

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (ministry) reconsideration decision dated September 27, 2016 in which the ministry found the appellant was not eligible for designation as a Person With Disabilities (PWD) because she did not meet all of the criteria in Section 2(2) of the *Employment and Assistance for Persons with Disabilities Act* (EAPWDA). The ministry was satisfied that the appellant has reached 18 years of age and that her impairment that is likely to continue for at least 2 years; however, based on the information provided in the PWD Designation Application (PWD application) and Request for Reconsideration, the minister was not satisfied that the following criteria were met:

- The appellant has a severe mental or physical impairment;
- The impairment, in the opinion of a prescribed professional, directly and significantly restricts the appellant's ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and
- as a result of these restrictions, the appellant requires help to perform DLA through an assistive device, the significant help or supervision of another person, or the services of an assistance animal.

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 evidence before the ministry at reconsideration consisted of the following:

1. A PWD application comprised of:

- The *Applicant Information and Self-report* (self-report) signed by the appellant on January 15, 2016;
- A *Physician Report* (PR) completed by a general practitioner (Dr. F.) on April 1, 2016. He indicates the appellant is a new patient who was referred to him by an registered nurse (the RN) and he has seen her once in the past 12 months;
- An *Assessor Report* (AR) completed by the RN on April 15, 2016. She indicates it was her first contact with the appellant, she has seen the appellant once in the last year, and she completed the form via an office interview.

The PWD application includes the following information:

Diagnoses

PR

The appellant is diagnosed with the following conditions:

- asthma – longstanding;
- musculoskeletal damage to lower back; and
- visually impaired – longstanding.

For *Health History*, Dr. F. writes, “She appears to have a number of conditions, none of which are overwhelming, but put together constitute a disability of some form”. He adds that the appellant has “poor vision/ musculoskeletal complaints” and “she is depressed” as a result of isolating herself.

AR

Under *Additional Information* the RN writes “no drugs, no alcohol, no smoking”.

Self-report

The appellant describes her disabilities as follows:

- vision: “very poor depth perception – left eye is a wandering eye – not corrected”;
- dental: “many painful issues”;
- left side of body: “very painful”;
- neck pain: “ ? pinched nerve” (a chiropractor sees her);
- right thumb: damaged when she fell off her bike, “it’s still painful”; and
- chronic asthma: “...out of breath with very little exertion”;
- left hip: “painful”; and
- legs: she was hit by a car, “caused very painful legs since”.

Functional Skills

PR

Dr. F. provides the following information regarding functional limitations:

- Walking: check mark for 1-2 blocks unaided on a flat surface;
- Stairs: check mark for 2-5 steps unaided;
- Lifting: The appellant is limited to lifting 5-15 pounds;
- Remaining seated: The appellant can remain seated for 2-3 hours;
- Communication: Check mark for *No*, the appellant has no difficulties with communication;
- Under *any significant deficits with cognitive and emotional function*, Dr. F. check marks *Yes*, and indicates deficits in the areas of Executive and Emotional disturbance, and provides no details under *Comments*.

AR

The RN provides the following information for *Mental or Physical Impairment*:

- *Ability to Communicate*: Speaking and Hearing are check marked *Good*. Reading and Writing are marked as *Satisfactory*;
- *Mobility and Physical Ability*:
 - Walking Indoors, Standing, Lifting, and Carrying/ holding are marked *Independent*. For Standing, the RN comments, “feet ache and are very painful after short periods of time”, and for Lifting she writes, “difficult to get up if it requires bending”.
 - For Walking Outdoors and Climbing stairs, the RN comments, “poor depth perception – difficult – poor due to vision...misses steps and slips down the stairs – falling and hurting herself frequently”.
- *Cognitive and Emotional Functioning*: The appellant’s impairment is reported to impact her functioning in 12 out of the 14 areas listed on the form as follows:
 - Bodily functions, Consciousness, Emotion, Attention/ concentration, Executive, Memory and Motor activity: *Major impact* is checked;
 - Impulse control: *Moderate impact* is checked;
 - Insight/ judgment, Motivation, Language, and Other neuro-psychological problems: *Minimal impact* is checked.

