

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (ministry) reconsideration decision dated 9 April 2018, which determined that the appellant was not eligible for Persons with Disabilities (PWD) designation because she had not met all of the legislated criteria under section 2 the *Employment and Assistance for Persons with Disabilities Act*. The ministry determined that the appellant had demonstrated that 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. The ministry further determined that the appellant had not demonstrated that she has a severe mental or physical impairment; the appellant's severe mental or physical impairment, in the opinion of a prescribed professional, does not directly and significantly restrict her ability to perform daily living activities (DLA) either continuously or periodically for extended periods; nor that as a result of direct and significant restrictions, she requires help to perform those activities.

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

Evidence before the ministry at reconsideration consisted of the following:

1. The appellant's PWD Application

The Application contained:

- A Medical Report (MR) dated 6 November 2017, completed by the appellant's general practitioner (GP) who has seen the appellant 11+ times in the past 12 months and known the appellant for 9 months.
- An Assessor Report (AR) dated 9 September 2017, completed by the appellant's social worker (SR) who has seen the appellant 2-10 times in the past 12 months and known the appellant for 4 months.
- A Self Report (SR) dated 16 August 2017 signed by the appellant.

Included with the PWD application were several medical and laboratory reports detailing the appellant's medical history back to 1999.

The panel will first summarize the evidence from the PWD Application as it relates to the PWD criteria at issue in this appeal.

Diagnoses

In the MR, the GP specifies the following diagnoses as related to the appellant's impairment:

- Diabetes – onset 1999
- General depression disorder – onset 1996
- Hypertension – onset 1996
- Chronic pain shoulders, wrists, legs – onset 2002
- Hypothyroidism/arrhythmia – onset 1993
- Sleep apnea - onset 2002

Severity of Physical Impairment

MR:

Under Health History, the GP writes that the appellant has diabetes that is poorly controlled with a high dose of insulin and she has not taken insulin on time due to financial concern. The GP writes that the appellant has major depression disorder and stress from her health condition as well as the health conditions of her child and spouse. The GP indicates that the appellant has pain in multiple joints and carpal tunnel syndrome. As well, the GP indicates that the appellant has hypothyroidism and arrhythmia, which may be related to abnormal thyroid hormone level.

For functional skills, the GP indicates that the appellant can walk 1-2 blocks unaided, climb 5+ steps unaided, lift 7-16kg and remain seated for 1-2 hours.

The GP has indicated that the appellant does not require any aids or prostheses for her impairment.

AR:

The SW describes the appellant's impairment as: *[Appellant] self-reports she struggles with chronic pain daily, fatigue, low energy, depression; [appellant] has been hospitalized for depression (approx. – 2004).*

The SW assesses the appellant's mobility and physical ability as independent for walking indoors and taking significantly longer (*3 times*) and walking outdoors (*longer to reach destination due to pain and fatigue "will avoid walking if" possible due to pain/fatigue*) requiring continuous assistance climbing stairs and taking significantly longer (*3 times longer; if climbing stairs more than 4 flight of stairs [appellant] requires assistance*); requiring periodic assistance with standing (*can stand 2-9 minutes then [appellant] requires assistance, hold on to something for support*); and requiring continuous assistance for lifting (*due to [appellant] having a son with a disability, she is left with no choice but to lift, otherwise she would avoid lifting due to pain and fatigue*); and independent with carrying and holding.

SR:

The appellant states that she suffers from fibromyalgia, diabetes, restless leg syndrome, insomnia, severe depression, trouble with recurring carpal tunnel syndrome and problems with one of her shoulders due to a dislocation. She reports that she is having some issues with her heart that will be investigated and a CT-scan to determine if there are problems that create her forgetfulness and inability to form words when she speaks at times.

Severity of Mental Impairment

MR:

The GP has ticked 'no' in response to whether there are difficulties with communication other than lack of fluency in English.

The GP indicates that the appellant has significant deficits with cognitive and emotional functioning in the areas of language and emotional disturbance and provides the comments: *she found it was hard to find the words. Head CT was normal. Major depression disorder.*

AR:

The SW assesses the appellant's ability to communicate as good in the areas of reading (*difficulty retaining information*) and hearing and poor in the areas of speaking (*some days [appellant] cannot remember words to form sentences*) and writing (*difficulty processing information to write sentences*).

