

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated January 6, 2017 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 will continue for at least 2 years; however, based on the information provided in the PWD Designation Application (PWD application) and Request for Reconsideration (RFR), the minister was not satisfied that three other 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 her ability to perform daily living activities (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.

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* signed by the appellant on July 21, 2016 [she chose not to complete the self-report];
- A *Physician Report* (PR) completed by a neurologist on July 22, 2016. The neurologist has known the appellant for 15 months and has seen her 2 to 10 times in the past 12 months;
- An *Assessor Report* (AR) completed by the neurologist on July 22, 2016. He indicates that he filled out the report via an office interview with the appellant and by consulting medical notes.

The PWD application includes the following information:

Diagnoses

PR

- The appellant is diagnosed with mechanical back pain, date of onset 1999, spinal cord disorder (not yet determined), date of onset 2014, and meralgia paraesthetica, date of onset 2016. Under *Health History*, the physician writes that the appellant has mechanical thoracolumbar back pain requiring the use of medications currently and in the past. He writes that she has a mild degree of leg spasticity indicative of a myelopathy but the neurologists have not diagnosed any specific condition as the cause of this. He writes that, together, her conditions limit walking ability and contribute to fatigue; her pain limits concentration and attention, and the use of medications cause sedation. Further, the appellant has right meralgia paraesthetica due to a nerve compression of the right groin giving her right leg pain that is treated with a medicinal ointment.
- Under *Degree and Course of Impairment*, the neurologist writes that improvement is not anticipated but stability is possible.

AR

- The neurologist writes *N/A* when asked what mental or physical impairments impact the appellant's ability to perform DLA. Under *Additional Information* he indicates that chronic pain impacts her mobility, attention, and concentration.

Functional Skills

PR

The neurologist provides the following information regarding any functional limitations:

- The appellant can walk 1 to 2 blocks unaided on a flat surface;
- can climb 2 to 5 steps unaided;

- can lift 5 to 15 pounds;
- has no limitation with remaining seated;
- has no difficulties with communication, and
- has significant deficits with cognitive and emotional function in the area of Attention/ sustained concentration [comment, “pain and medications are both contributing”].

AR

The neurologist provides the following information for *Mental or Physical Impairment (Abilities)*:

- The appellant has a good ability to communicate in all areas: speaking, reading, writing, and hearing;
- She takes significantly longer than typical with all areas of *Mobility and Physical Ability*: Walking indoors, Walking outdoors, Climbing stairs, Standing, Lifting, and Carrying/ holding. When asked to describe how much longer, the neurologist writes, “longer than required” for Walking indoors.
- In indicating whether any mental impairment impacts the appellant’s *Cognitive and Emotional Functioning*, the neurologist checks *No impact* for 13 of the 14 listed areas, and *Moderate impact* for one area: Attention/ concentration [no comments are provided].

Daily Living Activities (DLA)

PR

- The neurologist checks Yes, the appellant has been prescribed medication/ treatment that interferes with her ability to perform DLA [he lists her medications and states that the anticipated duration of treatment is *lifelong*].

AR

The neurologist provides the following information for DLA:

Personal Care, Basic housekeeping, and Shopping

- The appellant takes significantly longer than typical with all areas of Personal care and Basic housekeeping. When asked to describe how much longer, the neurologist does not provide any comments.
- She is independent with all areas of Shopping except Going to and from stores for which she requires continuous assistance from another person/ or is unable.
- Under *Additional comments*, the neurologist writes, “limitations are physical in nature”.

Meals, Pay Rent and Bills, Medications, and Transportation

- The appellant takes significantly longer than typical with all areas of Meals and Transportation. When asked to describe how much longer, the neurologist provides no comments.
- She is independent with all areas of Pay Rent and Bills, and Medications;

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- Under *Additional Comments*, the neurologist writes, “physical limitations due to pain and spasticity”.

Social Functioning

- The appellant is independent with all areas of *Social Functioning* and has good functioning with her immediate and extended social networks. The neurologist writes *N/A* when asked to describe what support/ supervision is required to help maintain the appellant in the community, and whether there are any safety issues.

Need for Help

PR

- The neurologist check marks *No*, the appellant does not require any prostheses or aids for her impairment.

AR

- The neurologist indicates the appellant lives alone and assistance is provided by family.
- She requires “periodic assistance during worst times of times of pain...or for more exertional tasks.”
- For assistive devices, the neurologist writes *N/A*, and he check marks *No*, the appellant does not have an assistance animal.

