

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (ministry) reconsideration decision dated 22 August 2018, which determined that the appellant was not eligible for persons with disabilities designation (PWD) because she 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 she has reached 18 years of age and that her 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 she has a severe mental or physical impairment; that her 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 direct and significant restrictions, she 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

Evidence before the ministry at reconsideration consisted of the following:

1. The appellant's PWD Application

The Application contained:

- A Medical Report (MR) dated 16 March 2018, completed by a medical doctor (MD) who indicates she has known the appellant for 1 month and has seen the appellant 2-10 times in the past 12 months.
- An Assessor Report (AR) dated 16 March 2018, completed by the same MD.
- A Self Report (SR) dated 14 March 2018, completed and signed by the appellant.

The panel will first summarize the evidence from the PWD Application as it relates to the PWD criteria at issue in this appeal.

Diagnoses

In the MR, the MD provides the following diagnoses:

- Spinal cord injury – central cord pattern – onset February 2018
- Substance related disorders – onset 2006
- Anxiety disorder – onset 2016
- Traumatic brain injury – mild; severe post-concussive – onset February 2018

Severity of mental impairment

MR:

The MD has ticked 'no' in response to whether there are difficulties with communication other than lack of fluency in English.

The MD indicates that the appellant has significant deficits with cognitive and emotional functioning in the areas of memory, emotional disturbance, impulse control and attention or sustained concentration.

AR:

In the AR, the MD has not responded to the question "What are the applicant's mental or physical impairments that impact his/her ability to manage Daily Living Activities?" but has referenced sections A & E of the MR.

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

The MD assesses the appellant's cognitive and emotional functioning as having a major impact in the area of emotion, moderate impacts on daily functioning in the areas of impulse control, insight and judgement, attention/concentration, executive, memory and other social or emotional problems. The MD assesses minor impacts in the areas of motivation and motor activity. The MD assesses no impacts in the areas of bodily functions, consciousness, language, psychotic symptoms, and other neuropsychological problems.

SR:

The appellant states that she suffered mild brain damage in a February 2018 motor vehicle collision. She states that she suffers from headaches and has had two migraine headaches. She reports difficulty with concentration.

Severity of physical impairment

MR:

Under Health History, the MD writes:

Hand weakness

Neurological pain arms and forearms

Reduced balance and gait

Reduced activity tolerance

Pain management challenge

Prior substance misuse – medication tolerance

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

The MD indicates that the appellant does not require any aids or prostheses for her impairment.

AR:

In the AR, the MD has not responded to the question "What are the applicant's mental or physical impairments that impact his/her ability to manage Daily Living Activities?" but has referenced sections A & E of the MR.

The MD indicates that the appellant is independent with walking indoors and outdoors, climbing stairs and standing, but requires periodic assistance and takes significantly longer with lifting (decreased hand strength) and carrying and holding.

SR:

The appellant indicates that she suffers from numbness and tingling in her arms, hands, feet and legs as well as pain in her neck, back and head from a motor vehicle collision. She reports that her motor skills are restricted and she is unable to carry anything heavy. The appellant states that she is unable to raise her arms above her head, which makes showering and washing her hair much trickier. She reports feeling deeply impaired and frustrated and fears for her future strength.

Ability to perform DLA

MR:

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

The MD indicates that the appellant's impairment restricts her ability to perform DLA. The MD goes on to indicate that the appellant is restricted in relation to meal preparation, basic housework, daily shopping, and mobility outside of the home and social functioning. The MD makes no indication as to whether the appellant is restricted continuously or periodically in her ability to perform these DLA.

The MD indicates that the appellant's ability to manage finances is unknown and she is not restricted with personal self-care, management of medications, mobility outside of the home and transportation.

In explaining restrictions to social function, the MD comments: *post-concussive symptoms – anxiety, stress, [decreased] attention, [decreased] memory.*

In explaining the degree of restriction, the MD comments: *prompt dependent.*

In relation to assistance needed with DLA, the MD comments: *prompt-supported living. Meds check and compliance check.*

AR:

The MD indicates that the appellant is independent in all personal care activities.

The MD indicates that the appellant requires periodic assistance with all basic housekeeping tasks (*heavier aspects of cleaning unable*).

The MD indicates that the appellant is independent with the shopping activities of going to and from stores, reading prices and labels and paying for purchases and requires periodic assistance making appropriate choices and carrying purchases home.

The MD indicates that the appellant is independent with meal planning and safe storage of food and requires periodic assistance with food preparation and cooking.

The MD indicates that the appellant is independent with all pay rent and bills activities.

