

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction's (the ministry) reconsideration decision dated September 12, 2018 which held that the appellant did not meet 2 of the 5 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 and duration requirements, and had a severe physical impairment, but was not satisfied 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 those restrictions, the appellant requires an assistive device, the significant help or supervision of another person, 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

Information before the ministry at reconsideration :

A PWD application comprised of a Medical Report (MR) and an Assessor Report (AR) both dated April 26, 2018 and completed by the appellant's general practitioner (GP) who has known the appellant for 1 year and seen the appellant 2-10 times in the past 12 months, and a self-report (SR) dated May 28, 2018 completed with the assistance of the Community Legal Advocacy Centre.

A Medical Imaging Report (MRI) dated May 3, 2017 for the appellant regarding her cervical spine with findings, "A minimal dextroconvex curvature and straightening of the normal cervical lordosis may be related to cervical immobilization, positioning and/or muscle spasm. There is no obvious fracture, subluxation or other acute bone abnormality. There is narrowing of the C4-C7 disc spaces with anterior and uncovertebral osteophytes present. There is also mild degenerative facet arthropathy. The cervical prevertebral soft tissues are normal in thickness."

"A Clinical Impression dated July 18, 2017 from a neurosurgeon concluding that "A lot of her symptoms are related to multiple episodes of soft tissue injury from [participating in competitive events] for 30 years. " Objectively, the nerve roots are functioning well." The neurosurgeon does not think surgery is going to help and suggested that she carry on with conservative measures instead. "Most of her current symptoms are ligamentous in nature and referred ligament symptoms. Heat, ice, massage and exercise is suggested. She will continue on with Naprosyn and gabapentin."

A Report of a Chest X-Ray dated April 3, 2018 for the appellant noting, "Lungs and pleural spaces are clear. Cardio mediastinal contour appears normal."

A Medical Imaging Report (MRI) dated June 4, 2018 for the appellant regarding her cervical spine. Noted was "No significant change from previous CT dated December 10, 2016."

Summary of the PWD Application:

The panel will first summarize the evidence from the PWD Application as it relates to the PWD criteria at issue in this appeal.

Diagnoses

In the MR, the appellant's GP identified the following specific diagnoses giving rise to the appellant's impairment; Degenerative disc disease and Traumatic back Injury, both with onsets of March 5, 2017.

In the AR, where asked to describe the appellant's mental or physical impairments that impact her ability to manage daily living activities, the GP wrote, "degenerative back disease affecting ADL's".

Ability to perform DLA

In the MR, the GP indicates that the appellant has not been prescribed medication and/or treatments that interfere with her ability to perform DLA and provides the following comments under Health History; patient has chronic back disease, non-operable, severe degeneration and chronic pain.

In the AR, the GP indicates that the appellant's impairment directly restricts her ability to manage DLA in the following areas:

Under Personal Care, the appellant is independently able to manage activities of bathing, toileting, feeding self and regulating diet while she requires periodic assistance from another person for dressing, grooming, transfers in/out bed and on/off chair.

Under Basic Housekeeping, the appellant requires periodic assistance with laundry and basic housekeeping.

Under Shopping, the appellant is independently able to manage going to and from stores, reading prices and labels, making appropriate choices, paying for purchases while she requires periodic assistance for carrying purchases home.

Under Transportation, the appellant requires periodic assistance with getting in and out of a vehicle while other activities of using public transport and using transit schedules and arranging transportation are indicated as N/A.

The AR otherwise indicates that the appellant is independent in all listed activities under areas of Meals, Pay Rent and Bills, Medications and Social Functioning.

When describing the type and amount of assistance required and identification of any safety issues, the GP comments that the patient occasionally has exacerbations causing immobility and requires help from others.

In her SR, the appellant states that the combination of her health conditions cause her to rely on others to complete her DLA. Examples given are as follows:

Under Personal Care, the appellant sits to get dressed and takes 3-4 times longer to do all activities of personal care. She requires periodic assistance 70% of the time from another person.

Under Basic Housekeeping, she indicates that 60-70% of the time, she is unable to do her laundry or housekeeping and has to rely on friends for assistance. She is unable to carry or bend to transfer her laundry. She is also unable to vacuum, wash floors, bend to clean out the bath tub or clean her toilet.

