

**PART C – DECISION UNDER APPEAL**

The decision under appeal is the ministry's reconsideration decision dated May 15, 2018. In that decision the ministry decided that the appellant was not eligible for Persons With Disabilities (PWD) designation. The minister found that the appellant met two of the five criteria that are required by Section 2(2) and 2(3) of the Employment and Assistance for Persons with Disabilities Act. The ministry found that the appellant met the criteria related to age and a serious impairment, but did not meet the criteria related to duration, directly and significantly restricted daily living activities and assistance required with daily living activities as a result of significant restrictions.

**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 information before the ministry at reconsideration included the following:

- A Medical Report (MR), dated December 6, 2017, and completed by the appellant's general practitioner. In the MR the doctor stated:
  - The appellant had been his patient for more than 2 years and he had seen the appellant 2-10 times in the previous 12 months;
  - The appellant was diagnosed with Anxiety Disorder (onset 2014) which he described as "quite intrusive in her day to day function" and "MGUS" (onset 2014) which is monoclonal gammopathy of undetermined significance which he described as "no symptoms";
  - With regard to whether "the impairment" was likely to continue for two years or more from today the doctor wrote "uncertain" and made no mark in either of the "Yes" or "No" checkboxes;
  - The doctor noted significant deficits with cognitive and emotional function including in the area of "executive", "memory", "emotional disturbance" and "motivation";
  - In response to the question "Does the impairment directly restrict the person's ability to perform Daily Living Activities the doctor checked the box "unknown"; and
  - In response to the question "What assistance does your patient need with Daily Living Activities" the doctor wrote "0" (zero).
- An Assessor Report (AR), dated December 11, 2017, completed by a registered nurse. In the AR the registered nurse stated:
  - She had known the appellant for 1 month and seen her 2-10 times in the previous 12 months;
  - In the section "Ability to Communicate", the registered nurse indicated that the appellant was good or satisfactory in relation to all the criteria but wrote the comment "Completion of form extremely difficult due to anxiety";
  - In the section "Mobility and Physical Ability", the registered nurse indicated the appellant was independent in relation to all the criteria except carrying and holding where the appellant was noted to require periodic assistance from another person and it was noted that the appellant "can only lift 5-15 pounds";
  - In the section "Cognitive and Emotional Functioning", the registered nurse indicated major impact on daily functioning for bodily functions, emotion, attention/concentration, executive, memory, motivation, motor activity, language, psychotic symptoms and "agoraphobia";
  - In the section "Daily Living Activities" the registered nurse identified that the appellant was independent regarding all criteria but that it took longer for the appellant to do many tasks and that the appellant had developed strategies to cope with her anxiety and other issues. The registered nurse noted that the appellant "would benefit from using premade meals to increase varied diet";
  - In the section for "Social Functioning" under "Daily Living Activities" the registered nurse indicated that the appellant required continuous support/supervision regarding the 5 indicia and that "self isolation due to anxiety, depression and agoraphobia" was very disruptive to the appellant's immediate social network and the appellants "agoraphobia" was very disruptive to the appellant's extended social networks;
  - The registered nurse indicated that the appellant receives help for daily living activities from Health Authority Professionals and Community Service Agencies;
  - The registered nurse wrote "N/A" over the section Assistance provided through the use of Assistive Devices;
  - The registered nurse checked the box "No" in the section Assistance provided by Assistance Animals;
- The appellant also provided a handwritten Self Report. In the Self Report the appellant states:
  - That the appellant "used to take care of myself and now it feels really overwhelming";
  - "Socially, I have a really hard time going out – there is no one in my life";
  - "When I need something at the store I get very nervous"; and
  - "I have a hard time being around crowds".

## **Information provided on appeal:**

### **Notice of Appeal**

In the Notice of Appeal dated May 18, 2018, the appellant wrote under the heading "Reasons for Appeal" that "I believe I qualify for disability benefits".

The Panel determined that this was argument and was not new evidence.