The MD indicates that the appellant is independent with the medications activities of filling/refilling prescriptions and taking as directed and requires periodic assistance with safe handling and storage (*secure lock design will need assist*).

The MD indicates that the appellant is independent with all transportation activities.

Section 2(1)(b) of the EAPWDR

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

Make decisions about personal activities, care or finances

MR:

The MD indicates that appellant is independent with personal self-care, medications and transportation and restricted in her ability to manage meal preparation and social functioning.

AR:

The MD indicates that the appellant is independent with all personal care tasks; the shopping tasks of reading labels and paying for purchases; the meals tasks of safe storage of food and meal planning; all pay rent and bills tasks; the medications tasks of filling/refilling prescriptions and taking as directed and; and all transportation tasks.

The MD indicates that the appellant requires periodic assistance with the shopping task of making appropriate choices and the medications task of safe handling and storage.

Relate to, communicate or interact with others effectively

MR:

The MD indicates that the appellant has no difficulties with communication and is restricted with social functioning.

AR:

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

In assessing social functioning, the MD indicates that the appellant is independent with developing and maintaining relationships, interacting appropriately with others and securing assistance from others. The MD indicates that the appellant requires periodic support/supervision in making appropriate social decisions and dealing appropriately with unexpected demands. The MD reports that the appellant has marginal functioning in her immediate and extended social networks.

Help required

MR:

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

AR:

The MD indicates that the appellant receives assistance from family, friends and health authority professionals.

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

2. Request for Reconsideration

The appellant submitted a signed Request for Reconsideration dated 10 August 2018. The appellant reports difficulty with mental clarity, focus and concentration and stated that she is struggling with depression. The appellant also reports pain and fluctuating paralysis in her arms. She states that she is suffering from headaches and pain in her arms neck and shoulders. She reports that she is drowning in anxiety.

Included at reconsideration are several documents:

- A letter dated 3 August 2018, from a law office stating that physicians have diagnosed the appellant with a mild traumatic brain injury and severe spinal injury with loss of function in her neck and arms as well as significant anxiety and depression.
- A letter dated 8 August 2018, from a physiotherapist stating that the appellant has been attending weekly physiotherapy following a spinal cord injury that required cervical fusion.
- An appointment confirmation for 22 August 2018 with the MD.
- A medical note dated 2 August 2018, stating that the appellant would benefit from an OT assessment and ongoing care. The note indicates that the appellant has an acquired brain injury, severe spine injury, and significant anxiety/depression and is in recovery from substance abuse.

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

Notice of Appeal

In the Notice of Appeal dated 22 August 2018, the following reasons for appeal are provided: *I disagree with the findings that I do not have a severe physical or mental impairment that my impairments do not significantly restrict my ability to perform activities of daily living, and that I do not require a help to perform my daily living activities such which are restricted by my impairment. More documentation in support of my claim will follow.*

Appeal Submissions

The appellant's submission included:

- A 3-page letter dated 21 September 2018, from the appellant's lawyer's office ("Lawyer's Letter") arguing that appellant meets all criteria for PWD designation.
- A 2-page consultation report dated 1 February 2018, from a surgeon ("Hospital Consult") who examined the appellant at the hospital on the day of her motor vehicle collision. The impression provided was that the appellant suffered an acute spinal cord injury with severe central cord syndrome.
- A 2-page discharge summary dated 20 March 2018, prepared by a medical doctor with diagnoses of significant central cord pattern spinal injury and anxiety ("Discharge Summary").
- A 2-page follow-up report dated 17 April 2018 from the surgeon ("Surgeon's Report") stating that the appellant has done very well but her recovery is complicated by intense neuropathic pain and difficulty with pain management.
- A 14-page Independent Occupational Therapist (OT) Case Management Report ("OT Report") dated 5 September 2018.

The ministry provided a 2-page submission dated 3 October 2018, in which it was argued that the additional documents in the appellant's submission do not establish that the appellant has a severe impairment or that her impairments significantly restrict her ability to perform daily living activities as required under the legislation.

Admissibility

The panel finds that the information provided in the appellant's Notice of Appeal and the Lawyer's Letter 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 Hospital Consult, Discharge Summary, Surgeon's Report and OT Report are admissible in accordance with section 22 (4)(b) of the *Employment and Assistance Act* because each speaks to the appellant's medical conditions and each is in support of information and records before the ministry at reconsideration. In reaching this decision, the panel notes that the ministry made no objection in its submissions to the panel admitting these documents.