Under Shopping, the appellant indicates that she needs assistance from another person to load and unload her groceries and that shopping takes her 3-4 times longer.

Help required

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

In the AR, the GP indicates that the appellant receives assistance from family and friends. Under assistance provided through the use of Assistive Devices, the GP indicates that the appellant routinely uses a cane, braces and bathing aids to help compensate for her impairment, mobilizing and limit risk to fall..

The AR also indicates that the appellant does not receive assistance provided by Assistance Animals.

In the appellant's SR, she reports that she uses a cane for waking, uses handrails when climbing stairs and is unable to lift or carry any weight. While shopping the appellant indicates that she uses a shopping cart for support and when getting in/out of a vehicle, she uses the seat and door for support.

The appellant's Request For Reconsideration (RFR) dated August 27, 2018 which included a submission from her advocate and a Consultation Slip from her GP dated August 24, 2018 which indicates that the appellant is unable to function in a working environment due to chronic pain and limited mobility. The GP states she struggles with her activities in all categories and this is continuous.

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

In the Notice of Appeal dated September 20, 2018, the appellant wrote that she is severely disabled, suffers from depression made worse by medication, anxiety and chronic pain.

Appeal Submissions Prior to the hearing:

The appellant submitted the following documents:

1. A one page document dated September 28, 2018 and signed by the appellant's GP who responds to questions as follows;

a) Is there a specific safety consideration related to the disability or medical condition that you noted? ["Are their conditions related to walking impairment? Can patient walk?"]

Response – "Pt has severe degenerative disc disease, mild stenosis and sciatica often antalgic"

b) Does the disabling condition require any special equipment or mobility aids? If yes, please explain.

Response – “uses a cane”

c) Are the mobility limitations or requirements arising from the condition expected to be permanent or do you believe that they will improve over time? [A handwritten notation is made of unknown authorship stating: “PATIENT IS YOUNG WHY PERMANENT?(life time)”]

Response – “permanent”

d) Your recommendation: Response – “Permanent” box ticked off.

2. A one page letter of support dated October 3, “2019” from the appellant's friend of 2 years who states that she has witnessed the deterioration of the appellant's abilities from doing everything on her own to having to walk the shortest of distances with a cane. The friend indicates that she assists the appellant with grocery shopping, loading and unloading items that weigh no more than 5 lbs, with getting up from chairs, bed and in/out vehicles, with cleaning, and with dog walking. She has assisted with cooking meals, helping her dress, brushing her hair, and picking up her prescriptions and groceries.

Hearing

The appellant's advocate began by highlighting the appellant's self-report as well as the 8 DLA indicated as needing support by the appellant's physician as documented in the appeal record. The advocate pointed out that the appellant's physician also indicated in the record that the appellant uses a cane.

The appellant testified that she was always an active person; however, now she walks with a cane, relies on the help of her friend who wrote the support letter as well as her dog. The appellant stated that lifting 2 cans of soup or putting anything in the oven is too much, causing excruciating pain. In response to a question by the ministry, the appellant stated that she lives alone and drives her own vehicle. She added that she required a lift into town today because of dizziness caused by a raised level of medication prescribed by her physician. In response to a question by the panel regarding the appellant's concern raised in her NOA that the GP did not fill in Section B4 of the MR, she confirmed that the details provided in the document dated September 28, 2018 by her GP, completed Section B4 of the MR.

The ministry relied on the reconsideration decision.

Admissibility

The panel finds that the information provided in the appellant's appeal submissions, dated September 28 and October 3, “2019”, are admissible in accordance with Section 22 (4)(b) of the *Employment and Assistance Act* because the information provided in both documents are in support of information and records that were before the ministry at reconsideration. The panel notes that the ministry did not object to the admission of the appeal submissions.

Arguments from the appellant's advocate are included in Part “F”.

PART F – REASONS FOR PANEL DECISION

The issue in this appeal is whether the ministry reconsideration decision that determined the appellant did not meet two of the five statutory requirements of Section 2 of the EAPWDA for PWD designation is reasonably supported by the evidence or is a reasonable application of the legislation in the circumstances of the appellant. Specifically, the ministry determined that the information provided did not establish that:

- the appellant'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 those restrictions, the appellant requires an assistive device, the significant help or supervision of another person, or the services of an assistance animal to perform DLA.

