

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction's ("ministry") reconsideration decision dated August 27, 2018, in which the ministry found that the appellant is not eligible for designation as a Person with Disabilities ("PWD") under section 2 of the *Employment and Assistance for Persons with Disabilities Act* ("EAPWDA"). The ministry found that the appellant meets the age and duration requirements and has a severe mental impairment but was not satisfied that:

- the appellant has a severe physical impairment;
- the appellant's 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 restrictions caused by the impairment, the appellant requires an assistive device, the significant help or supervision of another person, 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

PART E – SUMMARY OF FACTS

The evidence and documentation before the minister at the reconsideration consisted of:

1. Information from the ministry's Record of Decision that indicated the PWD application was received on April 17, 2018 and denied on May 23, 2018. The appellant submitted a Request for Reconsideration ("RFR") on July 23, 2018 and the ministry reviewed it on August 7, 2018.
2. An RFR signed by the appellant on July 23, 2018 in which she states her argument.
3. The appellant's PWD application comprised of:
 - her self-report ("SR") dated April 9, 2018; and
 - a Medical Report ("MR") and Assessor Report ("AR") dated April 8, 2018 and completed by a General practitioner ("GP") who has known the appellant for 5 - 6 months and has seen her 2 -10 times in the past 12 months. The GP based the assessment on an office interview with the appellant.

Summary of relevant evidence from the application:

Diagnoses

In the MR, the GP indicates the following conditions: Depression ("not on medication"), Anxiety, Emphysema, Osteoarthritis, and post-menopause ("sweating"). The GP states that the appellant is not on medication for depression/anxiety due to side effects and she cannot afford cannabis that is working for her. Under *Health History*, the GP indicates that osteoarthritis ("age related") causes pain throughout the appellant's body and emphysema causes shortness of breath. The physician reports that the appellant experiences "excessive sweating from her menopause."

Functional skills

In the SR, the appellant explains that COPD and osteoarthritis make it hard for her to perform activities (cleaning), that hot flashes deplete her strength and disturb her sleep, and she has pain on her right side from her shoulder to her toes that can range from "3" on a good day up to "about 10" if she has to "wander around too much or use too many stairs." The appellant reports that she limps "more often than not" and using her upper body leaves her breathless.

In the MR, the GP indicates the appellant can walk 4+ blocks unaided on a flat surface; climb 2 - 5 steps unaided; lift 5 - 15 pounds; and can remain seated for 1 -2 hours. The appellant has no difficulties with communication but "gets sad and mad easily" due to her emotional state. The appellant has significant deficits in five areas of cognitive and emotional function: *Memory, Emotional disturbance, Motivation, Impulse control, and Attention/sustained concentration* (comment: "gets sad and mad easily"). The GP writes that the appellant's circumstances (job loss and homelessness) make her symptoms and situation worse.

In the AR, the appellant's *Ability to Communicate* is good in all areas (speaking, reading, writing, and hearing) [comment: "emotionally gets sad and mad easily that makes her communication skills break"]. Regarding *Mobility and Physical Ability*, the appellant takes significantly longer than typical with *Walking indoors, Walking outdoors, and Climbing stairs* (comment: "due to pain"). The appellant is independent with *Standing* (comment: "but can't stand for long time") and she requires periodic assistance from another person with *Lifting and Carrying and holding* (comments: "depends on weight" and "can't sit or stand long, pain is the reason").

Regarding impacts to *Cognitive and Emotional Functioning*, the GP reports that the appellant's mental impairment restricts or impacts her functioning as follows:

- No impact in the areas of *Consciousness, Insight and judgment, Executive, Motor activity, Language, Psychotic symptoms, Other neuro-psychological problems, and Other emotional or mental problems;*
- Minimal impact: (no areas indicated);
- Moderate impact: *Memory;*
- Major impact: *Bodily functions, Emotion, Impulse control, Attention/concentration, and Motivation.*

Under Comments, the GP stated (among other things) that the appellant gets angry and anxious "when people speak in other languages [not English] and she does not understand."