The panel finds that the ministry' submission consists of argument, which does not require an admissibility determination in accordance with section 22 (4)(b) of the *Employment and Assistance Act*.

PART F – REASONS FOR PANEL DECISION

The issue in this appeal is whether the ministry's 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.

Severity of impairment

The legislation requires that for PWD designation, the minister must be "satisfied" that the person has a severe mental or physical impairment. The legislation makes it clear that the determination of severity is at the discretion of the minister, considering all the evidence, including that of the appellant. Diagnosis of a serious medical condition or the identification of mental or physical deficits does not in itself determine severity of impairment.

Severity of physical impairment

In the reconsideration decision, the ministry determined that a severe impairment of physical functioning had not been established. In making this determination, the ministry noted that the MD has indicated that the appellant has reduced balance/gait but is able to walk 4+ blocks unaided and climb 5+ steps unaided. The ministry argued that while the MD indicates reduced activity tolerance, she does not describe the nature of reduced activity. The ministry indicated that it does not consider the ability to walk 4+ blocks, climb 5+ steps and remain seated without limitation to be indicative of a severe impairment. The ministry argued that the MD has indicated that the appellant is independent with the majority of listed areas of mobility and physical ability. The ministry also noted that while the MD has indicated that the appellant requires periodic assistance and takes significantly longer with lifting and carrying and holding, the MD has not provided details regarding the nature and frequency of assistance required nor how much longer than typical the appellant takes. The ministry concluded that while the appellant is restricted with heavy lifting, a severe impairment of physical functioning has not been established.

The panel finds that the ministry's determination was reasonable. The panel notes that the MD's assessments of the appellant's functional capacity and mobility and physical ability assessments in the MR and AR indicate that the appellant is able to function independently, with some limitation in her ability to lift. However, the panel finds that the MD has not provided sufficiently coherent and detailed information in the assessments regarding the nature of the appellant's lifting restrictions. The panel also notes that the information provided by the MD in the MR is not entirely consistent with the information in the AR. For instance, the MD has indicated that the appellant is restricted with mobility outside of the home but has also indicated that the appellant is independent with walking indoors and outdoors. The panel finds that the Hospital Consult, Discharge Summary and Surgeon's Report speak to the appellant's injuries, diagnoses and medical conditions but do not speak to impairment(s) arising therefrom. The panel notes that the OT Report, like the MD's assessments, indicates that the appellant requires additional time for some activities. However, like the MD's assessments, the OT Report does not indicate how much longer than typical the appellant requires. The panel finds that the ministry's conclusion on this criterion, that a severe physical impairment has not been established, is reasonably supported by the evidence.

Severity of mental impairment

In the reconsideration decision, the ministry determined that the information provided does not establish a severe mental impairment. The ministry noted that the MD's assessments indicate that the appellant does not have any difficulties with communication and her abilities with speaking, reading, hearing and writing are good. The ministry noted that the MD indicated significant deficits to cognitive and emotional functioning, with one major impact (emotion) to cognitive and emotional functioning, six moderate impacts (impulse control, insight/judgment, attention, concentration, executive, memory and other emotional/mental problems), minimal impacts to motivation and motor control and no impacts in the other five listed areas. The ministry noted that the appellant is independent in three areas of social function, requires periodic support/supervision in two areas and has marginal functioning in her immediate and extended social networks. As well, the ministry noted the absence of information relating to support/supervision required or any safety issues. The ministry concluded that the information provided had established a moderate as opposed to severe impairment in mental functioning.

The panel finds that the ministry's determination that a severe mental impairment has not been established was reasonable. The panel finds that assessments in the MR and AR do not reflect significant restrictions in the

appellant's ability to function effectively or independently as a result of her mental health condition diagnoses or brain injury. The panel finds that the information provided does not sufficiently describe the impact(s) of a mental health condition or brain injury on the appellant's daily functioning. The panel notes the MD's assessments relating to decision-making indicate that the appellant is independent in most areas, with some need for assistance with medications storage and making appropriate purchases while shopping. However, the panel finds that the MD has not described the nature, frequency or duration of assistance required by the appellant for these tasks. The panel finds that the ministry's determination, that a severe mental impairment has not been established, is reasonably supported by the evidence.

Direct and significant restrictions in the ability to perform DLA

The legislation specifies that the minister assess direct and significant restrictions in the ability to perform DLA in consideration of the opinion of a prescribed professional, in this case the MD. This does not mean that other evidence should not be considered, but it is clear that a prescribed professional's evidence is fundamental. At issue in this assessment is the degree of restriction in the appellant's ability to perform the DLA listed in section 2(1)(a) and (b) of the EAPWDR. The panel notes that, according to the legislation, the direct and significant restriction in the ability to perform DLA must be due to a severe mental or physical impairment.

