

PART C – Decision under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Social Innovation (the ministry) dated 16 December 2015 that denied the appellant designation as a person with disabilities (PWD). The ministry determined that the appellant did not meet all of the required criteria for PWD designation set out in the *Employment and Assistance for Persons with Disabilities Act*, section 2. Specifically, the ministry determined that the information provided did not establish that the appellant has a severe mental or physical impairment that in the opinion of a prescribed professional

(i) directly and significantly restricts her ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and,

(ii) as a result of those restrictions, she requires help to perform those activities.

The ministry determined that the appellant satisfied the other 2 criteria: she has reached 18 years of age and her impairment in the opinion of a medical practitioner is likely to continue for at least 2 years.

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 appellant did not attend the hearing. After confirming that the appellant was notified of the hearing, the hearing proceeded in accordance with section 86(b) of the Employment and Assistance Regulation.

The evidence before the ministry at reconsideration consisted of the following:

1. The appellant's PWD Designation Application dated 09 July 2015. The Application contained:
 - A Self Report (SR) completed by the appellant.
 - A Physician Report (PR) dated 07 August, completed by the appellant's general practitioner (GP) who has known the appellant since January 2009 and seen her 2-10 times over the past year
 - An Assessor Report (AR) completed by by the same GP.
 - A neurosurgeon's consultation Report and 4 radiology reports (see below).
2. The appellant's Request for Reconsideration, dated 09 December 2015, to which was attached a submission from an advocate and 2 radiology reports (see below).

In the PR, the GP lists the following diagnosis related to the appellant's impairment: degenerative disc disease (onset Feb. 2012), arthritis (onset Feb 2012), neurological disorder – spinal stenosis (onset Feb 2012), and mood disorder and anxiety disorder (both with onset Nov 2012).

The panel will first summarize the evidence from the PR, the AR and the neurosurgeon's consultation report relating to the appellant's impairments as it relates to the PWD criteria at issue.

Severity/health history

Physical impairment

PR:

Under Health history, the GP writes: "This patient was working in [place of work] in March 2012. She developed paresthesias (R) extremity. She did see [a physician] who recommended a change in her work environment. This did not help (spinal stenosis). She has OA neck."

Under Additional comments, the GP refers to copies of consultations and reports attached

As to functional skills, the GP reports that the appellant can walk less than 1 block unaided, climb 2-5 steps unaided, can lift 5 to 15 lbs. and can remain seated for less than an hour.

The GP reports that the appellant's height and weight are relevant to her impairment: ~160-170 cm and ~ 85 kg.

The GP indicates that the appellant has been prescribed medication that interferes with her ability to perform DLA, explaining that she is taking an anticonvulsant medication that causes drowsiness and is required for her nerve pain. It also causes weight gain. The GP reports that the anticipated duration of the medication is "indefinite."

Neurosurgeon's consultation report:

The neurosurgeon provided the following assessment:

"Despite the mild changes on nerve conduction tests I don't think that this woman is at all likely to benefit from carpal tunnel decompression. I would recommend that she should be seen by one of the hand surgeons regarding her wrist pain."

Mental impairment

PR:

Under Health history, the GP reports that in November 2012 the appellant started becoming depressed and anxious.

The GP assesses the appellant as having no difficulties with communications.

The GP indicates that the appellant has significant deficits with cognitive and emotional function in the areas of emotional disturbance, motivation and attention or sustained concentration, commenting "Secondary to depression /deconditioning."

Ability to perform DLA

AR:

The GP reports that the appellant lives with family or friends.

The GP states that the appellant's mental or physical impairments that impact her ability to manage DLA are arthritis, paresthesias, depression and anxiety.

The GP assesses the appellant's ability to communicate as good for speaking, reading and hearing and poor for writing.

