

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (“ministry”) reconsideration decision, dated 28 June 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:

1. The appellant's PWD Application

The Application contained:

- A Medical Report (MR) dated 6 November 2017, completed by a general practitioner (GP) who has seen the appellant 2-10 times in the past 12 months and known the appellant for 6 months.
- An Assessor Report (AR), undated, completed by the same GP.
- A Self Report (SR) dated 16 December 2017, completed by the appellant's brother 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:

- Developmental disability (onset 1975)

Severity of impairment

MR:

Under Health History, the GP writes: *A new patient. Was unable to complete grade 8 because of profound inability to comprehend or express written language. He has a moderate to severe impairment in ability to calculate – being only able to do these in his head & unable to use a calculator, or written numbers to do simple math. I do not have any previous medical records or school reports.*

The GP has not completed the functional skills assessment in the MR.

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 but has responded to the prompt "if yes, what is the cause" by ticking the box for 'cognitive'.

The GP indicates that the appellant has significant deficits with cognitive and emotional functioning in the areas of executive and language. The GP comments: *The impairment in written language & written calculation is severe.*

The GP has provided the following Additional Functional Skills Comments: *He is unable to shop. He purchases by recognition, He can not read the contents – for example will not be able to distinguish between yogurt and sour cream. He recognizes that a red sign by a door means an exit but cannot read exit. He will confuse a red sign at an alarm that reads 'fire' with a red sign that is exit. He recognizes coins & colour of paper but cannot read the value. This was a problem with the new Canadian currency. He can do simple sums in his head but not when written down. He has assistance from family & friends to pay bills. He cannot read them. He does not own a phone. He is not sure where the 9 & 1 are on a digital phone. He is able to follow verbal instructions. He can do complex tasks that he can master with repetition & memory.*

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 has a profound inability to comprehend or express written language & can not do calculations when written down. This is a developmental [illegible] that includes dyslexia.*

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 major impacts for executive and language, minimal impact for memory and no impact in the remaining listed areas. No comments are provided.

The GP indicates that the appellant's ability to communicate is good for speaking and hearing and unable for reading and writing.

SR:

The appellant's brother has completed the SR and indicates that he is assisting the appellant due to the appellant's severe dyslexia. The SR indicates that the appellant's condition has impacted his academic development, daily living and social skills, and has placed him at a severe disadvantage with daily living activities. The SR indicates that, since leaving school as a teenager, the appellant's life has revolved around a dangerous and risky employment industry.

Ability to perform DLA

MR:

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

The GP has indicated that the appellant is continuously restricted with management of finances, daily shopping and social functioning. No assessment has been provided for the other listed DLA.

AR:

The GP indicates that the appellant is independent in all personal care activities, all basic housekeeping activities, all meals activities, all medications activities (*he is on no medication*) and all transportation activities. The GP indicates that the appellant is independent with the shopping task of carrying purchases home and takes significantly longer than typical with the shopping activities of going to and from stores, reading prices and labels, making appropriate choices and paying for purchases (*he cannot read prices & labels*). The GP indicates that the appellant takes significantly longer than typical with all pay rent and bills activities (*he can not read a written bill*). The GP comments: *He needs someone to read him any written information & transcribe any written information. He needs someone to pay bills. He would not be able to read medication labels.*

The GP indicates that the appellant is independent with the social functioning areas of making appropriate social decisions, developing and maintaining relationships, interacting appropriately with others and dealing appropriately with unexpected demands. The GP indicates that the appellant requires periodic support with securing assistance from others (*He would ask someone to call 911, he might not recognize the numbers on phone*).

The GP indicates that the appellant has good functioning in his immediate and extended social networks. The GP indicates that the help required by the appellant is: [...] *help securing benefits. He cannot use a computer.*

SR:

The information in the SR indicates that the appellant relies on family for daily activities, including banking, shopping and medical. This is difficult because the appellant's family does not live in his community and he must sometimes rely on the advice of strangers or acquaintances. The AR indicates that the appellant is not able to understand expiration dates on food or medication instructions.

Help required

MR:

The GP indicates that the appellant does not require any aids or prostheses. The GP indicates that the appellant has assistance from family and friends to pay bills.

AR:

The GP has indicated that the appellant receives assistance from family and friends. The GP indicates that the appellant requires a scanner reader.

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, 7 June 2018 reiterates much of the information in the SR. Included with the Request for Reconsideration is a copy of the appellant's permanent school record.

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

Notice of Appeal

In the Notice of Appeal dated 31 August 2018, the following reasons for appeal are provided: *My brother received this letter and didn't know what to do with it. Mailed it to me to [omitted]. He needs help, either assistance or a program that can help teach him to read.*

Appeal Submissions

The appellant submitted a 13 page appeal submission consisting of:

1. an email from the appellant's brother;
2. a 5 page Workspace BC decision report relating to a workplace injury to the appellant's leg; and
3. a 7 page permanent functional impairment evaluation relating to the same workplace injury.

The appellant and his brother attended the hearing and made submissions together on the appellant's behalf. These submissions detailed the appellant's workplace leg injury and the impacts of this injury on the appellant's ability to work. The submissions also detailed the appellant's mental impairment, which became evident during his public school years, and associated impacts experienced by the appellant. These submissions detailed the difficulties that the appellant experiences with shopping, banking, bill paying, driving and other activities. The appellant explained that he cannot successfully complete these tasks without assistance.