The following section of the EAPWDA applies to this appeal:

Persons with disabilities 2 (1) In this section: "assistive device" means a device designed to enable a person to perform a daily living activity that, because of a severe mental or physical impairment, the person is unable to perform; "daily living activity" has the prescribed meaning; "prescribed professional" has the prescribed meaning. (2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act if the minister is satisfied that the person is in a prescribed class of persons or that the person has a severe mental or physical impairment that (a) in the opinion of a medical practitioner or nurse practitioner is likely to continue for at least 2 years, and (b) in the opinion of a prescribed professional (i) directly and significantly restricts the person's ability to perform daily living activities either (A) continuously, or (B) periodically for extended periods, and (ii) as a result of those restrictions, the person requires help to perform those activities. (3) For the purposes of subsection (2), (a) a person who has a severe mental impairment includes a person with a mental disorder, and (b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires (i) an assistive device, (ii) the significant help or supervision of another person, or (iii) the services of an assistance animal. (4) The minister may rescind a designation under subsection (2).

The following section of the EAPWDR applies to this appeal:

2 (1) For the purposes of the Act and this regulation, "daily living activities", (a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following activities: (i) prepare own meals; (ii) manage personal finances; (iii) shop for personal needs; (iv) use public or personal transportation facilities; (v) perform housework to maintain the person's place of residence in acceptable sanitary condition; (vi) move about indoors and outdoors; (vii) perform personal hygiene and self-care; (viii) manage personal medication, and (b) in relation to a person who has a severe mental impairment, includes the following activities: (i) make decisions about personal activities, care or finances; (ii) relate to, communicate or interact with others effectively. (2) For the purposes of the Act, "prescribed professional" means a person who is (a) authorized under an enactment to practise the profession of (i) medical practitioner, (ii) registered psychologist, (iii) registered nurse or registered psychiatric nurse, (iv) occupational therapist, (v) physical therapist, (vi) social worker, (vii) chiropractor, or (viii) nurse practitioner, or (b) acting in the course of the person's employment as a school psychologist by (i) an authority, as that term is defined in section 1 (1) of the Independent School Act, or (ii) a board or a francophone education authority, as those terms are defined in section 1 (1) of the School Act, if qualifications in psychology are a condition of such employment.

Direct and significant restrictions in the ability to perform DLA

Section 2(2)(b)(i) of the EAPWDA requires that the minister be satisfied that in the opinion of a prescribed professional, a severe mental or physical impairment directly and significantly restricts the appellant's 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 that the legislative criteria are met, is dependent upon the evidence from prescribed professionals. The term "directly" has consistently had the meaning that there must be a causal link between the severe impairment and the restriction. The direct restriction must also be significant. Finally, there is a component related to time or duration – the direct and significant restriction may be either continuous or periodic. If periodic, it must be for extended periods. Inherently, any analysis of periodicity must also include consideration of how frequently the activity is restricted. In circumstances where the evidence indicates that a restriction arises periodically, it is appropriate for the ministry to require evidence of the duration and frequency of the restriction in order to be "satisfied" that this legislative criterion is met.

DLA are defined in Section 2(1) of the EAPWDR and are listed in both the MR and the AR sections of the PWD application with the opportunity for the prescribed professional to checkmark boxes and provide additional narrative. This does not include the ability to work.

At issue in this assessment is the degree of restriction in the appellant's ability to perform the DLA listed in Section 2(1)(a) and (b) of the EAPWDR applicable to a person with a severe mental or physical impairment.

Appellant's Position

The appellant's position is that she meets the legislative requirements for PWD designation. The appellant's advocate argues that the appellant's medical impairments require her to have periodic assistance from another person in 8 of her DLA up to 70% of the time. It is further argued that the ministry did not give enough consideration to the appellant's self-report or to the specialist's report provided in the appeal record. The appellant also argues that she has received treatments from a physio-therapist and a massage-therapist and is not a candidate for surgery.

Ministry's Position

The ministry's position is that the information provided by the prescribed professional does not establish that the appellant's impairment significantly restricts her daily living activities either continuously or periodically for extended periods.

