

PART C – DECISION UNDER APPEAL

The decision under appeal is the ministry's reconsideration decision dated March 19, 2010 which held that the appellant does not meet all the criteria required to be designated Persons with Disabilities. Specifically:

- a medical practitioner has not confirmed that the appellant's physical or mental impairment is likely to continue for at least two years,
- the minister is not satisfied that she has a severe physical or mental impairment,
- a prescribed professional has not confirmed that her impairment directly and significantly restricts her ability to perform daily living activities ["DLA"], either continuously or periodically for extended periods, and
- a prescribed professional has not confirmed that as a result of the restrictions that she needs help to perform those activities.

The appellant has met the age requirement.

PART D – RELEVANT LEGISLATION

Employment and Assistance for Persons with Disabilities Act ["EAPWDA"], section 2, and

Employment and Assistance for Persons with Disabilities Regulation ["EAPWDR"], section 2

PART E – SUMMARY OF FACTS

The evidence before the ministry at reconsideration was the appellant's application for Persons with Disabilities including the Physician and Assessor Reports both of which were completed by the appellant's physician. The appellant is diagnosed with anxiety disorder/depression, insomnia and chronic low back pain. With regard to severity, the physician reports that the appellant's main problem is low back pain resulting from a WCB event in 2007. She was to get an MRI but did not because she became claustrophobic with the MRI machine. While the physician reports that the appellant does not need any prosthesis or aids, he writes that she needs a heating pad and a foam pad on bed for extra support.

The physician indicates that the duration of the appellant's impairment is unknown but the Panel notes it has now been four years since she injured her back at work and subsequently attended WCB..

Functionally, the physician reports that, unaided, the appellant can walk 1 to 2 blocks, climb 2 to 5 stairs, lift 5 to 15 lbs and remain seated for less than 1 hour. He also reports significant deficits in emotional disturbance, motivation and attention or sustained concentration. He indicates that the appellant is not restricted in personal care, meal preparation, management of medications, mobility inside and outside the home, use of transportation and management of finances, but requires assistance from family and friends with basic housework and daily shopping because of her back pain. He later contradicts himself commenting that she also needs help with meal preparation then later indicates that she is independent in this and all other aspects of meals as well as paying rent and bills and medications. He reports that the appellant has difficulty getting in and out of vehicles and needs continuous assistance managing the step to get on and off public transit.

The physician indicates that she is independent in all aspects of social functioning and that she functions well in her immediate social network but marginally in extended social networks. To maintain her in the community, the physician reports that she requires help with DLA because of back pain and depression.

In the Assessor's Report, the doctor states that the appellant takes significantly longer walking indoors and outdoors and climbing stairs and needs continuous assistance from friends and family with lifting, carrying and holding items. In the areas of cognitive and emotional functioning, he notes that the appellant's impairment has a major impact on the bodily function of sleep (disturbance) and emotion, moderate impact on motivation and minimal impact on attention/concentration. No impact is noted on the other 10 aspects of cognitive and emotional functioning.

The physician indicates that the appellant requires continuous assistance with laundry, basic housekeeping and carrying purchases home. In addition, she takes significantly longer than typical dressing, grooming, toileting and going to and from the store (has to rest frequently). She needs grab rails in the shower and a foam mattress to assist her transfers in and out of bed.

In a self report submitted with her PWD application, the appellant states that she suffers from chronic depression, insomnia and because of constant lower back pain, she cannot do housework, shop or prepare meals without having to constantly rest. These ailments have affected her life and her ability to function on a daily basis. She avoids taking sleeping pills for her insomnia because she may not wake up to help her diabetic daughter who has seizures but she does take muscle relaxers, pain killers and Paxil. She also states she was diagnosed with ADD when she was four years old and was on Ritalin until she was twelve. She feels this may have contributed to her depression state. The appellant states that in addition to her constant pain her depression has caused social isolation and she has no desire to do much.

With the assistance of an advocate, the appellant submitted additional evidence ["supplemental report"] from her family physician. This consisted of another copy of the page in the Physician Report section of the PWD Application headed "E Daily Living Activities". This supplemental report is signed by the appellant's physician but is not dated. The advocate explained that the physician did not previously understand the PWD legislation and the significance of the report to the appellant's application for PWD designation. In the supplement, the physician clearly answers yes to the question, "Does the impairment directly and significantly restrict the person's ability to perform Daily Living Activities?" He further confirms that she is continuously restricted in the DLA of personal self care, meal preparation, management of medications, basic housework, daily shopping, mobility inside and outside the home, the use of transportation and social functioning. To explain how social functioning is impacted by her restrictions, the physician comments "Chronic Depression/Anxiety / Chronic Low Back Pain. He also comments that she needs help with all DLA and takes 3 times longer than typical to

perform them. The doctor notes frequent back spasms but provides no additional information as to the nature and extent of help the appellant needs.

The appellant's advocate explained that the physician did not have a complete understanding of the legislative criteria or of the appellant's daily challenges when he originally completed this page of the Application. On this occasion, the physician completed the page after consultation with the appellant.

