

PART C – DECISION UNDER APPEAL

(State the reconsideration decision)

The decision under appeal is the ministry's reconsideration decision dated 05 May 2011 which held that the appellant is not eligible for Person with Disabilities Designation because she does not meet all of the legislative criteria set out in the Employment and Assistance for Persons with Disabilities Act (EAPWDA) and the Employment and Assistance for Persons with Disabilities Regulation. The ministry determined that the appellant does not have a severe impairment; is not directly and significantly restricted in her daily living activities; and does not require assistance with daily living activities as a result of significant restrictions as set out in the EAPWDA s.2 and the EAPWDR s.2.

PART D – RELEVANT LEGISLATION

(State the relevant Legislation considered)

Employment and Assistance for Persons with Disabilities Act s.2 (EAPWDA)
Employment and Assistance for Persons with Disabilities Regulation s.2 (EAPWDR)

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 28 October 2011 Persons with Disabilities (PWD) Designation application with no Self Report but including a Physician Report (PR) dated 18 October 2010 and an Assessor Report (AR) dated 13 September 2010
- The appellant's 10 February 2011 Request for Reconsideration

The ministry did not attend the hearing. After confirming that the ministry was notified, the hearing proceeded pursuant to Section 86(b) of the Employment and Assistance Regulation.

The ministry's submission on appeal was its reconsideration summary.

The appellant did not complete a Self-Report.

The evidence contained in the PR is that the appellant suffers from osteomyelitis, fibromyalgia, deafness, malnutrition, addiction and depression. With respect to her Health History the physician reports that the appellant has constant body aches from fibromyalgia, partial deafness, has a sleep disorder, said to be sleep apnea, but cannot afford a CPAP machine, has poor energy level, and poor insight to improve her health. As a result of these issues the appellant has adjustment disorder and depression.

The PR indicated the appellant requires an aid, in the form of a cane, for her impairment and requires a hearing aid. She also requires a better diet and emotional support.

The physician reports the appellant can walk 2 to 4 blocks on a flat surface unaided, can climb 5+ stairs unaided, and her ability to lift is limited to under 2kg. Any limitation on sitting is unknown and no difficulties with communication are noted.

With respect to significant cognitive and emotional function the PR indicates the appellant has significant deficits with executive functions, memory, emotional disturbance (depression), and motivation.

With respect to Daily Living Activities (DLA's) the PR indicates the appellant is actively restricted in social functioning as she is a suggestive person with poor incentive to improve her status. She is described as a follower who is not able to make appropriate decisions and requires regular contact with a counselor. The appellant was noted as not having activity restrictions with personal self-care, daily shopping, mobility inside the home, or use of transportation. Her ability to prepare meals, do basic housework or manage finances was marked as unknown.

In the AR the assessor, a Registered Nurse, found the appellant to be suffering from osteoarthritis, depression, cognitive decline, poly-fibromyalgia, poor nutrition, poor eyesight and hearing loss. The

AR indicates the appellant is independent when walking indoors and when standing. She requires periodic assistance when lifting and carrying and holding and uses a small backpack for these functions. For walking outdoors the appellant uses an assistive device (a cane) and the aforementioned backpack. The AR indicates appellant takes significantly longer than is typical to walk outdoors and when climbing stairs. This is attributed to her poor eyesight, lack of depth perception, and muscle and arthritic pain.

With respect to the appellant's Mobility and Physical Ability, the AR indicates she can walk indoors independently but uses an assistive device walking outdoors and takes significantly longer than typical to do so as well. The latter is attributed to the appellant's depth perception resulting from poor eyesight, and arthritic pain. The Assessor indicates the appellant requires periodic assistance from another person for lifting, carrying and holding as a result of her small stature and muscle wasting.

With regard to Cognitive and Emotional Functioning the AR indicates the appellant's eating problems, toileting problems and sleep disturbance have a major impact on her daily functioning. Her drowsiness is said to have a moderate impact and is attributed to bladder problems and sleep apnea. According to the AR the appellant suffers from depression, lacks motivation, has difficulty concentrating and being attentive. These and executive function and memory (described as "cognitive decline") are all rated as having a major impact on her daily functioning. The appellant is shown as suffering from post-traumatic stress resulting from being traumatized by a previous landlord which causes her periods of anxiety. The appellant does not take any medication for her depression or anxiety.

In her DLA's the AR indicates the appellant is independent with respect to toileting and feeding herself. She is considered to require periodic assistance from another person in the areas of dressing, grooming, bathing, and regulating her diet. In the areas of transfer – in /out of bed and on/off chairs the appellant takes significantly longer than is typical. Similarly with doing her laundry and basic housekeeping she takes significantly longer than is typical. This because of her poor eyesight, muscle weakness, and arthritic hands.

