

PART C – Decision under Appeal

The decision under appeal is the ministry's reconsideration decision of August 20th, 2010 wherein the ministry denied the appellant a Person with Disabilities (PWD) designation.

The Ministry's decision was based on the assertion that the appellant only met 2 of the 5 legislative requirements (age and duration of impairment) in Section 2 of Employment and Assistance for Persons with Disabilities Act (EAPWDA) for designation as a person with disabilities (PWD).

PART D – Relevant Legislation

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

The Ministry rep did not attend. After confirming the Ministry had been properly notified of the Hearing date, time and place, the Hearing commenced in accordance with section 86(b) EAR.

The evidence before the ministry at the time of the reconsideration decision was the appellant's Persons with Disabilities Designation (PWD) application which included a report from a medical practitioner and an assessor, an Occupational Therapist, who is a prescribed professional.

A summary of the facts in the appellant's application are as follows:

- The physician indicates the appellant's most problematic impairment is the severe brain injury trauma and right knee and ankle pain from a fracture and dislocation suffered in a 2005 motor vehicle accident (mva); pain from a left hip fracture suffered in another mva and chronic pain from either right rotator cuff tendonitis or arthritis in right shoulder; sleep apnea and severe obesity. The brain injury significantly affects the short term memory. The physician indicates the appellant can walk unaided 2 to 4 blocks, climb 5+ stairs, has no limitation lifting or remaining seated and has no difficulty communicating with others. Significant deficits are indicated with cognitive and emotional function in the area of short term memory loss. The physician checked the box to indicate the impairment(s) directly restrict the appellant's ability to perform daily living activities (dla's). On the daily living activity (dla) chart the physician checked 'no' activity restriction in 9 areas, including social functioning, and only mobility outside the home was checked as restricted periodically. The physician explained the restricted rating by stating "the appellant utilizes a scooter for longer distances". The physician did not provide any comment in the area "If social functioning is impacted" or provide any additional comment regarding the degree of restriction the impairment(s) has on the appellant's dla's nor what assistance the appellant needed. The appellant is a new patient and the application indicates she has seen the physician 2-10 times in past 12 months.
- The assessor, a prescribed professional, is an occupational therapist (OT). The assessor provides no comment on what the mental or physical impairments are that impact on her ability to manage dla's". The Daily Living Activities section is comprised of 28 categories which relate to assistance required for completing the activity. Continuous or periodic assistance from another person is not indicated in any activity. The assessor rates the appellant as independent in 21 of 28. In the other 7 areas, except for bathing where an assistive device is used, the report indicates the appellant may take significantly longer to perform these dla's. In the area of mental or physical impairment the appellant's ability to communicate is good; her physical ability and mobility is rated as independent in standing, lifting and carrying and holding; uses assistive devices (cane) walking indoors and outdoors; and takes significantly longer when climbing stairs. Cognitive and emotional function has 14 areas and the appellant is not impacted in 11 and moderately impacted in 3 – bodily functions, attention/ concentration and memory. The appellant's mental impairments do not appear to affect the appellant's ability to function and interact with others or within the community. If assistance is needed it is provided by either family or the OT. The appellant routinely uses a cane, breathing device (CPAP), toileting aids, bathing aids and a scooter which she borrows. The OT indicates the appellant needs a 4 wheeled walker and a CPAP machine as her is broken. The appellant does not have nor does she need assistance from an assistance animal.

The appellant provided a letter from her physician dated 2010-09-13 as new evidence which the Panel accepted in accordance with section 22(4) EAA. This letter is in support of information or records that were before the Ministry when the decision being appealed was made.

At the Hearing the Appellant provided some background on her life history and also on the injuries she sustained in the accidents. The appellant stated she is in constant pain and has difficulty with her mobility due to her weight. The appellant stated she is frustrated with her present situation and her physical

condition (weight) and just wants and needs some assistance in getting back into the work force and integrating with society. The appellant also stated she was forced to move into her current living quarters, which she finds small and confining, when her former roommate left and she could not afford those accommodations. The appellant added that she had to return the scooter as it was only on loan from a community service agency.

