

PART C – Decision under Appeal

The decision under appeal is the ministry's Reconsideration decision dated April 8, 2011 which denies the appellant's request for Persons with Disabilities (PWD) designation. The ministry denied the request after determining that, based on the information provided, the appellant did not meet the following criteria under section 2 of the EAPWD Act and Regulation:

- The minister is not satisfied that the appellant has a severe physical or mental impairment;
- The information from the prescribed professional does not indicate the impairment directly and significantly restricts the appellant's ability to perform daily living activities either continuously or periodically for extended periods; and
- The prescribed professional does not indicate that the appellant requires help or supervision of another person to perform the daily living activities restricted by the impairment.

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities (EAPWD) Act, section 2
EAPWD Regulation, section 2

PART E – Summary of Facts

The evidence before the ministry at reconsideration included the appellant's PWD application which included a physician's report which is dated October 12, 2010, an assessor's report which is dated November 20, 2010, the appellant's written submission and a letter from her roommate dated March 7, 2011.

The physician's report indicates that he has been the appellant's doctor since for three years. He diagnoses the appellant with neck pain (osteoarthritis), COPD, sleep apnea and depression.

In his additional comments, the physician notes that the appellant has severe neck pain which is quite resistant to treatment. He states that this has led to drug abuse in the past, however she is currently maintained on a stable dose of morphine. He adds that the appellant continues to be disabled for her ADL's (activities of daily living) despite the lack of a clear cut diagnosis. With respect to her sleep apnea, the physician states that the appellant cannot afford a CPAP machine. He says she has COPD but, unfortunately continues to smoke. Finally, he adds that depression has been a long term problem for the appellant and she is being treated for this.

In terms of the appellant's functional skills, the physician notes that the appellant can walk 4+ blocks, can climb 5+ steps, cannot lift at all, and can remain seated for less than 1 hour.

The physician notes that the appellant has no difficulties with English communication.

In terms of whether the appellant suffers from any significant deficits with her cognitive and emotional function, the physician indicates that the appellant suffers from emotional disturbance related to depression.

Under Part E, the physician indicates that the appellant requires continuous assistance for personal self care, basic housework, daily shopping, mobility both within and outside of the home, and also for transportation.

In his additional written comments, he adds that the appellant experiences trouble when getting in/off the tub/toilet, and that a handrail would help, that she needs help carrying groceries and also with housework.

The appellant's alternate family physician completed the assessor's report. The assessor physician practices medicine with the appellant's family physician, and according to the appellant, he provides care for the appellant when her regular GP is not available.

Under Part B, the assessor indicates that the appellant is independent walking indoors and outdoors, climbing stairs and standing, but that she has required continuous assistance with lifting, carrying and holding for the past two years.

The assessor also indicates that the appellant's depression has had a major impact on her daily functioning, as has her lack of initiative and lack of movement/agitation.

Under Part C, the assessor indicates that the appellant is independent in 17 of 28 identified aspects of daily living activities. Specifically, the assessor indicates that the appellant is independent in her ability to dress, groom, feeding herself, regulate her diet, make appropriate shopping choices, pay for purchases, all aspects of meals, all aspects of paying rent/bills, all aspects of medications and using transit schedules and arranging transportation.

The assessor also indicates that the appellant requires periodic assistance with bathing, toileting, all aspects of transfers, going to and from stores, and reading prices and labels.

Additionally, he further indicates that the appellant requires continuous assistance with laundry, basic housekeeping, getting in and out of a vehicle, and using public transit.

Under Part D, the assessor notes that the appellant requires friends to assist her with her daily living activities. He states that she would like to employ someone as friends do not always show up as promised to assist her. When no help is available, this upsets her greatly. The assessor indicates that the appellant needs to feel assured that assistance will be available to her when needed.

With respect to her need for assistive devices, the assessor indicates that the appellant requires a CPAP for sleep apnea, and toilet and bath aids to assist her with getting in and out of the tub and on/off the toilet safely.

In her notice of appeal, the appellant says that she has a very severe impairment that does directly and significantly restrict her daily living activities. She further states that she requires help with her daily activities because of her impairment.

The appellant submitted detailed, written submissions in support of her appeal. At the oral hearing, the appellant and her advocate referenced the written submissions and further referenced an additional written statement from the appellant's physician. The physician's statement indicates that although the appellant is on a stable morphine dose, she is not well controlled in terms of pain control. He says she has "severe neck pain" and is "disabled by the pain."