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 in the appellant's appeal submission is not admissible, insofar as it speaks to the appellant's physical restrictions, in accordance with section 22 (4)(b) of the *Employment and Assistance Act* because it is not in support of the information that was before the ministry at reconsideration.

The ministry made no objection to the panel admitting the information provided in the appellant's appeal submission.

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.
- (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 GP's failure to provide an assessment of the appellant's physical functioning as well as the GP's assessment of the appellant's independence in all areas of mobility and physical ability. The Ministry noted that the appellant does not require any aids or prostheses. The ministry also noted that it does not take a person's employability or vocational ability into account in assessing PWD eligibility. The ministry also considered that the GP indicated in the MR that the appellant has language and executive deficits to cognitive and emotional function. As well, the ministry considered that the GP has indicated in the AR that there are major impacts to cognitive and emotional function in the areas of executive and language, minimal impacts to memory and no impacts in the remaining areas. The ministry also considered the GP's assessments of the appellant's ability to communicate, noting that his ability to speak and hear is good and he is unable to read and write. The ministry was not satisfied that the overall evaluation of the appellant's functional skills as described by his medical practitioner characterizes a severe mental or physical impairment.

The panel finds the ministry's conclusion on this criterion to be reasonable.

The panel notes that neither the of GP's assessments in the PWD application contain a diagnosis or other information relating to a physical impairment. The panel also notes 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 panel finds that the GP's information in the AR is that the appellant is able to function independently in these areas. The panel notes that the appellant has mentioned a serious injury and badly broken leg in the SR; however, the accompanying description of impacts to the appellant's life and ability to care for himself relate to mental rather than physical functioning. The panel also notes that the appellant has emphasized 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. As such, the panel finds the ministry's approach to determining PWD eligibility without reference to a person's employability or vocational ability to be reasonable. The panel finds that then ministry's conclusion, that a severe physical impairment has not been established, is reasonably supported by the evidence.

With respect to the appellant's mental impairment, the panel also notes that the GP has indicated in both the MR and AR that the appellant has significant deficits/major impacts in the cognitive and emotional functioning areas of executive and language as well as some limitations with communication. However, the panel finds that information provided in the MR and AR is not sufficient to present a clear and coherent picture of restrictions to the appellant's ability to function independently, effectively appropriately or for a reasonable duration as a result of these impacts/deficits. The panel notes, in reaching this conclusion, that the appellant's advocate argued that the GP has just met the appellant and did not have access to other assessments, reports or records at the time the PWD application was completed. The panel finds that the ministry's conclusion that a severe mental impairment has not been established is reasonably supported by the evidence.

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. 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 it was not satisfied that the information established that a severe mental or physical impairment significantly restricts the appellant's ability to perform DLA continuously or periodically for extended periods. The ministry considered the GP's assessment in the MR that the appellant is continuously restricted with shopping, finances and social functioning. As well, the ministry considered the GP's assessment in the AR that the appellant takes significantly longer with most shopping tasks and paying rent and bills. The ministry also noted that the GP's assessment in the AR indicates that the appellant is independent with all personal care, basic housekeeping, meals, medications and transportation tasks, as well as carrying purchases home. The ministry noted that the GP has indicated a need for periodic assistance with the social function task of obtaining assistance from others but has not indicated the degree or duration of assistance required. The ministry also noted the GP's indication in the AR that the appellant is independent with all other social function tasks and has good functioning in his immediate and extended social networks.

The panel notes that the GP's assessments provided in the MR and AR are not consistent with one another, not complete in some areas and not consistent with the information provided by the appellant. For instance, the GP has indicated in the MR that the appellant is continuously restricted with assistance with social functioning. Meanwhile, in the AR, the GP has indicated that the appellant is independent in all social functioning areas, except for securing assistance from others with which he requires periodic assistance. No information as to the nature of this periodic assistance has been provided. As a result, the panel finds it impossible to determine whether this need for periodic assistance is for extended periods as required by the legislation. With respect to medications, the GP has indicated that the appellant is independent in the MR and AR, but provides commentary indicating that the appellant is not on medication and could not read a medication label. The appellant's information is also that he is not on medications, but would be unable to read or follow instructions on a medications label. The GP has indicated in the MR and AR that the appellant is independent with all meals activities, including safe storage. However, the commentary provided by the GP is that the appellant cannot read labels and the appellant's information is that he is unable to read labels or understand expiration dates. With respect to shopping, the GP has indicated that the appellant is continuously restricted (MR) and takes significantly longer (AR). However, as there is no information provided in response to the prompt to describe how much longer, the panel finds that the significance of these restrictions is unclear. As well, the panel notes that the appellant's information is that it doesn't matter how much time he has, he is unable to shop successfully without assistance from another person. 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 finds that the GP's assessments, which are somewhat unclear and contradictory, indicate that the

appellant has some restrictions but is primarily independent with DLA. The panel finds that the ministry's determination on this criterion 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 information provided by the GP and the appellant is that the appellant does receive some assistance from family and friends and would benefit from a scanner reader. The panel also 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 in the reconsideration decision to be a non-material error. 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 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)

2018/09/21

PRINT NAME

Marcus Hadley

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2018/09/21

PRINT NAME

Jane Nielsen

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2018/09/21