

PART C – Decision under Appeal

The decision under appeal is the ministry's reconsideration decision dated May 13, 2011 which found that the appellant did not meet two of the five statutory requirements of Section 2 of the Employment and Assistance for Persons with Disabilities Act for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement and that her impairment is likely to continue for at least two years. The ministry was also satisfied that the evidence establishes that she has a severe physical impairment. However, the ministry was not satisfied that the appellant's daily living activities (DLA) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods. As the ministry found that the appellant is not significantly restricted with DLA, it could not be determined that she requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

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 evidence before the ministry at the time of the reconsideration decision consisted of:

- 1) Sleep Diagnostics- Complete Polysomnography dated January 25, 2010 which provides, in part, that following an observation of the appellant there is evidence of moderate sleep-disordered breathing;
- 2) Letter To Whom It May Concern from chiropractor dated February 18, 2010 which states, in part, that the appellant has lifting restriction of over 3 lbs. with her left wrist and lifting restrictions of over 5-7 lbs. with her right wrist;
- 3) Person With Disabilities (PWD) Application: applicant information dated October 4, 2010, physician report dated October 4, 2010, and assessor report dated October 4, 2010;
- 4) Operative Report from hospital dated December 15, 2010 describing colonoscopy and polypectomy procedures;
- 5) Surgical Pathology Report dated December 15, 2010 regarding biopsy of colonic polyps and indicating no evidence of malignancy or high grade glandular dysplasia; and,
- 6) Letter from the ministry to the appellant denying her request for persons with disabilities designation and enclosing the decision summary, dated February 24, 2011.

At the hearing, the appellant's advocate provided a number of additional documents as follows:

- 1) Hospital Report dated January 23, 2004 regarding degenerative disc disease;
- 2) Scan Report dated April 6, 2004;
- 3) Letter from chiropractor dated August 18, 2006 regarding neck and back;
- 4) Letter from physician dated June 22, 2007 regarding sciatica;
- 5) Letter from chiropractic clinic dated April 6, 2011 regarding back and neck;
- 6) Physician's notes (2) dated August 18, 2006 regarding neck, back, and wrist pain; and,
- 7) Physician's Report and checklist dated May 3, 2011.

The ministry did not object to admission of the first six documents but objected to admission of the Physician's Report and checklist dated May 3, 2011 since it had not been provided at the time of the reconsideration decision and it could have been submitted at that time. The panel reviewed the documents and admitted them under Section 22(4) of the Employment and Assistance Act as being in support of the information before the ministry when the decision being appealed was made. With the Physician's Report and checklist dated May 3, 2011, the panel noted that the content relates to medical conditions that were before the ministry at reconsideration and does not raise a new diagnosis.

The appellant's advocate explained that the Physician's Report and checklist was obtained from the same physician who prepared the reports in the original PWD application in order to clarify some inconsistencies in the original information. In the May 3, 2011 Report and checklist, it states, in part, that the appellant suffers from medical conditions including musculoskeletal (back, neck and wrist problems), hypothyroidism, internal hemorrhoids, periodic rectal bleeding, asthma which is environmentally situated, and sleep disorder. It is stated that these conditions will likely continue for at least 2 years and that the appellant is directly and significantly restricted in her ability to perform her daily living activities continuously as a result of the conditions noted. The physician has made a handwritten note that he reviewed the restrictions outlined in the checklist with the appellant and filled it in according to the information that she provided. The physician has made a check mark in the column titled "continuously restricted" and made handwritten notes under the column titled "takes longer" as follows: with walking outdoors ("can walk 2 blocks"), climbing stairs ("6 stairs at a time"), lifting/carrying/holding ("3 lbs. or less"), dressing ("sometimes"), standing ("20 minutes"), sitting ("15-20 minutes"), grooming ("sometimes"), bathing ("showers only"), toileting ("uses handle"), transfers (bed/chairs- "yes"), laundry ("yes"), basic housekeeping ("yes"), accessing community (bank/pharmacy- "no"), shopping/carrying items home ("3 lbs."), getting in and out of vehicles ("yes"), using public transit ("yes"). The Report clarifies that the appellant requires assistance with: basic mobility ("limited to less than one block due to her back pain- 2 blocks then takes a break"), climbing stairs ("limited to less than 6 steps, she says she takes rest after 6 steps, restricted by her musculoskeletal condition"), lifting/carrying/holding/including shopping purchases ("unable to lift more than 3 lbs., restricted by her wrists, neck pain, pain is the limiting factor"),

personal care including grooming/feeding self/regulating diet ("limited by her loss of balance, dizziness, and limits herself to one shower a week"), basic housework ("limited by wrist and neck pain"), laundry ("limited from transferring and lifting clothes"), shopping including making appropriate choices and paying for purchases ("unable to complete independently because needs assistance with lifting items off the shelf and pushing the grocery cart"), meal including preparation/cooking/safe storage of food ("limited from standing more than 20 minutes without a break"), banking/budgeting/paying rent and bills ("limited mobility, restricted by musculoskeletal condition"), filling prescriptions/taking medications as directed/safe handling and storage of medication ("limited mobility, restricted by her musculoskeletal condition"), using public transit and understanding transit schedules ("limited from standing, sudden movements exacerbates her pain levels"), and social functioning ("sleep disturbance causes fatigue during the day, along with a lack of energy").

