

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction's ("ministry") reconsideration decision dated October 30, 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 physical impairment, but was not satisfied that:

- the appellant has a severe mental impairment;
- the appellant's 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 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 indicating the PWD application was received on July 18, 2018 and denied on September 20, 2018. The appellant submitted a Request for Reconsideration ("RFR") on October 18, 2018. The ministry reviewed the RFR on October 30, 2018.
2. The RFR, signed by the appellant on October 21, 2018, describing his physical and mental impairments, and associated restrictions.
3. Chart Summary (2 pages) from the appellant's General Practitioner ("GP"), noting investigations and x-rays of the appellant's left leg injury, performed between March 6 and August 30, 2018. The appellant is to remain non-weight bearing for the time being.
4. An orthopedic consult report created on March 29, 2018, indicating a two-week follow-up post-surgery. The appellant's left tibial fracture that was treated by internal fixation.
5. An orthopedic consult report created on April 19, 2018, confirming a complex fracture and vascular injury. The appellant is on a good pain management regimen for his knee. He is working with physiotherapy for his "foot drop." He has no peroneal nerve function and may require a referral for nerve conduction studies and plastic surgery.
6. An orthopedic consult report created on May 19, 2018, indicating the appellant has regained 90% motion in his knee but continues to have "foot drop" for which he is using a splint. The appellant has no motor function of his peroneal nerve and is being referred to plastic surgery to consider surgical intervention as required.
7. An Operative Documentation report ("OR report") created on August 20, 2018, describing surgical intervention for left peroneal neuropathy relative to the appellant's complex tibial plateau fracture.
8. An orthopedic consult report created on September 6, 2018, indicating successful nerve decompression surgery. The appellant was able to weight bear as tolerated, and is on track for reasonable healing of the tibial plateau. The appellant may need further treatment over the years due to degeneration.
9. A letter from a mental health counsellor dated October 18, 2018, indicating the appellant has been receiving counselling since March 2018 for his long standing struggles with anxiety (particularly social anxiety), depression, and anger. These mental health struggles have a significant impact on the appellant's daily life and make it difficult for him to find and hold employment, especially as he recovers from a significant injury.
10. The appellant's PWD application comprised of:
 - a self-report ("SR") dated June 25, 2018;
 - a Medical report ("MR") dated July 10, 2018, signed by the appellant's GP who has known the appellant for more than 10 years, and has seen him 11 or more times in the past 12 months; and
 - an Assessor Report ("AR") dated June 28, 2018, completed by a physiotherapist who has known the appellant since March 2018, and has seen him 11 or more times in the past 12 months. The physiotherapist based the assessment on an office interview with the appellant, file/chart information, and direct observation.
11. The ministry's *Denial Decision Summary* with attached letter, dated September 20, 2018.

Summary of relevant evidence from the application:

Diagnoses

In the MR, the GP indicates "complex compound fracture left tibia/fibula" [onset February 2018]. Under *Comments*, the GP writes, "very severe injury with multiple complex surgeries to reconstruct vascular, skeletal system. Surgeries ongoing."

Functional skills

In the SR, the appellant states that since falling 20 feet and having his leg rebuilt, he deals with constant pain and electrical sensations in his leg. His normal routine of work, training, and outdoor activities has severely diminished as he cannot keep up a normal pace. Due to the discomfort in his leg, he has to reposition himself every couple of minutes when sitting or standing. Due to his "bad leg", he has great difficulty with balancing and it takes him 2 to 3 times longer to get out of bed. Going down stairs can be very difficult due to his "bad knee with plates and screws." Bending over to pick things up off the floor is very difficult; the appellant reports that he cannot kneel at all.

The appellant describes sleep disturbances due to pain and trauma. On bad days, he cannot get out of bed and feels highly unmotivated due to depression and pain. The appellant reports long standing issues with anxiety, agitation, stress, and panic attacks; he cannot plan ahead or finish tasks, and he has brain fog and poor short term memory. The appellant reports social isolation due to being unable to express feelings or ask for help. The appellant states that he has anger issues and feels socially awkward, and he has an equal number of good days and bad days.

