

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (“the ministry”) reconsideration decision dated April 10, 2019, 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 her 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**Adjournment Application**

The appeal hearing was originally set down for May 21, 2019. At the commencement of the hearing the appellant asked for an adjournment in order to obtain additional medical information from her doctor. The ministry did not object to the appellant's adjournment request.

Following discussion the panel consented to the adjournment request based on her evidence that she had spoken to her doctor and the doctor was willing to provide additional information related to the PWD medical report ("MR") and assessor report ("AR"). The appeal hearing re-commenced on June 18, 2019.

Evidence before the Ministry at Reconsideration

The evidence before the ministry at the time of the reconsideration decision included:

- the appellant's PWD Application comprised of the appellant's self report ("SR") dated March 13, 2019, the MR and the AR dated March 13, 2019, both completed by the appellant's family physician ("the GP"), who has known the appellant for 28 years and who has seen the appellant 11 or more times in the past 12 months;
- the appellant's request for reconsideration submitted November 15, 2018 and December 7, 2018, including:
 - appellant's additional comments, which in this decision have been included in the SR and summarized below;
 - May 7, 2018 medical imaging report of MR cervical spine examination;
 - April 7, 2018 medical imaging report of CT/cervical spine;
 - December 13, 2017 medical imaging report of MR cervical spine.

PWD Application Summary**Diagnosis**

In the MR the GP identified the following impairments:

- compressive neurogenerative spinal stenosis/spondylosis (back since 1978, neck since 2009)
- spondylosis-arthritis/degenerative C spine and L spine
- scoliosis – T spine

Physical Impairment

In her SR the appellant reported that she suffers from severe, crippling chronic pain caused by spinal stenosis, spondylitis and degenerative disc disease. She is unable to turn her neck well and can't bend at the waist, stand, sit or support the weight of her head for very long. Anesthetic injection treatment has helped greatly with the pain but doesn't fix it.

She experiences numbness in her hands and feet and occasionally loses her balance and falls. Bending at the knees is extremely difficult as a result of a prior multiple leg fracture. She can't climb any number of stairs without the assistance of a handrail or cane and can't lift more than 10 pounds without having to take morphine to deal with her pain. Often she must remain in bed for several days, wearing diapers sometimes eating peanut butter for sustenance. She can be up for 4 hours at a time but then must spend 1-6 days in bed without eating properly or brushing her teeth. She uses a cane or walker at all times unless she can lean against a wall.

In the MR the GP reported that the appellant:

- can walk less than 1 block and climb 2-5 steps unaided, lift 5-15 pounds unaided and remain seated for 1-

2 hours;

- is restricted in all areas of DLA except management of medications and finances.

In the AR the GP reported that pain restricts the appellant's mobility: (*"restricted neck motion/rotation restricts observation"*). He also reported that the appellant:

- uses an assistive device (cane, walker, wheelchair) for walking indoors and outdoors, climbing stairs and standing. It takes her twice as long to accomplish these activities;
- requires periodic assistance from another person with lifting and carrying, and cannot lift more than 10 pounds (*"low back and neck pain restrict walking/mobility/secondary pain"*);
- requires periodic assistance with basic housekeeping, going to and from stores and using public transit.

Mental Impairment

In her SR the appellant wrote that at the time of writing (March 13, 2019) she had not been out to socialize for 2 ½ months and has begun to experience anxiety, for which she requires medication.

The GP did not identify a mental impairment or impaired cognitive or emotional functioning in the MR or AR.

Daily Living Activities (DLA)

In her SR the appellant wrote that she can't do household chores that require bending or pivoting. Specifically she is unable to scrub the toilet, tub or floors, vacuum, load/unload the dishwasher. She needs to take breaks while preparing meals and must lie down. Her personal hygiene is affected; she is unable to bathe more than once or twice in a 10 day period.

In the MR the GP noted that the appellant's performance of DLA is periodically restricted in the following areas: personal self care, meal preparation, basic housework, daily shopping, mobility inside and outside the home and use of transportation. She is not restricted in medication management, management of finances or social functioning.

In the AR the GP indicated that the appellant:

- is independent in all areas of personal care, laundry, shopping (except going to and from stores), meals (including planning, food preparation, cooking, safe storage of food), paying rent and bills, managing medications, using transit getting in and out of a vehicle.
- requires periodic assistance with basic housekeeping (*"no vacuuming/bending"*) going to and from stores (*"difficult driving to/from"*) and using public transit (*"Getting to stops is a problem. From stop to location"*)

Assistance Required

In her SR the appellant noted that her daughter comes in to help but is out of the province for months at a time. The appellant uses a cane, walker or wheelchair for all mobility other than when a wall is available to lean on.

In the AR the GP noted that assistance with DLA is provided by family, and that light housekeeping assistance is required. With respect to use of assistive devices the GP indicated that the appellant routinely uses a cane, walker, manual wheelchair, raised toilet seat and a shower seat. The GP added that the appellant could use a mechanized scooter from time to time.

