

PART C – DECISION UNDER APPEAL

(State the reconsideration decision)

The reconsideration decision of December 29, 2009 denied the appellant's request for a person with disabilities [PWD] designation because she failed to meet all five of the criteria prescribed in the Employment and Assistance for Persons with Disabilities Act, s. 2 and the Employment and Assistance for Persons with Disabilities Regulation, s. 2. The ministry determined that:

1. the appellant is at least 18 years of age;
2. her medical practitioner confirmed that her impairment is likely to continue for at least 2 years;
3. the ministry is not satisfied that she has a severe physical or mental impairment;
4. the appellant's prescribed professionals have not provided evidence that her impairments directly and significantly restrict her ability to perform daily living activities [DLAs] either continuously or periodically for extended periods; and,
5. the appellant's prescribed professionals did not confirm that as a result of direct and significant restrictions, she requires help to perform her DLAs.

PART D – RELEVANT LEGISLATION

(State the relevant Legislation considered)

Employment and Assistance for Persons with Disabilities Act [EAPWDA], s. 2
Employment and Assistance for Persons with Disabilities Regulation [EAPWDR], s. 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 Reconsideration was:

- the appellant's PWD application signed and dated June 11, 2009 by the appellant and received by the ministry on August 14, 2009; with the Physician Report signed and dated July 7, 2009 by her physician and the Assessor Report signed and dated August 4, 2009 by a registered psychiatric nurse;
- a copy of the Health Assistance Branch [HAB] assessment dated October 21, 2009 stating that the appellant does not meet the legislative criteria for the PWD designation; and,
- the appellant's request for reconsideration dated November 23, 2009, received by the ministry on November 30, 2009, and attaching (a) a note from the appellant describing her recent emergency hospital treatment for a severe fall which exacerbated her knee and back conditions causing severe pain; (b) the hospital's discharge instructions for treatment of her injuries and pain; and (c) a copy of an excerpt from a previous PWD application from 2007 with the physician's narrative describing the appellant's attacks of severe inflammatory bowel syndrome [IBS] and chronic knee pain due to soft tissue damage.

The evidence of the physician in the Physician report of July 7, 2009 stated that:

- the appellant is diagnosed with situational anxiety, knee pain from a not yet diagnosed stress fracture, chronic back pain and IBS;
- her chronic back and knee pain affect her mobility, with episodic increased exacerbation of her baseline pain and she is currently awaiting a CT scan of her back;
- she also suffers from IBS with alternating episodes of constipation and diarrhea, resulting in increased anxiety with need of anxiolytic medication;
- her medications [ativan & oxycodone], the latter being a strong narcotic, interfere with her ability to perform DLAs;
- in terms of functional skills, she can walk 1-2 blocks unaided, with limitation in climbing stairs, remaining seated, and lifting marked as "unknown";
- in cognitive and emotional functioning, she suffers emotional disturbance with increasing insomnia and anxiety requiring medication;
- in answer to the question "does the impairment directly restrict the person's ability to perform DLAs, the physician responded "yes";
- she is continuously restricted in personal self care, meal preparation, basic housework, daily shopping, mobility inside the home, mobility outside the home, use of transportation, and social functioning;
- in the narrative under "if periodic, please explain", the physician stated that her symptoms are intermittent as she does have occasional episodes of mood improvement;
- in the narrative under "additional comments regarding degree of restriction", the physician stated that she suffers from chronic pain which along with environmental stresses is resulting in increased anxiety; and,
- she sees another doctor for regular chiropractic manipulation.

The evidence of the assessor in the Assessor's report of August 4, 2009 stated that:

- the appellant lives with her two sons;
- her impairments include severe, chronic pain in knees and spine, IBS, situational stress, anxiety, lack of concentration and social withdrawal;
- she has poor communication skills [reading, writing and hearing] due to anxiety, inability to concentrate, and social withdrawal;

PART E – SUMMARY OF FACTS [cont'd]

