

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (“the ministry”) reconsideration decision dated April 17, 2018 which found that the appellant did not meet four of the five 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. However, the ministry was not satisfied that the evidence establishes that:

- the appellant has a severe physical or mental impairment;
- in the opinion of a medical practitioner or nurse practitioner the appellant’s impairment is likely to continue for at least two years;
- 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 these restrictions, the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

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

Employment and Assistance Act (EAA), Section 22 (4) (b)

Employment and Assistance Regulation (EAR), Section 86 (b)

PART E – SUMMARY OF FACTS

The ministry was not in attendance at the hearing. After confirming that the ministry had been notified the hearing proceeded under Section 86 (b) of the *Employment and Assistance Regulation*.

Evidence before the Ministry at Reconsideration

The evidence before the ministry at the time of the reconsideration decision included:

- PWD denial decision summary dated February 14, 2018;
- Appellant's Request for Reconsideration received by the ministry on March 16, 2018 with attached 3 page handwritten document submitted by the appellant, summarized as follows:
 - she saw an ear, nose and throat specialist on February 19, 2018 who said this is not a quick fix;
 - she does not drive, her speech is slurred and she could not work more than 2 days;
 - she can no longer get in and out of the bathtub to bathe so limits bathing to once per week;
 - she doesn't clean her house and eats only once per day and no longer cares how she looks;
 - her handwriting has been affected;
 - she has glaucoma and has an appointment to see an eye doctor in March;
 - she also has an appointment in March to see a doctor for treatment of chronic obstructive pulmonary disorder (COPD);
 - she has anxiety, insomnia, rheumatoid arthritis (RA) and obstructive sleep apnea (OSA) recently diagnosed, as well as persistent postural perceptual dizziness (PPPD).
- Persons With Disabilities (PWD) Application comprised of the appellant's self report dated December 04, 2017 (SR), a medical report (MR) and an assessor report (AR) both dated November 28, 2017 and both completed by the appellant's family physician (the GP), who has known the appellant for 8 years and who has seen the appellant 11 or more times in the past 12 months.

PWD Application

Diagnosis

In the MR the GP noted that the appellant suffers from anxiety, with a January 2017 date of onset, and with an estimated duration of impairment of 6 months.

Physical Impairment

In her SR the appellant reports that she has OSA, feels wobbly, hasn't driven since April 2017, cannot walk without staggering and cannot bathe as often as she once did. On October 25, 2017 experienced a fall while walking outdoors and on November 23, 2017 fell while at a washing machine.

In the MR the GP reported that the appellant can walk 4+ blocks unaided, climb 5+ steps unaided and has no limitations with lifting or remaining seated.

In the AR the GP reported that the appellant is independent in managing all activities requiring mobility and physical ability, including walking indoors and outdoors, climbing stairs, standing, lifting carrying and holding, but takes significantly longer ("gets so anxious").

Mental Impairment

In her SR the appellant reported she suffers from insomnia, slurred speech and difficulty concentrating. Going outside causes her more anxiety; as a result she has not driven since April 2017.

In the MR the GP noted that the appellant has no difficulties with communication, but has significant deficits in cognitive and emotional functioning in the areas of executive function, emotional disturbance and motivation.

In the AR the GP noted that the appellant experiences the following daily impacts to cognitive and emotional functioning:

- major impact in the area of emotion;
- moderate impacts in the areas of insight and judgement, attention/concentration and executive function;
- minimal impacts in the areas of memory and motivation;
- no impact in the areas of bodily functions, consciousness, impulse control, motor activity, language, psychotic symptoms, other neuropsychological problems or other emotional or mental problems.

Daily Living Activities (DLA)

In her SR the appellant reported that she has had to reduce the frequency of bathing from daily to once every 3 days.

In the MR the GP reported that the appellant has not been prescribed any medications or treatments that interfere with her ability to perform DLA. Her impairment periodically restricts her ability to form DLA in the areas of medication management, basic housework, mobility outside the home and use of transportation (“*depending on level of anxiety*”).

In the AR the GP indicated that the appellant is independent in all areas of personal care, basic housekeeping, shopping, meals, paying rent and bills, medications and transportation.

DLA – Social Functioning

In the MR the GP noted that the appellant is periodically restricted in her social functioning (“*gets so anxious she cannot carry a conversation at times*”). She requires periodic support/supervision in all areas of social functioning, namely:

- making appropriate social decisions (avoiding dangerous situations, good social judgement) – “*I see her frequently to reinforce need for treatment and insure taking Rx*”;
- developing and maintaining relationships and interacting appropriately with others – “*Isolated at this time*”;
- dealing appropriately with unexpected demands – “*anxious, leaves*”; and,
- securing assistance from others – “*Isolates*”.

The GP also noted that the appellant’s mental impairment impacts her relationship with both immediate and extended social networks, describing her functioning as marginal (little significant participation/communication; relationships often minimal and fluctuate in quality, little more than minimal acts to fulfill basic needs).

Assistance Required

In the MR the GP reported that the appellant’s daughters sometimes help with appointments.

