

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (ministry) reconsideration decision dated 13 July 2018, which determined that the appellant was not eligible for persons with disabilities designation (PWD) because he 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 he has reached 18 years of age and that his impairment, in the opinion of a medical practitioner or nurse practitioner, is likely to continue for at least 2 years.

The ministry further determined that the appellant had not demonstrated that he has a severe mental or physical impairment; that his severe mental or physical impairment, in the opinion of a prescribed professional, directly and significantly restricts his ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and as a result of direct and significant restrictions, he 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

The appellant did not attend the hearing. After confirming that the appellant was notified, the hearing proceeded under section 86(b) of the Employment and Assistance Regulation.

Evidence before the ministry at reconsideration consisted of the following:

1. The appellant's PWD Application

The Application contained:

- A Medical Report (MR) dated 28 March 2018, completed by a general practitioner (GP) who indicates he has known the appellant for 1 year.
- An Assessor Report (AR) dated 28 March 2018, completed by the same GP who indicates he has seen the appellant 2-10 times in the past 12 months and known the appellant a few weeks.
- A Self Report (SR) dated 28 March 2018, completed and signed by the appellant.

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 provides the following diagnoses:

- Low back pain with DDD [degenerative disc disease] – onset January 2017

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 does not indicate whether the appellant has significant deficits with cognitive and emotional functioning. The following comments are provided: *anxiety, alcohol use.*

AR:

In the AR, the GP has responded to the question "What are the applicant's mental or physical impairments that impact his/her ability to manage Daily Living Activities?" as follows: *Unable to lift, bend over, twist his back, walk prolonged distance. [Patient] is on antidepressant.*

The GP indicates that the appellant's ability to communicate is good in all listed areas (speaking, reading, writing and hearing).

The GP assesses the appellant's cognitive and emotional functioning as having moderate impacts on daily functioning in the areas of emotion and other emotional or mental problems (*depression, anxiety*). The GP assesses no impacts in all other listed areas of cognitive and emotional functioning. No comments are provided.

SR:

The appellant does not speak to a mental impairment in his self-report.

Severity of physical impairment

MR:

Under Health History, the GP writes: *Documented on X-ray DDD, facet joints OA, severe pain. [left] leg goes numb, unable to walk more than 1 block. Difficulty bending over and lifting.*

For functional skills, the GP indicates that the appellant can walk 1-2 blocks unaided, climb 5+ steps unaided, lift 5-15 pounds unaided and remain seated for less than 1 hour.

In Part F, Additional Comments the GP: *to make it most objective I would support doing a functional capacity assessment.*

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

AR:

The GP has responded to the question "What are the applicant's mental or physical impairments that impact his/her ability to manage Daily Living Activities?" as follows: *Unable to lift, bend over, twist his back, walk prolonged distance. [Patient] is on antidepressant.*

The GP indicates that the appellant is independent with all areas of mobility and physical ability, including: walking indoors and outdoors, climbing stairs, standing, lifting and carrying and holding. No comments are provided.

The GP comments that the appellant has ongoing back pain that limits his physical ability and suggests a functional capacity assessment for an objective description.

SR:

The appellant indicates that he is in constant pain from a lower back injury. He reports being unable to walk very far without rest and unable to lift, twist or bend. He states that the pain is severe and he is unable to work. The appellant also reports that he has a heart condition, high blood pressure and is scheduled for a CT scan.

Ability to perform DLA

MR:

The GP indicates that the appellant has been prescribed medication that interferes with his ability to perform DLA (NSAIDs) the duration of which is indicated as: *? lifetime.*

The GP does not indicate whether the appellant's impairment restricts his ability to perform DLA. The GP goes on to indicate that the appellant is restricted continuously in relation to mobility inside and outside of the home. The GP makes no indication as to whether the appellant is restricted in any of the other DLA listed in the MR.

In explaining the degree of restriction, the GP comments: *moderate to severe degree of restriction.*

In relation to assistance needed with DLA, the GP comments: *not sure.*

AR:

The GP indicates that the appellant is independent in all personal care activities, all basic housekeeping tasks, all shopping activities, all meals activities, all pay rent and bills activities, all medications activities and all transportation activities. No comments are provided,

Section 2(1)(b) of the EAPWDR

The following DLA are applicable to a person who has a severe mental impairment:

Make decisions about personal activities, care or finances

MR:

The GP makes no indication as to whether the appellant is restricted in his ability to manage personal self-care, meal preparation, medications, finances and transportation.

AR:

The GP indicates that the appellant is independent with the personal care tasks of regulating diet; the shopping tasks of readings labels, making appropriate choices, and paying for purchases; the meals tasks of safe storage of food and meal planning; the pay rent and bills tasks of budgeting, banking and bill payment; the medications tasks of filling/refilling prescriptions, taking as directed and safe handling and storage; and the transportation tasks of using transit schedules and arranging transportation.

