

PART C – DECISION UNDER APPEAL

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Poverty Reduction (the ministry) dated February 22, 2018, 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 a medical practitioner has confirmed that the appellant's 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;
- the appellant's daily living activities (DLA) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and,
- as a result of those restrictions, in the opinion of a prescribed professional, the appellant requires an assistive device, the significant help or supervision of another person, or the services of an assistance animal to perform DLA.

PART D – RELEVANT LEGISLATION

Employment and Assistance for Persons with Disabilities Act (EAPWDA), section 2

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR), section 2

PART E – SUMMARY OF FACTS

Information before the ministry at reconsideration

- 1) The appellant's PWD application comprised of:
 - The Self-report section signed by the appellant and completed by an unknown person; and
 - A Medical Report (MR) dated October 27, 2017, and an Assessor Report (AR) dated November 10, 2017. Both were completed by a general practitioner (GP) who has treated the appellant since October 2017, has seen the appellant 2-10 times in the past 12 months, and relied on office interviews with the appellant to complete the PWD application.
- 2) The appellant's Request for Reconsideration, with a 2-page handwritten letter attached.

The panel notes that the appeal record includes multiple copies of documents, and that while a portion of the record includes incomplete copies of some documents, complete copies of those documents are included in the appeal record.

Information provided on appeal

- 3) The appellant's Notice of Appeal (NOA), received by the tribunal on Mar 1, 2018, in which the appellant states that her reason for appeal is "Due to the fact that [the GP's] information was not complete."
- 4) A 2-page handwritten appeal submission, received by the tribunal on March 13, 2018.

The ministry's appeal submission stated that it would rely on its reconsideration decision and did not include additional information or argument.

Admissibility

The panel determined that the additional evidence in the appellant's 2-page appeal submission tended to corroborate previous self-reported information. Accordingly, the additional evidence was admitted under section 22(4) of the *Employment and Assistance Act* (EAA) which provides that panels may admit as evidence "oral and written testimony in support of the information and records" before the minister when the decision being appealed was made.

The balance of the information in the appellant's appeal submission was found to be argument and was accepted on that basis.

The arguments of both parties are set out in Part F of this decision.

Summary of relevant evidence

Diagnoses

In the MR, where asked to provide a specific diagnosis and provide health history, the GP writes:

- Scoliosis
- Learning Disability/Dyslexia
- Obstructive Sleep Apnea

Physical Impairment

The GP reports as follows:

- Able to walk 1-2 blocks unaided on a flat surface and climb 2 to 5 stairs unaided (difficult to climb stairs due to back pain).
- Lifting limited to 5 to 15 lbs.
- Can remain seated for 1 to 2 hours.
- Scoliosis.
- Migraine - gets double vision.
- Uses CPAP.
- Someone helps with grocery shopping.
- Walking indoors and outdoors, climbing stairs (struggle to go up stairs), standing (stand only for 10 minutes), lifting (10-15 lbs.), and carrying/holding (10 lbs.) are managed independently. Walking indoors and outdoors and climbing stairs take significantly longer.
- In the MR, the GP indicates that the appellant requires prostheses or aids for her impairment, but no explanation is provided where requested. In the MR, the GP also comments that the appellant needs a stroller to lean on, otherwise she gets severe back pain. In the AR, the GP indicates that a cane is used and that the appellant uses a stroller to walk.

In the SR, scoliosis is reported to result in extreme muscle spasms and severe pain in the lower back. The appellant suffers from debilitating migraines requiring prescription medication. A car accident 5 years ago "implemented severe and chronic back pain." Something as simple as taking a walk is a tremendous task. Uses son's stroller for walking at all times; without it she is unable to walk more than a few minutes without needing to rest or sit down. She does not take medication prescribed for pain because of how it makes her feel.

In her reconsideration submission, the appellant writes that with no help, she has no choice but to walk up steps, but that doesn't mean that she is not screaming in pain. The appellant also describes her inability to work due to pain or harming herself or other people if her job was stacking shelves or lifting. She cannot do a desk job because she cannot sit for too long – 15 to 20 minutes. She cannot stand for longer than 15 to 20 minutes.

In her appeal submission, the appellant reports that all the walking she needs to do to see doctors hurts her back to the point where she can't move a lot of the times, mostly when she is stressed and feels anxiety kicking in and a sharp migraine comes on. Her back pain is caused by a car accident, resulting in 60 ft. tissue damage to the lower back. For the longest time she thought she had scoliosis, but her mother lied to her. She uses a sleep machine; if she doesn't, she gets chest pains and starts to choke.