- under “mobility and physical ability”, when asked to indicate the assistance required related to impairment(s) that directly restrict the appellant’s ability to manage in the following areas, the assessor stated that periodic assistance is required from another person with walking indoors, walking outdoors, climbing stairs [maximum = 3 steps], standing [maximum = 10 minutes], and lifting [can lift < 5 lbs without pain];
- walking indoors, walking outdoors, and climbing stairs takes 3 times longer than typical and is extremely painful;
- she cannot carry and hold without assistance;
- she requires an assessment since she may need an additional assistive device [brace for her leg];
- with respect to cognitive and emotional functioning, the following areas have a major impact on her daily functioning: eating problems and weight loss due to anxiety and mood swings, toileting problems due to flare ups of IBS, sleep disturbances, depression, worrying, poor concentration, executive functioning, memory, motor activities such as agitation and extreme tension; the following areas have a moderate affect on her daily functioning: poor insight and judgement, poor motivation, and hostility;
- with respect to the assistance required related to impairment(s) that directly restrict the applicant’s ability to manage DLAs, the assessor stated that:
 - two activities of personal care were independent, while the remaining five required periodic assistance from another person due to pain, anxiety, increased IBS activity, stress, and lack of motivation;
 - basic housekeeping and laundry take 3 times longer than typical;
 - four of the five shopping activities require significant help;
 - meal planning, preparation, and cooking take 3 times longer than typical;
 - banking and budgeting is restricted about half of the time due to lack of motivation and mood swings;
 - getting in and out of vehicles or public transit requires help; and
 - all areas of social functioning require periodic support due to isolation and social withdrawal, and she has marginal functioning in both her immediate and extended social networks; and,
- the type of assistance required by the appellant includes counseling, occupational and physical therapy, psychiatric assessment, and a full and partial leg brace when pain flares for her left knee [she requires emergency hospital treatment when the pain flares up].

The ministry decided that there was insufficient evidence to determine that the appellant has a severe physical or mental impairment. They found that her prescribed professionals have not provided evidence that her impairments directly and significantly restrict her ability to perform DLAs either continuously or periodically for extended periods and they could not determine that as a result of direct and significant restrictions, she requires help to perform her DLAs.

At the hearing the appellant’s advocate submitted, on behalf of the appellant, the following documents:

1. emergency radiology check-in form and radiology report dated November 26, 2009;
2. a list of the appellant’s medications with dosages and descriptions of their uses;
3. the appellant’s submission to the tribunal;
4. summary of a judicial review decision in a PWD case; and,
5. definitions of the term “severe”.

The panel admitted items #1 and #2, pursuant to s. 22(4) of the Employment and Assistance Act [EAA], as evidence in support of information before the ministry at reconsideration. The ministry concurred that these items were evidence in support. The panel accepted items #3, #4, and #5 as submissions only. The ministry concurred.

PART E – SUMMARY OF FACTS [cont'd]

The advocate presented the appellant's submission to the tribunal. The advocate asked, on behalf of the appellant, that the psychiatric nurse who completed the assessor's report dated August 4, 2009 be called to testify as a witness for the appellant.

The witness stated that she is a registered psychiatric nurse in BC with 35 years experience as a nurse, and an extensive career in the assessment and treatment of mental health conditions and addictions, psychotherapy, intake assessment and medical review. She explained that it would be a conflict of interest for her to be treating the appellant and at the same time completing the assessor's report. She stated that she had an intensive interview and assessment meeting with the appellant and has had many years of experience with this type of assessment process. She had read the physician's report and has medical experience.

The advocate questioned the witness on many of the details in the assessor's report of August 4, 2009. The witness provided details and clarification on her assessment, and reiterated that the appellant has severe impairments, both physical and mental, that significantly affect her ability to complete most of her DLAs without significant help. She found that the appellant suffered from severe muscular pain in her knee and spine, active IBS with continuous gas and bloating, causing pain from muscle tension and spasms. The appellant is currently taking a complex array of medications for her symptoms, including Buscopan, Oxycodone, a major narcotic for severe pain, Pariet for the IBS, Imovane for sleep disturbance, Advil, and Tylenol for pain and Ativan for anxiety and depression. She has serious mental and emotional impairments based on an abusive childhood, severe anxiety, and depression exacerbated by physical muscular pain and active IBS. The appellant needs, and would be willing to accept, psychiatric assessment and help as well as the medical help she requires for her physical impairments. The witness left the hearing after her testimony. The panel admitted the evidence of the witness pursuant to s. 22(4) of the EAA, as evidence in support of information before the ministry at reconsideration. The ministry did not object.