In a letter signed by the physician dated 2010-09-13, he confirms the appellant's diagnosis of mental and physical impairments as:

- Traumatic brain injury due to a vehicular assault
- Memory impairment
- Social anxiety
- Depression (which was struck out and initialed by physician)
- Degenerative arthritis
- Chronic pain syndrome
- Sleep Apnea
- Morbid obesity
- All conditions are Chronic

The letter also states the impairments listed above directly and significantly restrict the appellant's ability to perform dla's *continuously* and as a result of those restrictions; the appellant requires the significant assistance of another person to perform those daily living activities specifically;

- Basic housework
- Management of finances (paying bills in person, going to bank)
- Daily shopping
- Social functioning
- Transportation
- Mobility inside and outside the home

In response to questions from the Panel, the appellant advises her regular daily routine involves feeding her cat, sometimes turning on the propane so she can cook and sitting in her chair. The appellant receives assistance from her family and friends to go shopping as there is no public transportation near her home and when doing the laundry as the facilities in the complex are up hill from her residence. The appellant advises she can prepare her own meals, although sometimes her sister will bring prepared meals, and attend to her personal care needs. The appellant added that the shower she utilizes now is quite small and has a low edge so she does not require a 'clamp or bar' for stability.

The Panel makes the following finding of fact:

1. The appellant has met the age requirement.
2. The appellant's physician has confirmed the appellant's impairment(s) is likely to continue for at least two years.
3. The appellant does not use the service of an assistance animal.
4. The appellant suffers from chronic pain in left knee and ankle and right shoulder.
5. The appellant suffers from a head trauma injury which impacts on her short term memory.

PART F – Reasons for Panel Decision

The issue under appeal is whether the ministry reasonably concluded that the appellant does not have a severe mental or physical impairment and that, in the opinion of a prescribed professional, directly and significantly restricts, either continuously or periodically for extended periods, the Appellant's ability to perform daily living activities and as a result of those restrictions the appellant requires significant help or supervision of another person, the use of an assistive device, or services of an assistance animal to perform daily living activities.

The legislation states the application is a 2-stage process wherein the applicant must satisfy the requirements of s. 2(2) and (3) of the *Employment and Assistance for Persons with Disabilities Act (EAPWDA)*.

The EAPWDA, section 2 sets out 5 criteria which must be met for PWD designation:

1. The Appellant must have reached the age of 18 years;
2. The Minister must be satisfied that the person has a severe mental or physical impairment;
3. In the opinion of a medical practitioner, the impairment will continue for at least 2 years;
4. In the opinion of a prescribed professional, the impairment must directly and significantly restrict the persons' ability to perform daily living activities, either continuously or periodically for extended periods; and
5. As a result of those restrictions, the person requires help to perform those activities.
"Help" is defined in s, 2(3)(b) of the EAPWDA as an assistive device, the significant help or supervision of another person or services of an assistance animal.

For the purposes Act, section 2(2) EAPWDR, a '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.

The Daily Living Activities as listed in s. 2(1) EAPWDR are:

- (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

The evidence that is in dispute is whether or not the appellant has a severe mental or physical impairment which directly and significantly restricts the appellant's ability to carry out daily living activities either continuously or periodically for extended periods and as a result of those restrictions the appellant requires significant help or supervision of another person to perform daily living activities.

The ministry agrees the appellant meets the age requirement of 18 years of age and that the appellant's physician confirms that her impairment will continue for at least two years or more. The ministry argues the appellant does not have a severe mental or physical impairment based on the physician and the assessor (OT) reports and that the impairment(s) restricts the appellant's ability to perform her dla's without periodic or continuous assistance or supervision of another person.