In the MR under *Health History*, the GP reports that the appellant has compartment syndrome, peroneal nerve injury, post-traumatic pain with "foot drop", and limited use of his lower leg. The information in the MR indicates the appellant can walk 1 to 2 blocks unaided on a flat surface; climb 2 to 5 steps unaided; lift 5 - 15 pounds, and remain seated for less than one hour. The appellant has no difficulties with communication and no significant deficits with cognitive and emotional function. Under *Additional Comments*, the GP states that the appellant has significantly impaired mobility and struggles with post-traumatic pain. The injury significantly interferes with the appellant's ability to walk and work, and has taken a significant emotional toll on the normally active appellant.

In the AR, the appellant's *Ability to Communicate* is rated as good in all areas (speaking, reading, writing, and hearing). For the 6 activities listed under *Mobility and Physical Ability*, the appellant uses an assistive device (crutch) for *Walking Indoors*, *Walking Outdoors*, *Climbing Stairs*, and *Carrying and holding*. The appellant can carry with only one hand while holding his crutch with the other hand. The appellant is independent with *Standing and Lifting* but can stand for less than 20 minutes, and is awkward with lifting. The physiotherapist states that the appellant would not be able to pick up objects easily with two hands.

For *Cognitive and Emotional Functioning*, the physiotherapist indicates the appellant's mental impairment restricts or impacts his functioning as follows:

- No impact for 6 out of 13 areas: *Consciousness, Impulse control, Insight and judgment, Motor activity, Language, Psychotic symptoms, and Other neuro-psychological problems*;
- Minimal impact: for 4 areas: *Attention* (unable to maintain concentration), *Executive, Memory, and Motivation*;
- Moderate impact for 2 areas: *Bodily functions* (toileting "at night time", and insomnia), and *Impulse control* ("road rage");
- Major impact for 2 areas: *Emotion* (excessive or inappropriate anxiety, "feels stressed constantly"), and *Other emotional or mental problems* ("social anxiety, possible PTSD from traumatic experiences").
- Under *Comments*, the physiotherapist writes, "no identified mental or brain injury". In her appended note dated October 11, 2018, the physiotherapist writes, "have re-evaluated client in terms of mental/physical/emotional health...Now completed pre and post injury status (e.g., ongoing anxiety issues). Major problems are: stress, anxiety, possible PTSD, results in sleep disturbances, attention, and memory disturbances."

DLA

In the SR, the appellant reports restrictions with employment, and personal self-care. Bathing/showering and shaving take him 3 to 4 times longer because it is difficult to stand and balance and he needs breaks to rest his leg. The appellant states that he needs to be told to shower and change his clothes and he cannot cook or prepare meals because he cannot stand at the kitchen counter for more than a couple of minutes. It is also hard to reach the lower cupboards.

The appellant reports stress symptoms including ulcers and vomiting; he needs to be persuaded to eat a healthy diet. Due to high anxiety and stress from being in a busy public place, the appellant reports that he is unable to pick up/manage his prescriptions and he is unable to grocery shop as there are "too many people in the stores." The appellant states that he is unable to organize himself enough to clean his home and his leg pain and discomfort also restricts this activity. While he is able to drive short distances, his leg gets sore and stiff quickly and he cannot use public transportation due to extreme social anxiety. The appellant states that he also needs constant reminders to pay bills. Due to anxiety and anger issues, the appellant reports that he does not socialize much or have many friends.

In the MR, the GP indicates the appellant's pain, "foot drop", and limited use of his lower leg significantly interfere with DLA. The appellant has been prescribed pain medications that interfere with his ability to perform DLA. His need for these medications will vary depending on the progress of his recovery.

For the specific DLA listed in section 2 of the MR, the GP checks that 5 out of 10 activities are restricted:

- *Personal self-care* (the appellant is continuously restricted);
- *Basic housework* (the GP does not indicate whether the restriction is continuous periodic);
- *Daily shopping* (does not indicate whether continuously or periodically restricted);
- *Mobility inside the home* (does not indicate whether continuously or periodically restricted); and
- *Mobility outside the home* (does not indicate whether continuously or periodically restricted);
- Comment: "takes him significantly longer to perform ADL's [DLA] household tasks, etc."

In the MR, the GP indicates that 4 out of 10 DLA are not restricted:

- *Meal preparation*;
- *Management of medications*;
- *Use of transportation*; and
- *Management of finances*.
- The GP indicates that restrictions to *Social functioning* are "unknown" (comment: "emotionally difficult time" for the appellant).