Mental Impairment

The GP reports:

- There are no difficulties with communication. "Does have learning disability + dyslexia."
- Significant deficit with cognitive and emotional function in 1 of 11 specified areas: emotional disturbance.
- Good ability to communicate in the areas of speaking. Writing and hearing are satisfactory. Reading is poor (gets letters mixed up and therefore has difficulty understanding what she reads).
- No major impact on daily functioning for any listed area of emotional and cognitive functioning. Moderate impact for bodily functions (CPAP sleep apnea). Minimal impact for emotion (had depression before/anxiety) and memory. No impact in the remaining 11 areas.

- Social functioning:
 - All areas independently managed: appropriate social decisions; ability to develop and maintain relationships; interact appropriately with others; ability to deal appropriately with unexpected demands; and, ability to secure assistance from others.
 - Good functioning with immediate and extended social networks.

In the SR, the diagnoses of a comprehension learning disability and dyslexia are noted. No additional information respecting mental impairment is provided in the SR or in the appellant's reconsideration submission.

In her appeal submission, the appellant states that as she loses concentration and can't understand certain tasks her ability to obtain medical information in support of her PWD application was impacted, and that her mental issues played a role in why she thought she had scoliosis. She also notes that mild dyslexia impacts her comprehension when reading important information and her ability to remember what she has read and what needs to be done.

DLA

The GP reports the following:

- The appellant has not been prescribed any medication and/or treatments that interfere with the ability to perform DLA.
- Scoliosis/mechanical back pain, obstructive sleep apnea and learning disability/dyslexia impact the ability to manage DLA.
- Personal care – all listed tasks are managed independently (needs chair in shower to sit).
- Basic housekeeping – both tasks are managed independently (someone carries laundry and does basic housekeeping for the appellant).
- Shopping – independent with going to and from stores (someone helps). Carrying purchases requires continuous assistance from another person. Reading prices and labels, making appropriate choices and paying for purchases are managed independently.
- Meals – all listed tasks are managed independently (sits on chair when cooking).
- Pay rent and bills – banking and paying rent and bills are managed independently; budgeting requires periodic assistance from another person.
- Medications – all listed tasks are managed independently.
- Transportation – getting in and out of a vehicle takes significantly longer than typical ("Because of back pain".) Using public transit ("use bus") and using transit schedules and arranging transportation are managed independently.
- The ability to manage the DLA social functioning is as described above under Mental Impairment.

In the SR, the appellant is reported as having someone do her weekly shopping trips; she has someone who goes with her for all shopping as she needs assistance to lift items, with the shopping cart and to unload groceries at home. She requires a housekeeper; twice a week this person performs simple tasks the appellant is unable to do herself including, sweeping, mopping, vacuuming, dusting, laundry (unable to make multiple trips up and down stairs), and cleaning bedrooms and bathrooms. The appellant does cook and prepares all meals at home, but requires a chair as she can't stand for long periods of time.

In her reconsideration submission, the appellant writes that she does need help with daily living. She receives help with house cleaning, grocery shopping, bringing baskets of clothes upstairs. She gets rides, including to medical appointments and to the store, which is only a 5 minute walk from her home.

Need for Help

The GP reports that assistance is provided by friends, a cane is required, and that the appellant uses a stroller to walk.

PART F – REASONS FOR PANEL DECISION

Issue on Appeal

The issue on appeal is whether the ministry's decision to deny the appellant designation as a PWD was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. That is, was the ministry reasonable when determining that the requirements of section 2(2) of the EAPWDA were not met because:

- a severe physical or mental impairment was not established;
- the appellant's DLA are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and
- as a result of those restrictions, in the opinion of a prescribed professional, the appellant does not require an assistive device, the significant help or supervision of another person, or the services of an assistance animal to perform DLA?

Relevant Legislation

EAPWDA

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 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.

(4) The minister may rescind a designation under subsection (2).

EAPWDR

Definitions for Act

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.

(3) The definition of "parent" in section 1 (1) applies for the purposes of the definition of "dependent child" in section 1 (1) of the Act.