The GP reports that the appellant is independent with making appropriate social decisions.

Relate to, communicate or interact with others effectively

MR:

The GP indicates that the appellant has no difficulties with communication.

AR:

The GP assesses the appellant's ability to communicate as good in all listed areas (reading, writing, hearing and speaking).

In assessing social functioning, the GP indicates that the appellant is independent with developing and maintaining relationships, interacting appropriately with others, dealing appropriately with unexpected demands and securing assistance from others. The GP indicates that the appellant has good functioning in his immediate and extended social networks.

Help required

MR:

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

AR:

The GP indicates that the appellant receives assistance from friends.

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

2. Appended documents

Included with the PWD application is an unofficial Patient Medical History Report from a pharmacy dated 29 March 2018, listing the appellant's prescriptions.

3. Request for Reconsideration

The appellant submitted a signed Request for Reconsideration dated 6 June 2018, indicating that he required an extension as his doctor was away.

Included at reconsideration are a Medical Imaging Report dated 28 June 2018 and a Cumulative Lab Report for the period 1 July to 12 July 2018. The Medical Imaging Report indicates left-sided foraminal stenosis at the L5-S1 level and lateral recess stenosis impinging on the S1 nerve root.

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

Notice of Appeal

In the Notice of Appeal dated 14 August 2018, the following reasons for appeal are provided *not enough information on my claim to make the proper decision*.

Included with the Notice of Appeal are:

- A letter from the GP dated 23 July 2018 indicating that the appellant has requested a note for his disability. The letter states that the appellant has a history of depression and poly-substance use and has been seen in the emergency department for intoxication. The GP also states that the appellant has radiologically confirmed back problems.
- Records (53 pages) relating to hospital visits in January, March and July 2018.

Appeal Submissions

The appellant did not attend the hearing.

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, which does not require an admissibility determination in accordance with section 22 (4)(b) of the *Employment and Assistance Act*. The panel finds that the GP's 23 July letter and the hospital records are admissible in accordance with section 22 (4)(b) of the *Employment and Assistance Act* because it speaks to the appellant's medical conditions and is in support of information and records before the ministry at reconsideration.

PART F – REASONS FOR PANEL DECISION

The issue in this appeal is whether the ministry reconsideration 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 physical impairment;
- the appellant's severe mental or physical impairment, in the opinion of a prescribed professional, directly and significantly restricts his ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and
- as a result of those restrictions, he requires significant help or supervision of another person 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 or the identification of mental or physical deficits does not in itself determine severity of impairment.

Severity of physical impairment

In the reconsideration decision, the ministry determined that a severe impairment of physical functioning had not been established. In making this determination, the ministry noted that the GP has indicated that the appellant does not require aids or prosthesis. 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 5 to 15 lbs. and remaining seated for less than 1 hour. The ministry argued that the GP has indicated that the appellant is unable to lift and also indicates that the appellant can lift 5-15 lbs., which the ministry finds sufficient for various household and shopping items. The ministry argued that the GP has stated that the appellant can walk 1-2 blocks and also that he is not able to walk more than 1 block. As well, the ministry notes that the GP has not indicated how much less than 1 hour the appellant can remain seated. The ministry also noted that the GP stated that the appellant's back pain limits his physical ability but has also indicated that he is independent in all areas of mobility and physical ability. The ministry concluded that the assessments provided by the GP and the supplementary medical documents provided did not establish a severe physical impairment.

The panel finds that the ministry's determination was reasonable. The panel notes the ministry's approach to assessing severity in light of the nature of the impairment and extent of its impacts on functioning as evidenced by restrictions/limitations to functioning, ability to perform DLA and help required. Given the focus on restrictions and help required in the legislation, the panel finds this approach and the conclusions flowing therefrom to be reasonable. The panel notes that the GP's assessments of the appellant's functional capacity and mobility and physical ability assessments in the MR and AR indicate that the appellant is able to function independently, with some limitation in his ability to walk distances and lift heavy items. The panel also notes that the information provided by the GP in the MR is not entirely consistent with the information in the AR. For instance, in the MR the GP indicates that the appellant has difficulty lifting and can lift 5-15 lbs., whereas in the AR the GP indicates that the appellant is unable to lift and that he is independent with lifting. As a result, the panel finds it unclear as to the appellant's abilities and limitations with respect to lifting. Similarly, the GP has indicated that the appellant is continuously restricted with mobility inside and outside of the home but has also indicated that the appellant is independent with walking indoors and outdoors. The panel notes the lack of sufficiently coherent, consistent and detailed information in the assessments, and finds that a severe physical impairment has not been established. As well, the panel notes that the appellant has emphasized his inability to work. However, the panel notes that employability or vocational ability is not a criterion for PWD designation nor is it a DLA set out in the regulation. 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 determined that the information provided does not establish a severe mental impairment. The ministry noted that the GP's assessments indicate that the appellant does not have any difficulties with communication and his abilities with speaking, reading, hearing and writing are good. The ministry considered that the GP indicates anxiety and alcohol use as well as being prescribed antidepressant medication. The ministry noted that the GP indicated no major impacts to cognitive and emotional functioning, 2 moderate impacts (emotion and other emotional/mental problems) and no impacts in the other 12 listed areas. The ministry noted that the appellant is independent in all areas of social function and has good functioning in his immediate and extended social networks. As well, the ministry noted the absence of information relating to support/supervision required or any safety issues. The ministry concluded that the information provided had not established a severe impairment in mental functioning.

