

PART C – DECISION UNDER APPEAL

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Poverty Reduction (“the ministry”) dated 03 January 2017 that denied the appellant designation as a person with disabilities (PWD). The ministry determined that the appellant did not meet 3 of 5 of the required criteria for PWD designation set out in section 2 of the *Employment and Assistance for Persons with Disabilities Act*. Specifically, the ministry determined that the information provided did not establish that the appellant has a severe mental or physical impairment that in the opinion of a prescribed professional

- i. directly and significantly restricts her ability to perform daily living activities (DLA) either continuously, or periodically for extended periods; and,
- ii. as a result of those restrictions, she requires help to perform those activities.

The ministry determined that the appellant satisfied the other 2 criteria: 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.

PART D – RELEVANT LEGISLATION

Employment and Assistance for Persons with Disabilities Act (EAPWDA) – section 2.
Employment and Assistance for Persons with Disabilities Regulation (EAPWDR) – sections 2, 2.1 and 72.

PART E – SUMMARY OF FACTS

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

1. The appellant's PWD Designation Application dated 10 August 2017. The Application contained:
 - A Self Report (SR).
 - A Medical Report (MR), undated, completed by a general practitioner (GP) who has known the appellant for 5 - 7 years and seen her 2 – 10 times in the past 12 months.
 - An Assessor Report (AR) dated 04 September 2017, completed by the same GP.
 - A medical imaging report and accompanying medical note, both dated 17 July 2017.
2. The appellant's Request for Reconsideration, signed on 01 December 2017. Accompanying the Request is a letter from the appellant of the same date requesting an extension.
3. The ministry's original decision dated 27 October 2017 denying the appellant's application for PWD designation. Accompanying the decision sent to the appellant is a ministry brochure entitled "Reconsideration and Appeals" (see Part F, Reasons for Panel Decision, below).

In the MR, the GP provides the following diagnosis related to the appellant's impairment: osteoarthritis at the right and left knee (onset 2004)

The panel will first summarize the evidence from the MR, the AR and the medical reports as it relates to the PWD criteria at issue in this appeal.

Severity of impairment

Physical impairment

MR:

Under Health History, the GP writes, "Significant right knee pain with walking, standing, bending as well as some pain at night." The GP refers to appellant being prescribed anti-inflammatory medications and having intra-articular depot-medial injections. The GP adds that the appellant may need an off-loader brace but cost may be an issue.

The GP indicates that the appellant has not been prescribed any medication and/or treatments that interfere with her ability to perform DLA

Regarding functional skills, the GP reports that the appellant can walk 2 to 4 blocks unaided on a flat surface, can climb 5+ steps unaided, her lifting ability is unknown and she has no limitation in remaining seated.

Medical imaging report:

Exam date: 17 July 2017.

“Right knee and patella: Moderate narrowing of the lateral joint compartment is present. There is mild osteophyte lipping at the margins of both femoroltibial joints. Minimal osteophyte lipping at the margins of the patella is noted.”

Medical note:

Date: 17 July 2017.

“Right knee osteoarthritis. Valgus knee. Lateral > medial OA. General quad pain.”

AR:

Respecting mobility and physical ability, the GP provides no assessment for walking indoors. He indicates that the appellant takes significantly longer than typical for walking outdoors (“slowly, 2 to 4 blocks”), climbing stairs (“slowly ~ 5 stairs”), and standing (“10 – 15 minutes”). He indicates the appellant is independent for lifting and carrying and holding.

Mental impairment

MR:

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

The GP indicates that the appellant has no significant deficits with cognitive and emotional function.

AR:

The GP assesses the appellant’s ability to communicate as good for speaking, reading, writing, and hearing.

The GP puts a line through the table showing the degree of impact of the appellant's mental impairment on daily functioning.

Daily living activities

MR:

The GP indicates that the appellant’s activity is not restricted for personal self care, management of medications and management of finances. He indicates “unknown” for meal preparation. He indicates that the appellant is restricted on a continuous basis (“managing, but much slower with frequent breaks”) for basic housework, daily shopping, mobility inside the home, mobility outside the home, and use of transportation.

The GP provides no assessment or commentary for social functioning.

In providing additional comments on the degree of restriction, the GP writes, “Moderate restriction.”

AR:

The GP provides the following assessments of the assistance the appellant requires in performing DLA (the GP's comments in parenthesis):

- Personal care: independent in all aspects.
- Basic housekeeping: takes significantly longer than typical for laundry and basic housekeeping ([illegible] slower due to reduced mobility and elevated pain).
- Shopping: takes significantly longer than typical for going to and from stores and carrying purchase home (2 – 4 blocks walking slowly/not driving); independent for reading prices and labels, making appropriate choices and paying for purchase.
- Meals: independent in all aspects (limited 10 – 15 minutes standing for food preparation).
- Pay rent and bills: independent in all aspects.
- Medications: independent in all aspects.
- Transportation: no assessment for getting in and out of a vehicle; independent and takes significantly longer than typical for using public transit (slower to get to bus stop); N/A for using transit schedules and arranging transportation.