Under *Comments*, the RN writes, “Completed grade 11 and became [name of trade], unable to stand to do it now”.

Self-report

In terms of functional abilities, the appellant states that her asthma limits her activity as she is out of breath with very little exertion, and due to her painful left hip she has “difficulty getting up from a squat or the floor when she falls”.

Daily Living Activities (DLA)

PR

- Under *Health History* Dr. F. writes, “Most of her disabilities lead her to have an independent life but she does need help with ADLs from her son”. He also indicates that socially, the appellant tends to isolate and becomes depressed without social engagement.
- He indicates *No* when asked whether the appellant has been prescribed medication/ treatments that interfere with her ability to perform DLA.
- Regarding *Daily Living Activities*, Dr. F. checks *Yes*, the appellant’s impairment directly restricts her ability to perform DLA.
 - He indicates she is not restricted in the following DLA: Personal self-care, Meal preparation, Management of medications, Basic housework, Daily shopping, Mobility inside and outside the home, Use of transportation, and Management of finances;
 - He indicates that Social functioning is restricted with the comment, “has lost her confidence, is being driven by her sense of disability”.

AR

- The RN indicates the appellant is independent with all areas of Personal Care, Basic Housekeeping [comment for Laundry, “very small loads”], Meals [comment for Food preparation, “difficult to stand to prepare”], Pay Rent and Bills, Medications, and Transportation.
- She is reported as independent in 4 out of 5 areas of Shopping: Going to and from stores [with the comment, “small amounts”], Making appropriate choices, Paying for purchases, and Carrying purchases home [comment, “very small amounts”]. For Reading Prices and labels, the RN writes, “very difficult due to vision” with an additional note, “vision – everything close is blurred”.

Social Functioning

- The RN indicates the appellant requires *Continuous Support/ Supervision* in all areas of Social Functioning: Appropriate social decisions, Develop/ maintain relationships, Interacts appropriately with others, Able to deal appropriately with unexpected demands, and Able to secure assistance from others.
- The appellant is reported to have very disrupted functioning with both her immediate and extended social networks.
- In describing any support/ supervision required which would help maintain the appellant in the community, the RN writes, “Very socially isolated. Unable to get out to socialize”.

Need for Help

PR

- Dr. F. check marks *No*, the appellant does not require any prostheses or aids for her impairment.
- Under *Degree and Course of Impairment* he writes, “Will need to find herself an interested family physician who can help her build her self-esteem and confidence”.

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- Under assistance with DLA, Dr. F. writes, “Needs to have help from her son with ADL’s, shopping, etc.”
 - Under *Additional Comments*, he writes, “Patient needs counselling, an assessment by a physiatrist, engagement with social groups, needs to get back to meaningful employment”.

AR

- The RN indicates the appellant lives alone. The appellant’s son who lives in [a nearby community] helps her;
- The RN also indicates that assistance with DLA is provided by family [the appellant’s son] and community service agencies [a counsellor from an organization].
- In indicating whether assistance is provided through the use of assistive devices, the RN check marks *Cane* and writes, “Needs a scooter, needs dental work. Needs eyes tested and proper glasses”.
- The RN checks *No*, the appellant does not have an assistance animal.

2. A Request for Reconsideration (RFR) signed by the appellant on August 25, 2016 with an attached authorization from her chiropractor dated August 16, 2016. He confirms that the appellant is undergoing chiropractic care for chronic low/ mid back pain “facet OA / scoliosis” and it is inadvisable for her to work for an indefinite period.

Additional submissions

With the consent of both parties, the appeal proceeded as a written hearing pursuant to section 22(3)(b) of the *Employment and Assistance Act*. Subsequent to the reconsideration decision the appellant filed her Notice of Appeal dated October 3, 2016 in which she states that she is suffering from chronic pain due to nerve damage from scoliosis which is preventing her from seeking employment. [*The panel notes that ministry’s information that employability or vocational ability are not criteria under the EAPWDA for assessing PWD eligibility*].