2. A Request for Reconsideration (RFR) signed by the appellant on December 13, 2017 [*sic*] in which she states that she is also awaiting surgery [hopefully around July 2017] for a broken collar bone on her left shoulder that is very painful. She writes that she does not have any use of her left arm as far as lifting or range of motion and “the bone is actually sticking out of [her] shoulder.”

3. A letter from the appellant’s family physician dated December 14, 2016 stating that the appellant has “chronic left shoulder pain stemming from non-union of a left clavicular fracture” and is awaiting further surgery with bone graft and internal fixation. The physician writes, “this issue contributes to her inability to work.”

Additional submissions

Subsequent to the reconsideration decision, the appellant filed her *Notice of Appeal* dated January 23, 2017 in which she provides her argument on appeal and states that she has pain every day, very bad tremors in her legs, and a piece of collar bone sticking out of her shoulder. The panel will address the arguments of both parties in *Part F - Reasons for Panel Decision*.

At the hearing, the appellant further described her pain and ongoing medical conditions. In response to questions from the panel, the appellant stated that it is hard to do simple things such as getting dressed, especially with her collar bone problem. She stated that she needs help doing dishes and going to the store. It takes her one half to an hour longer to go out because she has to put on her

[Redacted]

seatbelt a different way; she needs 5 to 10 extra minutes to get out of the car, and she needs to hold onto the buggy for support when shopping.

In response to further questions, the appellant stated that she takes medication every day and although her concentration is affected she has “learned to adjust and live with it.” She described times when her pain is “a lot worse”, and stated that shopping “wears [her] body out” and her mother helps her with her kids and household tasks. The appellant described a typical day as getting her older child dressed and ready for school, playing with her younger child at home, and helping her older child with homework. She stated that she gets more done when her younger child is at pre-school and that her older child helps with dinner preparation. The appellant confirmed that she uses no assistive devices “at this time”.

In her question to the ministry regarding how severe her condition has to be, the appellant indicated there are some days where she cannot do anything at all; her left arm is very impaired due to her collar bone sticking out of her neck; and there are some days when she cannot get off the couch. She indicated that she did not complete the self-report because she is left-handed and writing is difficult with her shoulder/ collar bone condition.

At the hearing, the ministry presented its argument on appeal and explained that the adjudicator requires detailed information from both the applicant and medical professionals to make the determination of PWD eligibility. The panel finds that all of the information presented on appeal corroborates or adds further detail to the information in the reconsideration record which addresses the appellant’s symptoms of pain and spasticity and introduces her collar bone condition in the RFR and physician’s letter that were submitted for the reconsideration. The panel therefore accepts the additional submissions under section 22(4)(b) of the *Employment and Assistance Act* as evidence in support of the information and records that were before the minister when the decision being appealed was made.

PART F – Reasons for Panel Decision

The issue on appeal is whether the ministry's reconsideration decision of January 6, 2017 which found that the appellant is 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 minister was not satisfied that three 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(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:

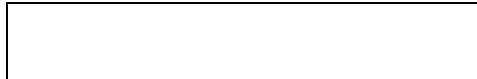
(i) prepare own meals;

(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

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

Severe mental impairment

The appellant argues, through the information provided by her neurologist, that she has significant deficits with Attention/ concentration due to pain and side effects from medications; that her mental impairment has a moderate impact on Attention/ concentration; and as stated in the AR, her “chronic pain impacts upon...attention and concentration.”

The ministry submits that the information provided does not confirm that the appellant has a severe mental impairment. The ministry argues that while the neurologist notes significant deficits with Attention/ concentration, the impact is described as moderate; there are no impacts reported for any other areas of *Cognitive and Emotional Function*; and no difficulties with communication or social functioning are reported.

Panel’s decision - Severe mental impairment

The panel finds that the ministry reasonably concluded that the information provided in the PWD application does not establish a severe mental impairment. Not only is the appellant not diagnosed with a mental impairment, the evidence indicates that her only cognitive/ emotional deficit is in the area of Attention/ concentration and the neurologist attributes this deficit to pain and side effects of medication and not to any diagnosed mental impairment. Further, the appellant testified at the hearing that she has learned to adjust to/ live with the concentration problems caused by her medications.

As noted by the ministry, the evidence also indicates that the appellant has no problems with communication and social functioning, and while the appellant testified that she has difficulty writing due to her collar bone problem, the neurologist check marked that her ability with writing is good, and there is no information in her family physician’s letter regarding any deficits in her ability to communicate in writing.