### **Testimony of Appellant's Neighbour**

The Panel heard the testimony of a neighbour. The neighbour stated that she assisted the appellant with shopping, laundry and cooking and spent approximately two hours per day with the appellant once the neighbour returned from work. The neighbour said she had known the appellant for about 4 years and that the appellant's condition had been mostly the same but had gotten worse over time. The neighbour said the appellant had been secluded and a "nervous wreck" for the last year and a half and that some days the appellant says she cannot walk because her legs are too sore and painful.

Section 22(4) of the EAA provides that panels may admit as evidence the information and records that were before the minister when the decision being appealed was made and "oral and written testimony in support of the information and records" before the minister when the decision being appealed was made. These limitations reflect the jurisdiction of the panel established under section 24 of the EAA - to determine whether the ministry's reconsideration decision is reasonably supported by the evidence or is a reasonable application of the enactment in the circumstances of an appellant. That is, panels are limited to determining if the ministry's decision is reasonable and are not to assume the role of decision makers of the first instance. Accordingly, panels cannot admit information that would place them in that role.

The Panel asked the appellant if the neighbour or the appellant had ever provided this type of information to the ministry and the appellant stated that she had not done that prior to the Notice of Appeal. The Panel determined that the testimony of the appellant's neighbour was not admissible because it was not in support of the information and records that were before the minister at the time the decision was made.

### **The Social Worker's Letter**

The appellant provided the Panel with a letter from a social worker dated June 28, 2018. In that letter the social worker wrote that she had known the appellant since "mid-May 2018" and that her opinion was that the appellant "requires assistance due to and for her mental illness on a consistent and continuous basis. This assistance would not only consist of a mental health case manager, counsellor and/or social worker but an outreach worker who would maintain contact not only in an office setting but in her home and in the community."

The appellant stated that, as with the neighbour's testimony, she had not provided any information from a social worker to the ministry prior to the Notice of Appeal. The Panel determined that the social worker's letter was not admissible because it was not in support of the information and records that were before the minister at the time the decision was made.

## PART F – REASONS FOR PANEL DECISION

The issue in this appeal is whether the ministry's determination that the appellant was not eligible for Persons with Disabilities (PWD) designation, is reasonably supported by the evidence or is a reasonable application of the legislation in the circumstances of the appellant.

### Applicable Legislation

#### EAPWDA

#### 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).

## EAPWDAR

### 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.

### Appellant's Submissions

The appellant's submission at the hearing was that because the appellant had suffered from disabilities her whole life and clinically for the last 5 years that the ministry should have determined that her impairment was likely to continue for two years or more.

The appellant did not make any submissions regarding any error of the ministry in the assessment of whether her ability to perform daily living activities was severely impaired nor whether she required significant help or supervision to perform daily living activities.

### Ministry Submissions

The ministry stated that pursuant to EAPWDA, Section 2(2)(a) the minister must be satisfied that a person has a severe mental or physical impairment that "in the opinion of a medical practitioner or nurse practitioner is likely to continue for at least 2 years". The MR was the only evidence provided by the appellant of the opinion of a medical practitioner regarding whether "the impairment" was likely to continue for two years or more and in that form the general practitioner indicated "uncertain" and made no mark in either of the "Yes" or "No" checkboxes. The AR was completed by a registered nurse and a registered nurse does not come within the definition of a medical practitioner or nurse practitioner.

The ministry stated that the EAPWDA section 2(2)(b) requires the minister to be satisfied that in the "opinion of a prescribed professional" is that a severe mental or physical impairment "directly and significantly restricts the person's ability to perform daily living activities." The ministry stated that it was not satisfied this condition was met because in the MR the general practitioner indicated that it was "unknown" whether the impairment directly restricted the appellant's ability to perform daily living

activities. The ministry stated that although the AR indicated that the appellant required continuous support/supervision regarding the 5 indicia for “Social Functioning” under “Daily Living Activities” that this did not satisfy the ministry because it conflicted with the opinion of the general practitioner who had known the appellant for more than 2 years.

