



PART C – DECISION UNDER APPEAL

(State the reconsideration decision)

The decision under appeal is the ministry's reconsideration decision dated October 16, 2009 which held that the appellant did not meet 3 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 requirement and that her impairment is likely to continue for at least 2 years. However, the ministry was not satisfied that the appellant has a severe physical or mental impairment or 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. The ministry also found that a prescribed professional has not confirmed that, as a result of direct and significant restrictions, the appellant requires help to perform DLA.

PART D – RELEVANT LEGISLATION

(State the relevant Legislation considered)

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

Please set out the facts as determined by the panel, based on the evidence at the hearing. Please note that subsection 22(4) of the Employment and Assistance Act states that, in a hearing referred to in subsection (3), a panel may admit as evidence only:

- (a) the information and records that were before the minister when the decision was being made, and
- (b) oral or written testimony in support of the information and records referred to in paragraph (a).

The evidence before the ministry at the time of reconsideration was comprised of a PWD application (Self-report (SR), Physician Report (PR), and Assessor Report (AR)), medical documentation for the period October – December 2008 respecting the diagnosis of Crohn's disease, and the Request for Reconsideration.

In the SR, the appellant reports that Crohn's disease has resulted in extreme discomfort and pain and the medication has resulted in insomnia and extreme fatigue and weakness. She has been forced to withdraw from school and work and change her eating habits. A recent diagnosis of epilepsy, due to a right temporal lobe brain tumour, has resulted in an inability to drive and bathe without supervision and visual spatial memory problems. Fear of seizures makes it difficult to be in crowds or to be alone. Seizures result in disorientation and migraine headaches which can last for 1 ½ weeks after a seizure. The appellant writes that she has had increasing depression and feelings of dependency.

In the PR, completed by a general practitioner who has known the appellant for more than 15 years, the appellant is diagnosed with Crohn's disease ("variable symptoms ↑ in cycles"), right temporal lobe tumor (surgery pending – "epilepsy may or may not persist?"), and epilepsy. Regarding Functional Skills, the appellant is able to walk 4+ blocks unaided on a flat surface, climb 5+ steps unaided, has no limitations with lifting or remaining seated, and no difficulties with communication; a significant deficit with 3 of 11 specified aspects of cognitive and emotional function is indicated (executive, memory, and emotional disturbance) which are secondary to the intracranial tumor.

In the AR, completed by the same physician, the impairments impacting the appellant's ability to manage DLA are listed as "↓ memory, ↓ mood". The appellant's Ability to Communicate is good and she is independent with all aspects of Mobility and Physical Ability (walking indoors, walking outdoors, climbing stairs, standing, lifting, and carrying/holding). No major impact is noted for any aspect of Cognitive and Emotional Functioning, a moderate impact is noted in 3 aspects (emotion, executive, and memory), with minimal or no impact noted for the remaining 10 listed aspects. Regarding DLA, the appellant is reported to be independent with all aspects of 'personal care' and 'medications', 3 of 5 aspects of 'shopping', 1 of 4 aspects of 'meals', 2 of 3 aspects of 'paying rent and bills', 2 of 3 aspects of 'transportation' (cannot drive due to seizures), and 3 of 5 aspects of 'social functioning'. Periodic assistance is indicated for both aspects of 'basic housekeeping', 2 aspects of 'shopping', 3 aspects of 'meals', and for 1 aspect of 'paying rent and bills'; periodic support/supervision is indicated for 2 aspects of 'social functioning'. Marginal functioning with both immediate and extended social networks is reported. Most support is provided by the appellant's family.

The Request for Reconsideration was comprised of:

- a June 1, 2009 Radiology report and June 16 and July 21, 2009 consult letters (neurosurgeon) respecting an intracranial tumor and surgical treatment;
- a July 28, 2009 consult letter from a neurologist stating that he has been in contact with the appellant over the last couple of months, during which the appellant has "had no further spells" and is consequently not on anticonvulsant medication;
- a September 19, 2009 letter in which the appellant writes that she cannot engage in daily activities that pose a risk to her safety due to seizures resulting from medication from Crohn's disease and that Crohn's disease results in extreme stomach pain, nausea and exhaustion; she also reports migraine headaches and extreme fatigue for two weeks following a seizure

Information submitted on appeal by the appellant is as follows:

