

PART C – Decision under Appeal

The decision under appeal is the ministry's reconsideration decision dated February 2, 2011 which held that the appellant did not meet 3 of the 5 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 2 years. However, the ministry was not satisfied that the appellant has a severe physical or mental impairment or 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. The ministry also found that a prescribed professional has not confirmed that, as a result of direct and significant restrictions, the appellant requires help 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

An observer from the advocacy organization assisting the appellant with her appeal was in attendance at the hearing with the consent of both parties.

The evidence before the ministry at reconsideration was comprised of a PWD application (Self-report (SR), Physician Report (PR), and Assessor Report (AR)), a March 3, 2010 consult report and April 29, 2010 consult letter from the same orthopedic surgeon, and a November 17, 2010 Supplemental Medical Opinion (SMO) from the general practitioner who completed the PR and AR.

In the SR, the appellant writes that she cannot walk far and uses a cane or crutches outdoors and is awaiting further [foot] surgery. Indoors, she is restricted to limited housework and cleaning. She is able to drive but finds shopping almost impossible by herself as concrete aggravates her situation and it is almost impossible to carry or push things. She is in pain most of the time and has pain that travels up her leg. The pain makes it hard to concentrate and stay focused. Her medical condition has hampered her on every employment opportunity. She is unable to plan much because she is awaiting surgery, which is the first surgery of probably three. She has some depression due to losing her independence.

In the PR, the appellant is diagnosed with fractured right foot 1st metatarsal/fusion of the MTP joint and osteoarthritis. Accompanying narrative is that the appellant has had pain and decreased ROM since the metatarsal fracture and has had surgery without improvement. The appellant uses a cane or crutches for walking greater than 1 block. Regarding Functional Skills, the appellant is able to walk less than 1 block unaided, climb 5+ steps unaided, lift 15 to 35 lbs, and has no limitations remaining seated. There are no difficulties with communication or significant deficits with cognitive and emotional function.

In the AR, completed by the same general practitioner, the appellant's Ability to Communicate is reported as good. Walking indoors and standing are managed independently without assistance with climbing stairs ("cannot climb 1 flight") and walking outdoors taking significantly longer with the use of an assistive device; lifting and carrying/holding require periodic assistance. Regarding DLA, the appellant is reported to independently manage all aspects of personal care, basic housekeeping, meals, medications, paying rent and bills, and transportation, as well as 3 of 5 aspects of shopping. Periodic assistance is indicated for the remaining 2 aspects of shopping, going to and from stores and carrying purchases home, with both activities taking significantly longer than typical to perform and requiring the use of an assistive device. The appellant is "able to handle light weights on own" and "can lift 35lb but cannot carry any significant distance". Assistance is provided by family and friends. The appellant uses a cane and crutches and, a wheelchair or scooter are required but not currently being used.

In the SMO, the physician provides the following information. There are no restrictions in the appellant's ability to make decisions and/or manage personal self care, activities and finances, communicate with others effectively, prepare own meals, use public or personal transportation, and manage personal medication. Respecting shopping for personal needs, the appellant "cannot walk for the time required due to pain". Respecting housework, the appellant "always cannot do more than basic housework". Assistance devices are needed to move around outdoors. The physician indicates that, in his opinion, the appellant's ability to perform DLA is directly and significantly restricted described "as above", that the restriction is continuous and that periodic assistance is required for activities requiring physical strain or ambulation 3 – 4 times per week. When asked if, in his professional opinion, the appellant has a severe physical and/or mental impairment, the physician responds "maybe".

The information provided by the orthopedic surgeon confirms the diagnoses of the general practitioner and details the potential risks and benefits of further foot surgery.

At the hearing, the appellant's advocate stated that the appellant currently takes Tylenol 3 and Alleve 1-2 times a day as well as ibuprofen as needed for pain which was confirmed by the appellant.

At the hearing, the appellant stated that she receives a \$1000.00 income tax credit available to disabled persons. Her last foot surgery was in 1995 or 1996. Her condition has worsened since the PWD application was completed, 8 months ago, and she wonders how long she will be able to drive. She can lift 15-35 lbs but cannot "pack it anywhere". She requires help with groceries, shoveling snow, and with firewood for heating her home. Shopping is usually done by her spouse or she uses an electric scooter available for customer use at one particular store. She is able to mobilize in her home without a cane as it is small and does not have any stairs. If she walks around too much, she will be laid up for a day. She can cook and wash dishes though her foot gets sore when standing to perform these tasks and "it all adds up" if she does both cooking and laundry. Tasks around the home take longer to perform and she requires rest between chores. Regarding housework, her home is not a pig sty but is not properly clean as she cannot wash walls or clean out cupboards. She can manage "thinking" tasks and her spouse handles personal finance matters as he is in town. She does not use a grab bar for bathing and it is not painful or difficult to bathe or shower.

No additional evidence was provided by the ministry at the hearing.

PART F – Reasons for Panel Decision

The issue under appeal is whether the ministry reasonably concluded that the appellant does not have a severe physical or mental impairment and that her DLA are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods, and that the appellant does not require help to perform DLA. The ministry determined that the age requirement had been met and that the appellant has an impairment that will last for 2 years.

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 applicant 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. Section 2(2)(b)(i) requires that the impairment, in the opinion of a prescribed professional, directly and significantly restricts the person's ability to perform daily living activities (DLA) either continuously or periodically for extended periods. Section 2(2)(b)(ii) states that as a result of those restrictions the person must require help to perform DLA. Section 2(3)(b) of the EAPWDA states that a person requires help in relation to a DLA if 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 preparing own meals, managing personal finances, shopping for personal needs, using public or personal transportation, performing housework to keep one's residence in acceptable sanitary condition, moving about indoors and outdoors, performing personal hygiene and self care and managing personal medication. Section 2(1)(b) adds two additional activities for a person with a severe mental impairment: making decisions about personal activities, care or finances; and, relating to, communicating or interacting with others effectively.