The ministry also submitted that EAPWDA section 2(2)(b)(ii) requires a “prescribed professional” to be of the opinion that a person requires help to perform daily living activities and in the MR the general practitioner wrote “0” [zero] in response to the question “What assistance does your patient need with Daily Living Activities?” In the AR the registered nurse indicated that the appellant receives help for daily living activities from Health Authority Professionals and Community Service Agencies but no help from Assistive Devices or Assistant Animals. The ministry position was that this did not satisfy this criterion, and even if this criterion was met the ministry was not satisfied that the appellant had a severe mental or physical disability that is likely to continue for more than two years.

### **The Panels’ Decision**

The Panel notes that EAPWDA section 2 requires the ministry to be satisfied all three criteria of a severe mental or physical impairment that is likely to continue for at least 2 years and, a severe mental or physical impairment that directly and significantly restricts the person’s ability to perform daily living activities and that as a result of those restrictions the person requires help to perform those activities.

#### ***Duration***

EAPWDA, Section 2(2)(a) requires the minister to rely on “the opinion of a medical practitioner or nurse practitioner” to be satisfied that a severe mental or physical impairment “is likely to continue for at least 2 years”.

The Panel finds that the only opinion from a medical practitioner or nurse practitioner before the ministry at the time of reconsideration was the opinion in the MR that the duration was “uncertain”. Consequently, the Panel finds the ministry’s decision that it was not satisfied that the appellant’s impairment would likely continue for at least 2 years is supported by the evidence and is a reasonable application of the legislation.

The Panel notes that this determination is sufficient to confirm the ministry’s decision on reconsideration but will address the other two requirements.

#### ***Direct and Significant Restrictions on DLA***

EAPWDA, Section 2(2)(b)(i) requires the minister to be satisfied that “in the opinion of a prescribed professional” that a person has a severe mental or physical impairment that “directly and significantly restricts the person’s ability to perform daily living activities”.

The ministry, in the reconsideration decision, acknowledged that the appellant experiences restrictions to social function. However, the ministry, due to the inconsistencies between the MR and AR regarding restrictions to areas of personal self-care, basic housekeeping, shopping, meals, finances, medications and transportation was not satisfied that the appellant had “a severe impairment that *significantly* restricts [the appellant’s] ability to perform [their] daily living activities *continuously* or *periodically* for extended periods.” [emphasis in original]

The Panel finds that the ministry’s decision that, although the appellant had restrictions in her social functioning, that there was not sufficient evidence to establish that it was a severe and significant restriction, is supported by the substantive conflict in the evidence available at reconsideration and is a reasonable application of the legislation.

### ***Requirement for Help to Perform DLA***

EAPWDA, Section 2(2)(b)(ii) requires the minister to be satisfied that “in the opinion of a prescribed professional” that as a consequence of the restrictions on a person’s ability to perform daily living activities “the person requires help to perform those activities.”

The Panel finds that the ministry’s decision that it was not satisfied this criterion was met because it was not satisfied that there were direct and significant restrictions on daily living activities is a reasonable application of the legislation.

Furthermore, the Panel notes that in the AR it is indicated that the appellant is independent regarding all criteria but that it took longer for the appellant to do many tasks. The EAPWDA specifies that the requirement is that a person “requires help to perform those [daily living] activities”. Consequently, the ministry may not be satisfied that a person who is independent but slower than expected meets this requirement.

### **Conclusion**

The Panel finds that the ministry’s reconsideration decision, determining that the appellant was not eligible for Persons with Disabilities (PWD) designation, is reasonably supported by the evidence and is a reasonable application of the legislation in the circumstances of the appellant. The panel confirms the ministry’s reconsideration 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

Trevor Morley

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2018/07/17

PRINT NAME

Kent Ashby

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2018/07/17

PRINT NAME

Richard Roberts

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2018/07/17