- November 23, 2009 letter from a physician (not the physician who completed the PWD application) who writes that the appellant has Crohn's disease and epilepsy secondary to a neuroepithelial tumor which has been incompletely excised. The appellant suffers from visual spatial memory problems and has experienced seizures post surgery as well as unremitting symptoms of Crohn's disease. The appellant is unable to work and requires supervision for some DLA including showering, managing finances and basic housekeeping.
- A November 23, 2009 letter from a Registered Psychiatric Nurse (RPN) and neighbour (for many years) of the appellant who writes that the appellant suffers from episodes of distress and anxiety likely due to loss of functioning and independence as well as fear of unpredictable seizures. The appellant requires the significant assistance of another person to attend to the DLAs of personal self care, cooking, meal planning and preparation, management of finances, basic housekeeping, laundry, daily shopping, lifting/carrying, transportation (cannot drive), and riding public transit (risk of seizure and anxiety). The RPN writes "it is my understanding, observation and professional opinion that the physical and mental impairments are severe and persistent and will continue for more than two years".
- An October 19, 2009 post-operative consult report from the neurosurgeon in which he reports no seizures in the post-operative period as of that date (surgery date of October 13, 2009).
- An operative report and tissue pathology report respecting the surgery to remove the tumour.
- A September 11, 2009 consult report from a gastroenterologist who writes that "It's not entirely clear to me what [the appellant] is complaining about in terms of [her] reaction to her Crohn's disease. She does have some diarrhea and it's possible that her Crohn's disease has become active again although I would like to confirm this with endoscopic evaluations. She also has some upper abdominal pain and we may need to do a gastroscopy as well as a flexible sigmoidoscopy. In the meantime I don't believe I would change anything. I told her that fatigue can be secondary to many different things and not just active inflammatory bowel disease. Clearly she is considerably worried about her upcoming neurosurgery and this may be playing a role in her level of energy".

The panel admitted the new evidence under section 22(4) of the Employment and Assistance Act as it is in support of the information and records before the ministry at reconsideration.

The ministry did not provide additional information on appeal.

PART F – REASONS FOR PANEL DECISION

(State the reasons for the panel decision)

The issue under appeal is whether the ministry reasonably concluded that the appellant does not have a severe physical or mental impairment and that her DLA are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods, and that the appellant does not require help to perform DLA. The ministry determined that the age requirement had been met and that the appellant has an impairment that will last for 2 years.

The criteria for being designated as a person with disabilities (PWD) are set out in section 2 of the EAPWDA. The minister may designate a person as a PWD when the following requirements are met. Pursuant to section 2(2) the applicant must have reached the age of 18 and the minister must be satisfied that the person has a severe mental or physical impairment. Under section 2(2)(a) the impairment must be likely, in the opinion of a medical practitioner, to continue for at least 2 years. Section 2(2)(b)(i) requires that the impairment, in the opinion of a prescribed professional, directly and significantly restricts the person's ability to perform daily living activities (DLA) either continuously or periodically for extended periods. Section 2(2)(b)(ii) states that as a result of those restrictions the person must require help to perform DLA. Section 2(3)(b) of the EAPWDA states that a person requires help in relation to a DLA if the person requires an assistive device, the significant help or supervision of another person, or the services of an assistance animal.

Section 2(1)(a) of the EAPWDR defines DLA for a person who has a severe physical or mental impairment as preparing own meals, managing personal finances, shopping for personal needs, using public or personal transportation, performing housework to keep one's residence in acceptable sanitary condition, moving about indoors and outdoors, performing personal hygiene and self care and managing personal medication. Section 2(1)(b) adds two additional activities for a person with a severe mental impairment: making decisions about personal activities, care or finances; and, relating to, communicating or interacting with others effectively.

The appellant's position is that she is eligible for designation as a PWD because her impairment is both severe and prolonged with Crohn's disease and the tumour/surgery restricting many of her DLA necessitating regular assistance from other people.

The ministry's position is that the evidence does not establish the existence of a severe physical or mental impairment that, in the opinion of a prescribed professional, significantly restricts DLA or necessitates help with DLA.