Additional Information Received after Reconsideration

Documents:

Prior to the hearing the appellant submitted two documents, both written by a physician specializing in pain management ("Dr. B"):

- January 30, 2019 letter to the GP, summarized as follows:
 - patient with failed back surgery walks with a cane to stabilize posture/gait and prevent falls due to leg weakness, which occurs suddenly and occasionally;
 - pain is constant, pain score is 8;
 - pain is worsened by walking, standing, sitting, lifting bending and twisting neck or lower back
 - discussed non-[pharmaceutical] treatments and how they complement medication: counseling, exercise, physio, massage. Encouraged patient engagement with treatment, walks, exercise, weight loss and self management;
 - social history: Living at home; divorced, sees both children; Family – fair social support; Activities – light exercise
 - pain relief injection administered.
- February 26, 2019 letter to the GP, summarized as follows:
 - follow up to January 30, 2019 pain relief injection;
 - no worsening, walking and doing exercises;
 - pain relief injection administered.

Oral:

Much of the oral evidence stated by the appellant during the hearing reiterated what she had written in her SR. Relevant new information included:

- Following the May 21, 2019 adjournment the appellant met with her GP. A supplementary letter from the GP was drafted but required some revision. The appellant assumed that the GP had forwarded the supplementary letter to the Tribunal office;
- She now has damage to her spinal cord, confirmed by a recent MRI;
- She suffers from job-related Post Traumatic Stress Disorder (PTSD) as a result of investigating thousands of homicides over 15 years;
- In addition to morphine she is injected with horse tranquilizers;
- In August 2019 she will be having neck-fusing surgery and insertion of 1 or 2 titanium plates, which will limit her neck movement even further;
- 3 previous back surgeries have failed, and no further back surgery can be done;
- In May 2019 she received another pain relief injection from Dr. B and she will see him again in July.

Admissibility of Additional Information

The ministry did not object to the admissibility of the documentary or oral evidence of the appellant. The panel admitted all of the appellant's additional information under EAA Section 22 (4)(b) as evidence in support of the information that was before the ministry at reconsideration because all of it was directly related to the information considered by the ministry at reconsideration and did not contain substantively new information.

PART F – REASONS FOR PANEL DECISION

The issue in this appeal is whether the ministry reasonably determined that the appellant was ineligible for designation as a PWD. The ministry determined that the appellant did not meet all of the required criteria for PWD designation set out in the *Employment and Assistance for Persons with Disabilities Act*, Section 2.

Specifically, the ministry determined that the information provided did not establish that:

- the appellant has a severe 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.

Relevant legislation:

EAPWDA:

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.

EAPWDR:

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 Physical Impairment

The appellant argues that she suffers a severe physical impairment arising from multiple musculoskeletal diseases that cause severe chronic pain in her neck, shoulders, and back.

The ministry's position is that the information provided by the appellant and the GP related to the appellant's mobility and functional skills are not indicative of a severe physical impairment.

Panel Decision

A diagnosis of a serious medical condition does not in itself determine PWD eligibility. Under the legislation, eligibility for PWD hinges on an "impairment" and its severity. "Impairment" is more than a diagnosed medical condition. An impairment is a medical condition that results in restrictions to a person's ability to function independently, appropriately, effectively or for a reasonable duration.

To assess the severity of impairment one must consider the nature of the impairment and the extent of its impact on daily functioning, as evidenced by functional skill limitations and the degree to which the ability to perform DLA is restricted. The legislation makes it clear that the determination of severity is at the discretion of the minister, taking into account all of the evidence, including the evidence of the appellant. However, the legislation is also clear that the fundamental basis for the analysis is the evidence from a medical practitioner or a "prescribed professional" – in this case, the appellant's GP. The legislation requires that for PWD designation, the minister must be satisfied that the person has a severe mental or physical impairment.

In her SR and oral evidence the appellant indicated that she suffers from chronic, crippling pain in her neck, shoulders and back that severely restricts her ability to hold up and turn her neck, stand, bend, walk unassisted, climb any number of stairs, and lift or carry. To alleviate her pain she requires daily oral doses of morphine and periodic anaesthetic injections administered by pain specialist Dr. B. She spends most of her day in bed and when

the pain is at its worst she cannot leave her bed to eat, drink or use the toilet for several days at a time. She requires a cane, walker or wheelchair in order to manage activities requiring mobility and physical functioning, and is unable to perform basic housework. She needs to take a break and lie down when preparing meals.

The severe degree of pain due to physical impairment described by the appellant is not reflected in the GP's assessments. In the MR the GP reported that the appellant is able to walk less than 1 block and climb 2-5 steps unaided, lift 5-15 pounds and remain seated for 1-2 hours. On Page 10 of the PWD application the GP did not provide additional comments regarding functional skills limitations. In the AR the GP reported that the appellant takes twice as long as typical to perform these activities and requires the use of an assistive device, namely a cane, walker or wheelchair. The GP also noted that the appellant requires periodic assistance from another person with basic housekeeping, going to and from stores, using transit and lifting/carrying loads that exceed 10 pounds.

