

PART C – DECISION UNDER APPEAL

(State the reconsideration decision)

The appellant is appealing the ministry reconsideration decision of December 29, 2009 denying her Persons with Disabilities (PWD) designation on the basis that she failed to meet several of the legislative criteria. The ministry found that the appellant met the age requirement, and has an impairment that her doctor has confirmed is likely to continue for at least two years. But the ministry was not satisfied that:

- the appellant has a severe mental or physical impairment
- the appellant's daily living activities are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and,
- a prescribed professional has confirmed that as a result of direct and significant restrictions, the appellant requires help to perform daily living activities.

PART D – RELEVANT LEGISLATION

(State the relevant Legislation considered)

Employment and Assistance for Persons with Disabilities Act, Section 2 (EAPWDA)
Employment and Assistance for Persons with Disabilities Regulation, Section 2 (EAPWDR)

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 reconsideration includes:

- The Request for Reconsideration dated November 30, 2009
- A note from the appellant's doctor dated December 8, 2009
- The appellant's PWD application

The appellant, who is over the age of 18, has been diagnosed by her physician with osteitis without bone tumor; breast cancer and GERD. Her doctor describes the severity of the medical conditions as: "Osteitis in 4 toes, 2x amputated; breast cancer with mastectomy and dissection of axilla; right arm symptoms; GQRD". The appellant further explains that she has had osteitis in four toes, has had two toes amputated, and had a lumpectomy (not a mastectomy). She states that her right arm was damaged in 2001 after surgery for an axial biopsy. She states as well that she suffers from chronic peptic ulcer disease and ulcerative oesaphaighis. She states, finally, that she has also had a dissection and that the dissection caused permanent brain damage. None of these conditions is confirmed by her physician.

The appellant's doctor has filled out both the physician's and assessor's report. In terms of functional skills, the doctor notes that the appellant's condition has had minimal impact on her abilities – she is able to walk more than four blocks and climb more than five steps unaided. There is no limitation to how long she can sit. She is limited to lifting no more than 16 kilograms, and requires periodic assistance in this area. The doctor notes no communication difficulties or cognitive and emotional deficits. He further notes that her conditions have not restricted any of her daily living activities. In his letter dated December 8, 2009, however, the doctor who has known the appellant for 15 years states, "Due to the amputation of her toes she cannot get out and resume work. In the winter she needs help with outdoor activities."

In the appeal record, the appellant states that she is limited in her daily functioning in a variety of ways. She writes that she has been told by three doctors that she can no longer wear shoes to work, and that she cannot work. She stated that she has bought a pair of sandals that allow her to "get around" but that she will have difficulty in the winter". She states that her right arm was damaged in 2001 after surgery for axial biopsy and that she cannot do repetitive work with this arm as a result. She cannot dig in her own garden, shovel snow or mow the lawn. Inside the house, she states that she has difficulty in filling the pellet stove, that housework takes longer than before, and that she cannot look after herself and her daughter.

At the hearing, the appellant stated that her inability to do repetitive actions with her arm makes doing dishes, cleaning the bathroom, vacuuming, and kneading dough very challenging. She indicates that while she is able to engage in these household activities, she does them much more slowly than she would normally, and less frequently. In her request for reconsideration, the appellant writes that "you are right that I can function inside by myself". She also states that her brain damage has left her with limited ability to do work inside the house and that "if I do them I must limit the amount I do at a time".

She adds that she does the cooking in the house.

The appellant stated that she has a significant problem with outside mobility "due to living in an environment with snow, mud and rain". She states that because she cannot wear boots or shoes other than sandals, she cannot shovel her driveway or steps, cannot mow the grass or dig in the garden. In the winter she needs help with outdoor activities." The doctor's note confirms that "due to the amputation of her toes she cannot get out and resume work. This impairment restricts the appellant's ability to take her disabled daughter hiking, to work in the garden, to mow the lawn, and in the winter, to shovel the snow. She indicated that it is also difficult for her to go shopping as she needs to wade through mud or snow to get to her vehicle; she added that her daughter helps with carrying groceries to the house, and that the manager of the local grocery store delivers groceries to her home when he is not busy. She noted as well that as a result of her inability to get out in the snow, she has been housebound on five occasions during the past winter, one time for three days, and the other four times for two days each. Her advocate noted that the appellant lives in a community that is lacking in services and that it is hard to find someone to volunteer to shovel snow or mow the lawn; the appellant noted that she currently pays someone to shovel the snow.

