

PART C – DECISION UNDER APPEAL

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Poverty Reduction (the ministry) dated September 19, 2018, which held that the appellant did not meet 3 of the 5 statutory requirements of section 2 of the *Employment and Assistance for Persons with Disabilities Act* for designation as a person with disabilities (PWD). The ministry found that the appellant met the age and duration requirements, but was not satisfied that:

- the appellant has a severe physical and/or mental impairment;
- the appellant's daily living activities (DLA) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and
- as a result of those restrictions, 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

1. The information before the ministry at the time of reconsideration included the appellant's PWD application comprised of a Medical Report (MR) and an Assessor Report (AR) both completed by the appellant's general practitioner (the "GP") and dated June 11, 2018. The GP has known the appellant for 10 years and saw the appellant 11 or more times in the past 12 months prior to completing the PWD application. The PWD application was completed by conducting an interview with the appellant and an interview with family/friends/caregivers. The PWD application also included the appellant's Self-Report (SR) dated June 11, 2018.
2. The evidence included the appellant's Request for Reconsideration (RFR) dated September 10, 2018. In the RFR the appellant described the impacts of his new medication and discussed the results of his MRI. The following was also stated:
 - The new medication has impacted his hearing, speaking, memory and breathing.
 - Reaching and bending is difficult and straightening out after reaching or bending is difficult.
 - He can only drive for 10 minutes, sit or stand for 20 minutes, walk for 5-10 minutes (or 25 feet), lift 10lbs and carry this weight for 10 feet, before his back pain gets too intense.
 - The back pain has impacted his ability for personal care, toileting, household maintenance and sleeping.
 - He does not use public transportation.
 - His bladder and bowel patterns and movements have changed due to his new medication.
3. Magnetic Resonance Imaging of Lumbar Spine (MRI) which was dated August 8, 2018 and stated, in part, the following:
 - "Mild multilevel degenerative disc disease predominantly involving the lower 3 levels of the lumbar spine as described above, with impingement of the traversing nerve roots L3-L4 and L4-L5. Mild degenerative OA changes at the SI joints".

Diagnoses

In the MR, the GP diagnosed the appellant with diabetes, atrial fibrillation and degenerative disc disease (DDD) – bulging disc. The onset of each diagnosis was not indicated and the GP commented: "waiting [for a] MRI [on the] lower spine".

Physical Impairment

In the MR, the GP indicated the following about the appellant:

- "Diabetes: [illegible] incurable disease. Lower spine: waiting MRI and then back surgery consult. Atrial fibrillation: on permanent [medication]".
- "Patient will be on [medication] rest of his life".
- The appellant can walk 1 – 2 blocks and climb 5+ steps unaided, lift 5-15lbs, and remain seated less than 1 hour.

In the AR, the GP indicated the following about the appellant:

- "Patient has chronic pain, fatigue and has to test his blood glucose daily"
- "Patient has chronic fatigue and pain".
- The appellant independently performs walking indoor/outdoor, climbing stairs ("no more than 5"), standing ("less than ½ hour"), lifting ("less than 15lbs"), and carrying and holding ("less than 5 lbs").

In the SR, the appellant stated, in part, the following:

- The back pain is progressing and he is experiencing it for over a month at a time. He also has osteoarthritis in both knees. Combined, the back pain and osteoarthritis makes it difficult for him to get around.
- Bulging discs in his back cause severe pain and sciatica.
- The pain medication used only provides temporary relief and causes constant fatigue.
- He takes time going up and down stairs and he needs to rest when walking.
- He cannot lift 20lbs without difficulty and immediately feels pain in the lower back when he does so.
- He has difficulty tying his shoes, showering, standing and getting dressed.

Mental Impairment

In the MR, the GP indicated the following about the appellant:

- There are no significant deficits with cognitive and emotional function.
- There are no restrictions with social functioning.

In the AR, the GP indicated the following about the appellant:

- The ability to communicate (speak, read, hear and write) is good.
- There are minimal or no impacts to the listed areas under cognitive and emotional functioning.