Panel Decision

Severe Physical or Mental Impairment

The legislation provides that the determination of severity of impairment is at the discretion of the minister, taking into account all of the evidence including that of the appellant. However, the legislation is also clear that the fundamental basis for the analysis is the evidence from a prescribed professional respecting the nature of the impairment and its impact on daily functioning. While the legislation does not define “impairment”, the MR and AR define “impairment” as a “loss or abnormality of psychological, anatomical or physiological structure or functioning causing a restriction in the ability to function independently, effectively, appropriately or for a reasonable duration.” While this is not a legislative definition, and is therefore not binding on the panel, in the panel’s opinion, it reflects the legislative intent and provides an appropriate analytical framework for assessing the degree of impairment resulting from a medical condition.

When considering the evidence provided respecting the severity of impairment, the ministry must exercise its decision-making discretion reasonably by weighing and assessing all of the relevant evidence and cannot simply defer to the opinion of a prescribed professional, as that would be an improper fettering of its decision-making authority.

Physical Impairment

The appellant is diagnosed with scoliosis and obstructive sleep apnea; migraines are also noted by the GP. The appellant argues that there is a lack of information from the GP and that she is disabled by her back pain and migraines. The ministry argues that the assessment of functional skills in the MR is not indicative of a severe impairment of physical functioning, noting that, despite reporting the need to use a stroller for walking, the GP also assesses the appellant as being able to walk 1 to 2 blocks and climb 2 to 5 steps unaided. Respecting the GP’s information about mobility and physical ability in the AR, the ministry notes that although struggles with going up stairs is reported, the ability to climb 2 to 5 steps unaided is reported in the MR. The ministry also notes that in the AR, the GP has assessed the appellant as independently managing all physical ability and mobility activities and argues that the ability to lift 10 to 15 lbs. lifting is sufficient to lift a variety of household and shopping items. For these reasons, the ministry concludes that the information does not establish a severe physical impairment.

The panel finds the ministry’s conclusion to be reasonable. The appellant reports that at times her back pain is to the point she cannot move a lot of the time, mostly when she is stressed or feeling anxious, and both the appellant and the GP report the use of a stroller for walking. However, the physical functional skills reported by the GP, who relied on an interview with the appellant for the purpose of completing the PWD application, were reasonably found by the ministry to reflect a level of independent functioning that does not equate with severe physical impairment. In particular, the GP reports that the appellant is able to walk 1 to 2 blocks unaided, climb 2 to 5 steps unaided, and independently lift 10 – 15 lbs., and independently carry 10 lb. loads. Additionally, the appellant reports that she is able to stand for 15-20 minutes.

Accordingly, the panel concludes that the ministry reasonably determined that the information establishes that the appellant experiences impacts to her physical functioning due to her medical conditions but that the information provided does not establish a severe physical impairment.

Mental Impairment

The GP diagnoses the appellant with learning disability/dyslexia. The appellant argues that the information from the GP was not complete and that due to physical and mental issues, she has had a hard time obtaining medical information. The ministry notes that while the GP identifies a significant deficit with emotional disturbance, when assessing the impact on daily functioning in the AR, the impact is reported to be minimal and no other significant deficits are identified. Additionally, in the AR, a major impact on daily functioning is not identified for any aspects of cognitive and emotional functioning and, except for a moderate impact for bodily functions (relates to use of

CPAP machine), either minimal or no impact is assessed for all other aspects, with 11 of the 14 listed aspects having no impact. Together with the assessment of independent functioning for all listed aspects of social functioning and good functioning with both immediate and extended social networks, the ministry concludes that although the appellant experiences impacts to cognitive and emotional functioning due to a learning disorder, a severe impairment of mental functioning has not been established based on the information of the GP and the appellant.

The panel concludes that the ministry's determination was reasonable. As was noted by the ministry, the GP identifies a significant deficit in only one area of cognitive and emotional functioning, emotion, and assesses only a minimal impact on daily functioning. The panel also notes that the accompanying commentary, that the appellant had depression and anxiety before, relates to mental health conditions not included in the GP's current diagnoses. The ministry's conclusion is further supported by the fact that the GP does not assess a major impact on daily cognitive and emotional functioning for any of the 14 listed areas, with no impact reported for the majority of areas. A moderate impact on daily functioning is reported for one area, bodily functions, which the GP identifies as relating to sleep disturbance and the use of a CPAP machine; however, the GP does not describe any resulting impact on mental functioning and none of the limitations on the ability to perform DLA are attributed to sleep disturbance or sleep apnea. Some difficulties are reported by the GP and/or the appellant respecting memory, concentration and reading comprehension. However, the appellant's description limits the difficulties to unspecified "certain tasks" and reading "important instructions" and the only aspect of communication assessed as "poor" by the GP, reading, is not identified as impacting the ability to manage DLA tasks requiring reading (read prices and labels, use public transit schedules). Finally, the appellant is assessed as having good abilities respecting social functioning.