The appellant, in her written submissions, goes into significant detail regarding the nature and extent of her physical impairments. She describes the difficulty she has getting out of the tub and explains how her disability affects her on a daily basis. For instance, she says she has to get on her hands and knees to pull herself up, that her roommate has helped her out of bed and out of the tub many times, and that she even requires help to scrub her own back.

Attached to her written submissions is a statement from the appellant's physician dated May 4, 2011. The physician clarifies at the outset that he has not had the opportunity to witness the appellant perform her daily living activities, but opines that he has reviewed her written statement and that it is consistent with what he knows of her condition. He has also added his own comments noting that the appellant suffers from "severe neck pain" and is "disabled by the pain". He concludes by stating that her impairments cause "significant disability in her level of functioning".

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The panel finds that the new information provided by the appellant including the doctor's information is in support of the original information and records that were before the ministry at the time of reconsideration, and as such the panel admits the new information as evidence before this appeal pursuant to section 22(4) of the Employment and Assistance Act.

PART F – Reasons for Panel Decision

The issue on this appeal is whether the ministry reasonably concluded that the appellant is not eligible for a PWD designation under section 2 of the EAPWD Act and Regulation because the appellant did not meet the following criteria:

- The minister is not satisfied that the appellant has a severe physical or mental impairment;
- The information from the prescribed professional does not indicate the impairment directly and significantly restricts the appellant's ability to perform daily living activities either continuously or periodically for extended periods; and
- The prescribed professional does not indicate that the appellant requires help or supervision of another person to perform the daily living activities restricted by the impairment.

Section 2(2) of the EAPWD Act provides that 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) states that for the purposes of section (2)(2), 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 of the Regulation states as follows:

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.

[am. B.C. Reg. 196/2007.]

The appellant argues that the ministry's reconsideration decision is not reasonably supported by the evidence. She says that she does have severe physical impairments which directly and significantly restrict her ability to perform various daily living activities either continuously or periodically for extended periods, and that as a result of her restrictions she requires help from others to perform her activities.

The appellant notes that her neck pain is significantly disabling, and that her ability to function is severely compromised as a result. She says she needs help all the time with lifting, carrying and holding. She says she always uses a handrail on stairs, and that her roommate helps her all the time with shopping tasks. She notes that her roommate is her "assistive device" for carrying things home.

The appellant, in her written submissions, goes into significant detail regarding the nature and extent of her physical impairments. She describes the difficulty she has getting out of the tub and explains how her disability affects her on a daily basis. For instance, she says she has to get on her hands and knees to pull herself up, that her roommate has helped her out of bed and out of the tub many times, and that she even requires help to scrub her own back.

She says her physical limitations are inescapable and that her depression goes hand in hand with those limitations. Neither impairment is going away.

She says she requires periodic help with dressing, that she requires help getting out of bed 75% of the time, and that she must be pulled off of a chair in a similar fashion. She says she and her roommate make meals together because she cannot stand and prep alone, although she can do the actual cooking. Her roommate does much of the clean up because the appellant cannot.

With respect to her sleep apnea, the appellant states that it affects her sleep. She says that the ministry temporarily funded a CPAP machine but that funding was not extended and as a result she now goes without the machine. As a result, she sleeps poorly and does not get enough oxygen, and that aggravates her other impairments.

In addition to the help she receives from her roommate, the appellant says that her son also assists her from time to time. In addition, her neighbors help her (ie: with shoveling when required).

Attached to her written submissions is a statement from the appellant's physician dated May 4, 2011. The physician clarifies at the outset that he has not had the opportunity to witness the appellant perform her daily living activities, but opines that he has reviewed her written statement and that it is consistent with what he knows of her condition. He has also added his own comments noting that the appellant suffers from "severe neck pain" and is "disabled by the pain". He concludes by stating that her impairments cause "significant disability in her level of functioning".

In response, the ministry says that both the physician's report and assessor's report confirm that, although the appellant has physical impairments, her impairments are not severe, and she is not significantly restricted in her daily living activities to the extent that her impairments directly and significantly restricts her ability to perform daily living activities either continuously or periodically for extended periods.