In the SR, the appellant stated that his disability is causing him a lot of stress as it is difficult to live a normal life.

Daily Living Activities

In the MR, the GP indicated the following about the appellant:

- He uses medication that interferes with his ability to perform his DLA.
- He is continuously restricted with 'personal self-care', 'basic housework', 'daily shopping', 'mobility inside the home' and 'mobility outside the home'.
- He has no restrictions with 'meal preparation', 'management of medications', 'use of transportation' and 'management of finances'.
- The GP commented: "patient has permanent incurable disease" and "patient is on permanent daily med[ication]".

In the AR, the GP indicated the following about the appellant:

- He independently performs all listed items under 'personal care', 'meals', 'pay rent/bills', 'medications', and 'transportation'.
- He is independent with all listed aspects of social functioning and has good functioning with immediate and extended social networks.
- He requires periodic assistance with all listed aspects of 'basic housekeeping' (laundry and basic housekeeping).
- Under the category of 'shopping', the appellant is independent with 'reading prices and labels', 'making appropriate choices' and 'paying for purchases' but requires periodic assistance with 'going to and from stores' and requires continuous assistance with 'carrying purchases home'.

Help

In the MR, the GP indicated the following about the appellant:

- He does not require any prostheses or aides for his impairment.
- When asked "what assistance does your patient need with DLA? Please be specific regarding the nature and extent of the assistance required", the GP stated "patient is on permanent daily med[ications]".
- The GP left blank the sections regarding help from others and use of assistive devices, and indicated 'no' to the use of assistance animals.

In the SR, the appellant did not mention needing help from others, the use of assistive devices or the use of assistance animals. In the RFR, the appellant stated that his brother provides assistance with shopping, cooking, cleaning and the purchasing of personal items.

Evidence on Appeal

Notice of Appeal (NOA), signed and dated September 28, 2018, which stated, in part, that the ministry's decision appears rushed and without receiving all of the information from the doctor. He is waiting for an appointment date with the back surgeon and after which he can provide more information.

The panel finds that the NOA contains the appellant's argument and notes that no additional evidence or information from the back surgeon had been submitted prior to the time of the written hearing.

PART F – REASONS FOR PANEL DECISION

The issue on appeal is whether the ministry's decision to deny the appellant designation as a PWD was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. In particular, was the ministry reasonable when concluding it was not satisfied that

- the appellant has a severe physical and/or mental impairment;
- the appellant's daily living activities (DLA) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and
- as a result of those restrictions, in the opinion of a prescribed professional, the appellant requires help, as it is defined in the legislation, to perform DLA?

Relevant 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 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.

(2) For the purposes of the Act, "**prescribed professional**" means a person who is

(a) authorized under an enactment to practice 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.

Panel Decision

Severe Impairment

In the reconsideration decision, the ministry was not satisfied that the information provided establishes a severe physical or mental impairment. Determining a severe physical or mental impairment requires weighing the evidence provided against the nature of the impairment and its reported functional skill limitations. A diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a severe impairment. An "impairment" is a medical condition that results in restrictions to a person's ability to function independently or effectively. To assess the severity of an impairment, the ministry must consider the nature of the impairment and the extent of its impact on daily functioning.

The panel finds that employability is not a consideration for eligibility for PWD designation because employability is not a criterion in section 2(2) of the EAPWDA nor is it listed among the prescribed daily living activities in section 2 of the EAPWDR.

Physical Impairment

The appellant's position is that his DDD is causing severe pain and an inability to physically function. The appellant argued that he can only walk for 5-10 minutes (or 25 feet), stand for 20 minutes, lift 10lbs and carry this weight for 10 feet, before his back pain gets too intense.

The ministry argued that based on the information provided in the PWD application, a severe impairment of the appellant's physical functioning has not been established.