In the AR, the physiotherapist states that the appellant's left leg injury with resultant nerve damage and "drop foot" (diminished strength in his leg and severe weakness in his left ankle) are the impairments that impact his ability to manage DLA. In section C of the form, the physiotherapist indicates the appellant is independent with all DLA (comment for *Carrying purchases home*: "drives car"). Under *Additional comments*, the physiotherapist writes: "he can put purchases from cart to car, but would not carry bags very far...able to drive").

For the *Social Functioning* DLA, the physiotherapist does not describe how the appellant's mental impairment impacts his relationship with his social networks (this section is left blank). The physiotherapist does not describe any support/supervision required to maintain the appellant in the community, or identify any safety issues (these sections are also left blank).

Need for help

In the SR, the appellant indicates that due to his injury, anxiety, and depressed mood, he needs help from his family to manage DLA. The appellant reports that his family helps him with personal care and financial transactions (reminders to shower, change clothes, and pay bills), cooking/meal preparation, housecleaning, shopping, and picking up prescriptions. The appellant reports that he also uses a cane or crutch to help with pain and relieve the stress to his knee.

In the MR, the GP states that the appellant requires mobility aids for his impairment ("crutches, AFO, brace"). The GP reports that family members assist the appellant with numerous activities during his recovery. In the AR, the physiotherapist indicates the appellant uses a crutch for walking and climbing stairs, and while lifting and carrying/holding (the appellant lifts/carries with one hand and holds the crutch with his other hand).

In the AR, Part D (*Assistance Provided for Applicant*), the physiotherapist states that the appellant is living with family "but is independent in ADL's" [DLA]. The physiotherapist indicates the appellant uses crutches, splints, and braces for his impairment (comment: "has a knee brace and ankle splint for left leg, and uses crutch for all walking"). The appellant does not have an assistance animal.

Additional information

With the consent of both parties, the appeal proceeded as a written hearing pursuant to section 22(3)(b) of the *Employment and Assistance Act* ("EAA"). Subsequent to the reconsideration decision neither party filed any new evidence requiring an admissibility determination in accordance with section 22(4) of the EAA. The appellant filed a *Notice of Appeal* with hand-written statement which the panel accepts as argument. In an email to the Tribunal, the ministry states that its submission on appeal will be the reconsideration summary.

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. Was the ministry reasonable in finding that the following eligibility criteria in section 2 of the EAPWDA were not met?

- the appellant has a severe mental impairment;
- the appellant's impairment, in the opinion of a prescribed professional, directly and significantly restricts his ability to perform 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 physical impairment. Therefore, the criteria in section 2(2) of the EAPWDA are met.

The ministry determined that the appellant does not have a severe mental impairment based on the information provided in the PWD application and RFR. "Severe" is not defined in the legislation but the diagnosis of a serious medical condition does not in itself establish a severe impairment of mental functioning. To assess the severity of a mental impairment, the ministry must consider the extent of any impact on daily functioning as evidenced by limitations/restrictions in mental functions; restrictions with DLA requiring mental/social functioning; and whether significant help is required to manage DLA.

The ministry argues that a severe mental impairment is not established on the evidence because the GP reports no deficits with cognitive and emotional functioning and the assessor finds only two major impacts due to a mental impairment (despite reporting that the appellant has "major problems" due to stress, anxiety, and possible PTSD). As well, neither prescribed professional reports any difficulties with communication. The ministry acknowledges the appellant experiences some impacts to his cognitive and emotional functioning but is not satisfied that the overall assessment of his mental status demonstrates a severe degree of mental impairment.

Based on the evidence provided, the panel finds that the ministry reasonably determined that a severe mental impairment is not established. The appellant reports a severe degree of impairment due to his anxiety, depression, anger issues, and traumatic experiences. The appellant reports that he is especially impaired by his anxiety, which hinders him from going to stores, socializing, and using public transit. Unfortunately, the information from the GP and physiotherapist does not reflect the degree of severity described in the appellant's self-reports.

The GP acknowledges that the appellant is going through a difficult time emotionally, but does not diagnose the appellant with anxiety or depression; or describe any functional restrictions that result from the appellant's anxiety. The GP check marks, *No*, when asked if the appellant has any significant deficits with cognitive or emotional function.