With respect to the existence of a severe physical impairment, the appellant's position is that a severe physical impairment is established because her physician has consistently identified limitations with mobility and that help from other people and assistive devices are required to manage daily activities. The ministry's position is that the limitations and restrictions reported for functional skills and mobility/physical ability do not establish a severe physical impairment. Additionally, the ministry points to the absence of information specifying how much longer the appellant takes to walk outdoors and climb stairs or the type, duration and extent of the periodic assistance required with lifting and carrying/holding.

The panel finds that a medical practitioner has diagnosed the appellant with fractured right foot 1st metatarsal/fusion of the MTP joint and osteoarthritis. The evidence of both the appellant and her physician is that she independently walks indoors. Respecting walking outdoors which is reported to take significantly longer, the physician has indicated both that the appellant can walk less than 1 block unaided and that an assistive device, a cane or crutches, is required for distances longer than 1 block. Additional narrative by the physician is that the appellant cannot walk for the time required to do shopping. In the SR, the appellant reported that she cannot walk far and, at the hearing, stated that if she walks around too much she will be laid up for a day. Respecting the appellant's ability to manage stairs, the evidence of the physician is that the appellant can climb 5+ steps unaided but cannot manage a flight of stairs. The appellant's evidence is that there are no stairs in her home to manage. The evidence of the physician and appellant consistently indicates that she can lift up to 35 lbs but that she can only carry light loads. Neither the physician nor the appellant report any limitations in terms of remaining seated. When directly asked if, in his professional opinion, the appellant has a severe physical and/or mental impairment, the physician responds "maybe." The panel finds that the evidence of the appellant and physician establishes that, with the exception of shopping, walking distances greater than 1 block, and heavier housekeeping tasks, all physical aspects of DLA are managed independently without any assistance. Therefore, while the evidence establishes physical functioning

limitations, most notably with walking outdoors and carrying other than light loads for any significant distance, given the evidence of both the appellant and her physician respecting her degree of independent physical functioning, the panel finds that the ministry reasonably determined that a severe physical impairment was not established under section 2(2) of the EAPWDA.

Respecting the existence of a severe mental impairment, the appellant's position is that she does not have a severe mental impairment and that, although she has some depression resulting from the loss of independence due to her physical impairment, she independently manages all cognitive tasks. The ministry's position is that a severe mental impairment has not been established as there is no diagnosis or information provided regarding a mental impairment. The panel finds that the physician has neither diagnosed a mental impairment nor indicated that the appellant has any difficulties with communication or deficits with cognitive and emotional functioning. In the absence of any diagnosed mental impairment, reported deficits with cognitive and emotional function, or impact on daily functioning due to a mental impairment, the panel finds that the ministry reasonably determined that a severe mental impairment was not established under section 2(2) of the EAPWDA.

Regarding the degree of restriction with DLA, the appellant argues that a direct and significant restriction in her ability to perform DLA is established by the evidence that she takes longer to perform and requires the assistance of another person and use of an assistive device for shopping, moving about outdoors, and some housekeeping tasks. The ministry argues that the physician's evidence in the PWD application is that, although two aspects of shopping take significantly longer and require periodic assistance, the appellant independently manages all areas of daily living, including personal care, basic housekeeping, meals, and transportation. The ministry further contends that the physician has not explained how much longer or the type and frequency of the assistance required for the two aspects of shopping. The ministry also argues that the narrative in the SMO, which includes the physician responding "maybe" when asked if the appellant has a severe physical or mental impairment, does not establish a direct and significant restriction with DLA.

The panel finds that the evidence of the appellant's physician, a prescribed professional, in the PWD application is that the appellant requires an assistive device and is limited in terms of the distance and speed with which she moves about outdoors and that the appellant takes longer, uses an assistive device and requires periodic assistance with 2 of 5 aspects of shopping (going to and from stores, carrying purchases home). Additional narrative is that the appellant can manage light weights independently. No other restrictions with DLA are noted. In the SMO, the same physician confirms the need for an assistive device outdoors, writes that the appellant cannot walk for the time required to shop for personal needs, and is restricted in her ability to perform housework with narrative that the appellant cannot do more than basic housework. The appellant's restrictions are identified as continuous with the need for assistance described as "periodic assistance with activities requiring physical strain or ambulation" 3-4 times per week. The panel finds that, while the evidence establishes continuous restrictions with moving about outdoors and with 2 aspects of shopping, the evidence also establishes that the appellant independently manages, without any restriction or the use of an assistive device or the assistance of another person, personal care, meals, paying rent and bills, medications and transportation. Additionally, while a continuous restriction with basic housekeeping is identified in the SMO, the accompanying narrative indicates that the appellant can manage basic housework suggesting that the restriction relates to activities more strenuous than those described as basic housework. Further, the accompanying narrative respecting the appellant's ability to carry purchases is that the appellant can manage light weights independently suggesting that the need for periodic assistance with this task relates to heavier weights. Based on the above evidence, and the degree of independence described therein, the panel finds that the ministry reasonably determined that a direct and significant restriction in the appellant's ability to perform DLA, either continuously or periodically for extended periods, in the opinion of a prescribed professional, was not established under 2(2)(b)(i) of the EAPWDA.

Regarding the need for help with DLA, the panel finds that the ministry reasonably determined that as it has not been established that DLA are directly and significantly restricted, it cannot be determined that help is required under section 2(2)(b)(ii) of the EAPWDA.

The panel finds that the ministry's decision was reasonably supported by the evidence and confirms the decision.