The appellant stated that she is restricted in her self-care because she often cannot lift her arm, and she will only prepare simple meals, such as a bowl of cereal or a sandwich. The appellant explained that she lives with her sister who prepares most of the meals and lifts anything heavy (i.e. weighing more than 3 lbs.) since the appellant's arm has "let go" and she has burned herself. The appellant stated that her sister does most of the housework, such as vacuuming and mopping, since the appellant finds it very difficult and painful to reach forward. The appellant stated that even to stand up from a sitting position is difficult because of the pain in her wrists, so that she is unable to support herself. The appellant stated that it is difficult to get out of bed in the morning, especially if she has been sleeping on her side and her neck has been out of position, her neck will be extremely painful and throbbing and her sister will bring her an ice pack to apply for 15-20 minutes and she practices meditation until the pain eases off. With the pain in her sciatic nerve, which she experiences through her leg and back, the appellant states that her sister has to help her get in and out of a vehicle, and her sister carries the groceries when they go shopping and pushes the cart. The appellant explained that picking up 4 oranges would be difficult for her. The appellant stated that her sister is her "lifesaver" and that she will take her outside for fresh air and they walk about a block and back. The appellant stated that she must wear flat shoes with no heels or it will aggravate her back and she cannot go to places like the theatre which involves sitting for an extended period. The appellant stated that she does not take any medications because she experiences side effects, such as throbbing headaches, from over-the-counter medications.

The physician who completed the physician report has confirmed that the appellant is diagnosed with hypothyroidism, asthma, environmental sensitivities, musculo-skeletal- back, neck and wrist problems, and sleep apnea. The physician comments that the appellant's main issues are extreme fatigue and pain and that she has a high level of "self-described disability." In the physician report included in the PWD application, the physician indicates that these impairments directly restrict the appellant's ability to perform daily living activities (DLA) in the areas of personal self care, meal preparation, basic housework, daily shopping, mobility inside the home, mobility outside the home, and use of transportation, with no restriction to management of finances and social functioning. The physician has added a handwritten note that "...patient filled in the above, see assessor report." In the assessor report, the physician indicates that the appellant requires periodic assistance with laundry, basic housekeeping, going to and from stores, paying for purchases, food preparation, and cooking. It is reported that the appellant takes significantly longer carrying purchases home, with the comment added that the appellant cannot do this activity. All other areas of DLA are independently completed. The physician indicates that the appellant does not require the use of any assistive devices, aids, or assistance provided by other people for her impairment.

PART F – Reasons for Panel Decision

The issue on the appeal is whether the ministry reasonably concluded, under Section 2 of the EAPWDA and the EAPWDR, that the appellant is not eligible for designation as a person with disabilities (PWD) as her daily living activities (DLA) are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods and that, as a result of those restrictions, it could not be determined that the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

The criteria for being designated as a person with disabilities (PWD) are set out in Section 2 of the EAPWDA. The minister may designate a person as a PWD when the following requirements are met. Pursuant to Section 2(2), the person must have reached the age of 18 and the minister must be satisfied that the person has a severe mental or physical impairment. Under Section 2(2)(a) the impairment must be likely, in the opinion of a medical practitioner, to continue for at least 2 years. The impairment must also, in the opinion of a prescribed professional, directly and significantly restrict the person's ability to perform daily living activities (DLA) either continuously or periodically for extended periods, as set out in Section 2(2)(b)(i). As a result of those restrictions, the person must require help to perform DLA, pursuant to Section 2(2)(b)(ii). Section 2(3)(b) sets out that a person requires help in relation to DLA if, in order to perform it, the person requires an assistive device, the significant help or supervision of another person, or the services of an assistance animal.

Section 2(1)(a) of the EAPWDR defines DLA for a person who has a severe physical or mental impairment as: prepare own meals, manage personal finances, shop for personal needs, use public or personal transportation facilities, perform housework to maintain the person's place of residence in acceptable sanitary condition, move about indoors and outdoors, perform personal hygiene and self care, and manage personal medication. In relation to a person who has a severe mental impairment, there are two additional activities, namely: making decisions about personal activities, care or finances, and relating to, communicating or interacting with others effectively.