In the area of shopping the appellant requires periodic assistance reading labels and carrying purchases home.

The assessor found the appellant is independent in the areas of food storage, banking, budgeting paying rent and bills, and the safe handling and storage of medications. Periodic assistance is required by the appellant in the areas of meal planning, food preparation, cooking, filling and refilling prescriptions, and taking medications as directed.

The AR indicates the appellant requires periodic assistance using public transit and using transit schedules as a result of her poor eyesight and needs assistance arranging transportation. Further, she takes significantly longer to into vehicles due to her medical conditions. The assessor found the appellant requires periodic support/supervision in all areas of "Social Functioning". Further the appellant requires continued support and counseling from victim services.

The assessor wrote the appellant's osteoarthritis, poly-fibromyalgia, depression, and cognitive decline all affect her ability to perform and maintain ADL's in a normal, healthy, safe and timely manner.

The appellant, through her advocate, submitted a written submission to the Tribunal and receipt of this submission by the ministry was confirmed. This submission, in addition to responding to the ministry position at reconsideration, included a letter from the physician who prepared the PR and a letter from the assessor, both dated May 16, 2011. The panel reviewed these letters and concluded they were "oral or written testimony in support of the information and records referred to in paragraph (a)" as set out in EAA s.22 (4).

The letter from the physician stated the appellant:

- has been his patient for 6 years
- her disabilities are severe and will continue for more than 2 years, and
- her disabilities will have a direct impact on her daily living activities

Further, he reiterated the appellant is "a very suggestive person who has poor incentive to improve her state and is a follower who is unable to make appropriate decisions." The physician is of the opinion the social functioning restrictions the appellant faces are continual impairments. He concludes the appellant's many physical and mental impairments have a severe and significant impact on her DLA's.

The letter from the assessor describes the appellant's disabilities as significantly restricting her overall functioning and will be a permanent challenge for her. The collective effect of the appellant's physical and mental disabilities is described as resulting in a severe impairment that has a direct and significant impact on her DLA's.

PART F – REASONS FOR PANEL DECISION

(State the reasons for the panel decision)

The issue in this appeal is the reasonableness of the ministry's decision to deny the appellant Person with Disability Designation as she does not meet all of the legislative criteria set out in the EAPWDA s.2 and the EAPWDR s.2 in that the appellant does not have a severe impairment, is not directly and significantly restricted in her DLA's, and does not require assistance with daily living activities as a result of significant restrictions.

The applicable legislation is:

EAPWDA

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;

"health professional" repealed

"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

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- (i) an assistive device,
 - (ii) the significant help or supervision of another person, or
 - (iii) the services of an assistance animal.
- (4) The minister may rescind a designation under subsection (2).

EAPWDR

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.

The ministry agrees the appellant meets the age and duration of impairment criteria. It is the ministry's position, however, that the information provided in the Application for Persons with Disability designation and the supporting reports does not establish a severe physical impairment. The PR indicates the appellant has osteomyelitis, fibromyalgia, deafness, malnutrition, addiction and depression but provides no dates for the onset of any of these diagnoses. Further, the functional deficits are not severe in terms of overall functionality. For example the appellant can walk two to four blocks unaided, climb 5+ steps unaided, lift less than 5lbs. and her seating abilities are unknown.

The ministry notes that the AR while indicating the appellant requires periodic assistance lifting and carrying and holding does not explain the frequency and duration of that assistance. Similarly, the use of the cane is not explained nor is the frequency and duration of the appellant's use of a cane explained. Finally, the ministry has determined a backpack is not an assistive device under the legislation.

The ministry notes the PR does not report there are any communication difficulties. Further, the PR provides no narrative to support the severity of the deficits reported in 4 of the 12 areas of cognitive/emotional functioning; those being executive, memory, emotional disturbance and motivation.

The ministry finds that although the AR finds major impacts in 6 of 14 aspects of the appellant's daily cognitive/emotional functioning much of the related narrative relates to situational issues which do not support severe mental impairment. Consequently the ministry finds a severe mental impairment has not been established.

With respect to DLA's the ministry notes the physician reports no restrictions in 4 of 10 DLA's and unknown to meal preparation, basic house housework, and management of finances. The ministry acknowledges the appellant is restricted in terms of social functioning but argues the physician has not indicated if this is periodic or continuous in nature.