Regarding the existence of a severe mental impairment, the panel finds that the evidence in the PWD application is that the appellant has significant deficits with 3 of 11 identified aspects of cognitive and emotional function which have a moderate impact on daily functioning in the areas of emotion, executive, and memory and that either a minimal or no impact is indicated in all other aspects of cognitive and emotional function. The appellant has marginal functioning with social networks but is independent with most social functioning DLA. The November 23, 2009 letter from another physician confirms problems with visual spatial memory but provides no further information as to the impact on daily functioning. In the November 23, 2009 letter from a RPN, episodes of distress and anxiety likely due to loss of function and independence and fear of seizures are indicated, and the RPN writes that is her professional opinion that the appellant's mental and physical impairments are severe. The panel finds that the evidence of the RPN reflects a much greater degree of mental impairment than the evidence of both physicians. Given this conflicting evidence, the panel has placed greater weight on the evidence of the two physicians for the following reasons: (i) the evidence of the two physician's is consistent; (ii) the physician

who completed the PWD application has treated the appellant for over 15 years; (iii) it is not clear that the RPN has been involved in the professional care of the appellant as the November 23, 2009 letter is not on professional letterhead and the RPN is the appellant's neighbour, and as such, the RPN's evidence has the appearance of being offered by a support person rather than a professional charged with the care of the appellant. Therefore, the panel finds that, as there is no diagnosis of a mental impairment by a physician and the evidence of both of the appellant's general practitioners does not establish that the deficits with cognitive and emotional functioning have more than a moderate impact on functioning in 3 of 11 areas, the ministry reasonably concluded that a severe mental impairment has not been established under section 2(2) of the EAPWDA.

Regarding the existence of a severe physical impairment, the panel finds that the evidence in the PWD application is that the appellant has Crohn's disease with variable symptoms, a temporal lobe tumour, and epilepsy which may or may not persist after surgery to remove the tumour. The appellant is independent in all physical functional skills and all aspects of mobility and physical ability. The November 23, 2009 physician's letter establishes that post-surgery, the appellant still experiences seizures (frequency or degree not stated) and that symptom's of Crohn's disease are unremitting (again, no further details as to the nature, frequency or duration of the symptoms are given or any impact they may have on physical functioning). In the July 21, 2009 neurologist's letter, he reports that the appellant's GI symptoms are under reasonable control and that the appellant had not had any seizures since last seen (unknown date). The most recent evidence from the specialist treating the appellant for Crohn's disease (September 11, 2009 gastroenterologist's letter) is that he is uncertain as to whether the Crohn's disease is active again and would like testing determine this; further, despite the appellant reporting intestinal symptoms, he suggests that the reported fatigue may be due to concern about the upcoming neurosurgery. The panel notes that no evidence was submitted establishing whether further testing was done. The most recent evidence from a specialist regarding the tumour is that the appellant experienced no seizures in the 6 days following surgery. The panel finds that the evidence of the prescribed professionals establishes that the appellant is experiencing seizures post-operatively and symptoms of Crohn's disease but that the appellant is independent in terms of all aspects of functional skills and mobility and physical ability. Therefore, the panel finds that the ministry reasonably determined that a severe physical impairment has not been established under section 2(2) of the EAPWDA.

Regarding the degree to which the appellant's DLA are restricted, the panel finds that the evidence provided in the PWD application indicates that the appellant is able to independently manage the majority (22) of aspects of DLA independently without any assistance. Regarding the remaining 10 DLA aspects (no information was provided for 1 aspect of transportation), the panel finds that there is no information provided as to how frequently or for what duration periodic assistance/supervision is required. In the November 23, 2009 physician's letter, assistance is indicated for showering, managing finances and basic housekeeping but again, no information respecting the frequency or duration is provided in order to establish that periodic assistance is required for an extended period; however, the panel accepts this evidence as establishing that continuous assistance is required for 1 aspect of personal care, bathing, given that bathing can reasonably be seen as an every day activity. The panel acknowledges the conflicting evidence of the RPN that the appellant requires the significant assistance of another person with almost all DLA but, again, places greater reliance on the reasonably consistent evidence of the two physicians for the reasons already stated. The panel notes that the evidence of the other prescribed professionals does not address the appellant's ability to manage DLA. The panel finds that the evidence of the prescribed professionals can reasonably be seen as establishing that while the appellant is continuously restricted in 1 aspect of personal care and requires periodic assistance of an unspecified frequency and duration for 10 additional aspects of personal care, the appellant is independently able to manage the remaining (21) majority of aspects of DLA. Thus, the panel finds that the ministry reasonably concluded that the appellant is not directly and significantly restricted either continuously or

periodically for extended periods in her ability to perform DLA as required under section 2(2)(b)(i) of the EAPWDA.

The panel also finds that, as a direct and significant restriction with DLA has not been established, as the appellant is able to independently manage most aspects of DLA, the ministry reasonably determined that the evidence does not establish that, in the opinion of a prescribed professional, the significant help or supervision of another person, use of an assistive device or assistance animal is required to perform DLA as required under section 2(2)(b)(ii) of the EAPWDA.

The panel finds that the ministry's reconsideration decision is reasonably supported by the evidence and confirms the decision.