The legislation requires evidence of a severe mental impairment that significantly impacts daily functioning. As the neurologist and the physician do not provide a diagnosis of a mental impairment, or give any detail regarding significant deficits with Attention/ concentration, or written communication, 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

In her RFR, the appellant submits that her broken collar bone is very painful and she does not have any use of her left arm as far as lifting and range of motion. In her *Notice of Appeal*, the appellant argues that she is “clearly a person with disabilities” because she is “living in pain every day”, and has “very bad tremors in her legs as well as a piece of collar bone sticking out of [her] shoulder.” At the hearing, the appellant added that it is hard to hear that there is not enough information because every day she is affected by her conditions; she has days when her pain is “a lot worse”, and there are some days, “quite a few”, where she cannot do anything at all, or even get off the couch.

The ministry acknowledges that the appellant experiences some limitations to her physical functioning “due to back and leg pain and fatigue”. The ministry argues, however, that the assessments provided by the neurologist “speak to a moderate rather than a severe physical impairment.” The ministry notes that the appellant does not require any prostheses or aids; is able to walk and climb stairs without the assistance of another person or assistive device; is able to lift 5 to 15 pounds [as reported by her neurologist] and has no limitations with remaining seated. The ministry notes that the neurologist has not provided any information with regard to how much longer than typical it takes the appellant to manage physical functions such as walking, and carrying/ holding; and argues that it requires that information in order to determine whether there is a significant restriction to her overall level of physical functioning. Regarding the appellant’s fractured collarbone, the ministry submits that there is not enough information to determine how it impacts her overall level of physical functioning.

Panel’s decision - Severe physical impairment

The panel finds that the ministry reasonably determined a severe physical impairment has not been established by the information provided. The legislation requires evidence of a severe impairment that significantly impacts daily functioning; and as noted by the ministry, the diagnosis of a severe medical condition does not in itself establish a severe impairment. As the ministry further notes, an *impairment* is a medical condition that results in restrictions to the person’s ability to function independently and effectively.

Regarding the appellant’s physical functioning, the evidence from the neurologist in the PR indicates a moderate, rather than severe range of restriction. For example, despite being diagnosed with back conditions and leg spasticity, the appellant is able to independently walk 1 to 2 blocks, climb 2 to 5 steps, lift 5 to 15 pounds, and she has no limitations with remaining seated. Furthermore, in the AR, while she is reported as taking “longer than required” with Walking Indoors and significantly longer than typical with all of the other listed functions [Walking outdoors, Climbing stairs, Standing, Lifting, and Carrying/ holding], there is no description or any detail provided regarding how much more time she requires for these functions or how her back and leg conditions are impacting these functions other than contributing to fatigue and causing her right leg pain [neurologist’s comments in the PR under *Health History*]. In addition, in the PR [under *Health History*], the neurologist states that the appellant has “a mild degree of leg spasticity”. As the medical reports fall short of confirming significant impacts to physical functioning as a result of any of the appellant’s diagnoses, the panel finds that the ministry reasonably determined that the information as a whole demonstrates a moderate rather than severe physical impairment.

Regarding the appellant's fractured collar bone and resulting restrictions to the use of her shoulder and left arm, this condition is characterized by the appellant as severe - with no use of her left arm for lifting or range of motion activities, given that "the bone is actually sticking out of [her] shoulder." The panel notes that in the PR and AR, the neurologist provides no diagnosis or information regarding the appellant's collar bone, ostensibly because those reports were filled out in July 2016 and the appellant does not make mention of her collar bone/ shoulder issues until her RFR in December 2016. From that point, the appellant's argument for a severe physical impairment centers on her restricted function due to a fractured collar bone that she is awaiting surgery for.

Unfortunately, the appellant has not provided further medical information to corroborate that her collar bone/ shoulder problem is a severe impairment that significantly impacts her physical function. While she submitted a letter from her family physician for the reconsideration, this letter, as argued by the ministry, falls short of providing enough information on how the fracture impacts the appellant's overall physical functioning. In reviewing the letter, the panel notes that the physician reports only one impact to function; i.e., the issue with the collar bone "contributes to her inability to work." As noted by the ministry, an applicant's employability/ ability to work is not taken into consideration. This is because the ability to work is not one of the criteria for PWD designation under the EAPWDA. As there is no medical report that substantiates the appellant's reported severe restrictions in the use of her left arm, the panel finds that the ministry reasonably determined that there is not enough information to support the finding of a severe physical impairment due to a fractured collar bone.