The SW has assessed the appellant's cognitive and emotional functioning as having major impact to bodily functions, emotion, attention/concentration, motivation, motor activity, language and other emotional or mental problems (*anger – with certain sounds/lights*); moderate impact to consciousness and memory; minimal impacts to impulse control and executive; and no impact to insight and judgment, psychotic symptoms and other neuropsychological problems. The SW provides the comments: *major impact with sleeping (restless legs syndrome and pain). [Appellant] used to shower daily, now she self-reports she showers weekly due to pain, fatigue and depression. [Appellant] self-reports she will pick at skin until sore forms. This worker observed open sores on arms (ritualistic, repetitive actions)>*

SR:

As noted above, the appellant states that she suffers from severe depression and reports that a CT-scan has been ordered to determine if there are problems that create her forgetfulness and inability to form words when she speaks at times.

Ability to perform DLA

MR:

The GP indicates that the appellant has been prescribed medication that interferes with her ability to perform DLA.

The GP indicates that the appellant requires continuous assistance with meal preparation and is independently able to perform all other listed DLA.

In response to the question: **What assistance does your patient need with Daily Living Activities?**, the GP writes: *Help from another person. Her son.*

AR:

The SW indicates that the appellant is independent with d grooming, toileting, feeding self, regulating diet, and transfers in/out of bed and on/off chair. The SW indicates that the appellant requires periodic assistance with bathing (*[appellant] will ask her youngest son to assist with drying after bath*) and continuous assistance with dressing (*[appellant] will ask her youngest son to assist her with dressing*).

The SW indicates that the appellant requires continuous assistance with all basic housekeeping activities, and comments that the appellant will ask her son to complete these activities.

The SW indicates that the appellant is independent with the shopping activities of readings prices and labels, making appropriate choices and paying for purchases; she is independent going to and from stores and takes significantly longer (*takes approx. 3 times longer to complete task or will ask her son to go to the store*) and requires continuous assistance carrying purchase home (*always asks for assistance from her son*).

The SW comments: *[appellant] self-reports that it takes her 3 time longer to walk to destinations. She will avoid walking and carrying items if possible. If it is required, her younger son will carry the items – Always).*

The SW indicates that the appellant is independent with the meals activities of meal planning and safe storage; she requires periodic assistance with food preparation and cooking.

The SW indicates that the appellant is independent with all pay rent and bills activities, all medications activities and all transportation activities.

The SW comments: *[Appellant] self-reports that she can use public transit however, she can not carry on the bus. Depending on how many stairs [appellant] has to climb determines if she needs assistance. Can not stand on bus due to pain and balance issues.*

The SW has assessed the appellant as independent in the social functioning areas of appropriate social decision, developing and maintain relationships, and interacting appropriately with others (*difficulty maintaining friends due to having 'bad' days dealing with pain/depression*). The SW indicates that the appellant requires periodic assistance dealing appropriately with unexpected demands (*will ask family members for support*) and securing assistance from others (*son is available to secure assistance however, if son transition out of home, [appellant] would require support to secure assistance for her chronic pain, fatigue and depression*).

The SW indicates that the appellant has very disrupted functioning in her immediate (*due to depression, lack of sleep and pain [appellant] will sometimes not leave home for [a] week to ten days at a time*) and extended (*[appellant] self-reports she will require ongoing counselling, further medical testing to explore her chronic pain*) social networks.

Help required

MR:

The GP indicates that the appellant does not require any aids or prostheses.

The GP indicates that the appellant needs assistance with DLA and receives this assistance from her son.

AR:

The SW indicates that the appellant receives assistance from Health Authority Professionals and Community Service Agencies and from the use of an assistive device (*[appellant] uses splints on her wrists to aid with chronic pain. Dr. [omitted] Tens machine for ongoing pain*).

The SW indicates that the appellant does not receive assistance from assistance animals.