The ministry noted that in the MR, the GP indicated that the appellant does not require prostheses or aids for his impairment and that the appellant can walk 1-2 blocks and climb 5+ steps unaided, and lift between 5-15lbs. The GP indicated that the appellant can remain seated for 1 hour. The ministry concluded that the inability to remain seated for long periods does not establish a severe degree of impairment.

The ministry noted that in the AR, the GP indicated that the appellant completes the physical functions of walking indoor/outdoor, climbing stairs (no more than 5), standing (less than 30 minutes), lifting (less than 15lbs) and carrying/holding (less than 5lbs) independently but with some noted limitations. The ministry concluded that the limitations mentioned by the GP do not support a severe degree of impairment.

The panel finds that the ministry reasonably concluded that the information provided by the GP regarding the appellant's physical functioning does not support a finding of a severe physical impairment. The panel also noted that there is a stark difference between the analysis provided by the GP in the PWD application and the testimony of the appellant in the RFR. The panel notes that the appellant stated that his new medication has impacted his hearing and speaking, which the GP indicated as 'good' in the PWD application, and he stated that his memory, breathing, bladder and bowel movements have been impacted by his new medication, which the GP did not address in the PWD application. The panel finds that without an explanation or supporting evidence from a prescribed professional, only little weight can be placed on the information provided in the RFR.

Given the assessments of the appellant's functional ability, and mobility and physical ability in the PWD application and the lack of additional or supporting information that was provided at appeal, the panel finds that the ministry was reasonable in its determination that the evidence does not support a finding that the appellant suffers from a severe physical impairment and that the legislative criteria outlined in Section 2(2) of the EAPWDA have not been met.

Mental Impairment

The appellant argued that his disability causes him stress and that his new medication causes issues with seeing, hearing, speaking, memory, and sleeping.

The ministry's position is that based on the assessments provided by the GP in the PWD application and the SR, a severe impairment of mental functioning has not been established and therefore the legislated criteria has not been met.

In its reconsideration decision, the ministry noted that the GP did not provide a diagnosis of a mental impairment, the GP indicated that there are no significant deficits with cognitive and emotional functioning, and in the AR, there were only minimal or no impacts to cognitive and emotional functioning.

The ministry concluded that there is insufficient evidence to conclude that the appellant presents with a severe impairment of mental functioning.

The panel notes that the appellant indicated that since the use of his new medication he has experienced deficits with seeing, hearing, speaking, memory and sleeping and that in the SR he indicated that he is stressed due to his conditions. The panel finds that though this information is compelling, there is no evidence provided by the GP that would confirm or support the appellant's testimony. It is further noted, that the PWD application was completed by an interview with the appellant and his friends/family/caregivers. Therefore, there was an opportunity for the appellant to have input regarding his mental condition. If the appellant's mental condition worsened from the time of the PWD application and the RFR, then evidence from the GP explaining the changes in the appellant's mental condition should have been provided at the time of reconsideration or at the time of the hearing.

Given that the assessment of the appellant's mental functioning provided by the GP does not indicate a severe mental impairment, that there is no diagnosis of a mental impairment, and the fact that no additional or supportive information from the GP was provided at appeal, the panel finds that the ministry was reasonable in its determination that the evidence does not support a finding that the appellant suffers from a severe mental impairment and the legislative criteria outlined in Section 2(2) of the EAPWDA have not been met.

Restrictions in the ability to perform DLA

Section 2(2)(b)(i) of the EAPWDA requires that the minister be satisfied that in the opinion of a prescribed professional, a severe mental or physical impairment directly and significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods. While other evidence may be considered for clarification or support, the ministry's determination as to whether or not it is satisfied that the legislative criteria are met, is dependent upon the evidence from prescribed professionals. The term "directly" means that there must be a causal link between the severe impairment and the restriction. 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, it must be for extended periods. Any analysis of periodicity must also include consideration of how frequently the activity is restricted. All other things being equal, a restriction that only 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 legislative criterion is met.