With respect to social functioning, the GP assesses the appellant as independent in all listed areas: making appropriate social decisions, developing and maintaining relationships, interacting appropriately with others, dealing appropriately with unexpected demands, and securing assistance from others.

The GP put a line through the questions as to the appellant's functioning with her immediate and her extended social networks, as well as the question as to what support/supervision might be required to maintain her in the community

Under additional comments, the GP writes, "Also significant language barrier."

Help provided/required

MR:

The GP indicates that the appellant requires a prosthesis or aid to compensate for her impairment, noting that she may benefit from an off-loader brace.

AR:

The GP indicates that the appellant routinely uses braces, noting, "Pending (knee brace)."

In terms of equipment required but not currently used, the GP gives as the needed device, "off-loader knee brace."

The GP indicates that the appellant is provided help by her family, commenting, "Lives with family who can help when available."

Self Report

In describing her disability, the appellant writes that she has pain in both of her legs and knees, especially her right knee. This pain started a few years ago and the pain is getting worse and worse. The pain is so severe that it makes it very hard or impossible to walk or stand, especially for extended time periods. She has gone to her family doctor many times and nothing he has prescribed, such as pills or injections, seems to work.

In explaining how her disability affects her life and her ability to take care of herself, the appellant writes that it affects her life a great deal, because she cannot walk or climb the stairs to her apartment building. Since she doesn't drive, she relies on walking and taking the bus to do basic things like grocery shopping and going to her doctor's appointments. Even when she does do basic things like cooking and doing house cleaning there is constant pain.

She writes that she is in constant pain in her knees with any minor movements. Each day her condition is getting worse and worse and when she walks or does any movement for an extended time the pain stays with her all day and night and it even affects her sleeping so that she can't sleep.

Request for Reconsideration.

At reconsideration the appellant submitted the following:

- A Request for Reconsideration, signed by the appellant on 01 December 2017. Attached to the Request for Reconsideration is a letter dated 01 December 2017 in which the appellant requests “an extension so that I can acquire supporting documentation from my doctor and work with my advocate...”
- A letter from the appellant and her advocate dated 12 December 2017, stating that due to holiday time they request at least a month of extension to acquire supporting documentation from the doctor and filing the letter of reconsideration.
- A letter from the appellant dated 02 January 2018, requesting an extension, “since the office was closed from Dec 23 to Jan 3, 2018, I need time to acquire supporting documentation from my doctor and work with my advocate to finish my letter for reconsideration.”
- A letter from the appellant's advocate, undated, received by the ministry on 03 January 2018. The advocate writes, “[Advocacy organization] was closed for the holidays. Client was unable to get the support. Due date for the submission is January 3, which is today. [Advocacy organization] advocate is working on gathering additional information from the doctor to complete the reconsideration submission. We request you consider client's request for an extension.”

Notice of Appeal

The appellant's Notice of Appeal is dated 11 January 2018. Under Reasons for Appeal, she writes, “The ministry is not fair in the decision as I was not allowed to submit my reconsideration documents on Jan 3, 2018 (due date for submission).”

The hearing

At the hearing, the appellant's advocate limited her submission to the procedural fairness issue raised in the Notice of Appeal (see also Part F, Reasons for Panel Decision, below). She called as a witness the appellant's daughter, who testified that:

- She went to the ministry office on 02 January 2018 to deliver the letter of the same date [see above] from the appellant requesting an extension. She was told that there was nobody in authority at the office at that time who would be able to grant such an extension. She was advised to come back the next day.
- She went to the ministry office around 10:30 AM the next day, 03 January 2018, and was told by a ministry worker that there could not be an extension, and to submit any information that might be available by 4:00 PM that afternoon.
- She went again to the ministry office around 2:30 PM and presented a package of reconsideration materials that the advocate had managed to put together. The same ministry worker told her that it was too late, the opportunity for submitting new information had passed and a decision had already been made.

The advocate stated that she had not finalized a reconsideration package when the appellant's daughter went to the ministry office on the morning of 03 January to request an extension, but on learning that an extension would not be granted, rushed to put together as best she could the material to be presented that afternoon. The advocate contended that, had this additional information been considered, the reconsideration decision might have been different.

The ministry referred to the reconsideration decision, reading,

“... the maximum allowed time for the ministry to render a reconsideration decision, and in turn the maximum extension allowed for client to submit reconsideration materials, is 20 business days from the date the client submits their signed reconsideration request.