2. Request for Reconsideration

The Request for Reconsideration dated 15 March 2018 is signed by the appellant. Included with the request for reconsideration were a number of documents:

- A copy of the PWD denial decision summary annotated with comments by the appellant
- A copy of a letter from an internist dated 21 July 2017, with asterisks placed next to Fibromyalgia
- 3-page handwritten statement prepared by the appellant
- Handwritten list of the appellant's current medications
- 1-pge letter dated 17 January 2018, from the SW indicating her support for the appellant having a dog
- A Patient Medical Summary and Medical Record from the appellant's former physician, with stars placed next to some of the listed medical conditions
- A copy of the appellant's PWD application and accompanying documents, annotated with comments, asterisks, stars and underlining by the appellant

Additional information before the panel on appeal consisted of the following:

Notice of Appeal

In the Notice of Appeal dated 12 April 2018, the appellant's reasons for appeal are illegible. In an appended document dated 16 April 2018, the appellant has written: *My Dr. missed many things in her report. She also didn't discuss anything with me. I'm not sure why she answered the way she did as we have never talked about these things. I've only her and we talked about 1 or 2 things. My social worker spent hours with me going over things. I feel the decision was based only on my Dr.'s report. It is very hard to describe then problems I have with my health on paper. I want to be heard in person or by telephone.*

Appeal Submissions

At the hearing, the appellant stated that she wakes up each day not knowing if she will be able to do things. She reported often being unable to get out of bed. She stated that her son does 99% of the housework, shopping and meal preparation. He also helps her to wash her feet and dry them about once a week when she bathes and sometimes helps her to get dressed. She stated that her condition is getting worse and there are an increasing number of days, sometimes 6 out of 7 days, where she can't do things. She argued that her GP failed to acknowledge her fibromyalgia in the application and its impacts combine with her other conditions. She also argued that her medications impact her ability to do things and her memory. She reported that she began using a CPAP machine a few weeks ago and it tracks her sleep; the most sleep she has had since she began tracking is 6 hours. She argued that a lack of sleep compounds her fibromyalgia and depression. She reported that her restless leg syndrome used to occur at night but is now unpredictable and can occur at any time of day or night. She reported episodes occurring 3 times per day and every night for up to 3 hours. She stated that she gets no relief even with medications. The appellant reported that her depression makes her feel 'bleak' and affects her wanting to get up and do things. She also stated that she has had abscesses on her skin for a long time and cannot control her urge to scratch and pick at them when she is stressed. She reported that she has attended some counselling but misses a lot of appointments because it is hard for her to remember and sometimes she cannot deal with it because of depression. She stated that she gets so fatigued that walking 3 feet makes her want to "crumple to the floor". She reported being unable to stand long enough to do dishes and because of her carpal tunnel and shoulder issues, she ends up dropping and breaking them. She argued that she does qualify for PWD designation but doesn't "fit into a box" on the application forms. Her situation requires looking at the sum of the whole picture. She reported a difficult childhood and stated that she was hospitalized after her first son was born and it has been a battle since then. She stated that she has been hospitalized a few times for depression and has recently declined hospitalization because she did not want to leave her sons alone. She reported that both her older son and husband have serious medical conditions. She stated that she gets comfort and support from her dog despite him not being a registered assistance animal and that her dog has alerted her to low blood sugar quite a few times. She reported that the dog provides emotional support for her and motivates her to get out of the house for short walks or in the car.

The appellant's SW attended the hearing and reported that she has known the appellant for 6-7 months. She stated that she has observed the appellant walking and it appears to be challenge for her and she seems to be in pain. She stated that the appellant is respectful, polite, sincere and honest. The SW stated that, despite the lack of diagnosis, she believes the appellant is struggling with early trauma and her pet dog provides anxiety relief.

The appellant's GP attended the hearing and stated that the appellant has a lot of medical issues. She reported that they are working with multiple specialists. As well, the GP indicated that the appellant had been struggling with her insulin for a while due to financial issues and she requires financial support. The GP reported that the appellant is OK to walk, but not for long distances. The GP reported having had 3 home visits with the appellant. The GP indicated that fibromyalgia is hard to diagnose but it is a possible diagnosis for the appellant as she does suffer from chronic pain in multiple joints. The GP indicated that she hopes for more support for the appellant.

The ministry relied on the reconsideration decision.

Admissibility

The panel finds that the information provided in the appellant's Notice of Appeal consists of argument and will be considered on that basis

The panel finds that the appellant's oral evidence at the hearing consisted of information and argument in support of information and records that were before the ministry at reconsideration and is admissible in accordance with section 22 (4)(b) of the *Employment and Assistance Act*.

The panel finds that the SW's oral evidence at the hearing consisted of information and argument in support of the information and records before the ministry at reconsideration and are admissible in accordance with section 22 (4)(b) of the *Employment and Assistance Act*.

