

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (“ministry”) reconsideration decision, dated 15 August 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;
- 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 information before the ministry at reconsideration included the following:

Evidence before the ministry at reconsideration consisted of the following:

1. The appellant's PWD Application

The Application contained:

- A Medical Report (MR) dated 10 May 2018, completed by a general practitioner (GP) who has seen the appellant 3 times in the past 12 months and known the appellant since October 2017
- An Assessor Report (AR) dated 10 May 2018, completed by the same GP.
- A Self Report (SR) dated 10 May 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:

- Backache (onset October 2017)

Severity of impairment

MR:

Under Health History, the GP writes: *He complains of backache. He feels he can only work 2 days per week. Clinical examination is totally normal, normal x-rays. Normal range of motion, normal reflexes and power. No antalgic gait. Full range of motion. He is catastrophizing his backache.*

For functional skills, the GP indicates that the appellant can walk 4+ blocks unaided, climb 5+ steps unaided, lift without limitation and remain seated without limitation.

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

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 does not have significant deficits with cognitive and emotional functioning. No comments are provided.

The GP has provided the following Additional Comments in Section F: *I have seen him since [...] October 2017, when he wanted sick leave to [care for a family member]. In Oct. 2017 he mentioned his backache and he decided he is not capable of working anymore.*

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: *He complains of backache.*

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 assesses the appellant's cognitive and emotional functioning as having no impact in all listed areas. No comments are provided.

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

SR:

The appellant indicates that he suffers from severe back pain every few days and has tried to hold a job, but sometimes cannot even put his socks on. He explains that he has had some work opportunities but employers cannot rely on him, as he is unable to do much when his back goes out. He states that he is able to care for himself but that employers don't want someone who cannot come to work consistently. He argues that he is not lazy and will work when he can. The appellant states that he has an upcoming appointment at a pain clinic as well as an upcoming medical imaging appointment.

Ability to perform DLA

MR:

The GP indicates that the appellant has not been prescribed medication that interferes with his ability to perform DLA.

AR:

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

The GP indicates that the appellant is independent with all areas of social functioning and has good functioning in his immediate and extended social networks.

SR:

The appellant indicates that he is able to care for himself but has difficulty consistently attending work due to his backache. He argued that he barely able to or not able to put his socks on when his back goes out.

Help required

MR:

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

AR:

The GP has put a strike through the portions of the AR addressing help provided by other people and help provided through the use of assistive devices. No comments are provided.

The GP indicates that the appellant does not receive assistance from assistance animals. No comments are provided.

SR:

The appellant does not indicate that he receives or requires assistance with DLA from another person, an assistive device or an assistance animal.

2. Request for Reconsideration

The appellant's signed Request for Reconsideration, dated 3 October 2018 (but stamped 3 August 2018), provides the following reasons for the request: *I was told by the employment person that I should be on disability because I have lost 3 jobs already because my back problems are so severe some mornings that I can't even put my socks on. The last job opportunity for [employer omitted], I could not be at work consistently but the employer said that when you're able to function on good days they can give me work. So if I'm on disability I can afford to pay rent and food and my transportation, etc. and get to work when I can. I have severe barriers to work because my back is got bad discs and I can't get into a car even some mornings. How can I hold a job with my back problems? Thank you.*

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

Notice of Appeal

In the Notice of Appeal dated 26 August 2018, the following reasons for appeal are provided *I cannot hold a job because my back will go out and I cannot get my socks on. I cannot show up for work consistently.*

Appeal Submissions

The appellant's witness indicated that he has been a neighbour of the appellant for the past 11 months and has been assisting the appellant with various 'day to day living' tasks for approximately the past 10 months. He stated that he assists the appellant to sit up and get his shoes on, as well as helping out with sweeping, tidying, driving, shopping, bringing him dinner and moving things. The witness stated that he helps the appellant at least two times per week and estimates that he spends 2-3 hours per week providing this assistance.

The appellant explained that he doesn't have a family doctor and he sees whichever doctor is available at the clinic when he goes there. He stated that he has seen several doctors for his back condition, which has worsened in the past two years, and he understands that the decision was made on the basis of the doctor's reports. He stated that he did not discuss the assistance he receives from his neighbour with the doctor, and the doctor did not ask any him about anything like this. He explained that on a good day he is able to perform at the level the GP has indicated in the MR and AR, but on bad days he cannot even get out of bed on his own. He explained that it is particularly difficult to get his socks or a pair of jeans on when his back is bad. He explained that when he has a bad back episode, it lasts about half an hour of extreme pain and then it takes 2-3 hours of sitting on the couch for it to settle down. He argued that this means he cannot consistently attend work on time and cannot keep a regular job. The appellant stated that receiving disability assistance would allow him to work on good days but still be able to pay rent, buy food and pay his other expenses.

He explained that he has had medical imaging to look for fractures, but a doctor at the pain clinic has indicated that it may be a 'nerve thing which would not show up on X-ray. He explained that he lives in a rural area because the rent is more affordable but this means that the fuel to travel to the pain clinic regularly is expensive and he cannot afford to go regularly.

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 information provided by the appellant at the hearing consisted primarily of argument and some reiteration and explanation of information that was before the ministry at reconsideration.