The appellant provided oral testimony explaining that her nephew came to live with her about one year ago to provide help with heavy chores, meal preparation and shopping. She also receives some help from her 13 year old daughter who is diabetic and can only do a certain amount. She explained that her daughter helps her get in and out of the shower and bath and helps her dress. The daughter will also lift heavy pots for her as an example. Her nephew does the shopping and much of the cooking as she cannot bend down, lift heavy pots or stand long to cook a meal. The appellant also explained that her depression causes her to isolate herself from others and she has to be encouraged to take her medicine as some days she takes a "what's the use" attitude.

When asked, the appellant could not explain why the physician had not completed the question about the duration of her impairment. She said the WCB "paid her out" because her back problem was permanent. She also said she has been designated a Person with Persistent Multiple Barriers ["PPMB"] for more than two years. This fact was not disputed by the ministry.

The appellant called her nephew as a witness. He confirmed that for the past year, he has been helping the appellant with housework, meals, laundry and any heavy chores around the house. In addition, he does the shopping and carries the purchases home. He said that 2 to 3 days per week, the appellant has trouble getting out of bed. This is usually because of a spasm in her back which is extremely painful. At those times, he must help her out of bed and to walk and to sit. He described it as "her back does not work". The nephew says he also helps care for the appellant's daughter. He gets her clothes ready for school, does her laundry and prepares meals and so on.

The ministry also presented oral testimony by reviewing the reconsideration decision and the reasons why the ministry came to conclusion it did. The ministry also noted that the physician did not confirm in the original application or the supplemental report that the appellant's impairment would likely continue for more than two years.

In accordance with the Employment and Assistance Act, section 22 (4) (b), the panel admitted the appellant's new written evidence from her doctor as well as her oral testimony and that of the ministry as being in support of the information and records that were before the ministry at reconsideration.

PART F – REASONS FOR PANEL DECISION

The issue in this case is the reasonableness of the ministry's decision to deny the appellant Persons with Disabilities designation because she does not meet all the 5 criteria. The relevant legislation is found in section 2 of the EAPWDA and section 2 of EAPWDR:

EAPWDA

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 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.

(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

Daily living activities

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 authorized under an enactment to

practice the profession of
(a) medical practitioner,
(b) registered psychologist,
(c) registered nurse or registered psychiatric nurse,
(d) occupational therapist,
(e) physical therapist,
(f) social worker,
(g) chiropractor, or
(h) nurse practitioner.
(B.C. Reg. 196/2007)

The ministry agrees that the appellant meets the age requirement but the minister is not satisfied that the appellant has a severe physical or mental impairment. In addition, they argue that a medical practitioner has not confirmed that the appellant's impairment will likely continue for at least two years and that a prescribed professional has not confirmed that the impairment directly and significantly restricts the appellant's ability to perform DLA or that she needs the significant help or supervision of another person to perform DLA.

The appellant argues that her physician, a prescribed professional has confirmed that she meets all five criteria.

In the original Application, the physician did not answer all the questions and there were some inconsistencies regarding what DLA the appellant needs help with. In the supplemental report, he confirms that the appellant is directly, significantly and continuously restricted in 9 of 10 DLA listed in the Physician Report and that she needs help with all DLA. Given the extent of the need for continuous help with DLA, the panel finds that the appellant has a severe physical impairment that directly and significantly restricts her ability to perform DLA and that she requires significant help from another person on a continuous basis.

The issue of duration of the appellant's impairment was not specifically confirmed by the physician in the original or supplemental reports. The appellant provided straight forward and credible testimony that her lower back problems are permanent. Also, she stated she is currently designated a PPMB and has been for the past two years. Additionally, the Panel notes the appellant suffered a back injury at work in 2006 and was under WCB for this matter and it is likely to continue for at least two years.

The Panel finds that the appellant does have a severe physical impairment. In the supplemental report the doctor comments that the appellant suffers from "Chronic Depression/Anxiety / Chronic Low Back Pain." The doctor notes frequent back spasms. The evidence from the appellant and her nephew confirm that the impairment is such that she requires constant help from her nephew, daughter and friends to carry out daily living activities.

The Panel also finds that the physician clearly answers yes to the question, "Does the impairment directly and significantly restrict the person's ability to perform Daily Living Activities?" He further confirms that she is continuously restricted in the DLA of personal self care, meal preparation, management of medications, basic housework, daily shopping, mobility inside and outside the home, the use of transportation and social functioning. He also comments that she needs help with all DLA and takes 3 times longer than typical. He notes frequent back spasms and, although the physician provides no additional information as to the nature and extent of help the appellant needs, the appellant and her nephew confirmed the necessity of this help.

The Panel further finds that the appellant requires the significant help of her 13 year old daughter and her nephew in performing her daily living activities. The appellant confirmed that her daughter has to help her in and out of the shower and help her to dress, while the nephew confirmed he has to assist her in and out of her bed, especially when she has a back spasm which is 2 or 3 times a week. He also does most of the shopping, cooking, heavy chores, meal preparation and laundry

After reviewing all the evidence submitted, the Panel finds that the ministry's decision was not reasonably supported by the evidence and rescinds the decision. The ministry's decision is therefore overturned in favour of the appellant.