In your particular case, the ministry received your signed request for reconsideration on December 1, 2017. As noted above, the ministry approved your request for an extension, resulting in a due date of January 3, 2018 to submit additional documents or information (i.e. 20 business days from December 1, 2017). Unfortunately, the EAPWD Regulations do not set out for an extension beyond 20 business days from the date you submitted your signed reconsideration request (as set out in EAPWD Regulation Section 72).”

The ministry stated that it was unfortunate that the appellant's daughter had been given incorrect information in the morning of 03 January 2018. The ministry noted that if the appellant was not successful in this appeal, she has the right to submit a new application and any new information could be incorporated into it.

With respect to the PWD designation denial decision under appeal, the ministry stood by its position at reconsideration.

The panel accepts the advocate's submission and the daughter's testimony as argument.

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. Specifically, the ministry determined that the information provided did not establish that the appellant has a severe physical or mental impairment that, in the opinion of a prescribed professional,

(i) directly and significantly restricts her ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and,

(ii) as a result of those restrictions, she requires help to perform those activities.

The ministry determined that the appellant satisfied the other 2 criteria: 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 following section of the EAPWDA applies 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 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.

Time limit for reconsidering decision

72 The minister must reconsider a decision referred to in section 16 (1) of the Act, and mail a written determination on the reconsideration to the person who delivered the request under section 71 (1) [*how a request to reconsider a decision is made*],

- (a) within 10 business days after receiving the request, or
- (b) if the minister considers it necessary in the circumstances and the person consents, within 20 business days after receiving the request.

Analysis

The appellant's advocate submits that, by denying the appellant the opportunity to submit new information on 03 January 2018, the ministry did not meet its obligations for procedural fairness. The advocate referred to the reconsideration decision, where it states, "It is noted that upon receipt of your December 1, 2017 submission, the ministry granted your request for an extension with a due date of January 3, 2018 to submit additional documents or information." The advocate submits that, on the basis of testimony from the appellant's daughter, this deadline was met and the ministry was in breach of procedural fairness requirements in not considering the information that was presented on time but not accepted by the ministry.

The panel notes that the thrust of EAPWDR section 72 is to place an obligation on the ministry to make a timely decision – *within* 10, or at the most 20, business days of receipt of the Request for Reconsideration. This means that the reconsideration decision must be finalized by the close of business on day 10 or 20, as applicable. The legislation provides for the ministry to defer a decision from 10 to 20 days if it considers it necessary under the circumstances, subject however to the consent of the person requesting a reconsideration (not the other way around). Nevertheless, as the ministry acknowledged in the reconsideration decision, the ministry granted the appellant's request for an extension with a specified due date of January 3, 2018 to submit additional documents or information. The panel also notes that the legislation does not provide any consequences for the ministry if the 10 or 20 business day deadline is missed, but if the person seeking a reconsideration decision does not provide additional information on time, the consequence is a possible denial of the redress sought through the reconsideration process.

The panel finds that the appellant had a legitimate expectation that if she presented new or additional information before the close of business on 03 January 2018, that this information would be considered at reconsideration and might have an effect on the decision. This expectation was reinforced by her daughter's visit to the ministry office on morning of 03 January 2018, when the daughter was advised to submit any additional information before 4 PM that afternoon. As the reconsideration decision states, "It is noted that upon receipt of your December 1 2017 submission, the ministry granted your request for an extension with a due-date of January 3, 2018 to submit additional documents or information," without specifying the time on the due-date the material had to be submitted.

The panel also notes that the ministry's "Reconsideration and Appeals" brochure, sent to the appellant with the original decision, also does not provide any guidance as to what time on the due date any additional materials must be submitted. For example:

- Under Reconsideration requests outside of My Self Serve: » Generally a decision will be mailed to you within 10 business days of receiving your Request for Reconsideration form, or if you do not have a mailing address, the decision will be available for pickup at your local Employment and Assistance Once. At any time after your submission has been received and before a reconsideration decision is made, you can request an extension of 10 business days, if more time is needed to gather and submit information.

Without being given a specific time before which additional material had to be presented, the panel finds that the appellant would have a legitimate expectation that the material must be presented by the close of business on the specified "due-date." As noted above, this

expectation was reinforced by representations made by ministry staff to the appellant's daughter that additional material would be accepted until 4:00 p.m. on 03 January 2018. The panel finds that the appellant relied on this representation and attempted to submit additional material to the ministry before 4:00 p.m. on 03 January 2018 but was not permitted to do so.

As the appellant was not permitted to present new or additional information inside of what she legitimately expected to be her submission deadline, the panel finds a breach of procedural fairness. The appellant was unfairly denied the opportunity to have new information considered at reconsideration.

Conclusion

Given the breach of procedural fairness discussed above, the panel finds that the ministry's decision denying the appellant PWD designation was not a reasonable application of EAPWDR section 72 in the circumstances of the appellant. Accordingly, the panel rescinds the ministry's decision in favour of the appellant.