Regarding mobility and physical ability, the physiatrist assesses the appellant as taking significantly longer than typical for walking indoors, walking outdoors and climbing stairs, independent for standing, requiring continuous assistance from another person for lifting and requiring periodic assistance from another person for carrying and holding. The GP comments: "ongoing neck pain, persisting paresthesias."

The GP assesses the assistance required for managing DLA as follows:

- Personal care – Independent for dressing, toileting, feeding self regulating diet and transfers on/off chair; periodic assistance from another person for grooming, bathing, and transfers in/out of bed.
- Basic housekeeping – periodic assistance from another person for laundry and basic housekeeping.
- Shopping – independent for reading prices and labels, making appropriate choices and paying for purchases; periodic assistance from another person for going to and from stores

and carrying purchases home.

- Meals – independent for meal planning and safe storage of food; periodic assistance from another person for food preparation and cooking.
- Pay rent and bills – independent in all aspects.
- Medications – independent in all aspects.
- Transportation – periodic assistance from another person for getting in and out of a vehicle and using transit schedules and arranging transportation; continuous assistance from another person or unable for using public transport..

The GP comments: “Not able to do ADL without help from family” and “Help from her family”

Regarding cognitive and emotional functioning, the psychiatrist indicates that the appellant's mental impairment restricts or impacts her functioning as follows:

- Major impact – none.
- Moderate impact – consciousness, emotion, attention/concentration and memory.
- Minimal impact – executive, motivation, motor activity.
- No impact – bodily functions, impulse control, insight and judgment, language, psychotic symptoms, other neuropsychological problems, and other emotional or mental problems

The GP comments: “ Became depressed & anxious following medical issues which date back to 2012.”

With respect to social functioning, the psychiatrist assesses the appellant as independent for making appropriate social decisions, developing and maintaining relationships, interacting appropriately with others, dealing appropriately with unexpected demands and securing assistance from others.

The GP assesses the impact of the appellant's impairment on her immediate social networks as good functioning and on her extended social network as marginal functioning, commenting “Doesn't socialize as much as before.”

Help provided/required

PR:

The GP indicates that the appellant requires no prostheses or aids for her impairment.

AR:

The GP reports that help required for the appellant' DLA is provided by family: “Family helps her.”

The GP marks “N/A” regarding the appellant's use of or need for assistive devices.

The GP marks “N/A” regarding support/supervision for social functioning.

Radiology reports

- 08 February 2012: Radiology Report – Impression: mild degenerative disc disease and foraminal narrowing at C5/6 and C6/7.
- 27 March 2012: EMG Report – Assessment: there is no evidence of right C5, C6 or C7 cervical radiculopathy.

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- 24 May 2012 Radiology Report – Interpretation: degenerative changes of the cervical spine without disc herniation but causing severe spinal canal and right-sided neural foraminal narrowing.
 - 08 January 2014: Diagnostic Imaging Report – Findings: there is no knee effusion. There is moderate change of patellofemoral joint with evidence of chondromatosis. No chondrocalcinosis or loose bodies.
 - 06 October 2015: Radiology Report – Impression: 1) moderate to advanced cervical spondylosis, most severely affecting the C5-6 and C6-7 levels, resulting in severe spinal stenosis at both levels . Mild spinal stenosis is seen at C4-5. multilevel foraminal narrowing, most severely affecting the C5-C7 level. 2) mild lumbar spondylosis but no significant spinal stenosis or foraminal narrowing identified.
 - 14 October 2015: Diagnostic Imaging Report– Findings: no displaced or healing fracture evident. No sacral coccygeal deformity to indicate a prior fracture. There is mild sacroiliac joint osteoarthritis.