The panel finds that the GP's oral evidence at the hearing consisted of information and argument in support of the information and records before the ministry at reconsideration and are admissible in accordance with section 22 (4)(b) of the *Employment and Assistance Act*.

In making these determinations regarding admissibility, the panel notes that the ministry did not attend the hearing and was, therefore, unable to express any objection in relation to admissibility.

PART F – REASONS FOR PANEL DECISION

The issue in this appeal is whether the ministry decision that determined that the appellant did not meet three of the five statutory requirements of Section 2 of the *EAPWDA* for PWD designation is reasonably supported by the evidence or is a reasonable application of the legislation in the circumstances of the appellant. Specifically, the ministry determined that the information provided did not establish that:

- the appellant has a severe mental or severe physical impairment;
- that the appellant's severe mental or physical 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 those restrictions, she requires help to perform those activities.

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

Persons with disabilities

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 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.

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

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

The legislation requires that for PWD designation, the minister must be "satisfied" that the person has a severe mental or physical impairment. The legislation makes it clear that the determination of severity is at the discretion of the minister, considering all the evidence, including that of the appellant. Diagnosis of a serious medical condition does not in itself determine severity of impairment.

Severity of physical impairment

In the reconsideration decision, the ministry determined that it was not satisfied that this criterion had been met. In making this determination, the ministry considered the functional skills assessment by the GP noting that the appellant is able to walk 1-2 blocks unaided, climb 5+ steps unaided, lift 7-16 kg. and remain seated for 1-2 hours; the ministry concluded that this assessment is not indicative of a severe physical impairment. The ministry also considered the SW's assessment of mobility and physical ability in the AR, noting that it does not consider taking 3 times longer to be indicative of a severe impairment of physical functioning. The ministry also noted that the SW has indicated that the appellant requires continuous assistance climbing stair and that she can climb 4 flights of stairs before requiring assistance. The ministry noted that the GP has indicated that the appellant can lift up to 35lbs. while the SW indicates she requires continuous assistance with lifting. The ministry concluded that the ability to lift up to 35lbs. is sufficient for a wide variety of household and shopping tasks. The ministry also noted that the SW has described limitations in the appellant's ability to stand but the GP has not described these limitations. The ministry determined that it was difficult to establish a severe impairment of physical functioning based on the reports of the SW in the AR. The ministry's conclusion on this criterion was that a severe impairment of the appellant's physical functioning had not been established.

The panel notes that the assessments of the appellant's functional capacity and mobility and physical ability assessments in the MR and AR do not provide a consistent and coherent picture of the appellant's ability to function independently. The panel finds that the information provided in the two assessments, as well as the information provided by the appellant conflicts in a number of areas, including standing, climbing stairs and lifting. The panel notes that the appellant has argued that she feels the decision was based only on the GP's information, which she feels is less accurate than the SW's information; however, the reconsideration decision does not indicate that it considered only the GP's information or that the ministry gave more weight to the GP's information. Rather, the ministry specifically indicated that it considered both assessments, as well as the supplementary information and self-reports provided by the appellant. The panel finds that the information provided reflects an individual with limitations but does not provide sufficient and consistent information establishing a severe physical impairment. The panel finds that the ministry's determination, that a severe physical impairment has not been established, is reasonably supported by the evidence.

Severity of mental impairment

In the reconsideration decision, the ministry found that the appellant does not have a severe mental impairment. The ministry noted that the GP's assessment in the MR indicated that the appellant does not have difficulties with communication and is not restricted with social functioning but did indicate that there are deficits to cognitive and emotional functioning in the areas of language and emotional disturbance. The ministry noted that the GP did not describe the severity of these deficits and does not indicate deficits to the majority of listed areas of cognitive and emotional functioning. The ministry noted that the SW has indicated that the appellant has poor ability with speaking and writing, while the GP has indicated that there are no difficulties with communication. As well, the ministry noted that the SW indicates major or moderate impacts to cognitive and emotional function in the areas of attention/concentration, motivation, motor activity, consciousness and memory but the GP did not indicate deficits in these areas. The ministry also noted that the SW has indicated a need for periodic assistance with some aspects of social functioning but has not indicated the frequency or duration of support required. As well, the ministry noted that the GP has indicated that the appellant is not restricted with social functioning. The ministry concluded that a severe impairment of mental functioning had not been established.

