of ability to communicate in all areas; speaking, reading, writing and hearing.
- While the appellant has not been identified with a mental impairment or brain injury, it was noted that she has a major impact to cognitive and emotional functioning in the areas of bodily functions and motor activity as well as a moderate impact to emotion. No impacts were noted for consciousness, impulse control, insight and judgement, attention/concentration, executive, memory, motivation, language, psychotic symptoms, other neuropsychological problems and other emotional or mental problems.

Daily Living Activities (DLA)

In the MR, GP reports that the appellant has not been prescribed medication that interferes with her ability to perform DLA.

The GP also reports continuous restrictions in the appellant's ability to perform the following DLA: basic housework, daily shopping, mobility outside the home and use of transportation. Personal self-care, meal preparation, management of medications, mobility inside the home, management of finances and social functioning are not restricted.

In the AR, the RN reports that the appellant is independent in all listed areas under: Personal care – dressing (bathing, toileting, feeding self, regulating diet, transfers in/out of bed and transfers on/off chairs; Meals – meal planning, cooking, food preparation and safe storage of food; Paying rent and bills - banking, budgeting and pay rent and bills; Medications – filling/refilling prescriptions, taking as directed and safe handling and storage.

Under Transportation – getting in and out of a vehicle while using public transit and using transit schedules and arranging transportation are noted as N/A.

Under Basic housekeeping - laundry and basic housekeeping are indicated to take significantly longer than typical with a note that it is difficult due to lifting.

Under Shopping – going to and from stores and carrying purchases home take significantly longer than typical with a note that she is unable to carry heavy loads.

Under Social Functioning, the appellant is reported to be independent with all listed areas; appropriate social decisions, ability to develop and maintain relationships, interact appropriately with others, ability to deal appropriately with unexpected demands and ability to secure assistance from others.

Good functioning is reported with both immediate and extended social networks.

In her Self-Report and Request for Reconsideration, the appellant wrote that there are lots of days when she cannot brush her teeth or lift her arm and drops a lot of things when her hand goes numb and she can't grasp anything. She has a friend who goes shopping with her or does it for her when she can't go out. Friends come over and do the housework or outside work and take her garbage out. She does not live close to a store or public transport so she cannot have anything delivered.

Need for Help

In the MR when asked "What assistance does your patient need with DLA?" the GP responds that friends help her at home and with transportation and shopping.

In the AR, the RN indicates that if the appellant requires help to maintain her in the community, friends and neighbours assist her when she needs it. Under assistance provided by others, it is noted family and friends.

In her Notice of Appeal dated January 30, 2018, the appellant writes that she is constant pain, cannot control her bowel, and changes plans all the time because she cannot put clothes on. She adds that there are days she cannot brush her hair nor have anything to drink because she cannot hold on to anything.

Hearing

At the hearing, the appellant testified that her life has changed significantly as a result of her medical conditions. She stated that she is in pain 24-7, can't plan due to having uncontrolled diarrhea, doesn't have a life, and sometimes spends the day lying on her sofa, crying and wishing she were dead. The appellant indicated that she can't sweep or vacuum her floor and has to wait for friends to come over and do it for her. She testified that she

laundries one pair of pants at a time and some days she can't put on pants due to the weight placed against her stomach. The appellant described trying to peel a small potato as taking 4 times as long because her hands feel like sausages. When asked about the problem with her hands, the appellant indicated that it was caused by her right shoulder injury and that she is right handed.

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

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 designation as a person with disabilities (PWD) is reasonably supported by the evidence or is a reasonable application of the legislation in the circumstances of the appellant.

The ministry found that the appellant met the age requirement and that the appellant's impairment is likely to continue for at least two years.

However, the ministry was not satisfied that the evidence establishes that:

- the appellant has a severe physical or mental impairment;
- the appellant's 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.

The following Sections of the EAPWDA apply to this appeal:

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 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 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 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.

Severe Impairment

In the reconsideration decision, the ministry was not satisfied that the information provided is evidence of a severe physical or mental impairment. Determining a severe physical or mental impairment requires weighing the evidence provided against the nature of the impairment and its reported functional skill limitations. A diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a severe impairment.

"Impairment" is a medical condition that results in restrictions to a person's ability to function independently or effectively for a reasonable duration. To assess the severity of impairment, the ministry must consider the nature of the impairment and the extent of its impact on daily functioning.

Severe Physical Impairment

In the MR, the GP diagnosed the appellant with pancreatic/diverticulitis, right hemicolectomy, emergency surgery for intestinal blockage and bowel leak, COPD and right shoulder adhesive capsulitis.

In terms of physical functioning, the GP indicates that the appellant can walk 2- 4 blocks unaided, climb 2-5 steps unaided, lift 2 to 7 (5 to 15 lbs.) and can remain seated less than an hour. While restrictions are evident, the minister is not satisfied that the level of physical capability is indicative of a severe physical impairment.

In the AR, the RN reports that the appellant is independent with walking indoors/outdoors and standing. Although the RN indicates that the appellant is restricted to lifting 'very small' weights of 5-10 lbs, the minister does not consider this to be a significant restriction. Although acknowledging this restriction, the minister is not satisfied that this necessarily confirms a severe physical impairment as the appellant is capable of lifting small amounts of weight and is therefore capable of performing light household tasks. The RN explains that the appellant is very unsteady with stairs and requires a 'good handrail' for assistance; however, needing to use a handrail for stairs does not confirm a severe physical impairment. The ministry has also reviewed and considered the letters submitted by the appellant's friends and notes that the PWD application is not intended to assess employability or vocational abilities. The minister does not argue that the appellant experiences medical conditions which affect her ability to perform daily tasks; however, the level of severity of an impairment is determined by the ministry based on an all-encompassing view of the PWD application and additional information as a whole.