While the appellant experiences pain, fatigue, and spasticity due to her medical conditions, the legislative test requires evidence of a severe impairment that results in significant restrictions to physical function. As the information provided lacks the detail necessary to confirm severity and the appellant is reported to have a moderate degree of physical function, 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

The appellant's position is that her impairment significantly restricts her daily activities. In her RFR, she reports that she does not have any use of her left arm for activities requiring lifting or range of motion. At the hearing, she submits that she has significant restrictions with going out as it takes her one half to an hour longer, and 5 to 10 extra minutes to get out of the car. In addition, she needs to hold the buggy to support herself when shopping, and grocery shopping "wears [her] body out." She stated that she has also had to adjust to a "boring life" due to her difficulties with going anywhere.

The ministry was not satisfied that the information from a prescribed professional demonstrates that a severe impairment significantly restricts the appellant's ability to perform DLA as set out in the legislation and argues that there was not enough information to confirm significant restrictions. The ministry acknowledges that the appellant has certain limitations resulting from pain and spasticity and would reasonably be expected to encounter some restrictions with DLA. The ministry argues, however, that it could not determine if these represent a significant level of restriction to the appellant's overall level of functioning given that the neurologist does not describe the frequency and duration of the periodic assistance she requires to perform DLA tasks, and he also does not describe the frequency and duration of her "worst times of pain." The ministry further notes that the appellant

is reported to need continuous assistance in only one area [across all of the listed DLA] - Going to and from stores.

Panel's decision - Restrictions to DLA

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. In this case, the prescribed professional is the neurologist that filled out the PR and AR. 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 finds that the ministry reasonably determined the evidence from the neurologist does not establish that the appellant's DLA are directly and significantly restricted either continuously, or periodically for extended periods. While the neurologist indicates in the PR that the appellant takes medication that causes sedation and concentration problems and therefore interferes with her ability to perform DLA, he indicates in the AR that the DLA involving attention/ concentration [especially Pay Rent and Bills, and Medications] are performed independently. In addition, while 4 of the 8 listed DLA [Personal Care, Basic Housekeeping, Meals, and Transportation] are reported to take the appellant significantly longer to perform, there is no indication that she cannot perform these DLA independently.

As noted by the ministry, there is also no information from the neurologist with regard to how much longer the appellant takes to perform these activities or the frequency or duration of her episodes of increased pain. Therefore, a prescribed professional has not confirmed that DLA are restricted to a significant degree as required under subsection 2(2)(b)(i) of the EAPWDA, or that DLA are periodically restricted for extended periods as required under subsection 2(2)(b)(i)(B). Moreover, while the appellant is reported to have some limitations with lifting, she is able to independently carry purchases, and while she requires continuous assistance with Going to and from stores, there is no indication that she cannot independently manage transportation, except for taking significantly longer. While the neurologist did not indicate how much longer that appellant takes to manage transportation,

the appellant testified that it takes her one half to an hour longer to go out because she has to put her seatbelt on a different way, and 5 to 10 minutes longer to get out of the car. The panel notes that even if this information had been provided by the prescribed professional, restrictions of less than one hour fall short of fulfilling the legislative test of "significantly restricts" under subsection 2(2)(b)(i) of the EAPWDA.

The legislation requires evidence from a prescribed professional confirming significant restrictions to DLA either continuously or periodically for extended periods as the result of a severe impairment. As the neurologist indicates the appellant is independent with 4 of the listed DLA, and does not provide any detail to confirm that the 4 remaining DLA are significantly restricted either continuously, or periodically for extended periods, the panel finds that the ministry reasonably determined that the criteria in subsection 2(2)(b)(i) of the EAPWDA were not met.

Help to perform DLA

The appellant argues that she needs help from her family to perform DLA. 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.

Panel's decision - Help to perform DLA

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. The appellant confirmed the neurologist's information that she does not use any prostheses or aids for her impairment at this time, and that she receives help from family. Nevertheless, the panel found that the ministry reasonably determined the information provided does not confirm significant restrictions to DLA that are the result of a severe impairment. As restrictions to DLA are a precondition for the help criterion and the precondition has not been met, the panel finds that the ministry reasonably determined the criterion under subsection 2(2)(b)(ii) of the EAPWDA 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 sections 24(1)(a) and 24(2)(a) of the *Employment and Assistance Act* and the appellant is not successful in her appeal.