Self report

In her SR, the appellant writes:

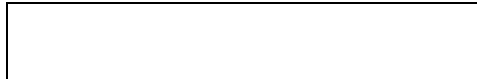
“I have been diagnosed with severe osteoarthritis, degenerative disc disease & spinal stenosis. I also suffer from both anxiety and depression. As a result I must rely heavily on my children to assist me. This diagnosis has left me with nerve damage in my neck (C6). which makes me lose feeling in my arms and hands. More specifically my right hand as I am right handed. It makes it very difficult to hold things (like a pen) and write (as you can tell). I tend to drop things a lot

I do not grocery shop alone anymore. I have to take my kids with me as I cannot lift things and I have lots of difficulty holding onto bags or dropping them. There are days when my daughter has to help brush my hair because I cannot hold the brush.

The osteoarthritis pain is severe. Walking or standing or sitting for long periods (over 30 min) is very painful. Some days are good but most days I have lots of trouble getting out of bed and going up the stairs. Again I must have help from my kids. I am able to do housework but it takes me a very long time to finish because I have to continue to sit down. I am in pain every day. There is no such thing as being pain-free for me. My medication makes me very drowsy so I have to make sure I have a plan in place for errands so I can get them done as quick as possible because I can't drive after taking meds. The only type of relief I am able to get is by laying on my back with arms above my head and I don't move. I really try every day to push myself to get stuff done because it's not fun staying in bed all day long or on the couch. My doctor made the suggestion that I apply for disability after being told from the neurosurgeon that my diagnosis does not get better... it gets worse. Every day is different & difficult. I am thankful that my kids are here and are a great help. Otherwise it would be hard for me to manage.”

Request for Reconsideration

The submission by the appellant's advocate provided no new information and went to argument (see Part F, Reasons for Panel Decision, below)



Notice of Appeal

The appellant's Notice of Appeal is dated 23 December 2015. Under Reasons, she writes:
“Since first applying my circumstances have changed and have worsened severely. I need assistance every day from my children and am in severe pain. My condition will only get most of the time.”

The hearing

The ministry stood by its position at reconsideration.

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PART F – Reasons for Panel Decision

The issue in this appeal is whether the ministry decision that determined that the appellant did not meet two of the five statutory requirements of Section 2 of the *EAPWDA* for designation as a person with disabilities (PWD) is reasonably supported by the evidence or is a reasonable application of the legislation in the circumstances of the appellant. The ministry found that the appellant met the age requirement and that, in the opinion of a medical practitioner, her impairment is likely to continue for at least two years. However, the ministry was not satisfied that the evidence establishes that:

- the appellant has a severe physical or mental impairment;
- the appellant's DLA are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and,
- as a result of these restrictions, 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 following section of the *EAPWDA* applies to this appeal:

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;

"**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 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

(i) an assistive device,

(ii) the significant help or supervision of another person, or

(iii) the services of an assistance animal.

The following section of the *EAPWDR* applies to this appeal:

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
- (a) authorized under an enactment to practise the profession of
 - (i) medical practitioner,
 - (ii) registered psychologist,
 - (iii) registered nurse or registered psychiatric nurse,
 - (iv) occupational therapist,
 - (v) physical therapist,
 - (vi) social worker,
 - (vii) chiropractor, or
 - (viii) nurse practitioner, or
 - (b) acting in the course of the person's employment as a school psychologist by
 - (i) an authority, as that term is defined in section 1 (1) of the *Independent School Act*, or
 - (ii) a board or a francophone education authority, as those terms are defined in section 1 (1) of the *School Act*,
- if qualifications in psychology are a condition of such employment.

Severity of Impairment

Physical Impairment

The appellant's position, as explained in her advocate's submission at reconsideration, is that the application must be read as a whole. Taking into account all the evidence provided, the ministry was unreasonable in determining that a severe physical impairment had not been established.

The position of the ministry, as set out in the reconsideration decision, is that it is not satisfied that the information provided establishes a severe impairment. The ministry acknowledged that the appellant is currently experiencing limitations with mobility/physical ability due to her medical conditions. However, based on the assessments provided by the GP and the documents included with her PWD application/reconsideration and her Self Report, the Ministry found that the appellant has a moderate as opposed to a severe impairment of physical functioning.