In terms of assistance, her doctor has indicated in the form that the question of assistance provided to the appellant to help her with her daily living activities is not applicable. The appellant states, however, that she requires assistance for outside work, and for housekeeping and looking after her daughter. At the hearing, the appellant stated that she had been present when the doctor filled in the application form, and that when he asked her if she needed any assistance with her daily living activities, she had responded, "No, because I couldn't afford it".

In its reconsideration decision, the ministry stated that an inability to work is not a criterion for determining eligibility for PWD status. It also stated that activities such as shoveling snow, mowing grass, or digging in the garden are not considered to be activities of daily living under the legislation.

At the hearing, the ministry testimony was not fully in support of the reconsideration decision. The ministry representative stated that she examined the appellant's file from its opening date in 1998. She stated that she felt the appellant did meet the criterion of having a severe physical impairment and pointed out that the appellant had been approved by the ministry for six separate "medical trips" since 2008. She clarified that the doctor who had filled out the appellant's PWD application form had also filled out the appellant's CPP form, and noted that the appellant had been designated by CPP as a Person with Disabilities. She stated that it is possible that CPP's criteria for eligibility may not be the same as the ministry's criteria.

At the hearing, the ministry representative also appeared to have a different position than the reconsideration decision on the appellant's ability to perform activities of daily living. She indicated that in her opinion, the appellant's abilities were affected in four of eight aspects of daily living as outlined in the legislation: shopping for personal needs; using public or personal transportation facilities; performing housework to maintain the person's place of residence in acceptable sanitary condition; and moving about indoors and outdoors. She stated that her medical conditions and her corresponding inability to wear closed-toed shoes impaired her abilities in these four areas. She stated that in her opinion, activities such as shoveling snow, gardening and mowing the lawn fell into the legislative definition for "daily living activities", specifically, that of being able to move about

outdoors. She added that she was confused by the doctor's evidence and was "wavering" in her support for the ministry's position. She added, however, that she could understand how the ministry arrived at its decision based on the evidence in the appeal record and provided by the appellant's doctor.

It should be noted that the panel considered the concerns raised orally by both the appellant and the ministry at the hearing as to the accuracy and validity of the physician's report. The legislation is clear in the importance of the opinion of a medical practitioner and a prescribed professional, and thus, that the findings of the practitioner cannot be ignored. In the absence of any conflicting evidence from another prescribed professional, the panel must consider this evidence.

PART F – REASONS FOR PANEL DECISION

(State the reasons for the panel decision)

Under appeal is the ministry's reconsideration decision denying the appellant Persons with Disabilities designation on the basis that she failed to meet several of the legislative criteria. The ministry found that the appellant met the age requirement, and has an impairment that her doctor has confirmed is likely to continue for at least two years. But the ministry was not satisfied that:

- the appellant has a severe mental or physical impairment
- the appellant's daily living activities are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and,
- a prescribed professional has confirmed that as a result of direct and significant restrictions, the appellant requires help to perform daily living activities.

The criteria for being designated a Person with Disabilities (PWD) are set out in Section 2 of the EAPWDA. It states:

2(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 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.

Section 2(3)(b) of the EAPWDA states that 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.

Section 2(1)(a) of the EAPWDR defines daily living activities:

(a) in relation to a person who has a severe physical impairment or a severe 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.

ATTACH EXTRA PAGES IF NECESSARY

[]

The ministry's position as set out in the reconsideration decision is that the appellant is not eligible for designation as a Person with Disabilities first because the impact of the appellant's impairment on her functional abilities has been minimal, and thus her impairments cannot be considered to be severe. The ministry further argued that a medical professional has indicated that she is independent in all activities of daily living, thus eliminating the need for the assistance of a person or an assistive device. At the hearing, the ministry representative stated she was "wavering" in her support for the ministry's position, but that she could understand how the ministry arrived at its decision based on the evidence in the appeal record and provided by the appellant's doctor. It should be noted that the panel's jurisdiction is limited to reviewing the reasonableness of the reconsideration decision. The ministry representative's statements do not change the ministry reconsideration decision and as such are considered by the panel as a ministry submission only regarding the reasonableness of the ministry's decision.