In the AR the GP reported that that no one provides assistance with DLA. The GP added the following comment regarding the type of assistance that would be necessary: “*Benevol (volunteer assistance) that could help her get out*”. The GP also noted that the appellant does not require assistance through use of assistive devices and the appellant does not require an assistance animal.

Oral Evidence at the Hearing

The appellant stated that she has been to several medical specialists, including kidney, ear, nose and throat, arthritis and “head”. She has also been to a sleep clinic to assist with her OSA. She has scheduled an appointment for an MRI and to see her GP in July. She has had one appointment with a psychiatrist. She added that she cannot bathe, and on some days she has chronic pain from RA and can’t walk. A community volunteer mows her lawn, and she is waitlisted for housekeeping help. One of her children drives her to medical appointments.

Admissibility of Oral Evidence

The panel admitted all of the appellant’s oral evidence under EAA Section 22 (4) (b) as evidence in support of the information that was before the ministry at reconsideration because it provided additional detail to the information provided by the appellant in her SR and Request for Reconsideration.

PART F – REASONS FOR PANEL DECISION

The issue in this appeal is whether the ministry decision of April 17, 2018 which found that the appellant did not meet four of the five statutory requirements of Section 2 of the *Employment and Assistance for Persons with Disabilities Act* for designation as a PWD is reasonably supported by the evidence or is a reasonable application of the legislation in the circumstances of the appellant. The ministry found that the appellant met the age requirement. However, the ministry was not satisfied that the evidence establishes that:

- the appellant has a severe physical or mental impairment;
- in the opinion of a medical practitioner or nurse practitioner the appellant's impairment is likely to continue for at least two years;
- 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 these restrictions, the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

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 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.

EAPWDR:

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.

PANEL DECISION

1. Duration of Impairment

Panel Decision

In Part C of the MR the GP indicated that in her opinion the appellant's impairment is not likely to continue for 2 or more years from the date on which she completed the report. She commented: "6 months", and did not explain whether there were treatments that could affect the prognosis.

The panel finds that the ministry reasonably determined that the appellant's impairment is not likely to continue for 2 or more years from the date on which the GP completed the MR.

2. Severe Physical Impairment

The appellant argues that she suffers from several physical impairments, including RA, COPD, OSA, glaucoma and PPD which affect her mobility and functional abilities.

The ministry's position is that the appellant does not have a severe impairment in her physical functioning.

Panel Decision

Pursuant to section 2 EAPWDA, eligibility for PWD hinges on an "impairment" and its severity. "Impairment" is more than a diagnosed medical condition. An impairment is a medical condition that results in restrictions to a person's ability to function independently, appropriately, effectively or for a reasonable duration.

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

In her SR, Request for Reconsideration and oral evidence the appellant indicated that her physical impairments have caused her to walk unsteadily, fall twice, and restrict her ability to bathe, clean house, drive and write.

In the MR the GP did not diagnose any physical impairments, and assessed the appellant as having no limitations with walking, climbing lifting or remaining seated. In the AR the GP indicated that the appellant is independent in all activities with the exception that she takes significantly longer with walking outdoors because of her anxiety. No additional information was provided by the GP prior to reconsideration.

Based on the available information, the panel finds that while the information submitted by the appellant indicates ongoing and worsening limitations to her mobility and physical functioning, given the absence of any physical diagnosis in the MR and the GP's assessment of unimpaired physical functioning and mobility, the ministry reasonably determined that a physical impairment has not been established.

3. Mental Impairment

The appellant argues that she suffers from anxiety, which severely impairs her cognitive and emotional functioning.

The ministry's position is that there is insufficient information to establish a severe mental impairment.

Panel Decision

A diagnosis of a serious medical condition, in this case anxiety, does not in itself determine PWD eligibility. A severe mental impairment is a medical condition that results in significant cognitive and emotional deficits to a person's cognitive, emotional or social functioning.

In her SR, Request for Reconsideration and oral evidence the appellant indicated that she is too anxious to drive, is embarrassed by her slurred speech, has sleep problems and trouble concentrating, has little motivation and no longer cares about her physical appearance.

In the MR the GP noted that the appellant was diagnosed with anxiety, with an onset date of January 2017. As a result she suffers panic attacks, isolates herself, doesn't drive, is unable to concentrate or multitask and has impaired judgement. She has no difficulties with communication, but has significant deficits with cognitive and emotional functioning in the 3 of the 9 listed areas of functioning: executive, emotional disturbance and motivation. The GP did not provide additional information in the "comments" sections provided.

In the AR the GP indicated that the appellant's mental impairment causes a major impact in the 1 of the 14 areas of cognitive and emotional functioning, namely emotion, and moderate impacts in 3 areas: insight and judgement, attention/concentration and executive function and minimal impacts in memory and motivation. No impacts are indicated in the 10 remaining areas: bodily functions, consciousness, impulse control, motor activity, language, psychotic symptoms, other neuropsychological problems or other emotional or mental problems. The GP did not complete the "comments" section following, and did not provided additional information prior to reconsideration that would assist the ministry in determining the extent to which the specified mental impairment impacts the appellant's mental functioning.