The advocate noted that a recent supreme court decision stipulated that there is no statutory requirement that more than two DLAs be restricted. She stated that the appellant's prescribed professionals indicated that she has significant difficulties in making decisions about personal activities, care or finances, and difficulties communicating with or interacting with others effectively. The impact of these restrictions has an overall effect on most of her DLAs. She referred to evidence in the PWD application, including the appellant's report, the physician's report and the assessor's report to demonstrate that the appellant has a combination of impairments that individually and in combination are severe; that she is directly and significantly restricted in many DLAs on a continuous basis, and needs the significant assistance of a device and from others to perform these activities.

The ministry reiterated the reconsideration decision and had no further evidence to submit.

With respect to the severity of the appellant's physical impairments the panel's findings of fact were:

- the physician's evidence states that the appellant's chronic back and knee pain affects her mobility; she is only able to walk 1 to 2 blocks unaided; she suffers episodic increased exacerbation of her baseline pain requiring strong narcotic medication; she also suffers from IBS with alternating episodes of constipation and diarrhea, resulting in increased anxiety with need of anxiolytic medication; she suffers emotional disturbance with increasing insomnia and anxiety; and her impairments will likely continue for two years or more;
- the assessor's evidence states that the appellant's impairments include severe, chronic pain in knees and spine, IBS, situational stress, anxiety, lack of concentration and social withdrawal.

The panel found that both the physician and the assessor are prescribed professionals under the EAPWDR. There is no statutory requirement for a prescribed professional to have a history of contact and recent experience with the appellant. The combined evidence of the two prescribed professionals confirms that the appellant has severe physical and mental impairments that will last more than two years.

PART E – SUMMARY OF FACTS [cont'd]

With respect to appellant's restrictions, the panel's findings of fact were:

- the physician's evidence states that the appellant's impairment directly restricts her ability to perform DLAs. She is continuously restricted in personal self care, meal preparation, basic housework, daily shopping, mobility inside the home, mobility outside the home, use of transportation, and social functioning. She has occasional episodes of mood improvement, but due to her pain anxiety she isolates herself at times;
- the assessor's evidence states that periodic assistance is required from another person with walking indoors, walking outdoors, climbing stairs, standing, and lifting and that walking indoors, walking outdoors, and climbing stairs takes 3 times longer than typical and is extremely painful. She cannot carry and hold without assistance, and she requires a knee brace. With respect to her mental impairments, the assessor's evidence states that she needs help with banking, budgeting, communication, and has only marginal functioning in social interaction.

The panel found that the ministry's application form defines continuous assistance as referring to needing significant help most or all of the time for an activity; and defines periodic assistance as referring to the need for significant help for an activity some of the time as would be the case where a person required help due to the episodic nature of the impairment. The panel found that the prescribed professionals have confirmed that the appellant's impairments directly and significantly restrict her ability to perform the following DLAs continuously: personal care, meal preparation, basic housework, moving about indoors and outdoors, using public or personal transportation. Making decisions about finances and relating to, communicating or interacting with others effectively require periodic assistance.

With respect to the appellant's requirement for help to perform DLAs the panel's findings of fact were:

- the physician's evidence states that the majority of her DLAs are continuously restricted and that they require continuous assistance, which refers to needing significant help most or all of the time for an activity; and,
- the assessor's evidence states that two activities of personal care were independent, while the remaining five required periodic assistance from another person due to pain, anxiety, increased IBS activity, stress, and lack of motivation, and that the majority of other DLAs required periodic assistance and take 3 times longer to complete than typical. She requires an assistive device [knee brace].

The panel found that the appellant's prescribed professionals have confirmed that as a result of the restrictions due to her impairments, she requires the significant help of another person to perform the following DLAs: personal care, meal preparation, basic housework, moving about indoors and outdoors, using public or personal transportation, making decisions about finances and relating to, communicating or interacting with others effectively.

PART F – REASONS FOR PANEL DECISION (State the reasons for the panel decision)

The issue under appeal is whether the ministry reasonably denied the appellant's application for a PWD designation pursuant to the EAPWDA, s. 2 and the EAPWDR, s. 2 because she failed to meet all of the necessary criteria for the designation.

Sections 2(2) and 2(3) of the EAPWDA list the criteria that an applicant who has reached 18 years of age must meet for the minister to designate him/her as a PWD. The minister must be satisfied that a person has a severe mental or physical impairment that:

- a) pursuant to s. 2(2)(a) in the opinion of a medical practitioner is likely to continue for at least 2 years;
- b) pursuant to s. 2(2)(b) in the opinion of a prescribed professional: (i) directly and significantly restricts the person's ability to perform DLAs, either continuously or periodically for extended periods; and, (ii) as a result of those restrictions, the person requires help to perform those activities; and,
- c) pursuant to s. 2(3)(b) the help required may be in the form of (i) an assistive device; (ii) the significant help or supervision of another person; or, (iii) the services of an assistance animal.