DLA

In the SR, the appellant reports restrictions with housecleaning due to her COPD and osteoarthritis. In the MR, the GP indicates the appellant has not been prescribed any medications or treatments that interfere with her ability to perform DLA.

In the AR, the GP provides the following information for DLA:

- The appellant is independent with all areas indicated for *Personal Care: Grooming, Bathing, Toileting, Feeding self, Regulating diet, Transfers in/out of bed, and Transfers on/off chair*.
- The appellant requires assistance with both areas listed for *Basic Housekeeping*: periodic assistance from another person with *Laundry* (comment: "depends on weight"), and continuous assistance with *Basic Housekeeping* (comment: "if has home due to pain - homeless currently").
- The appellant is independent with 3 of the 5 areas listed for *Shopping: Reading prices and labels, Making appropriate choices, and Paying for purchases*. The appellant requires periodic assistance with *Going to and from stores* and *Carrying purchases home* (comment: "depends on weight"). Under *Additional comments*, the GP states that due to being homeless the appellant "does not eat healthy" and does not have very much shopping or cleaning to do.
- The appellant is independent with 2 of the 4 areas for *Meals: Meal planning, and Safe storage of food*. The appellant requires periodic assistance and takes significantly longer than typical for *Food preparation* and *Cooking* (comments: "depends: due to pain needs help in lifting, cooking").
- The appellant is independent with all areas of *Pay Rent and Bills: Banking, Budgeting, and Pay rent and bills*; and with all areas of *Medications: Filling/refilling prescriptions, Taking as directed, and Safe handling and storage*.
- The appellant is independent with all areas of *Transportation: Getting in and out of a vehicle, Using public transit* (comment: "but gets angry when hear people speaking other languages"), and *Using transit schedules/arranging transportation*. Under *Additional comments*, the GP states that the appellant "will cook" if she has a home "but due to pain she's can't lift or stand for a long time and would need help, depends on what prepare, how heavy is that").
- The appellant requires support with all areas of *Social Functioning: periodic support/supervision with Appropriate social decisions* (comment: "needs reminder that we live in multicultural community, needs counselling to improve her judgmental skills"); *Able to develop and maintain relationships* (comment: "gets sad and mad easily"); and *Able to secure assistance from others*. The appellant requires continuous support/supervision with *Able to deal appropriately with unexpected demands* and the GP indicates the appellant has marginal functioning with her immediate and extended social networks (comments: "she thinks she is a burden to people since she is homeless...homeless, no money...hard to interact when you don't have a place to live or sleep"). The GP indicates that the support/supervision required to maintain the appellant in the community is "needs a home, counselling." The GP wrote "N/A" for *Additional Comments (including identification of any safety issues)*.

Need for help

In the AR, the GP indicates the appellant is homeless and friends assist her with DLA (comment: "she sleeps in different places"). The GP wrote, "needs a home" when asked to describe what assistance the appellant needs. The GP wrote, "N/A" regarding the use of assistive devices. The GP check marked *No*, the appellant does not have an assistance animal. In the SR, the appellant describes her attempts at getting help from community service agencies but states that she does not qualify for housing and other supports.

4. A *Computed Tomography Report* ("chest scan") from a radiologist dated April 19, 2017. The report describes physiological findings and indicates the appellant has a history of emphysema.

5. The ministry's *Denial Decision Summary* and accompanying letter dated May 23, 2018.

Additional information

The appellant attended the hearing with her friend who acted as an advocate. Subsequent to the reconsideration decision, the appellant filed a *Notice of Appeal* with hand-written submission which the panel accepts as argument. At the hearing, the appellant summarized her arguments and also introduced new evidence, explaining that she recently injured her left hand in a fall (while carrying laundry bags) and is waiting to see a specialist. The appellant testified that she fractured her fingers and tore the ligaments. The appellant indicates that her injury compounds the difficulties with physical function that she already experiences with her osteoarthritis and she does not know whether she will be able to vacuum or clean (another person's house) with one hand even though she is right-handed. The appellant indicates that she does not know how long the injury will take to heal.

