

PART C – Decision under Appeal

The decision under appeal is the Ministry's reconsideration decision dated November 23, 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 her daily living activities (DLAs) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods. The Ministry also found that as the Appellant is not significantly restricted from DLAs, it could not be determined that she requires the significant help or supervision of another person, although the required use of a splint for her left hand was noted.

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 was not in attendance at the hearing. After confirming that the Ministry was properly notified, the hearing proceeded pursuant to Section 86(b) of the Employment and Assistance Regulation.

The evidence before the ministry at the time of the Reconsideration Decision included:

The Physician's report, prepared by Dr C, which noted:

- Depression and anxiety,
- Nerve damage in the Appellant's left arm,
- Chronic liver failure, and
- Severe mood disorder.
- Dr C specified that the Appellant "suffers from a severe mood disorder that causes impairment despite medication. She also has nerve damage in her L arm that impairs her ability to use her L hand. Her chronic liver failure is stable."
- None of the medication taken by the Appellant interfered with her ability to perform DLAs.
- The nerve damage in her left hand required the use of a splint.
- Dr C stated both conditions were permanent. While he doesn't specify which conditions the rest of the report focuses on her mood disorder and left arm nerve damage. The Panel interprets his remarks to apply to these conditions

With respect to her functional skills, Dr C found the Appellant could walk 4+ blocks unaided, climb 5+ steps, had no limitations in lifting and had no difficulties communicating in English.

Dr C also found that her mood disorder caused significant deficits in the Appellant's cognitive and emotional functioning, in terms of her:

- Executive functioning
- Memory
- Emotional disturbance
- Attention or sustained concentration.
- The remaining functioning was normal: consciousness, language, perceptual psychomotor, psychotic symptoms, motivation, impulse control, and motor activity.

In his notes, Dr C opined that the Appellant's "severe mood disorder impacts her ability to work and function. Her L arm nerve damage affects the jobs that she would be able to do. Her chronic liver disease causes fatigue."

He stated he had known her for three years as her patient and seen her 11 or more times.

Acting as the Assessor, Dr C found that the Appellant was unable to use her left hand to carry or hold objects and her bodily functions, emotions, attention/concentration, executive functioning, memory, lack of motivation had a moderate to major impact on her daily functioning. In other categories: communicating, and mobility and physical ability she was deemed independent, although Dr C notes she was "unable to use L hand to carry or hold objects." Consciousness, impulse control, insight and judgement, motor activity, language and psychotic symptoms had minimal to no impact on her functioning.

The Appellant needed periodic assistance with laundry, housekeeping, going to and from stores, one of four aspects of food preparation, as well, she needed continuous assistance with carrying purchases home due to

her inability to use her left hand. However, with all aspects of personal care and three of five shopping activities she is independent. Similarly, she is independent in three of four activities in meal planning, all aspects of paying rent and bills, medications and transportation.

Emotionally, she requires periodic support/supervision with her ability to develop and maintain relationships, interacting appropriately with others, dealing with unexpected demands or secure assistance from others. She has marginal functioning with her immediate social network and very disrupted functioning when dealing with her extended social network.

Dr C found the Appellant able to communicate but affected by her "low mood, anxiety, insomnia, chronic pain, decreased memory + concentration, + strength and [range of motion] + sensation L arm, wrist and hand."

However, she is also independent in terms of making appropriate social decisions.

The Appellant provided a self report which discussed her emotional and physical history. Her emotional state was affected by her divorce from her husband of 20 years in 2001 and the subsequent legal proceedings, the caring of the sons of her new husband, caring for her elderly father-in-law, carpal tunnel surgery, a back injury, the death of her father-in-law, the sale and purchase of real estate, the financial difficulties caused by her husband's new business, a left leg injury and nerve damage in her left arm.

At the hearing, the Appellant and her representative (her husband) discussed their daily routine, which requires the Appellant's husband to do many of the household duties including cleaning, food preparation, opening medicine bottles, helping the Appellant shower, and splitting and carrying firewood. She also discussed her inability to perform DLAs due to her left arm injury and her mood disorder, which is exacerbated by her frustration at not being able to use her left hand.

Under section 22(4)(b) of the Act, the Panel is empowered to accept new evidence in support of information and records which were before the Ministry at the time of its decision. The Ministry was not present at the hearing and did not challenge the Appellant's introduction or the content of the evidence. The Panel accepts it.

PART F – Reasons for Panel Decision

This is a review of the Ministry's reconsideration decision dated November 23, 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 Panel must determine whether the Ministry's decision was reasonably supported by the evidence, or a reasonable application of the applicable enactment in the circumstances of the person appealing the decision.

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 (DLAs) either continuously or periodically for extended periods. Section 2(2)(b)(ii) states that as a result of those restrictions, in the opinion of the prescribed professional, the person must require help to perform DLAs. 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 DLAs 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 facilities,
- 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.

An "assistive device" is defined in the EAPWDA as "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."

Appellant's position

The Appellant, through her representative, argued that her physical and mental impairments are severe and that she cannot perform certain DLAs. As a result of the nerve damage in her left arm she is unable to prepare meals, perform housework, perform personal hygiene and self care or manage her personal medication. Due to her depression and anxiety she is unable to relate to, communicate or interact with others effectively.

Ministry's position

The Ministry's position is contained in its reconsideration decision. It contends that, while the Appellant meets the age requirement and that her condition is likely to last for two or more years, the Appellant's ailments are not severe in that her Assessment Report (AR) showed few limitations and that she was not significantly restricted in her DLAs.

There is no dispute that the Appellant is over 18 years old nor that her impairment is likely to last for at least two years.

The Act requires the physical or mental impairment to be severe. Evidence of severity can be drawn from the Appellant's ability to perform DLAs as well as medical evidence of the impairment itself.