The ministry argues that in terms of physical impairment the appellant is able, unaided, to walk 2-4 blocks, to climb 5+ stairs, with no limitations to lifting or remaining seated. The ministry argues this is confirmed by the OT who indicates that the appellant is able to walk, climb stairs, stand, lift, and carry/hold albeit the appellant uses a cane and a scooter for longer distances. The ministry argues the appellant has a good degree of functional skill ability and independent mobility/physical abilities. The ministry argues that the reports from the physician and the OT do not support that appellant has a severe physical impairment.

The ministry argues that in terms of mental function (impairment) the physician reports only one deficit to cognitive and emotional functioning in the area of memory described as "some mild short term memory problems". The physician reports no deficit in the remaining 10 of 11 aspects of this category. The OT reports 3 moderate impacts on daily functioning in the areas of bodily functions (related to sleep apnea), attention/concentration and memory. The OT reports no impact on 11 of the 14 remaining categories and there is no difficulty with communication. The ministry argues that the impacts are in the moderate range and the impact on the bodily functions is due to physical not mental conditions, therefore, and as the appellant is able to make decisions about personal activities, care and finances, and are able to relate to, communicate, and interact with others effectively. The ministry argues that the reports from the physician and the OT do not support that appellant has a severe mental impairment.

The ministry also argues that neither report from the physician or the OT indicated the appellant needed or required the continual or periodic assistance of another person to assist the appellant in performing her dla's due to a physical or mental impairment.

The appellant argues that "chronic" is defined in the Merriman-Webster dictionary as "of long duration, continuing and lasting for long period of time" as it relates to physician's rating on page 10 of Part D of PWD application - Degree and course of impairment. The appellant also argues that this dictionary also defines "significant" as "of a noticeably or measurably large amount" as it relates to the physician's rating on page 10 of Part D of the PWD application - significant deficits with cognitive and emotional function.

The appellant argues her physical impairments are severe which is supported by her physician. The appellant argues that the physician's ratings in Part D of PWD application (functional skills) are not accurate that she cannot walk unaided 2 to 4 blocks but something less than one block; can only climb 2 to 5 steps and not 5+ steps that she is unsteady and if she has to climb stairs it's a slow process and this action creates pain in her left hip. The appellant argues the physician changed his ratings in his letter of September 13th for Part E from only 1 activity being restricted to 7 activities being restricted.

The Panel finds the original assessment of the appellant's physical abilities by the physician and the OT are in agreement and compatible with one another. The Panel notes initially the physician indicated only 1 of 10 dla activities was restricted and the assessor indicated that the appellant was independent in 21 of the 28 dla categories; being restricted in transfers in/out of bed, laundry, carrying purchases home (affects ambulation), going to and from stores and getting in and out of vehicle. This coincides with the physician's recent letter as he now indicates the appellant is restricted in 7 of 10 categories - basic housework, shopping, mobility inside and outside the home, transportation, management of finances and social functioning. In comparing the two assessments the Panel finds the two assessments still compliment one another indicating the appellant is restricted to some degree in areas of mobility inside/outside the home, basic laundry and going shopping. The Panel finds that the transportation

restriction is due to ambulation (getting in and out of a vehicle) and that since no public transport is available the appellant's need is to rely on others.

The Panel finds that although the physician changed his rating on which dla's were restricted the physician did not provide any narrative comment(s) supporting these changes. On the PWD the physician's response to the question "What assistance does your patient need with dla's" was "N/A" indicating the question was non-applicable or did not apply to his patient, the appellant. Although the Panel does respect the opinion of the physician, the Panel finds that without supporting rationale from the physician on why the ratings were changed on the dla activities, the Panel can not give the new ratings the significant weight it requires to assist the Panel in determining that the appellant's physical impairment(s) severely restrict the appellant's functional ability to perform her dla's.