Based on the above analysis, the panel concludes that the ministry was reasonable to determine that the information establishes impacts to cognitive and emotional functioning due to a learning disorder, a severe mental impairment is not established.

Restrictions in the ability to perform DLA

Section 2(2)(b)(i) of the EAPWDA requires that the minister be satisfied that in the opinion of a prescribed professional, a severe mental or physical impairment directly and significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods. While other evidence may be considered for clarification or support, the ministry's determination as to whether or not it is satisfied, is dependent upon the evidence from prescribed professionals. The term "directly" means that there must be a causal link between the severe impairment and the restriction. The direct restriction must also be significant. Finally, there is a component related to time or duration – the direct and significant restriction may be either continuous or periodic. If periodic, it must be for extended periods. Inherently, any analysis of periodicity must also include consideration of the frequency. All other things being equal, a restriction that only arises once a year is less likely to be significant than one that occurs several times a week. Accordingly, in circumstances where the evidence indicates that a restriction arises periodically, it is appropriate for the ministry to require evidence of the duration and frequency of the restriction in order to be "satisfied" that this legislative criterion is met.

DLA are defined in section 2(1) of the EAPWDR and are listed in both the MR and the AR sections of the PWD application with the opportunity for the prescribed professional to check marked boxes and provide additional narrative. DLA, as defined in the legislation, do not include the ability to work.

The appellant's position is that she does require assistance with DLA as demonstrated by the fact that she receives assistance with shopping, housekeeping and laundry, and gets rides to shopping and other destinations. The ministry notes that while the GP describes assistance required with certain tasks of personal care, basic housekeeping and meals, he also assesses the appellant as being independent with these tasks. The ministry also notes that while the GP assesses the appellant as requiring continuous assistance from another person with

carrying purchases home, he also assess the ability to lift 10 – 15 lbs. and to carry 10 lbs. Additionally, for the two tasks reported to take significantly longer to perform, carrying purchases home and getting in and out of a vehicle, no description of how much longer is provided. Finally, the GP assesses the appellant as independently managing the large majority of listed areas of DLA.

In this case, the GP is the only prescribed professional providing information respecting the appellant's ability to manage DLA. As the ministry notes, while the GP reports that the appellant receives assistance with housekeeping and shopping, and that a chair is used in the shower and when preparing meals, the GP also reports that the appellant is independent with these tasks. It is possible that the GP has assessed the appellant as independent on the basis that no additional assistance is required but is also possible, based on the level of independent physical functioning assessed by the GP for walking, carrying, and holding, that the appellant independently manages these tasks within the limitations of being able to walk 1 to 2 blocks unaided, lift 10 – 15 lbs., and carry 10 lbs. As the ministry argues, it is unclear why continuous assistance from another person would be required for carrying purchases home when the appellant can carry 10 lb. loads. Also, there is no description as to how much longer carrying purchases home, getting in and out of a vehicle, and budgeting take, in order to assess both the significance of the restriction and whether it is for extended periods. Overall, the GP reports that the appellant is independent with, as the ministry notes "the large majority" of listed DLA tasks.

Accordingly, the panel considers that the ministry reasonably determined that there is insufficient evidence to confirm that in the opinion of a prescribed professional the appellant's impairment *significantly* restricts the ability to perform DLA either *continuously or periodically for extended periods*.

Help to perform DLA

Section 2(2)(b)(ii) of the EAPWDA requires that, *as a result of direct and significant restrictions in the ability to perform DLA*, a person requires help to perform those activities. 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 DLA.

The establishment of direct and significant restrictions with DLA is a precondition of the need for help criterion. As the panel found that the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established, the panel also finds that the ministry reasonably concluded that it cannot be determined that the appellant requires help to perform DLA as required by section 2(2)(b)(ii) of the EAPWDA.

Conclusion

The panel finds that the ministry's reconsideration decision, which determined that the appellant was not eligible for PWD designation, was reasonably supported by the evidence and a reasonable application of the applicable enactment, and therefore confirms the decision. The appellant is not successful on appeal.