Based on the assessments provided, the ministry finds that the majority of DLA are performed independently or require little help from others. The ministry acknowledges that the GP states that the appellant requires periodic assistance with managing activities of personal care, basic housekeeping, carrying purchases home and getting in/out of a vehicle and that the appellant occasionally has exacerbations causing immobility and requires assistance from others. However, the ministry finds that there is no information provided by the GP to explain the nature of the periodic assistance, such as the type, degree or the frequency that she requires.

The ministry notes that it is the opinion of the GP that the appellant is unable to function in a working environment due to chronic pain and limited mobility, as she struggles with activities in all categories and "this is continuous", while the GP provides no information to further explain the nature of the restrictions. The ministry also notes that for the purpose of determining eligibility for PWD designation an applicant's employability or vocational ability is not taken into consideration. Subsequently the ministry is unable to establish that the appellant requires a significant degree of assistance to manage areas of daily living. Therefore, the ministry finds that the legislative criteria have not been met.

Panel Decision

The panel notes that the GP indicates that the appellant has not been prescribed medication and/or treatments that interfere with her ability to perform DLA. The panel finds the GP does not report that the appellant has any areas of DLA that require continuous assistance from another person or is unable, although in the AR, it is reported the appellant occasionally has exacerbations causing immobility and requires help from others. The panel finds that, in relation to the 8 activities where some need for periodic assistance is assessed, the GP has not provided sufficient information in relation to the nature, degree and duration of the assistance required by the appellant to establish that there are significant restrictions for extended periods in the appellant's ability to perform DLA. The panel notes that this information is not consistent with the level of restriction reported by the appellant where with some aspects of DLA namely basic housekeeping, laundry and carrying purchases home, she argues that help with DLA is required from another person up to 70% of the time. The panel also notes that there is no evidence from the appellant's specialists to support that her severe impairment directly and significantly restricts her ability to perform daily living activities either continuously, or periodically for extended periods.

The panel finds that the assessments provided by the prescribed professional indicate that the appellant is primarily independent with DLA, with some activities requiring periodic assistance. However, the information regarding the nature of periodic assistance required is not sufficient to establish direct and significant restrictions for extended periods as required by the legislation. Therefore, the panel finds that the ministry reasonably determined that the assessments provided are not indicative of a severe level of impairment that directly and significantly restricts the appellant's DLA either continuously or periodically for extended periods as required by Section 2(2)(b) of the EAPWDA.

Help to perform DLA

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 DLA.

Appellant's Position

The appellant's position is that she uses a cane for walking, uses handrails when climbing stairs and is unable to lift or carry any weight. While shopping the appellant indicates that she uses a shopping cart for support and when getting in/out of a vehicle, she uses the seat and door for support. The appellant argues that she requires help from another person for some of her daily living activities.

Ministry's Position

The ministry's position is that it has not been established that daily living activities are significantly restricted; therefore, it cannot be determined that significant help is required from other persons.

Panel Decision

The panel finds that the information provided indicates that the appellant routinely uses a cane and requires help with some aspects of DLA. However, as confirmation of direct and significant restrictions with DLA is a precondition of the need for help criterion and 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.

Conclusion

The panel finds that the ministry's reconsideration decision, which determined that the appellant was not eligible for PWD designation, was reasonably supported by the evidence and is a reasonable application of the applicable enactment, and therefore confirms the decision. The appellant is not successful on appeal.

PART G – ORDER

THE PANEL DECISION IS: (Check one)

UNANIMOUS

BY MAJORITY

THE PANEL

CONFIRMS THE MINISTRY DECISION

RESCINDS THE MINISTRY DECISION

If the ministry decision is rescinded, is the panel decision referred back to the Minister for a decision as to amount? Yes No

LEGISLATIVE AUTHORITY FOR THE DECISION:

Employment and Assistance Act

Section 24(1)(a) or Section 24(1)(b)

and

Section 24(2)(a) or Section 24(2)(b)

PART H – SIGNATURES

PRINT NAME

Lynn Twardosky

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2018/10/12

PRINT NAME

Kent Ashby

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2018/10/12

PRINT NAME

Kim Polowek

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2018/10/12