Panel decision

A diagnosis of a serious medical condition does not in itself determine PWD eligibility. Under the legislation, eligibility for PWD hinges on an "impairment" and its severity. An "impairment" is more than a diagnosed medical condition. An impairment is a medical condition that results in restrictions to a person's ability to function independently, appropriately, effectively or for a reasonable duration.

To assess the severity of impairment one must consider the nature of the impairment and the extent of its impact on daily functioning, as evidenced by functional skill limitations and the degree to which the ability to perform DLA is restricted. The legislation makes it clear that the determination of severity is at the discretion of the minister, taking into account all of the evidence. However, the legislation is also clear that the fundamental basis for the analysis is the evidence from a medical practitioner and a prescribed professional – in this case, the appellant’s GP.

The legislation requires that for PWD designation, the minister must be “satisfied” that the person has a severe mental or physical impairment. For the minister to be “satisfied” that the person’s impairment is severe, the panel considers it reasonable for the ministry to expect that the information provided presents a clear and complete picture of the nature and extent of the impacts of the person's medical conditions on daily functioning.

In the PR, the GP diagnosed the appellant with degenerative disc disease, arthritis and neurological disorder – spinal stenosis. Under health history, where the medical practitioner is asked to describe the severity of the medical conditions relevant to a person's impairment, the GP wrote that in March 2012 the appellant developed parathesias in her right extremity and saw another physician who recommended a change in her work environment; this however did not help. As the ministry noted in the reconsideration decision, employability is not a criterion for PWD designation. The GP also wrote that the appellant has osteoarthritis in her neck. The GP also referred to the consultation and radiology reports submitted with the application. As the ministry pointed out in the reconsideration decision, these reports do not speak to the appellant’s physical or mental functioning, resulting restrictions to her ability to perform DLA or the need for help with DLA. In answer to the question as to whether the appellant has been prescribed any medication that interferes with her ability to perform DLA, the GP indicated that the appellant has been prescribed an anticonvulsant medication that causes drowsiness and causes weight gain.

In terms of functional skills, the GP reports that the appellant is able to walk less than 1 block unaided, climb 2-5 steps unaided and lift 5 to 15 lbs. and can remain seated for less than one hour. In the AR the GP assesses the appellant is taking significantly longer than typical (without indicating how much longer) for walking indoors, walking outdoors and climbing stairs, and requiring continuous assistance from another person for lifting and periodic assistance for carrying and holding, noting “Ongoing neck pain and persisting parathesias.” However, as the ministry noted in the reconsideration decision, in the PR and AR the GP indicated that the appellant does not require any prosthesis or aids to compensate for her impairment.

In her submission at reconsideration, the appellant's advocate stressed the obligation of the ministry to read the application as a whole, including the SR, referring to these statements: “I do not grocery shop alone anymore. I have to take my kids with me as I cannot lift things and I have lots of difficulty holding onto bags or dropping them. There are days when my daughter has to help brush my hair because I cannot hold the brush ” and “Some days are good but most days I have lots of trouble getting out of bed and going up the stairs. Again I must have help from my kids.”

The advocate also points to the most recent radiology report dated 06 October 2015, which found moderate to advanced cervical spondylosis, most severely affecting the C5-6 and C6-7 levels, resulting in severe spinal stenosis at both levels. The advocate refers to a medical article by a physician [no citation provided] which states: “However, severe foraminal stenosis can greatly narrow

these new passageways, thereby giving the nerves so little space that they can become stressed and pinched. This pressure on spinal nerves can mean that normal daily activities, such as work, driving, recreation or even basic physical activity can be acutely hindered.” The panel notes that this quote is expressed in terms of how something **can** happen, and is of only of general application, not specific to the appellant.