The panel finds that the information regarding the appellant's injury is in support of her self-reported restrictions that were before the minister at the reconsideration. While the injury occurred subsequent to the reconsideration, the appellant describes functional limitations in her self-report due to osteoarthritis, and "restless legs" and states that these conditions were already impacting her movement. As the appellant explained, the injury to her hand compounds her movement issues. The ministry did not object to the information about the recent hand injury and the panel admits the information under section 22(4) of the Employment and Assistance Act as evidence in support of the information and records that were before the minister when the decision being appealed was made.

The ministry relied on the reconsideration decision and did not submit any new evidence.

PART F – REASONS FOR PANEL DECISION

The issue on appeal is whether the ministry's decision to deny the appellant PWD designation is reasonably supported by the evidence or a reasonable application of the legislation in the circumstances of the appellant. In particular, was the ministry reasonable in finding that the following criteria in section 2 of the EAPWDA were not met?

- the appellant has a severe physical impairment;
- the appellant's 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 restrictions caused by the impairment, the appellant requires an assistive device, the significant help or supervision of another person, or the services of an assistance animal to perform DLA.

The ministry based its reconsideration decision on the following 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 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).

EAPWDR

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.

Analysis and panel's decision

Severe mental or physical impairment

To be eligible for the PWD designation, the legislation requires several criteria to be met including the minister being satisfied that the applicant has a severe mental or physical impairment. On reconsideration the ministry was satisfied the appellant has a severe mental impairment. Thus, the legislative criterion under section 2(2) of the EAPWDA is met. The ministry still made a determination on severe physical impairment and was not satisfied that that the information provided establishes a severe impairment of physical functioning.

Physical impairment

While "severe" is not defined in the legislation, section 2(2) of the EAPWDA authorizes the ministry to determine whether a severe impairment is established on the evidence as a whole. The diagnosis of a severe medical condition does not in itself establish a severe impairment of mental or physical functioning. To assess the severity of the impairment, the ministry must consider the extent of its impact on daily functioning as evidenced by limitations/restrictions in physical functions, DLA, and whether significant help is required to manage DLA. The ministry argues that the GP's assessment of the appellant's basic functional skills does not establish a severe impairment of physical functioning. The ministry notes that under the legislation, the applicant's employability or ability to work is not taken into consideration in determining eligibility for the PWD designation.

In the MR, the GP indicates the appellant can walk 4+ blocks, and climb 5+ steps unaided (but experiences pain and shortness of breath). The GP indicates the appellant is limited to lifting 5 to 15 pounds and she can remain seated for 1 to 2 hours. The ministry argues that being able to remain seated for 1 to 2 hours is not indicative of severe impairment of physical functioning. At the hearing, the advocate argued that the GP is underestimating the appellant's arthritis when she says that the appellant can sit for 2 hours.

In the AR, the GP indicates the appellant takes significantly longer than typical with *Walking indoors*, *Walking outdoors*, and *Climbing stairs* (due to pain from osteoarthritis). The GP physician indicates the appellant is independent with Standing but "can't stand for a long time" and she also "can't sit long" due to pain. The appellant also comments on her pain - in the SR, she states that on a good day, the pain level for her shoulder is "3"; however, her pain from shoulder to toe can be "about 10" if she has to "wander around too much or use too many stairs." The appellant reports that she limps more often than not, and using her upper body leaves her breathless. The appellant reports that her inability to sleep makes her "restless arms and legs worse." The GP reports the appellant requires periodic assistance from another person with *Lifting* and *Carrying and holding* (depending on the weight of the item). The ministry argues that the ability to lift 5 to 15 pounds is "sufficient ability to lift a variety of household and shopping items."