The ministry was not satisfied that the appellant has a severe impairment that, in the opinion of a prescribed professional, directly and significantly restricts her ability to perform DLA. In reaching this conclusion, the ministry noted that MD's MR assessment indicates restrictions with meal preparation, basic housework, daily shopping and mobility outside of the home but the assessments do not indicate the frequency of restriction in these areas. The ministry noted that in the AR the MD indicated that the appellant requires periodic assistance with basic housekeeping, two of the four meals areas, two of the five shopping areas and is independent walking outdoors. The ministry argued that the MD has indicated that the appellant is independent with the majority of listed DLA areas and has not indicated the frequency or duration of assistance required by the appellant for those DLA which she requires assistance. The ministry also argued that the MD has not provided the frequency or duration of assistance required for social functioning DLA and also does not describe any support/supervision required to maintain the appellant in her community. The ministry concluded that there was not enough evidence to confirm that a severe impairment significantly restricts the appellant's ability to perform DLA continuously or periodically for extended periods.

The panel finds that the ministry's determination that the assessments provided do not establish that a severe impairment significantly restricts the appellant's ability to perform DLA continuously or periodically for extended periods was reasonable. The panel notes that the legislation specifies that direct and significant restrictions to DLA must be in the opinion of a prescribed professional. The panel notes that the MD has not indicated in the MR whether the appellant's restrictions are periodic or continuous. The panel notes that the MD has indicated in the AR that the appellant requires periodic assistance with some activities, but does not provide sufficient detail to establish that the restrictions are significant and periodic for extended periods. The panel finds that the information provided in the OT Report contains a similar lack of detail in that it indicates that the appellant takes longer with some activities, but does not provide detail as to how much longer is required. As well, the panel notes that the MD has assessed the appellant as being largely independent with DLA. The panel finds that, in relation one area where some restriction is assessed (mobility outside of the home) in the MR, the MD has provided contradictory information (independence with walking indoors and outdoors) in the AR. The panel concludes that the ministry's determination, that the evidence is insufficient to show that the appellant's overall ability to perform her DLA is significantly restricted either continuously or periodically for extended periods, is reasonable.

Help required

The legislation requires that, as a result of being directly and significantly restricted in the ability to perform DLA either continuously or periodically for extended periods, a person must also require help to perform those activities. The establishment of direct and significant restrictions under section 2(2)(b)(i) is a precondition of meeting the need for help criterion. Help is defined in subsection (3) as the requirement for an assistive device, significant help or supervision of another person, or the services of an assistance animal in order to perform a DLA.

In the reconsideration decision, the ministry determined that as it had not been established that the appellant's ability to perform DLA were significantly restricted, it cannot be determined that significant help is required. While the information provided indicates that the appellant does receive assistance from family, friends and health authority professionals, the panel has concluded that the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established. As such, the panel finds that the ministry reasonably concluded that under section 2(2)(b)(ii) of the EAPWDA it cannot be determined that the appellant requires help to perform DLA.

Conclusion

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

PART G – ORDER	
THE PANEL DECISION IS: (Check one) <input checked="" type="checkbox"/> UNANIMOUS <input type="checkbox"/> BY MAJORITY	
THE PANEL <input checked="" type="checkbox"/> CONFIRMS THE MINISTRY DECISION <input type="checkbox"/> RESCINDS THE MINISTRY DECISION	
If the ministry decision is rescinded, is the panel decision referred back to the Minister for a decision as to amount? <input type="checkbox"/> Yes <input type="checkbox"/> No	
LEGISLATIVE AUTHORITY FOR THE DECISION:	
<i>Employment and Assistance Act</i>	
Section 24(1)(a) <input checked="" type="checkbox"/> or Section 24(1)(b) <input checked="" type="checkbox"/>	
and	
Section 24(2)(a) <input checked="" type="checkbox"/> or Section 24(2)(b) <input type="checkbox"/>	

PART H – SIGNATURES	
PRINT NAME Jennifer Smith	
SIGNATURE OF CHAIR	DATE (YEAR/MONTH/DAY) 2018/10/12

PRINT NAME Vivienne Chin	
SIGNATURE OF MEMBER	DATE (YEAR/MONTH/DAY) 2018/10/12
PRINT NAME Lowell Johnson	
SIGNATURE OF MEMBER	DATE (YEAR/MONTH/DAY) 2018/10/12