The appellant provides a 3-page submission for the written hearing dated October 21, 2016, with two attached images of muscle systems and discs in the back, with a hand-written comment “this area” indicating the location of her back problem. In her submission, she provides her argument on appeal and explains that she was referred to Dr. F. by her social worker and Dr. F. diagnosed her with scoliosis. She reports that she is suffering from nerve damage from the scoliosis that is also causing sciatica in her left leg. The panel finds that the appellant’s submissions corroborate the information in the PR and AR regarding her musculoskeletal problems and symptoms and admits the information under section 22(4)(b) of the *Employment and Assistance Act* as evidence in support of the information and records before the minister when the decision being appealed was made.

In an e-mail to the tribunal, the ministry states that the ministry’s submission on appeal will be the reconsideration summary. The panel accepts the submissions of both parties as argument in support of their positions. The panel will consider the arguments of both parties in the next section – Part F - *Reasons for Panel Decision*.

PART F – Reasons for Panel Decision

The issue in this appeal is whether the ministry's reconsideration decision of September 27, 2016, which found that the appellant was not eligible for PWD designation, was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. Based on the information provided in the PWD application and RFR, the ministry was not satisfied that the following criteria in EAPWDA section 2(2) were met: The appellant has a severe mental or physical impairment; the impairment, in the opinion of a prescribed professional, directly and significantly restricts her ability to perform DLA either continuously or periodically for extended periods; and as a result of these restrictions, she requires help to perform DLA through an assistive device, the significant help or supervision of another person, or the services of an assistance animal.

The eligibility criteria for PWD designation are set out in section 2(2) of the EAPWDA as follows:

- (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 is in a prescribed class of persons or that the person has a severe mental or physical impairment that
- (a) in the opinion of a medical practitioner or nurse 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
 - (i) an assistive device,
 - (ii) the significant help or supervision of another person, or
 - (iii) the services of an assistance animal.

The “daily living activities” referred to in EAPWDA section 2(2)(b) are defined in section 2 of the EAPWDR:

Definitions for Act

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;

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.

Analysis and decision

The panel provides the following analysis and decision for each of the legislative criteria the ministry found were not met.

Severe mental impairment

Appellant's position

The appellant does not argue that she has a mental impairment. On the contrary, she states in her appeal submission that she needs to “rail against” Dr. F.’s “assumptions pertaining to my emotional state of well-being as he is only basing his assumptions on [the RN’s] assumptions”. While the appellant acknowledges that she limits herself socially, she argues that it is by choice due to “a great deal of stress in the past” from not always reading “other peoples’ agendas” correctly.

Ministry's position

The ministry argues there is not enough evidence to establish a severe mental impairment, noting that Dr. F. does not diagnose a mental disorder. The ministry notes that although Dr. F. indicates in the PR that the appellant has significant deficits in the areas of Executive and Emotional disturbance, he does not provide any information to clarify this assessment. The ministry further notes that neither Dr. F. nor the RN indicate any restrictions to DLA involving cognitive abilities or any problems with communication, and the RN indicates the appellant is *Good* or *Satisfactory* in all areas of communication.

The ministry acknowledges that the RN reports impacts to most areas of *Cognitive and Emotional Functioning* but argues that these impacts are not explained by the RN’s comments indicating the appellant is unable to work at her trade because she is limited in how long she can stand. The ministry further argues that the RN’s assessment of cognitive and emotional impacts does not correlate with Dr. F.’s information that indicates deficits in only two areas of cognitive/ emotional functioning.

Regarding *Social Functioning*, while the ministry acknowledges that Dr. F.s and the RN’s information indicates impediments to social functioning such as the appellant’s tendency to isolate herself, the ministry argues that it is not clear from the information provided that the appellant’s social functioning is impeded by her impairments. The ministry notes that the appellant has not been diagnosed with a mental disorder (agoraphobia for example) that would keep her isolated from other people. The ministry argues that the origins of the reported social deficits are therefore unclear.