The panel finds that the ministry reasonably determined that the information provided does not establish a severe impairment of physical functioning. The information in the MR indicates the least severe degree of restriction for walking; and for climbing stairs, lifting, and remaining seated, the GP indicates a moderate rather than severe degree of restriction. The ministry notes that in the AR, the GP does not describe how much longer the appellant takes with walking and climbing stairs and does not describe the frequency or duration of periodic assistance required with lifting and carrying/holding. While information on the frequency and duration of restrictions is not a legislative requirement, it assists the ministry to form a clear picture of the severity of the restriction. The information in the AR indicates the appellant requires periodic assistance or takes significantly longer than typical with most physical functions but the GP provides insufficient detail to establish a severe degree of impairment.

The appellant testified about her recent hand injury that causes even greater restrictions to her physical function. The panel admitted the information but does not find that it confirms that the appellant has a severe physical impairment. The appellant did not provide any medical reports to explain the impact of the injury on her physical functioning or to indicate whether the injury will have a temporary or long term impact, given the appellant's osteoarthritis. Based on the information in its entirety, the panel finds that the ministry reasonably determined a severe physical impairment under section 2(2) of the EAPWDA was not established.

Restrictions in the ability to perform DLA

Subsection 2(2)(b)(i) of the EAPWDA requires the ministry to be satisfied that, in the opinion of a prescribed professional, a severe impairment directly and significantly restricts a person's ability to perform DLA either continuously, or periodically for extended periods. In this case, the prescribed professionals are the GP that filled out the MR and AR and the radiologist who provided the chest scan report. The term "directly" means there must be a causal link between the severe impairment and the restriction to DLA. The direct restriction must also be significant.

Finally, there is a component related to time or duration - the direct and significant restriction may be either continuous or periodic. If periodic, the restriction must be for extended periods. Inherently, any analysis of periodic restrictions must also include consideration of how frequently the activity is restricted. All other things being equal, a restriction that arises once a year is less likely to be significant than one that occurs several times a week. Accordingly, in circumstances where the evidence indicates that a restriction arises periodically, it is appropriate for the ministry to require evidence of the duration and frequency of the restriction in order to be satisfied that this criterion is met.

DLA are defined in section 2(1) of the EAPWDR and are also listed in the MR, with additional details in the AR. Therefore, a medical practitioner completing these forms has the opportunity to indicate which, if any, DLA are significantly restricted by the appellant's impairments either continuously or periodically for extended periods and to provide additional narrative. DLA, as defined in the legislation, does not include the ability to work or to perform specific vocational tasks.

In the MR, the physician indicates that the appellant has not been prescribed any medications or treatments that interfere with her ability to perform DLA. The information indicates that due to the appellant's experience with side effects, she is not taking any medications. The appellant reports that she is homeless and cannot afford housing, food, or cannabis which helps her depression. The appellant states that if she does not get into housing she will die. She states that she was recently diagnosed with COPD and osteoarthritis which make it harder to perform house cleaning tasks and her strength is also depleted due to frequent hot flashes. The appellant reports that her osteoarthritis (in addition to pain) causes her shoulder to go numb and she will not be able to perform cleaning tasks such as vacuuming for much longer. The appellant states that with her current injury ("wrecked arm and hand injury") she is trying to decide if she can do any cleaning at all. Regarding the ability to do laundry, the appellant reports that her recent hand injury ("fractured fingers, ripped ligaments") was caused by a fall she had while carrying laundry bags. At the hearing, the advocate stated they are disappointed with the GP who "says [the appellant] can do things when she really can't."

The ministry argues there is not enough evidence to confirm significant restrictions to DLA, noting that the GP assesses the appellant as independent with most DLA and while she requires assistance with Basic Housekeeping, and with two areas of Shopping and Meals, the GP does not describe the frequency or duration of the periodic assistance required and does not indicate how much longer it takes her to prepare food and cook. The GP indicates the appellant takes significantly longer with these activities due to pain, and the appellant's restrictions with laundry and shopping depend on the weight of the item. The ministry argues that the ability to lift 5 to 15 pounds (as indicated in the MR) is "sufficient ability to lift a variety of household and shopping items."