The appellant's position is that the combination of her conditions – her toe amputations, her brain damage, the damage she has suffered to her right arm – has restricted her ability to perform activities of daily living inside and outside the house, including house cleaning. She further argues that, because she is unable to wear closed-toed shoes, and lives in an environment of snow, rain and mud, she cannot perform outside chores such as mowing the lawn, shoveling snow, walking through the snow to go shopping, and digging in her garden. Her position is also that she has hired someone to help her with these outdoor activities, and that she requires assistance to perform other indoor activities.

With respect to a severe mental impairment, the panel notes that the doctor has not indicated that the appellant suffers from a mental impairment, and has indicated that there are no limitations to the appellant's cognitive or social functioning. The appellant also stated during the hearing that she does not have a mental impairment. The panel thus finds that the ministry's decision was reasonable in this instance.

With respect to a severe physical impairment, the panel notes that the ministry representative stated at the hearing that she feels the appellant meets the criteria for having a severe physical impairment. However, the test for severity revolves around an impairment's capacity to significantly restrict the appellant's functional abilities. The panel notes that the appellant's doctor has stated that the appellant suffers from osteitis in four toes; an amputation of two toes; breast cancer and GQRT. Her doctor adds: "right arm symptoms", which the appellant states is damage done during surgery to her right arm that has left her with a corresponding difficulty in engaging in activities requiring repetitive actions, such as house cleaning. The appellant's doctor's report indicates that the impact on her functional abilities is minimal – that is, that as a result of her impairments, she is limited only in her ability to carry items weighing more than 16 kilograms. He notes that she is able to walk more than four blocks and climb more than five steps unaided. There is no limitation to how long she can sit. The doctor also notes no communication difficulties or cognitive and emotional deficits. In his letter dated December 8, 2009, the doctor states, "Due to the amputation of her toes she cannot get out and resume work. In the winter she needs help with outdoor activities." The panel concludes, therefore, that the appellant does not have a severe physical impairment and that, based on the evidence, the ministry's decision was reasonable.

With respect to the issue of daily living activities, the doctor states that the appellant's conditions have not restricted any of her daily living activities. The appellant has stated that she is able to perform her indoor activities despite her physical impairment, though it takes her longer than it would normally. The doctor has also noted that the appellant is limited by her amputation with outside activities in the winter. The panel acknowledges that the appellant's inability to wear closed-toed shoes outside the house inhibits her mobility outside the house. The panel also accepts that tasks such as shoveling snow and mowing the lawn fall within the legislative definition of daily living activities that relate to moving about outdoors. However, these limitations appear to be seasonal and episodic – she has been housebound five times over the past few months which equates to approximately two to three days per month. In short, the limitations she experiences, while periodic, are not for extended periods and do not appear to be significant. Similarly, she is able to go shopping despite the rain, mud and snow, though from time to time she has had to ask the store manager to deliver groceries. The panel notes therefore, that although the appellant's impairment has limited the appellant's abilities in several aspects of daily living activities – specifically, house cleaning, indoor and outside movement; shopping for personal needs and using public or personal transportation, these limitations cannot be seen to be significant. And while these limitations may be experienced periodically, they are not experienced for extended periods.

Thus, on the basis of the evidence contained within the physician and assessor's reports, and the testimony of the appellant herself, the panel finds that a prescribed professional has not confirmed that the appellant's impairment directly and significantly restricts the appellant's ability to perform daily living activities either continuously or periodically for extended periods, and thus that the ministry's decision was reasonable in this instance.

With respect to the issue of requiring help to perform daily living activities, the panel notes that the appellant herself has stated on several occasions that she is able to perform her household-related daily living activities independently. While her doctor has indicated that she requires help in the winter with outdoor activities, he has not elaborated on how much help, and on the nature of the activities with which she requires assistance. In response to the question in the application regarding assistance, the doctor wrote, "not applicable". The panel thus finds that a prescribed professional has not confirmed that, as a result of her restrictions, the appellant requires help to perform her daily living activities; the panel finds, therefore, the ministry's decision is reasonable, based on the evidence in this instance.

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