More specifically, the ministry says that the information provided by the prescribed professionals is lacking in information suggesting that the appellant's restrictions are "significant". The ministry relies on the assessor's findings that, notwithstanding her impairments, the appellant is still found to be independent in many areas of daily living.

With respect to whether or not the appellant suffers from a severe physical impairment, the panel has considered the comments in the physician's report that the appellant suffers from "severe neck pain which is quite resistant to treatment". It is so severe, he says, that it has led to drug abuse in the past. The panel also noted the physician's comments that the appellant cannot lift at all and that she can remain seated only for up to one hour.

In his written statement dated May 4, 2011, the same physician again describes the appellant as having "severe neck pain" resulting in a significant disability.

The assessor, at Part B paragraph 3, comments that the appellant's impairments require her to rely on others for continuous assistance with lifting, carrying, and holding, for all aspects of basic housekeeping, and for getting out of a vehicle and using public transit.

Given the physician and assessor's description of the appellant's physical impairment, the panel finds it unreasonable for the ministry to conclude that the appellant's physical impairment is not severe.

With respect to the existence of a severe mental impairment, the panel notes the evidence in the physician's report that the appellant suffers from depression. The panel also notes the findings from Part B of the assessor's report wherein the physician makes only three findings regarding the degree of impact that the mental impairment may have on the appellant's daily functioning. In Part C, the assessor makes no comments at all regarding any impact on the appellant's social functioning. In her oral submissions, the appellant did not elaborate on the severity of her depression.

Given the evidence, the panel finds that the ministry's decision is reasonable in so far as it concludes that the appellant does not suffer from severe mental impairments.

The panel next considered the physician and assessor's reports in terms of how the appellant's impairments affect her daily living activities.

In terms of the appellant's functional skills, the physician notes that the appellant can walk 4+ blocks and climb 5+ stairs. However, he also notes that the appellant cannot lift at all and that she can remain seated for up to one hour only.

In part E, the physician clearly indicates that the appellant requires continuous assistance for 6 of 9 identified aspects of daily living, namely personal self care, basic housework, daily shopping, mobility inside and outside of the home, and use of transportation. His findings are consistent with the findings of the assessor in Part C of the assessor's report.

Under Part C of the assessor's report, and although the assessor indicates that the appellant is independent in several identified aspects of daily living activities, the assessor finds that the appellant requires continuous assistance with getting in and out of a vehicle, using public transportation, and all aspects of basic housekeeping.

In his written statement dated May 4, 2011, the same physician who authored the physician's report confirmed all of the above when he noted that the appellant has a "significant disability in her level of functioning".

In light of the evidence of the prescribed professionals, the panel finds that the ministry's decision is unreasonable in so far it concludes that the impairments do not directly and significantly restrict the appellant's ability to perform daily living activities continuously or periodically for extended periods. Both physicians have clearly indicated the opposite.

With regard to the any assistance the appellant requires, the panel again references the information from both the physician and assessor.

The physician notes that the appellant requires a hand rail for bathroom use, and a CPAP machine to assist with her sleep apnea condition. At Part E of his report, he adds that the appellant could benefit from handrails in the bathroom for toilet and tub use, that she needs help carrying groceries and also with housework.

The assessor indicates, at Part B, that the appellant requires continuous assistance with lifting, carrying and holding and confirms that this has been the case for the past two years. At Part C, the assessor notes that the appellant uses an assistive device for carrying groceries home. In her submissions, the appellant says her roommate is her "assistive device". The assessor also confirms, at Part D, that the appellant requires toilet and bath aids, and that she relies on friends to assist her.

The assessor further indicates that the appellant requires continuous assistance only with laundry, basic housekeeping, getting in and out of a vehicle, and using public transit. This is combined with the periodic assistance she requires for bathing, toileting, all aspects of transfers, going to and from stores, and reading prices and labels.

Taking all of this evidence into account, the panel concludes that the ministry's decision is unreasonable in so far as it concludes that the appellant does not require the significant help or supervision of another person to perform the daily living activities restricted by the impairment.

In summary, the panel concludes that the ministry unreasonably determined that the appellant has not met all of the legislated criteria in order to be eligible for PWD status. The ministry's decision was not reasonably supported by the evidence and, as such, the panel rescinds the decision pursuant to section 24(1)(a) and 24(2)(b) of the Employment and Assistance Act.