The panel finds that the ministry's determination that a severe mental impairment has not been established was reasonable. The panel finds that assessments in the MR and AR do not reflect restrictions in the appellant's ability to function effectively or independently as a result of a mental health condition and there is no suggestion of restriction in the appellant's social functioning ability. The panel notes the absence of a mental health diagnosis in the diagnoses section of the MR, although there is mention of depression and anxiety in the commentary provided. While the GP states, in the letter of July 23, 2018 submitted on appeal, that the appellant has a history of depression and poly-substance use and has been seen in the emergency department for intoxication, no further information has been provided that would describe the how or to what degree this has an impact on the appellant's daily functioning. The panel notes the GP's assessments relating to decision-making indicate that the appellant is independent in all areas. The panel also notes the absence of an assertion by the appellant of a mental basis for his PWD application. The panel finds that the ministry's determination, that a severe physical impairment has not been established, 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 in consideration of the opinion of a prescribed professional, in this case the GP. This does not mean that other evidence should not be considered, but it is clear that a prescribed professional's evidence is fundamental. At issue in this assessment is the degree of restriction in the appellant's ability to perform the DLA listed in section 2(1)(a) and (b) of the EAPWDR. The panel notes that, according to the legislation, the direct and significant restriction in the ability to perform DLA must be due to a severe mental or physical impairment.

The ministry was not satisfied that the appellant has a severe impairment that, in the opinion of a prescribed professional, directly and significantly restricts his ability to perform DLA. In reaching this conclusion, the ministry noted that the appellant has been prescribed medication that impacts his ability to perform DLA. The ministry noted that the GP's MR assessment indicates continuous restrictions with mobility inside and outside of the home. The ministry also considered the GP's assessment in the AR that the appellant is not restricted with any listed DLA. The ministry argued that the information provided does not establish that a severe impairment significantly restricts the appellant's 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 legislation specifies that direct and significant restrictions to DLA must be in the opinion of a prescribed professional. The panel notes that the GP has not indicated in the MR whether the appellant's impairment restricts his ability to perform DLA and has assessed him as being largely independent in both the MR and AR. The panel finds that, in relation to the only areas where some restriction is assessed (mobility inside and outside of the home) in the MR, the GP has provided contradictory information (independence with walking indoors and outdoors) in the AR. The panel concludes that the ministry's determination that the evidence is insufficient to show that the appellant's overall ability to perform her DLA is significantly restricted either continuously or periodically for extended periods is reasonable.

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 the appellant's ability to perform DLA were significantly restricted, it cannot be determined that significant help is required. While the information provided demonstrates that the appellant does receive assistance from friends, 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. As such, the panel finds that the ministry reasonably concluded that under section 2(2)(b)(ii) of the EAPWDA it cannot be determined that the appellant requires help to perform DLA.

Conclusion

The panel finds that the ministry's reconsideration decision, determining that the appellant had not met all of the legislated criteria for PWD designation, was a reasonable application of the legislation in the circumstances of the appellant and was reasonably supported by the evidence. The panel confirms the ministry's reconsideration decision. The appellant is not successful on appeal.

PART G – ORDER	
THE PANEL DECISION IS: (Check one) <input checked="" type="checkbox"/> UNANIMOUS <input type="checkbox"/> BY MAJORITY	
THE PANEL <input checked="" type="checkbox"/> CONFIRMS THE MINISTRY DECISION <input type="checkbox"/> 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? <input type="checkbox"/> Yes <input type="checkbox"/> No	
LEGISLATIVE AUTHORITY FOR THE DECISION:	
<i>Employment and Assistance Act</i>	
Section 24(1)(a) <input checked="" type="checkbox"/> or Section 24(1)(b) <input checked="" type="checkbox"/>	
and	
Section 24(2)(a) <input checked="" type="checkbox"/> or Section 24(2)(b) <input type="checkbox"/>	

PART H – SIGNATURES	
PRINT NAME Jennifer Smith	
SIGNATURE OF CHAIR	DATE (YEAR/MONTH/DAY) 2018/09/04

PRINT NAME Sarah Bijl	
SIGNATURE OF MEMBER	DATE (YEAR/MONTH/DAY) 2018/09/04

PRINT NAME Richard Roberts	
SIGNATURE OF MEMBER	DATE (YEAR/MONTH/DAY) 2018/09/04