The panel finds that the information provided by the appellant's witness is admissible insofar as it speaks to the nature and frequency of the appellant's restrictions. However, the panel finds that the witness' information about the assistance he provides to the appellant is not admissible in accordance with section 22 (4)(b) of the *Employment and Assistance Act* as it contradicts rather than supports the information that was before the ministry at reconsideration.

The ministry made no objection to the panel admitting the information provided by the appellant or his witness.

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 her ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and
- as a result of those restrictions, she 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.
- (3) The definition of "parent" in section 1 (1) applies for the purposes of the definition of "dependent child" in section 1 (1) of the Act.

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.

In the reconsideration decision the ministry determined that this criterion was not met. In reaching this conclusion, the ministry considered the commentary provided by the GP in the MR and AR as well as the information provided by the appellant in the SR. The ministry noted that employability and vocational ability are not considered for determining PWD eligibility. The ministry argued that the GP's assessment of physical functioning indicates that the appellant is capable of walking 4+ blocks, climbing 5+ steps and has no limitations with lifting or remaining seated. In addition, the ministry argued that the GP has indicated that the appellant is independent with all aspects of mobility and physical ability. The ministry also noted that the GP has indicated that the appellant does not require aids or prostheses. The ministry argued that the functional skills limitations described by the GP do not describe a severe degree of physical impairment. The ministry went on to note that the information provided in the MR and AR reflect no mental health diagnosis, the absence of significant deficits to cognitive and emotional functioning, no impact in all areas of cognitive and emotional functioning, and no communication difficulties. The ministry concluded that it was not satisfied that the information provided is evidence of a severe mental impairment.

The panel finds the ministry's conclusion on this criterion to be reasonable. The panel notes that neither the GP's assessments or the appellant's information in the PWD application contain information relating to a mental impairment. The panel also notes that the appellant has not disputed the ministry's conclusions regarding a mental impairment. As well, the panel notes that the appellant has not argued at reconsideration or on appeal that he suffers from a severe mental impairment. As such, the panel finds that the question of whether the appellant suffers from a severe mental impairment is not at issue in this appeal.

The panel also finds that the physical functioning assessments provided by the GP do not indicate restrictions in the appellant's ability to function independently, effectively appropriately or for a reasonable duration as defined in the PWD application. The GP's information is that the appellant is able to function independently and at the highest end of the assessment scales provided in the PWD application. The panel notes that the appellant and the appellant's witness have indicated that the appellant has severe back pain every few days. The panel notes appellant has also indicated that he is unable to even get out of bed or out his shoes on when his back 'goes out'. However, the panel finds that this information is not sufficient to establish a severe physical impairment, particularly as the GP's assessments do not support the appellant's information in this regard. The panel also notes that the appellant has also spent significant time emphasizing his inability to work consistently. However, the

panel finds that employability or vocational ability is not a criterion for PWD designation nor is it a DLA set out in the regulation.

The panel concludes that the ministry's determination that a severe mental or physical impairment has not been established is reasonably supported by the evidence, and is a reasonable application of the legislation in the circumstances of the appellant.

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. 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) of the EAPWDR applicable to a person with a physical impairment. The panel notes that, in accordance with 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 concluded that there was not enough evidence to confirm that a severe mental or physical impairment significantly restricts the appellant's ability to perform DLA continuously or periodically for extended periods. The ministry noted that the GP has indicated that the appellant is independently able to manage all activities of daily living, including social functioning activities, and has good functioning in his social networks. The ministry argued that the information from the appellant's prescribed professional does not establish significant restrictions to DLA because the majority of DLA are performed independently and the appellant does not require help from others.

The panel finds that the ministry's determination on this criterion is 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 indicated that the appellant is independent with all DLA listed in the AR. The panel finds that the only suggestion of restrictions to DLA in the PWD application are located in the SR, where the appellant indicates that his ability to get into a car and put on socks are restricted when his back 'goes out'. However, the panel notes that the information in the SR is not 'in the opinion of a prescribed professional' as required by the legislation. The panel concludes that the ministry's determination that the evidence is insufficient to show significant restrictions, either continuously or periodically for extended periods, in the appellant's ability to perform DLA 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.

The ministry concluded, in the reconsideration decision, that because it had not been established that DLA were significantly restricted, it could not be established that significant help is required from other persons.

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 also finds that the ministry reasonably concluded that it cannot be determined that the appellant requires help to perform DLA in accordance with section 2(2)(b)(ii) of the EAPWDA. However, in reaching this conclusion, the panel notes that the ministry's conclusion in the reconsideration decision incompletely captures the 'help' criterion as set out in the legislation. The legislation indicates that "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." The panel finds the ministry's incomplete reflection of this criterion to be a non-material error because the information

provided by the appellant and by the GP does not reflect the appellant's need for an assistive device, the assistance or supervision of another person, or an assistance animal in order for the appellant to perform a DLA. The panel finds that the ministry's conclusion on this criterion was reasonably supported by the evidence.

Conclusion

The panel finds that the ministry's reconsideration decision, which held that the appellant was not eligible for PWD designation because he did not meet all of the legislated criteria in section, is a reasonable application of the legislation in the circumstances of the appellant and is 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)

 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

Jennifer Smith

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2018/09/18

PRINT NAME

Jan Lingford

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2018/09/18

PRINT NAME

Marilyn Mellis

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2018/09/18