The medical imaging reports submitted by the appellant with her request for reconsideration do not explain how the findings impact the appellant's mobility, functional ability and performance of DLA and as such they are not helpful in determining the degree of physical impairment experienced by the appellant.

Dr. B confirmed that the appellant suffers from chronic pain that is worsened by walking, standing, sitting, lifting, bending and twisting the neck or lower back, and that she uses a cane to stabilize her posture and prevent falls. He did not provide an assessment as to the degree of functional impairment experienced by the appellant. He encouraged the appellant to walk and exercise as part of her pain management plan, which implies that she is capable of physical mobility.

The panel acknowledges that the appellant experiences chronic, severe pain that restricts her mobility, functional ability and performance of DLA. However, as noted above the assessments provided by the GP and Dr. B do not reflect a severe impairment of physical functioning. Given the discrepancies between the appellant's self-assessment and the assessments provided by the prescribed professionals the panel finds that the ministry reasonably determined that the information provided is not sufficient to demonstrate a severe physical impairment.

Severe Mental Impairment

The appellant argues that she suffers from anxiety and PTSD, which severely impairs her cognitive and emotional functioning.

The ministry's position is that there is insufficient information provided to establish a severe mental impairment.

Panel Decision

In her oral evidence the appellant reported that she suffers from anxiety and from employment-related PTSD. However the GP did not include a mental disorder in the diagnostic section of the MR and did not identify any deficits to cognitive and emotional functioning in either the MR or the AR. Dr. B noted that the appellant reported stress and panic attacks.

The panel therefore finds that the ministry reasonably determined there was insufficient information provided to demonstrate that the appellant suffers from a severe mental impairment.

Restrictions in Ability to Perform DLA

The appellant argues that her ability to perform DLA is significantly restricted as a result of her severe impairment.

The ministry's position is that a severe impairment has not been established that directly and significantly restricts the appellant's ability to perform DLA, and that the information submitted by the prescribed professionals is not sufficient to establish that the appellant's DLA are directly and significantly restricted either continuously or for extended periods.

Panel Decision

The legislative requirement respecting DLA 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, the ministry's determination as to whether or not it is satisfied is dependent upon the evidence from prescribed professionals. DLA are defined in section 2(1) of the EAPWDR and are listed in both the PR and the AR sections of the PWD application with the opportunity for the prescribed professional to check marked boxes and provide additional narrative.

Although not required, the GP chose to complete Section E – DLA of the MR. She indicated that the appellant's impairment directly restricts the appellant's ability to perform DLA in all listed areas except management of medications, management of finances and social functioning. The GP did not indicate whether the restrictions were continuous or periodic and did not provide additional comments.

In the AR the GP assessed the appellant as being independent in all areas of personal care, laundry, shopping (except going to and from stores), meals (including planning, food preparation, cooking, safe storage of food), paying rent and bills, managing medications, using transit getting in and out of a vehicle, but noted that the appellant requires periodic assistance with basic housekeeping, going to and from stores and using transit. The GP did not describe the frequency or duration of periodic assistance required for completion of these activities, and did not describe the type and extent of assistance required. Dr. B noted that the appellant walks with a cane for stabilization and prevention of falls.

Due to the GP's assessment of the appellant's ability to perform DLA independently in several areas and the lack of information provided to explain the frequency and duration of periodic assistance required in the remaining areas of DLA the panel finds that the ministry reasonably determined that the information provided by the prescribed professionals does not establish that the appellant has a severe impairment that directly and significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods.

Help in Performing DLA

The appellant argues that she requires the use of assistive devices and the significant help of another person to perform DLA.

The ministry's position is that because the information did not establish that the appellant's DLA are significantly restricted it cannot be determined that an assistive device or significant help is required.

Panel Decision

The appellant, the GP and Dr. B all indicate that the appellant requires the use of an assistive device to assist with mobility. The appellant reported that she requires a cane, walker or wheelchair at all times that she is not in bed or leaning against a wall. In the AR the GP indicated that the appellant routinely uses a cane, walker, wheelchair, raised toilet seat and shower seat to compensate for her physical impairment. The GP also indicated that help for DLA is provided by family.

The information provided by the prescribed professional indicates that the appellant requires assistance devices and the help of another person to perform DLA. However, the establishment of direct and significant restrictions to the performance of DLA is a precondition of the "need for help" criterion. Because 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

Having reviewed and considered all of the evidence and relevant legislation, the panel finds that the ministry's reconsideration decision, which determined that the appellant was not eligible for PWD designation, was reasonably supported by the evidence, and confirms the decision. The appellant is not successful on appeal.

APPEAL NUMBER

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

Joan Bubbs

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2019/06/18

PRINT NAME

Susanne Dahlin

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019/06/18

PRINT NAME

Barbara Insley

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019/06/18