In the area of social functioning the GP indicated that the appellant requires periodic support/supervision in all 5 listed areas: making appropriate social decisions ("*see her frequently to reinforce need for treatment and insure taking Rx*"); developing and maintaining relationships, interacting appropriately with others ("*isolated at this time*"), dealing appropriately with unexpected demands ("*anxious, leaves*") and securing assistance from others ("*isolates*"). Although the GP's comments provide some description of impacts to social functioning they do not explain the degree or duration of periodic support/supervision required.

The GP also noted that the appellant's mental impairment impacts her relationship with both immediate and extended social networks, describing her functioning in both networks as marginal (little significant participation/communication, relationships often minimal and fluctuate in quality, little more than minimal acts to fulfill basic needs). However, the GP did not indicate that the appellant requires help with her social functioning or provide any additional comment prior to reconsideration.

The information submitted by the appellant indicates that her cognitive and social functioning is impaired as a result of her anxiety. However, given the limited number of cognitive and emotional impacts identified in the MR (3 of 9), the limited number of major impacts to cognitive and emotional functioning listed in Part B-4 of the AR (1 of 14) and the limited explanatory comments provided by the GP the panel finds that the ministry reasonably determined that the appellant's mental impairment is within the moderate range of mental functioning.

For these reasons the panel finds that the ministry reasonably determined that the information provided at reconsideration fails to establish a severe mental impairment.

4. Restrictions in Ability to Perform DLA

The appellant argues that her ability to perform DLA is significantly restricted as a result of her mental and physical impairments.

The ministry's position is that a severe impairment has not been established that directly and significantly restricts the appellant's ability to perform DLA, and that the information submitted by the prescribed professional is not sufficient to establish that the appellant's DLA are directly and significantly restricted either continuously or for extended periods.

Panel Decision

The legislative requirement respecting DLA set out in section 2(2)(b) of the EAPWDA is that the minister be satisfied that as a result of a severe physical or mental impairment a person is, in the opinion of a prescribed professional, directly and significantly restricted in the ability to perform DLA either continuously or periodically for extended periods. While other evidence may be considered, the ministry's determination as to whether or not it is satisfied is dependent upon the evidence from prescribed professionals. DLA are defined in section 2(1) of the EAPWDR and are listed in both the PR and the AR

sections of the PWD application with the opportunity for the prescribed professional to check marked boxes and provide additional narrative.

In the MR the GP indicated that the appellant is periodically restricted in her ability to perform DLA in 5 areas: medication management, basic housework, mobility outside the home, use of transportation and social functioning. She commented that the periodic restriction of DLA “*depends on [the appellant’s] level of anxiety*” and added that the appellant “*gets so anxious [she] cannot carry a conversation at times*”. This information does not describe the frequency or duration of periodic restriction in the performance of DLA.

In the AR the GP noted that the appellant is independent in all areas of DLA except social functioning. The GP explained that she sees appellant frequently to reinforce the need for treatment and ensure medication compliance, and added that the appellant is isolated, anxious, and leaves when confronted with unexpected demands. None of these comments speaks to the degree and duration of support/supervision the appellant requires to carry out the listed areas of social functioning.

A severe impairment was not established in the appellant’s circumstances. Because this precondition was not met and because the GP did not provide sufficient information to establish that the appellant’s impairment significantly restricts her ability to perform DLA either continuously or periodically for extended periods the panel finds that the ministry reasonably determined that the legislative requirement set out in EAPWDA Section 2 (2)(b)(i) was not met.

5. Help in Performing DLA

The appellant argues that she requires the assistance of her adult children to drive her to and from appointments, and the help of a community volunteer to mow her lawns and to help with housework.

The ministry’s position is that because the information did not establish that the appellant’s DLA are significantly restricted it cannot be determined that an assistive device or significant help is required.

Panel Decision

The establishment of direct and significant restrictions with DLA is a precondition of the need for help criterion. Because 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

Having reviewed and considered all of the evidence and relevant legislation, the panel finds that the ministry’s reconsideration decision, which determined that the appellant had not met the eligibility criteria for PWD designation, was reasonably supported by the evidence, and confirms the decision. The appellant is not successful on appeal.

PART G – ORDER

THE PANEL DECISION IS: (Check one)

 UNANIMOUS BY MAJORITY

THE PANEL

 CONFIRMS THE MINISTRY DECISION RESCINDS THE MINISTRY DECISION

If the ministry decision is rescinded, is the panel decision referred back to the Minister
for a decision as to amount? Yes No

LEGISLATIVE AUTHORITY FOR THE DECISION:*Employment and Assistance Act*Section 24(1)(a) or Section 24(1)(b)

and

Section 24(2)(a) or Section 24(2)(b) **PART H – SIGNATURES**

PRINT NAME

Joan Bubbs

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2018/Jun/26

PRINT NAME

Linda Smerychynski

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2018/Jun/26

PRINT NAME

Meghan Wallace

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2018/Jun/26