In terms of how the appellants diagnosed medical conditions that restrict her ability to perform DLA, in the AR the GP comments: “Not able to do ADL on own. Help from family.” The panel understands that “Activities of Daily Living” (ADL) is a medical term referring to routine activities that people tend to do everyday without needing assistance; there are six basic ADL: eating, bathing, dressing, toileting, transferring (walking) and continence. These ADL are different from the prescribed DLA in the EAPWD legislation. While the GP states that the appellant is unable to do ADL on her own, this is contradicted by the GP’s assessments that she is independent for dressing, toileting and eating (feeding self).

Regarding the other DLA requiring physical effort, the GP has assessed the appellant as requiring periodic assistance from another person in several aspects of the DLA basic housekeeping, shopping, meals and transportation, though the frequency and duration of such assistance is not explained, and requiring continuous assistance from another person or unable for using public transit. (See below under “Direct and significant restrictions in the ability to perform DLA.”)

The panel considers it unreasonable to expect the ministry to deduce the severity of the impact on physical functioning resulting from a list of diagnosed medical conditions. The narrative provided by the GP does not provide an understanding of how and to what extent the physiological abnormalities caused by her medical conditions restrict her physical functioning. In particular, and as noted by the ministry, there is no explanation as to why, given the assessment that the appellant is able to walk less than 1 block unaided, that she does not require any aids or assistance from another person to compensate for her impaired mobility. Based on these considerations, the panel finds the ministry was reasonable in determining that a severe physical impairment had not been established

Mental impairment

The appellant's position is that, as she has been diagnosed with mood disorder and anxiety disorder and considering the suffering resulting from her physical conditions, the evidence clearly shows that she has a severe mental impairment.

The position of the ministry is that the information provided does not establish a severe impairment of physical function.

Panel decision

The GP diagnosed the appellant with mood disorder and anxiety disorder, with significant deficits with cognitive and emotional function in the areas of emotional disturbance, motivation and attention or sustained concentration “secondary to depression/deconditioning.”

In terms of impacts, the GP indicated in the PR that the appellant has no difficulties with communication. In the AR, the GP assesses the appellant's ability with writing as poor, which the

appellant in her SR attributes to her parathesias, a physical condition.

In the AR, the GP assesses no major impacts of the appellant's mental impairment on daily functioning, moderate impacts in the area of consciousness, emotion, attention/concentration and memory, and minimal impacts in the areas of executive, motivation and motor activity. In terms of impacts on DLA, the GP assessed the appellant as independent for making appropriate social decisions, developing and maintaining relationships, interacting appropriately with others, dealing appropriately with unexpected commands, and securing assistance from others. The GP assessed the appellant's social functioning as good with her immediate social network and marginal for her extended social networks, commenting "Doesn't socialize as much as before." The GP indicates "N/A" regarding any support/supervision required which would help to maintain her in the community.

While the appellant writes in her SR and she also suffers from both anxiety and depression, she provides no other description as to how mental health conditions affect daily life.

Given that the GP has assessed no major impacts of the appellant's mental health conditions on her daily functioning and has not identified any support/supervision required, the panel finds that the ministry is reasonable in determining that a severe mental health condition had not been established.

Direct and significant restrictions in the ability to perform DLA

The appellant's position is that, considering her mobility limitations, the number of activities for which she is assessed as requiring periodic assistance from another person, and her social functioning restrictions, it was unreasonable for the ministry to determine that this criterion had not been met.

The position of the ministry is that based on the information provided, there is not enough evidence to confirm that the appellant has severe impairment that significantly restricts her ability to perform her DLA continuously periodically for extended periods.

Panel decision

The panel notes that, according to the legislation, the direct and significant restriction in the ability to perform DLA must be a result of a severe impairment, a criterion that has not been established in this appeal. The legislation – section 2(2)(b)(i) of the *EAPWDA* – requires the minister to assess direct and significant restrictions of DLA in consideration of the opinion of a prescribed professional, in this case the appellant's GP. This doesn't mean that other evidence shouldn't be factored in as required to provide clarification of the professional evidence, but the legislative language makes it clear that the prescribed professional's evidence is fundamental to the ministry's determination as to whether it is "satisfied."