Panel's decision

The panel finds that the ministry reasonably determined the appellant does not have a severe mental impairment based on the information provided in the PWD application. As noted by the ministry, Dr. F. does not diagnose any mental impairment. Although he recommends counselling, and states that the appellant "without social engagement...is depressed", these comments do not confirm the legislative criterion of a severe mental impairment that impacts the appellant's ability to function and perform DLA independently.

As noted by the ministry, both the PR and AR indicate the appellant has no problems with communication, and further, there is no explanation regarding Dr. F's and the RN's conflicting information on the extent of deficits and impacts to *Cognitive and Emotional Functioning* and no information that relates the reported impacts to a mental impairment. Dr. F. reports significant deficits in only two areas, Executive and Emotional disturbance and he does not provide any comments that explain how these deficits are related to a mental impairment. And while the RN indicates impacts in most areas of *Cognitive and Emotional Functioning*, including Moderate and Major impacts in 8 out of the 14 areas listed in the AR, her comments as noted by the ministry, address the appellant's vocational limitations and do not relate the impacts to a mental impairment.

Furthermore, none of the DLA involving cognitive skills such as Pay Rent and Bills and Medications are reported as restricted, and this information is consistent across the PR and AR. The appellant's ability to independently manage DLA involving mental skills does not correspond to the deficits and impacts for *Social and Emotional Functioning* reported in the PR and AR. Regarding the deficits in Social Functioning reported in both the PR and AR, neither the panel nor the ministry can find any information in the reports connecting the appellant's social isolation to a mental impairment. As noted by the ministry, Dr. F. attributes the appellant's problems with social functioning to her "loss of confidence" and "sense of disability", and as noted by the appellant in her appeal submission, she chooses to limit her social engagement due to stressful past experiences with "peoples' agendas". Based on the totality of the information provided, the panel finds that the ministry reasonably determined a severe mental impairment under section 2(2) of the EAPWDA was not established.

Severe physical impairment

Appellant's position

In her appeal submission, the appellant indicates she has "never ending" pain due to nerve damage from her scoliosis that is "quite severe". She states that she is attempting a PWD application so that she could get additional sessions with her chiropractor who helps quite a bit. She needs to see him once a week for maximum benefit rather than the 10 visits a year that she gets coverage for on her current income. She states that she would also like to travel to find a general practitioner in another community who is willing to see her on a regular basis. In her self-report, she states that she has difficulty getting up from a squatting position or when she falls.

Ministry's position

The ministry argues that the appellant does not have a severe physical impairment as there is not enough evidence to establish such. The ministry notes Dr. F.'s information that indicates the appellant can walk 1-2 blocks unaided on a flat surface, climb 2-5 steps unaided, lift 5-15 pounds, and remain seated for 2-3 hours. The ministry further notes that Dr. F. indicates no requirement for any aids or prostheses and he reports no restrictions with mobility inside or outside the home.

The ministry acknowledges the RN's information regarding the appellant's vision problems; i.e., poor depth perception that makes walking and climbing stairs difficult, as well as pain that causes difficulty with standing and bending. The ministry argues, however, that this information indicates a moderate rather than severe impairment as the RN does not indicate the appellant requires assistance or is unable to manage any activities requiring mobility and physical ability.

Panel's decision

The panel finds that the ministry reasonably determined a severe physical impairment has not been established by the information provided. The panel notes that the reported restrictions to physical functioning in the PR are in the middle range of the scale for indicating the degree of the restriction. Dr. F.'s evidence is that the appellant can perform all of her physical functions (walking, climbing stairs, etc.) without assistance.

While the RN indicates the appellant has some difficulty with Walking outdoors, Climbing stairs, and performing activities that require standing and bending, she marked the appellant as independent with DLA involving physical skills and abilities including Transportation, notwithstanding the reported need for a scooter and information that the appellant uses a cane. Furthermore, despite the appellant's vision problems and need for proper glasses, the RN indicates the appellant is *Satisfactory* with Reading, although Reading prices and labels is "very difficult due to vision". Given that the appellant is reported to have a moderate degree of physical function and can perform physical DLA independently, the panel finds that the ministry reasonably determined a severe physical impairment under section 2(2) of the EAPWDA was not established.