The GP comments that due to homelessness, the appellant is currently not doing very many DLA ("does not eat healthy...does not have that much of shopping or cleaning house as she can't afford to do shopping"). The appellant states that she does not have any cooking facilities due to being homeless and she therefore eats sandwiches. The only activity for which the GP indicates a need for continuous assistance is *Basic Housekeeping*. The GP reports that if the appellant had a home, her restrictions with cleaning would be due to pain. The information in the chest scan confirms that the appellant has emphysema but the radiologist does not include any information on restrictions to DLA due to the appellant's shortness of breath.

Regarding DLA that involve mental abilities or cognitive function, these DLA are largely unrestricted based on the information from the GP. In the AR, the GP indicates the appellant is independent with all areas of Personal Care (despite the major impacts of anxiety/depression and sleep disturbance on her ability to function). The appellant is also independent with all areas of Pay Rent and Bills and Medications (despite the major impact her mental impairment has on her concentration and motivation). The appellant emphasizes that she has very limited financial resources and is homeless, and she cannot tolerate medications due to side effects.

The GP indicates the appellant requires support/supervision with all areas of Social Functioning. She needs periodic support with *Appropriate social decisions*, *Able to develop and maintain relationships*, and *Interacts appropriately with others* due to becoming "sad and mad easily", behaving impulsively, and getting frustrated with

people who communicate in a language other than English. The GP does describe the frequency/duration of the periodic support/supervision required and it is therefore difficult to establish significant restrictions based on the opinion of a prescribed professional as required under the legislation.

The GP indicates the appellant requires continuous support/supervision with *Able to deal appropriately with unexpected demands* but no additional explanation or comments are provided. The GP indicates the appellant has marginal functioning with her immediate and extended social networks because “it is hard to interact when you don’t have a place to live or sleep.” The GP does not identify any safety issues but states that the appellant needs a home and counselling to be maintained in the community. The ministry argues that impacts to social functioning due to financial and housing limitations “does not necessarily establish impacts due to a mental impairment.”

The panel finds that the ministry reasonably concluded there is insufficient information from prescribed professionals to establish that the appellant’s DLA are directly and significantly restricted either continuously, or periodically for extended periods as required by the legislation. The information in the AR indicates the appellant is independent with most DLA and while restrictions are reported for three DLA (mainly a need for periodic assistance/support), the GP does not include detailed information about the frequency/duration of the help and support that is needed in order to confirm that the appellant’s restrictions are for extended periods. Both the appellant and the GP indicate that the appellant’s restrictions (with social functioning in particular) stem from homelessness and inadequate financial resources but the legislation requires restrictions with DLA to be a direct result of a severe impairment. While the panel is sympathetic to the appellant’s circumstances the GP has provided insufficient evidence of significant restrictions to DLA as a result of the appellant’s severe mental impairment. The panel finds that the ministry’s decision on DLA was reasonably supported by the evidence and the ministry reasonably determined the criteria in section 2(2)(b)(i) of the EAPWDA are not met.

Help to perform DLA

Section 2(2)(b)(ii) of the EAPWDA requires that, *as a result of direct and significant restrictions in the ability to perform DLA*, a person requires help to perform those activities. Help is defined in subsection (3) as the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform DLA.

The appellant provides detailed submissions on her attempts to seek help from community resources. The appellant describes her frustration and feelings of helplessness in not qualifying for housing or other supports. The GP indicates that the appellant receives help from friends to perform her DLA and that she needs a home. The ministry’s position is that because it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required. Under the legislation, confirmation of direct and significant restrictions to DLA is a precondition for needing help to perform DLA. As the panel found that the ministry reasonably determined that significant restrictions to DLA were not established by the information provided, the panel also finds that the ministry reasonably concluded that the criteria for help under section 2(2)(b)(ii) of the EAPWDA are not met.

Conclusion

The panel finds that the ministry’s reconsideration decision, which determined the appellant was not eligible for PWD designation, is reasonably supported by the evidence and is a reasonable application of the legislation. The panel confirms the decision and 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

Margaret Koren

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2018-09-18

PRINT NAME

Brenda Austin

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2018-09-18

PRINT NAME

Nancy South

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2018-09-18