In this case, the evidence provided does not sufficiently describe or portray a severe impairment. While the minister acknowledges that the appellant experiences some degree or restriction due to her impairment, the minister is not satisfied that the combination of the appellant's functional skills, mobility and physical abilities exhibit a severe physical impairment.

Based on the above information, the panel finds that while the appellant suffers from chronic pain from her stomach and shoulder and has difficulty with lifting more than 5 lbs, the evidence does not demonstrate that she has

significant limitations to her physical functioning. The panel concludes that the ministry was reasonable to determine that the GP's assessment of current physical functioning does not reflect a severe physical impairment. Therefore, the panel finds that the ministry was reasonable in its determination that the evidence does not support a finding that the appellant suffers from a severe physical impairment pursuant to Section 2(2) of the EAPWDA.

Severe Mental Impairment

The ministry finds that the GP has made no diagnosis of a mental impairment and has indicated that the appellant has no significant deficits with cognitive and emotional functioning. While the RN indicates almost all areas of the appellant's cognitive and emotional functioning have no impact on daily functioning; she does indicate 2 areas which have a major impact (bodily functions and motor activity), noting in the narrative that this mostly relates to the appellant's physical impairments. With regards to social functioning, the RN indicates that the appellant is independent in all areas. Considering the information the minister is not satisfied that the information provided establishes a severe mental impairment. Therefore, the minister is not satisfied that the information provided is evidence of a severe mental impairment.

The legislation requires that the minister must be satisfied that a person has a severe mental or physical impairment. While the panel notes that the appellant indicated that she has had to cancel or not plan to do so many things because she cannot leave the house or bed or wear any clothing due to pain, the assessment by the RN indicates deficits in cognitive and emotional functioning on daily functioning relating to the physical impairment and not a mental impairment. Therefore, the panel finds that the ministry reasonably determined that the assessment provided by the prescribed professionals do not establish a severe mental impairment pursuant to Section 2(2) of the EAPWDA.

Restrictions in the ability to perform DLA

Legislation requires that the appellant's restrictions be both significant and either continuous or periodic for extended periods in order for PWD designation.

When asked to assess the appellant's ability to perform DLAs, the GP indicates that she is not restricted in most areas. Although the GP indicates that the appellant is continuously restricted in basic housework, daily shopping, mobility outside the home and use of transportation, the section that asks to explain the degree of restriction is left blank.

The RN indicates that the appellant does not require any periodic or continuous assistance in any DLAs, and that she is independent in most areas. The RN writes that the appellant is restricted to lifting 'very small' weights of 5-10lbs.; however, the minister does not consider this to be a significant restriction. In regards to laundry and basic housekeeping, the RN indicates that the appellant is capable of performing the task but it takes her significantly longer, explaining that tasks are difficult due to lifting restrictions. In regards to carrying purchases home, the RN writes that the appellant is unable to carry 'heavy loads'. In the RFR, the RN provides additional information; the appellant is capable of carrying 5 lbs., for less than 3 - 4 feet before needing to put it down which means that only small loads of laundry at a time with numerous rests in-between.

Although acknowledging this restriction, the minister is not satisfied that this necessary confirms a significant restriction as the appellant is therefore capable of lifting small amounts of weight and is therefore capable of performing light household tasks. The RN explains that the appellant is very unsteady with stairs and requires a 'good handrail' for assistance; however, needing to use a handrail for stairs does not confirm a significant restriction. The RN writes that the appellant is only able to carry lightweight groceries from her car so she relies on friends to load them in to the car and into her home. This restriction of only being capable of lifting 5 lbs is acknowledged but does not necessarily confirm a significant restriction. While it is evident that the appellant benefits from help from friends, the evidence suggests it is in the nature of the duty of friends to help each other when in need, but it does not necessarily establish that such help is required as a result of the impairment.

Therefore, even though the ministry acknowledges that the appellant has certain limitations as a result of her medical conditions, it finds that the information provided does not establish that an impairment significantly restricts DLA continuously or periodically for extended periods.

According to the legislation, the ministry must assess direct and significant restrictions to DLA in consideration of the opinion of a prescribed professional, in this case the appellant's GP. This does not mean that the other evidence is not factored in as required to provide clarification of the professional evidence, but the legislative language makes it clear that a prescribed professional's evidence is fundamental to the ministry's determination as to whether it is "satisfied." The prescribed professionals completing the assessments have the opportunity to indicate which, if any, DLA are significantly restricted by the appellant's impairments either continuously or periodically for extended periods. In the opinion of a prescribed professional, a person's ability to perform daily living activities must be directly and significantly restricted either continuously, or periodically for extended periods.

The panel finds that the ministry's determination that this criterion is not met is a reasonable application of the legislation as there is insufficient information as to the degree of restriction, the frequency and duration of the periodic assistance that is required and no indication as to how much longer the appellant takes to perform DLA, thus it is difficult to determine if this restriction is significant. The panel finds that the ministry was reasonable in its determination that there is not enough evidence to confirm that the appellant's impairment significantly restricts DLA continuously or periodically for extended periods pursuant to Section 2(2)(b)(i) of the EAPWDA.

Help to perform DLA

The ministry finds that as it has not been established that DLA are significantly restricted continuously or periodically for extended periods, it therefore cannot be determined that significant help is required from other persons.

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.

With consideration for the above, 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

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 therefore confirms the decision. The appellant's appeal, therefore, is not successful.