DLA are defined in section 2(1) of the EAPWDR and are listed in both the MR and the AR sections of the PWD application with the opportunity for the prescribed professional to check marked boxes and provide additional narrative. DLA, as defined in the legislation, do not include the ability to work.

The appellant argued that the back pain has impacted his ability for personal care, toileting, household maintenance and sleeping.

The ministry argued that it is 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 the DLA set out in the legislation.

In its reconsideration decision, the ministry noted that in the MR, the GP indicated that the appellant has continuous restrictions in the areas of 'personal care', 'basic housework', 'daily shopping' and 'mobility inside and outside the home' but the degree of the restriction is not reported. Though daily medication is required, no assistance with DLA is reported to be required.

The ministry noted that in the AR, the GP indicated that almost all listed DLA are performed independently. The GP indicated that periodic assistance is required with 'laundry', 'basic housekeeping' and 'going to/from stores'. The ministry noted that the GP did not describe the frequency, duration and nature of the assistance required. The ministry also noted that the GP indicated that continuous assistance is required with 'carrying purchases home' but no further narrative was provided to discuss the nature of the assistance required or to confirm that this assistance supports a direct and significant restriction in the ability to complete this DLA. In addition, the source of the assistance has not been identified.

The panel considered the MR and AR and noted that there are unexplained discrepancies in the evidence provided by the GP. In the MR, the GP indicated that 'personal care' and mobility inside and outside the home are continuously restricted. However, in the AR, the GP indicated that 'personal care', and 'walking indoor/outdoor' are performed independently. In the MR, the GP indicated that 'housekeeping' is continuously restricted. However, in the AR, the GP indicated that all listed items under basic housekeeping (namely laundry and basic housekeeping) require periodic assistance. The panel notes that these inconsistencies were not explained by the GP or the appellant and that such conflicting information makes it difficult to make a determination.

The panel finds that the ministry reasonably determined that the GP failed to provide information regarding the type, frequency and duration of the periodic assistance required and notes that the GP did not provide information explaining the causal link between the physical or mental impairment and the appellant's ability to perform DLA either continuously or periodically for extended periods.

The panel considered the assessment by the GP in the PWD application of independence with almost all of the DLA, the lack of information regarding the causal link between a physical or mental impairment and a restriction to perform some DLA either continuously or periodically for extended periods, and that no additional or supporting information was provided from a prescribed professional at appeal to support the appellant's position. The panel finds that the evidence provided by the GP does not describe or indicate that a severe impairment restricts the appellant's ability to perform his DLA either continuously or periodically for extended periods. Given the evidence as a whole, the panel finds that the ministry reasonably concluded that the evidence does not establish that an impairment significantly restricts DLA continuously or periodically for extended periods, pursuant to Section 2(2)(b)(i) of the EAPWDA.

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 did not directly indicate that he receives help from others, an assistive device or assistive animal in the SR. In his RFR, the appellant stated that his "brothers perform the shopping, cooking [and] cleaning activities".

The ministry argues that because it has not been established that DLA are significantly restricted, it cannot be determined that help is required.

The panel notes that, in the MR and AR, the GP did not indicate that assistance from another person, assistive device or assistive animal was required.

Given that confirmation of direct and significant restrictions with DLA is a precondition of the need for help criterion and because the panel found that the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established, the panel also finds that the ministry reasonably concluded that it cannot be determined that the appellant requires help to perform DLA as required by section 2(2)(b)(ii) of the EAPWDA.

Conclusion

The panel finds that the ministry's reconsideration decision, which determined that the appellant was not eligible for PWD designation, was reasonably supported by the evidence and is a reasonable application of the applicable enactment, and therefore confirms the 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 Neena Keram	
SIGNATURE OF CHAIR	DATE (YEAR/MONTH/DAY) 2018/11/07

PRINT NAME Tina Ahnert	
SIGNATURE OF MEMBER	DATE (YEAR/MONTH/DAY) 2018/11/07
PRINT NAME Simon Clews	
SIGNATURE OF MEMBER	DATE (YEAR/MONTH/DAY) 2018/11/07