The panel finds that the ministry's determination that a severe mental impairment has not been established was reasonably supported by the evidence. The panel notes the inconsistencies in the information that was before the ministry at reconsideration. The panel finds that the GP's & SW's assessments of cognitive and emotional functioning in the MR and AR conflict with one another in some areas and do not provide a consistent and coherent picture reflective of a severe mental impairment. As such, the panel finds the ministry's conclusion that the information provided does not establish a severe mental impairment and that this criterion was not met is reasonably supported by the evidence.

Direct and significant restrictions in the ability to perform DLA

The legislation specifies that the minister assess direct and significant restrictions in the ability to perform DLA, as listed in section 2(1)(a) and (b) of the EAPWDR, in consideration of the opinion of a prescribed professional. While this does not preclude consideration of other evidence, the legislation it is clear that the opinion of a prescribed professional is fundamental. In this instance, the prescribed professionals are the appellant's GP and SW.

The ministry was not satisfied that the appellant has a severe impairment that, in the opinion of a prescribed professional, directly and significantly restricts her ability to perform DLA. In reaching this conclusion, the ministry noted that the appellant has been prescribed medication that interferes with her ability to perform DLA. The ministry considered the GP's assessment that the appellant is not restricted with all but one DLA, meal preparation. The ministry also considered that the SW has indicated that, in addition to requiring periodic assurance with some meals activities, the appellant is restricted in some areas of personal care, basic housekeeping and shopping. However, the ministry noted that the GP has indicated that the appellant is not restricted in these areas. In relation to social functioning, the ministry noted that the GP has indicated that the appellant is not restricted, while the SW has indicated periodic restrictions in some areas. The ministry also noted that the SW has not described the frequency or duration of assistance required in these areas. The ministry concluded that there was 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.

The panel finds that the ministry's determination that the assessments provided do not establish that a severe impairment significantly restricts the appellant's ability to perform DLA continuously or periodically for extended periods was reasonable. The panel notes that the GP's assessment of DLA in the MR indicates that the appellant is independent in all areas except meal preparation, which requires continuous assistance. The panel notes that this is not consistent with the report provided by the SW in the AR, which indicates that the appellant requires periodic assistance with some meals activities, as well as periodic and continuous assistance with other activities. The panel finds that, in relation to the activities for which periodic assistance is indicated, the SW's assessment does not provide sufficient information regarding periodicity. This results in a lack of clarity with respect to whether periodic assistance is required for extended periods as required by the legislation. For instance, in relation to meals activities of food preparation and cooking, for which periodic assistance is indicated, the SW has not provided a response to the prompt to "Explain/Describe (include a description of the type and amount of assistance required)". In relation to bathing, for which periodic assistance is indicated, the SW's response to the same prompt is "[appellant] will ask for youngest son to assist with drying after bath." The panel finds that this does not provide enough information establish that the legislative requirement of "periodically for extended periods" has been met. The panel notes that while the appellant argued at the hearing and in her annotation of the PWD application that she requires assistance with several DLA, the legislation specifies that direct and significant restrictions to DLA must be in the opinion of a prescribed professional. Given the absence of sufficient and consistent information from the prescribed professionals regarding direct and significant restrictions to DLA, the panel concludes that the ministry's determination that this criterion has not been met is reasonably supported by the evidence.

Help required

The legislation 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 must also require help to perform those activities. 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, significant help or supervision of another person, or the services of an assistance animal in order to perform a DLA.

In the reconsideration decision, the ministry determined that as it had not been established that appellant's ability to perform DLA were significantly restricted, it cannot be determined that significant help is required. The panel finds that the information provided demonstrates that the appellant receives assistance from her son. The panel also notes the SW's indication that the appellant receives assistance from Health Authority Professionals and Community Service Agencies and uses wrist splints. As well, the panel notes that the appellant has indicated that she receives emotional support from her dog and the SW has indicated that she supports the appellant having a dog. The panel notes that it is not clear that the appellant's dog is an "assistance animal" as contemplated by the

legislation. However, the panel finds that it need not make a determination on this question. As the panel has concluded that the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established, the panel must also find that the ministry reasonably concluded that it cannot be determined that the appellant requires help to perform DLA under section 2(2)(b)(ii) of the EAPWDA.

Conclusion

The panel finds that the ministry's reconsideration decision, determining that the appellant is not eligible for PWD designation, was reasonably supported by the evidence. The panel confirms the ministry's reconsideration decision. The appellant is not successful on appeal.