The assessor's report that the appellant requires periodic assistance with her DLA's is acknowledged by the ministry but the lack of information about the type of assistance she requires, and the frequency and duration of that assistance is noted. Similarly the assessor's report that the appellant takes significantly longer with some of her DLA's is noted but notes that how much longer has not been specified. Also the assessor report that the appellant requires periodic support/supervision with all social functioning is acknowledged by the ministry but the lack of information about the type, frequency and duration of support/supervision is noted.

It is the position of the appellant that she does meet the legislated criteria for designation as a Person with Disabilities. She argues in addition to the arguments made in her written submission her physician, who prepared the PR, and the assessor, who prepared the AR, have, in their follow-up letters of May 16, 2011, affirmed that she faces severe and permanent disabling challenges. Further that her physician clarifies that her social function restriction is continual and her many

physical and mental impairments have a severe and significant impact on her DLA's.

In his letter the appellant's physician confirms her disabilities are severe, will continue for more than 2 years, and have a direct impact on her DLA's. He reaffirms that as noted on page 9 of the PR that the appellant has numerous emotional and physical problems all of which restrict or have an impact on her daily life. He also states that while he did not "check the box" in the PR that explains the periodic nature of her social functioning restriction he is of the view that these are continual impairments. The panel notes that in the Daily Living Activities portion of the PR the only activity that is marked as restricted is "Social Functioning" with "Mobility outside the home" noted as maybe.

In his letter, the physician makes no reference to any change in his assessment of the appellant having no restriction in the DLA's of personal self-care, daily shopping, mobility inside the home, use of transportation, or the description of maybe concerning mobility outside the home. He does, however, reaffirm that her social functioning is restricted. He does not address any change in his assessment of the DLA's meal preparation, basic housework or management of finances as being unknown. No additional information is provided about the impact the appellant's reported sleep apnea may be having on her DLA's.

In her letter, the assessor states the appellant that depression, cognitive decline, osteoarthritis, poly-fibromyalgia, poor nutrition, eyesight and hearing will be a permanent challenge to the appellant and will significantly restrict her overall functioning. The assessor states the appellant's daily mobility is extremely limited but does not specifically address her findings in the AR that the appellant was independent when walking indoors and standing.

With respect to the appellant's DLA's, the assessor affirms she requires the assistance of a cane and a backpack. Further, that the appellant requires personal assistance from her roommate and from the staff of the house. The assessor's letter does not address if this assistance is required more than periodically as was indicated for meal planning, food preparation, cooking, filling/refilling prescriptions (the AR notes that the appellant is not currently taking any medications), using public transit, and using transit schedules and arranging transportation.

The appellant argues that in assessing her eligibility the ministry did not give any consideration to the severe impact her deafness and vision impairment have on her physical activities even though these are noted in the narrative portion of the AR. She argues her vision impairment impacts ability to climb stairs and significantly restricts her mobility when doing laundry, food preparation, housekeeping, and shopping. And, her ability to use transit is impacted by her poor vision. She concludes that the physical impairments arising from these deficits are both severe and continuous.

The panel notes that the PR made no diagnosis, prognosis, or mention of a medical condition associated with poor vision. Further while the appellant does mention having poor eyesight in in Section 3 of for her request for reconsideration she does not mention what steps, if any, have been taken to correct her vision.

The panel also notes that while the PR mentions deafness it does not address if the impairment is mild, moderate, or profound. The PR does note the appellant requires a hearing aid but offers no further comment on to what extent the problem would be addressed with such an aid.

Given that the physician has not diagnosed a visual deficit and has provided limited information regarding the appellant's hearing loss the panel finds the appellant's statement is not well supported.

The panel finds that the ministry's determination that the appellant does not have a severe physical impairment is reasonably supported by the evidence.

With respect to mental impairment the appellant argues the ministry did not give proper regard to the significant deficits identified by her physician that included executive, memory, emotional, disturbance and motivation. Further the assessor found a major impact on daily functioning in the areas of bodily functions, emotion, attention/concentration, executive memory and motivation. The appellant also argues that the ministry did not give proper regard to the assessor's finding that she suffered from depression. In their letters of 16 May 2011 both the physician and the assessor state the appellant suffers from emotional impairment which have a direct impact on her DLA's.

The panel finds the physician and the assessor both established that the appellant has significant deficits in the areas of cognitive and emotional function in the areas of executive function, memory, emotional disturbance, specifically depression, and motivation.

The panel finds that the ministry's determination that the appellant does not have a severe mental impairment is not reasonably supported by the evidence was not reasonable.

The panel finds the ministry's decision to deny the application for PWD designation was not reasonably supported by the evidence. The panel rescinds the ministry decision and the decision is overturned in favour of the appellant.