The physiotherapist's evidence comes closer to identifying a severe impairment of mental functioning ("major problems are stress, anxiety, possible PTSD - results in sleep disturbances, attention and memory disturbances"). The physiotherapist indicates the appellant's mental impairment has a moderate or major impact in four areas of cognitive and emotional functioning. However, the problems identified by the appellant (planning, memory, and motivation) are assessed by the physiotherapist as minimal impact.

The appellant provides a letter from his counsellor that confirms his longstanding struggles with anxiety, depression, and anger. While the counsellor states that these feelings have a significant impact on the appellant's daily life, the only specific functional restriction the counsellor describes is difficulty with employment. As noted by the ministry, employability or the ability to work is not a factor in determining eligibility for PWD designation. The legislation does not include the inability to hold employment as a criterion for PWD. Based on the evidence in its entirety, the panel finds that the ministry reasonably determined that a severe mental impairment is not established under section 2(2) of the EAPWDA.

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 and the physiotherapist who completed the PWD medical reports, and the specialists and counsellor who provided additional reports/ letters. 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, an analysis of periodic restrictions must also include 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 on 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 practitioner completing these forms has the opportunity to indicate which, if any, DLA are significantly restricted by the applicant'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.

The ministry argues there is not enough evidence from the prescribed professionals to confirm that DLA are significantly restricted either continuously, or periodically for extended periods. In the MR, several DLA are marked as restricted but with the exception of *Personal self-care* (continuously restricted), the GP does not indicate whether the activities are continuously or periodically restricted or how much longer it takes the appellant to perform these DLA.

The appellant provides a greater degree of detail in his self-reports. He states that it takes him 3 to 4 times longer to shower and shave; he is unable to perform housework or shop due to his leg injury and anxiety; and he has "bad days" half of the time. The GP does not confirm this information as required by the legislation. The panel therefore finds that the ministry reasonably determined there is insufficient information to establish that DLA are significantly restricted either continuously, or periodically for extended periods.

In the AR, the physiotherapist assesses all DLA as independent despite reporting functional restrictions with most areas of mobility including lifting and carrying (the appellant performs these activities with one hand while he holds his crutch with the other hand). Logically, it is unclear how the appellant can be independent with all of the physical DLA given his severe physical impairment for which he employs several assistive devices and uses only one hand. Even if the panel gives little weight to the physiotherapist's assessment of DLA, there is insufficient evidence from the GP to confirm that most of the appellant's restrictions are continuous or periodic for extended periods as required by the legislation.

While the appellant provides a detailed description of the help he needs from his family to perform DLA, the ministry argues that the GP does not describe the nature and frequency of the help provided. Neither the GP nor the physiotherapist confirm the appellant's reports of restrictions with meal preparation, management of medications and finances, use of transportation, and social functioning. The GP indicates that these DLA are not restricted and that restrictions to social functioning are unknown.

The orthopedic consult reports and the letter from the appellant's counsellor do not address the appellant's ability to perform the DLA listed in the EAPWDR. As noted, employment is not listed as a DLA in the legislation. The panel finds that the ministry reasonably determined there is not enough information in the PWD application and RFR to establish that DLA are significantly restricted as required by the legislation. Based on the information from prescribed professionals, the panel finds that 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 MR and AR indicate the appellant uses assistive devices to perform DLA, and he receives help from his family. 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

Based on the DLA assessment of the GP and physiotherapist, and considering the evidence in its entirety, the panel finds that the ministry's reconsideration decision, which determined that the appellant was not eligible for PWD designation, is reasonably supported by the evidence. The panel 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 type="checkbox"/> CONFIRMS THE MINISTRY DECISION <input checked="" 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 type="checkbox"/> or Section 24(1)(b) <input type="checkbox"/>	
and	
Section 24(2)(a) <input type="checkbox"/> or Section 24(2)(b) <input checked="" type="checkbox"/>	

PART H – SIGNATURES	
PRINT NAME Margaret Koren	
SIGNATURE OF CHAIR	DATE (YEAR/MONTH/DAY) 2018-10-10

PRINT NAME Stephanie Korour	
SIGNATURE OF MEMBER	DATE (YEAR/MONTH/DAY) 2018-10-10
PRINT NAME Nancy Eidsvik	
SIGNATURE OF MEMBER	DATE (YEAR/MONTH/DAY) 2018-10-10