

PART C – DECISION UNDER APPEAL

This decision under appeal is the reconsideration decision of the Ministry of October 22, 2009, to deny the Persons with Disabilities designation. The Ministry found that the Appellant met the age requirement and that the Appellant has a severe mental and physical impairment that is likely to continue for at least 2 years. However, the Ministry found that the material submitted by the prescribed professional did not establish that daily living activities are directly and significantly restricted either continuously or periodically for extended periods. The Ministry also found that the prescribed professional does not confirm that as a result of direct and significant restrictions, the Appellant requires help to perform daily living activities.

PART D – RELEVANT LEGISLATION

Employment and Assistance for Persons with Disabilities Act, s. 2
Employment and Assistance for Persons with Disabilities Regulation, s. 2

PART E – SUMMARY OF FACTS

The evidence before the Ministry at the time of reconsideration was comprised of the Persons with Disabilities Designation Application assessor's report and the physician's report, both dated June 23, 2009, and both completed by the same physician; the radiology report and computed tomography reports, both dated August 15, 2005; the letter to the physician from the internist dated August 22, 2005; the letter to the oncologist from the surgeon dated January 12, 2006; the discharge summary, dated June 17, 2006; the letter from the oncologist to the physician dated May 26, 2009.

It was the Ministry's submission that, while the Appellant met the age and duration criteria and has a severe impairment, it was not satisfied that the Appellant's impairment directly and significantly restricts her ability to perform daily living activities, and that she requires significant help or supervision of another person to perform daily activities restricted by her impairment.

In her request for reconsideration, the appellant points out that she has difficulties with balance and coordination, decreased cognitive abilities and significant depression. She relies on a cane and cannot lift or carry. Her handwriting is poor. She also has major impairment to her emotional functioning, attention and concentration, executive abilities, memory, concentration and motivation. She notes that since her original application in June, 2009, when she described herself as being primarily independent and still able to care for herself, although everything took longer, her condition has deteriorated and she has since suffered a major fall in the bathtub, which in turn has caused further difficulties with balance, coordination and her emotional state. She argues that the impact of these physical and emotional impairments on her daily living activities is that she must avoid stairs, use her cane, and walk less than three blocks with frequent breaks of sitting. She often falls and cannot carry more than a light bag. She uses taxis and HandiDart, or relies on help from her daughter and son in law, but has great difficulty entering and exiting a vehicle due to imbalance, weakness and difficulty with movement control of her legs. For laundry, she relies on a wheeled cart and help from her daughter. Other housekeeping chores and cleaning are difficult due to lack of balance. Her daughter and son in law help her with grocery shopping and carrying the groceries. Since her fall, she can no longer bathe independently, but showers with the help of her daughter. She is able to cook, but with difficulty, and suffers from problems with concentration, word comprehension and communication. Her daughter occasionally helps her with money management. She has few social connections due to her depression and fatigue. She also gave oral evidence at the hearing to this effect.

In her PWD application and medical letters, it was noted that the Appellant has had metastatic bronchogenic cancer with metastases to the cerebellum and depression. She underwent a right lobectomy and a craniotomy with radiation to treat cancer, and now suffers from decreased balance, ataxia, decreased cognitive abilities and depression. She was assessed as being able to walk 2 to 4 blocks unaided on a flat surface, climb 2 to 5 steps unaided, and unable to lift anything. The physician had noted the significant deficits with cognitive and emotional function of executive, memory, emotional disturbance and attention or sustained concentration. He indicated in the report that the Appellant required a cane to help compensate for her impairment, and acknowledged her hand tremor which affects her writing, and poor balance which affects her ability to lift, carry and hold. He noted that she required family assistance for shopping and laundry.

New medical evidence from the Appellant's physician was presented at the oral hearing. The Ministry did not object, and the Panel admitted the written evidence submitted by the Appellant at the hearing as evidence in support of the information and records before the Ministry at Reconsideration under s. 22(4) of the Employment and Assistance Act. This was comprised of the physician's written answers to questions in order to assist in determining eligibility for the disability designation, dated November 12, 2009. These included explanation that the Appellant suffered a severe impairment that affected her daily living activities, which involved severe chronic pain, fatigue, depression and serious falls due to her loss of balance. He described that she takes significantly longer, that is, five to six times longer than normal to perform daily living activities as a direct result of her impairment. Her level of activity is significantly reduced each and every day as a direct result of her impairment. He indicates that the Appellant is significantly restricted in preparing her own meals, managing her personal finances, shopping for her personal needs, using public or personal transportation facilities, performing housework, moving about indoors and outdoors, performing personal hygiene and self care, and managing personal medication. He expressly states that she is not significantly restricted in making decisions about personal activities, care or finances, and relating to, communicating or interacting with others effectively. The physician expressly states that she requires significant ongoing assistance from other individuals and also a cane for ambulation, bathroom grab bars and a shower seat.