In the Physician's Report (PR), Dr C diagnosed depression and anxiety, nerve damage in the Appellant's left arm and chronic liver failure. Dr C elaborated on these diagnoses, opining that the Appellant "suffers from a severe mood disorder that causes impairment despite medication. She also has nerve damage in her L arm that impairs her ability to use her L hand. Her chronic liver failure is stable."

Dr C noted that the Appellant requires prostheses or aids in the form of splints for the fingers in her left hand and that her conditions were likely permanent.

With respect to the Appellant's functional skills Dr C did not find her limited in walking, climbing, lifting or remaining seated. However, Dr C found significant deficits with the Appellant's executive skills, memory and ability to concentrate, as well as her being emotionally disturbed. Dr C opined that "Her mood disorder affects her memory, executive functioning and attention." Dr C has seen the Appellant as a patient for three years; 11 or more times in the previous 12 months.

Acting in the capacity of Assessor, Dr C found the Appellant able to communicate but affected by her "low mood, anxiety, insomnia, chronic pain, decreased memory + concentration, + strength and [range of motion] + sensation L arm, wrist and hand."

Under the category of Mobility and Physical Ability, Dr C checked "independent" for walking, climbing, standing, lifting and carrying and holding, but then stated that the Appellant was unable to use her left hand to carry or hold objects.

Regarding cognitive and emotional functioning, Dr C found the Appellant's emotional condition had a major impact on her daily functioning. Namely, bodily functions, poor attention/concentration, executive skills and memory and a lack of motivation were moderate impacts on her daily functioning.

With respect to specific DLAs, Dr C stated that the Appellant needed periodic assistance for laundry, food preparation, basic housekeeping and going to and from stores. She needs continuous assistance for carrying purchases home. Again, it is the inability for the Appellant to use her left hand, as well as fatigue which inhibited her functioning properly.

With social functioning, Dr C found the Appellant required periodic support/supervision with her ability to develop and maintain relationships, interact appropriately with others deal with unexpected demands and her ability to secure assistance from others. She also suffered very disrupted functioning in terms of social isolation. Dr C noted that the Appellant was affected by her mood disorder and severely isolates herself.

The Appellant's family (husband) provides help with her DLAs and the Appellant requires the use of a splint on her left hand as an assistive device.

The Appellant provided a self report which discussed her emotional and physical history. Her emotional state was affected by her divorce from her husband in 2001 and the subsequent legal proceedings, the caring of the sons of her new husband, caring for her elderly father-in-law, carpal tunnel surgery, a back injury, the death of

her father-in-law, the sale or purchase of real estate, the financial difficulties caused by her husband's new business, a left leg injury and nerve damage in her left arm.

At the hearing, the Appellant stated that her inability to use her left arm means that she cannot clean properly, prepare food, do dishes, chop and carry wood for heating or open pill bottles. Her husband is prevented from working full time as he must help bring in wood, do chores, prepare food, and do dishes. The Appellant helps where she can but is only able to sweep the floor and keep the fire going. Because of the nerve damage in her left hand, she must wear a splint.

In determining whether the Ministry's decision was reasonable, the Panel notes that Dr C diagnosed the Appellant with "a severe mood disorder," and the inability to use her left arm due to nerve damage. The evidence shows severe physical impairment from the nerve damage and severe mental impairment due to the Appellant's anxiety and mood disorder. The Panel finds that the Ministry was not reasonable in finding these were not severe.

The next test is whether, in the opinion of a prescribed professional, the impairments directly and significantly restrict DLAs continuously or periodically for extended periods. As a prescribed professional assessing the Appellant, Dr C found that the Appellant needs periodic or continuous assistance with laundry, housekeeping, food preparation, going to and from stores and carrying purchases home.

That being said, Dr C found her independent in all aspects of

- communication,
- mobility and physical ability,
- personal care and
- three of five shopping activities.
- meals
- paying rent and bills
- medications and
- transportation.

Because of her mood disorder she required periodic support/supervision with relationships and interacting with others, as well as dealing with unexpected demands.

The DLAs set out in the Regulations are as follows:

Section 2(1)(a)

- (i) prepare own meals
- (ii) manage personal finances
- (iii) shop for personal needs
- (iv) use public or personal transportation
- (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

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

The Panel notes that the Appellant's evidence demonstrates more severe restrictions in terms of performing

DLAs, particularly in terms of cleaning, food preparation, opening medicine bottles, showering, and splitting and carrying firewood. As well, the Appellant stated her mood disorder is exacerbated by her frustration at not being able to use her left hand. However, the Act requires the DLA restrictions to be determined by a prescribed professional - Dr C in this case.

For a person to qualify for PWD status, s/he must have direct and significant restrictions in at least two DLA categories either continuously or periodically for extended periods. The Ministry argued that her DLAs were not restricted in a way that met the legislative criteria. The Panel notes that despite her conditions, Dr C found her independent or mostly independent in all DLAs with the exception of social functioning. There, her mood disorder requires periodic support/supervision. With this level of independence, the Panel cannot find the Ministry was unreasonable in finding that she is not directly and significantly restricted in two or more DLAs either continuously or periodically for extended periods. As mentioned, the Appellant's self-report and her evidence at the hearing is at odds with this conclusion but the legislation requires the restrictions to be assessed by a prescribed professional.

The final test is contained in section 2(2)(b)(ii) of the Act, which states that as a result of those restrictions, in the opinion of the prescribed professional, the person must require help to perform DLAs. Section 2(3)(b) of the EAPWDA expands upon this section, stating 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. The Ministry also reasonably concluded that this could not be determined given that her DLAs were not found to be significantly restricted.

Accordingly the Panel finds that the reconsideration decision was reasonably supported by the evidence and the decision is confirmed.