The ministry's position is that although the appellant meets criterion 1, 2 and 3 as set out in the legislation, in that she has reached the age of 18, the appellant has a severe physical impairment and her impairment is likely, in the opinion of a medical practitioner, to continue for at least 2 years, the evidence does not establish that she has met criterion 4 and 5. In particular, the ministry argues that the evidence does not show that the prescribed professional confirms that the appellant's physical impairment directly and significantly restricts her ability to perform DLA either continuously or periodically for extended periods so that she requires the significant help or supervision of another person to perform these activities.

The appellant's position is that the prescribed professional has provided sufficient evidence that the appellant's severe physical impairment directly and significantly restricts her ability to perform many DLA, for which she requires the significant help and supervision of another person, namely her sister. The appellant's advocate points out that the physician who completed the application for PWD has confirmed that the appellant is continuously restricted in many areas of DLA in his Report and checklist dated May 3, 2011, which was provided to clarify the initial information. The advocate argues, based on the Hudson decision, that the requirement is only that two DLA are directly and significantly restricted, and that any ambiguities should be resolved in favour of the appellant.

Regarding the appellant's ability to manage daily living activities (DLA), the panel has relied on the evidence of the physician who completed the PWD application, with substantial weight given to his updated letter dated May 3, 2011 which is more current and has been completed by the physician. In the assessor report included in the PWD application, the physician notes that the appellant completed much of the checklist "based on her subjective symptoms" which indicates the appellant requires periodic assistance with laundry, basic housekeeping, going to and from stores, paying for purchases, food preparation, and cooking.

It is reported that the appellant takes significantly longer carrying purchases home, and that all other areas of DLA are independently completed. Although the physician has indicated in his May 3, 2011 report that he reviewed the checklist with the appellant and filled it in according to the information she provided, the panel finds that it provides a more definitive response to the restrictions on the appellant's DLA as it includes the physician's handwritten notes regarding each aspect. Accordingly, the panel finds that the physician has responded "yes" to continuous restrictions in the areas of transfers (in/out of bed and chairs), laundry, basic housekeeping, getting in and out of vehicles, using public transit and bathing ("showers only"). The physician has responded "sometimes" in the areas of dressing, and grooming, which the panel finds indicates a periodic restriction for an extended period. For toileting, the physician notes that the appellant "uses handle" and for feeding self and regulating diet, the comment is that the appellant is limited by her loss of balance and dizziness. In the area of shopping, the physician has commented that the appellant is unable to complete independently because she needs assistance with lifting items off the shelf and pushing the grocery cart. For banking, budgeting and paying rent and bills, although the physician has stated "no" with respect to a continuous restriction, his comment is that the appellant has limited mobility and is restricted by her musculoskeletal condition. The appellant clarified that she cannot stand for very long and that the bank staff will give her special consideration when she goes to the bank. In the area of medications, the physician has again commented that the appellant has limited mobility and that she is restricted by her musculoskeletal condition. In the area of social functioning, the physician's comment is that sleep disturbance causes fatigue during the day along with a lack of energy, which restricts the appellant in all aspects of making appropriate social decisions, developing and maintaining relationships, interacting appropriately with others, dealing appropriately with unexpected demands, and securing assistance from others. The panel also finds that the physician has stated a medical opinion or conclusion, in his May 3, 2011 Report, that the appellant is directly and significantly restricted in her ability to perform her DLA continuously as a result of her medical conditions. Therefore, the panel finds that the ministry's determination that the evidence of a prescribed professional does not establish a direct and significant restriction on the appellant's ability to perform DLA either continuously or periodically for extended periods, as required by Section 2(2)(b)(i) of the EAPWDA, was unreasonable.

In determining whether the ministry reasonably concluded that the appellant does not require the significant help or supervision of another person, the panel relies on the information from the physician in the PWD application that the appellant shares an apartment with her sister and receives help from her. The panel finds the appellant has stated that her sister is "her lifesaver" who assists with many of the appellant's DLA. The physician has confirmed in his updated letter of May 3, 2011 that the appellant requires assistance with several DLA, including lifting, carrying and holding including shopping purchases, personal care, basic housework, laundry, shopping meal preparation, cooking and safe storage of food, banking, filling prescriptions and using public transit. The panel finds that the ministry's conclusion that the requirement for significant help or supervision of another person to perform DLA under Section 2(2)(b)(ii) of the EAPWDA has not been met was unreasonable.

The panel finds that the ministry's reconsideration decision was not reasonably supported by the evidence and rescinds the decision. Therefore, the ministry's decision is overturned in favour of the appellant.