The Panel finds the OT indicates the appellant is independent in 21 of 28 dla categories and the assessment does not indicate assistance is required, either periodically or continuously, in any category. In one category, bathing, it is indicated the appellant uses an assistive device and in walking indoors and outdoors it's indicated the she uses a cane or scooter. In the remaining 6 categories it is indicated the appellant takes significantly longer to perform the activity. Only one comment regarding restriction is found, "the appellant is unable to walk long distances". The physician made the same comment stating, "the appellant uses a scooter for longer distances than she can walk comfortably".

The Panel finds that although the injuries sustained by the appellant in the accidents have left her with physical challenges there is not sufficient evidence to support a finding that the appellant has a severe physical impairment. Therefore based on the evidence, the Panel finds that the ministry's decision to conclude that the evidence does not support that the appellant has a severe physical impairment that restricts her ability to perform daily living activities is reasonable.

In reference to the existence of a severe mental impairment, both the physician and the OT indicate there are deficits within the cognitive and emotional function area, i.e. short term memory loss. The physician initially indicated there is no impact on her social functioning but in the letter dated September 13th he changed that opinion without providing any supporting rationale. On the PWD application the physician did comment "the patient is well motivated and making good effort to normalize her life as best she can." The area of mental or physical impairment is only completed by the OT if the applicant has an identified mental or physical impairment, including brain injury. The OT noted 3 of 14 areas (sleep disturbance, attention/concentration and memory) in the Cognitive and Emotional Functioning area as moderately impacting on the appellant's dla's. Sleep is associated with Sleep Apnea which the physician notes is being addressed by a CPAP machine and the attention/concentration and memory are linked to the brain injury.

Continuing, under Social Functioning the OT indicates the appellant is independent in all categories and when describing how the mental impairment impacts on the appellant's relationship with her immediate or extended social networks, the OT ticks the box indicating 'good functioning' which is defined as positive relationships, assertively contributes to relationship; positively interacts with community and often participates in activities. Neither the physician nor the OT indicated the appellant requires any assistance.

Based on the ratings and comments by the physician and the OT, the Panel finds that there is insufficient evidence to support the statement that the appellant has a severe mental impairment which impacts on the appellant's ability to perform dla's. Therefore, based on the evidence, the Panel finds that the ministry's decision to conclude that the evidence does not support that the appellant has a severe physical impairment that restricts her ability to perform daily living activities is reasonable.

Respecting the appellant's ability to manage dla's, the Panel relies on the totality of the evidence of both the physician and the OT (prescribed professional). The Panel has relied on the evidence of the OT which establishes that the appellant is independent in 26 of 33 categories (including social functioning); takes

significantly longer in 6 other areas uses an assistive device (cane) in one category. Assistance on a periodic or continuous basis from another person is not indicated in any category assessed nor is it commented upon by either the physician or the OT in either the application or the physician's letter.

In determining whether the ministry reasonably concluded that the appellant does not require significant help or supervision with dla's, the Panel does accept the appellant's evidence that she does receive periodic assistance from family and friends to do laundry and with transportation although, both the physician and the OT indicate she does not need continual or periodic assistance of another person to perform her dla's. The Panel finds this type of assistance can change depending on where the appellant is living.

The Panel acknowledges the appellant's injuries do impact on her ability to perform certain tasks, however, the evidence does not establish that the appellant's impairment has directly and significantly restricted her ability to perform dla's. Therefore, the Panel finds that the ministry reasonably concluded that the evidence does not establish a direct and significant restriction, as in the opinion of the prescribed professional (assessor), of the appellant's ability to perform dla's as required by section 2(2)(b)(i) of the EAPWDA.

The Panel finds that the evidence does not establish that the appellant has severe mental or physical impairment that directly and significantly restricts the appellant to perform dla's and further, that the ministry reasonably determined that the requirement for significant help or supervision to perform dla's under section 2(2)(b)(ii) EAPWDA has not been met.

The Panel finds that the ministry's reconsideration decision of August 20th, 2010 is reasonably supported by the evidence and confirms the decision in accordance with section 24(1)(a) and section 24(2)(a) of EAA.