S. 2(1)(a) of the EAPWDR lists the DLAs pertaining to those with severe physical and mental impairment. These include meal preparation, managing personal finances, shopping for personal needs, using public or personal transportation facilities, performing basic housework, mobility indoors and outdoors, performing personal hygiene and self-care, and managing personal medication. S. 2(1)(b) of the EAPWDR lists the additional DLAs pertaining to those with a severe mental impairment and includes making decisions about personal activities, care or finances; and ability to relate to, communicate, or interact with others effectively. S. 2(2) of the EAPWDR lists the prescribed professionals referred to in s. 2(2)(b) of the EAPWDA.

The ministry argues that the appellant's prescribed professionals did not establish a severe physical or mental impairment. The ministry relied on the evidence of the physician because they found that the assessor did not have a history of contact and recent experience with the appellant. They contended that there was insufficient evidence to determine that the appellant has a severe physical or mental impairment. They found that her prescribed professionals have not provided evidence that her impairments directly and significantly restrict her ability to perform DLAs either continuously or periodically for extended periods and nor, that as a result of direct and significant restrictions, she requires help to perform them.

The advocate contended that the ministry had dismissed most of the evidence in the assessor's report of August 4, 2009 because the assessor did not have a history of contact and recent experience with the appellant; the ministry gave precedence to the physician's evidence on the appellant's cognitive and emotional functioning. The advocate argued that there was no statutory requirement for the assessor to have known the appellant for any length of time before completing the assessment. The advocate also stated that since there is no definition of "severity" in the legislation, she used the criterion that "severity is tested by restrictions and the requirement for assistance." The advocate argued that the evidence from the appellant's prescribed professionals indicated that her impairments, both physical and mental are severe, and that both her family doctor and her assessor's evidence indicated that most DLAs are directly and significantly restricted by her impairments, and that she requires help to perform them.

The panel finds that the ministry's decision that the appellant's impairments were not severe was not a reasonable application of s. 2(2)(a) of the EAPWDA because the combined evidence of her prescribed professionals was sufficient to determine that the appellant has severe physical and mental impairments that will likely continue for at least two years. The physician stated that the appellant has chronic back and knee pain affecting her mobility and requiring strong narcotic medication, painful IBS resulting in increased anxiety, needing anxiolytic medication, emotional disturbance, insomnia and anxiety. He stated that her impairments will likely continue for two years or more. The assessor stated that the appellant's impairments include severe, chronic pain in knees and spine, IBS, situational stress, anxiety, lack of concentration and social withdrawal.

PART F – REASONS FOR PANEL DECISION [cont'd]

The panel finds that the ministry's decision that the appellant's prescribed professionals have not confirmed that her impairments directly and significantly restrict her ability to perform DLAs either continuously, or periodically for extended periods was not a reasonable application of s. 2(2)(b)(i) of the EAPWDA because the medical evidence of her prescribed professionals combines to indicate that the appellant's impairments directly and significantly restrict her ability to perform the following DLAs continuously: personal care, meal preparation, basic housework, moving about indoors and outdoors, using public or personal transportation; and the following DLAs periodically: making decisions about finances and relating to, communicating or interacting with others effectively.

The panel also finds that the ministry's decision that the appellant's prescribed professionals have not confirmed that she requires significant help to complete those DLAs that are restricted by her impairment was not a reasonable application of sections 2(2)(b)(ii) and s. 2(3)(ii) of the EAPWDA. Both prescribed professionals stated that she requires the significant help of another person to perform the following DLAs: personal care, meal preparation, basic housework, moving about indoors and outdoors, using public or personal transportation, making decisions about finances and relating to, communicating or interacting with others effectively. The assessor's evidence also indicated that the appellant uses a knee brace and requires a full or partial leg brace when the pain flares and she seeks emergency hospital treatment. Thus the ministry did not reasonably apply s. 3(b)(i) of the EAPWDA.

Therefore, the panel finds that the ministry's decision was not a reasonable application of the applicable enactment in the circumstances of the appellant and rescinds the ministry decision.