In terms of the DLA applicable to a person with a severe mental or physical impairment, for the DLA moving about indoors and outdoors, in the PR the GP has assessed the appellant as being able to walk less than 1 block unaided and able to climb 2-5 stairs. In the AR, the GP assessed the appellant as taking significantly longer than typical for walking indoors and outdoors. However, as explained above under "Severity of physical impairment," it is difficult to assess the significance of these restrictions as the GP did not explain how much longer than typical and indicated that no prostheses

or aids have been prescribed or were required to compensate this level of restriction, while providing no description of how the physiological abnormalities associated with her medical conditions results in such restrictions.

In the AR, the GP assesses the appellant as requiring periodic assistance from another person for the following aspects of these DLA:

- Personal care – grooming, bathing, transfers in/outbed.
- Basic housekeeping – laundry, basic housekeeping.
- Shopping – going to and from stores, carrying purchases home.
- Meals – food preparation, cooking.
- Transportation – getting in and out of the vehicle and using transit schedules and arranging transportation.

In making these assessments, the GP provided no information as to the frequency and duration of periodic assistance required. As the ministry noted in the reconsideration decision, while the legislation does not specifically require the frequency and duration of restrictions to be explained, the ministry finds such information valuable in determining the significance of the restrictions. The panel notes that information providing some detail as to what specific tasks within each aspect requiring periodic assistance would have been helpful in assessing how significantly the DLA is restricted. None was provided, with the “Explain/Describe” column left blank. Further, in the AR, a footnote explains that periodic assistance refers to the need for significant help for an activity some of the time, as would be the case where a person required help due to the episodic nature of the impairment. The panel notes that the GP has provided no information describing the episodic nature of the appellant’s impairments.

The GP assesses the appellant as requiring continuous assistance from another person or unable for using public transit. Again, no explanation is provided, making it unclear as to whether this restriction is a result of the appellant's physical impairments or mental health conditions

With respect to the DLA applicable to the person with a mental impairment, as discussed above under “Severity of mental impairment,” the GP assessed the appellant as independent in all listed aspects of the 2 DLA of making decisions about personal activities, care or finances and relating to, communicating or interacting with others effectively, albeit noting marginal functioning with extended social networks as the appellant “Doesn’t socialize as much as before.” The GP further indicates “N/A” regarding support/supervision required to maintain her in the community.

Based on the foregoing, the panel finds that the ministry reasonably determined that there is not enough evidence to confirm that the appellant has a severe impairment that significantly restricts her ability to perform DLA continuously or periodically for extended periods.

Help with DLA

The appellant argues that she relies on the ongoing help from her family to manage on a daily basis.

The ministry’s position is that because it has not been established that DLA are significantly restricted, it cannot be determined that help is required.

Panel Decision

Section 2(2)(b)(ii) of the EAPWDA requires that, as a result of being directly and significantly restricted in the ability to perform DLA either continuously or periodically for extended periods, a person requires help to perform those activities. That is, the establishment of direct and significant restrictions under section 2(2)(b)(i) is a precondition of meeting the need for help criterion. Help is defined in subsection (3) as the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform a DLA.

The evidence of the prescribed professional is that the appellant does not currently require the use of an assistive device and that she needs help from her family. The appellant in her SR describes how she takes her children with her grocery shopping as she cannot lift things and there are days when her daughter has to help brush her hair because she cannot hold the brush.

As the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established, the panel finds that the ministry reasonably concluded that it cannot be determined that the appellant requires help to perform DLA.

Conclusion

Having reviewed and considered all of the evidence and relevant legislation, the panel finds that the ministry's reconsideration decision determining that the appellant was not eligible for PWD designation was reasonably supported by the evidence. The panel therefore confirms the ministry's decision.