Restrictions in the ability to perform DLA

Appellant's position

In her self-report, the appellant argues that her asthma limits her activities as she is out of breath with very little exertion.

Ministry's position

The ministry acknowledges that the appellant would have some restrictions to DLA considering her medical history; however, the ministry argues there is not enough evidence to confirm that a severe impairment significantly restricts her ability to perform DLA continuously or periodically for extended periods. The ministry notes that Dr. F. does not indicate any medications/ treatments that interfere with DLA and although Dr. F. indicates the appellant has restrictions with Social Functioning, all other DLA in the PR are marked as unrestricted.

The ministry also notes the following restrictions as reported by the RN: the appellant has difficulty reading prices and labels; she can only do small loads of laundry and carry a small amount of groceries; and food preparation is difficult due to her limitations with standing. At the same time, the appellant is marked as independent in the AR across the majority of DLA.

Panel's decision

Subsection 2(2)(b)(i) of the EAPWDA requires the minister to be satisfied that in the opinion of a prescribed professional a severe impairment directly and significantly restricts DLA either continuously, or periodically for extended periods. DLA are defined in section 2(1) of the EAPWDR and are also listed in the PR, with additional details in the AR. Therefore, a prescribed professional completing these forms has the opportunity to indicate which, if any, DLA are significantly restricted by the appellant's impairments either continuously or periodically for extended periods.

The panel notes that Dr. F. who completed the PR, and the RN who filled out the AR, are both prescribed professionals as defined in the legislation. As noted by the ministry, these professionals consistently indicate the appellant is unrestricted and independent with almost all of her DLA. While they both report that she needs/ receives her son's assistance with DLA, Dr. F. comments that "Most of her disabilities lead her to have an independent life".

While both Dr. F. and the RN indicate the appellant is significantly restricted with Social Functioning and the RN indicates that continuous support is required for all areas of this DLA, there is no information on what type of support/ supervision is required and no evidence that the appellant is housebound due to her social isolation. The evidence is that she is not diagnosed with a mental health condition and she is independent with DLA that involve being out in the community including Shopping and Using public transportation.

The legislation requires evidence of significant restrictions to DLA either continuously or periodically for extended periods as the result of a severe impairment. As the appellant is independent with the majority of DLA, the panel finds that the ministry reasonably determined the criteria in subsection 2(2)(b)(i) of the EAPWDA were not met.

Help to perform DLA

Appellant's position

The appellant submits that she needs weekly chiropractic treatments and a regular physician to support her ability to do daily activities.

Ministry's position

The ministry argues that as it has not been established that DLA are significantly restricted, it cannot be determined that *significant* help is required from other persons. The ministry notes the RN's information that the appellant requires a cane and a scooter but argues that the information in the PR and AR does not support the need for assistive devices. The ministry further notes that while the RN

indicates the appellant needs proper glasses, the use of eye glasses is not indicative of a severe impairment and the ministry also provides funding to income assistance recipients to cover eye examinations and eye wear.

Panel's decision

Subsection 2(2)(b)(ii) of the EAPWDA requires a prescribed professional to confirm that as a result of significant restrictions to DLA, the person requires help to perform an activity. Where another person is providing the help, the level of assistance or supervision required must be significant as set out in subsection 2(3)(b)(ii) of the EAPWDA. While the evidence indicates the appellant's son helps her with DLA, she is at the same time reported as independent with the majority of her DLA, and is able to independently go out in the community, shopping, etc. presumably with the use of her cane. As the panel found that the ministry reasonably determined the information provided did not confirm significant restrictions to DLA, the panel accordingly finds that the ministry reasonably determined the criterion for help under EAPWDA subsection 2(2)(b)(ii) was not met.

Conclusion

The panel finds that the ministry's reconsideration decision that determined the appellant is not eligible for PWD designation under section 2 of the EAPWDA was reasonably supported by the evidence. The panel confirms the decision pursuant to section 24(2)(a) of the *Employment and Assistance Act* and the appellant is not successful in her appeal.