PART F – REASONS FOR PANEL DECISION

The issue in this Appeal is the reasonableness of the Ministry's decision to deny Persons with Disabilities designation.

The criteria for being designated as a Person with Disabilities are set out in the legislation. The Employment and Assistance for Persons with Disabilities Act, s. 2(2) provides that:

The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of the Act if the minister is satisfied 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 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.

S. 2(3) further provides that:

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 Employment and Assistance for Persons with Disabilities Regulation, s. 2(1) provides that:

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.

The Ministry found that the Appellant meets the age requirement and that the Appellant has a severe mental and physical impairment that is likely to continue for at least 2 years. However, the Ministry found that the material submitted by the prescribed professional did not establish that daily living activities are directly and significantly restricted either continuously or periodically for extended periods. The Ministry also found that the prescribed professional does not confirm that as a result of direct and significant restrictions, the Appellant requires help to perform daily living activities.

It was the Ministry's position that the prescribed professional does not confirm that the impairment directly and

and significantly restricts her ability to perform daily living activities on a continuous basis or periodically for extended periods. She uses a taxi and HandiDart for shopping and travel, but can perform all aspects of daily living and social functioning without assistance from another person.

It was also submitted that the prescribed professional did not confirm that as a result of direct and significant restrictions, the Appellant requires help to perform daily living activities. Because it had not been determined that she was significantly restricted with daily living activities, it could not be established that she required significant assistance to perform activities that are significantly restricted.

The Appellant's position was that there is sufficient evidence to support the designation, especially in light of the further evidence presented in support of the original records and information as below. She submitted that her impairment does significantly restrict her ability to perform daily living activities independently, and that she requires significant help to perform them.

The Appellant argues that there was sufficient favourable evidence to meet the legislative requirements, especially in light of the additional medical evidence admitted by the Panel at the oral hearing.

The Panel finds:

- 1) the Appellant's daily living activities are directly and significantly restricted continuously. The evidence of the physician is that she suffers a severe impairment significantly restricting her daily living activities, which involve severe chronic pain, fatigue, depression and serious falls due to her loss of balance. That she takes five to six times longer than normal to perform daily living activities as a direct result of her impairment is a significant restriction. The fact that her level of activity is significantly reduced daily as a direct result of her impairment makes it a continuous restriction. He indicates that the Appellant is significantly restricted in preparing her own meals, managing her personal finances, shopping for her personal needs, using public or personal transportation facilities, performing housework, moving about indoors and outdoors, performing personal hygiene and self care, and managing personal medication. He expressly states that she is not significantly restricted in making decisions about personal activities, care or finances, and relating to, communicating or interacting with others effectively. Therefore, the Panel finds that s. 2(2)(b)(i)(A) of the Act is thereby satisfied.
- 2) as a result of direct and significant restrictions, the Appellant requires help to perform daily living activities. That "continuous assistance" is defined on the physician's form in Part E, footnote 1, as "needing significant help most or all of the time for an activity" means that for meal preparation, basic housework, daily shopping, performing personal hygiene and self care, mobility inside the home and mobility outside the home, the Appellant requires continuous assistance. The physician expressly states that she requires significant ongoing assistance from other individuals and also a cane for ambulation, bathroom grab bars and a shower seat. This supports the evidence of the Appellant, herself, that she is increasingly reliant on her daughter and son in law for help. The Panel finds that s. 2(2)(b)(ii) and s. 2(3)(b) (i) and (ii) of the Act are thereby satisfied.

After considering all the evidence, the Panel finds that the decision of the Ministry to deny PWD designation is not reasonably supported by the evidence and rescinds the Ministry's decision in accordance with s. 24(2)(b) of the Employment and Assistance Act.