

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (ministry) reconsideration decision dated 20 November 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 Self Report (SR) dated 30 May 2018, completed and signed by the appellant.
- A Medical Report (MR) dated 05 June 2018, completed by a general practitioner (GP) who indicates she has known the appellant for 1 year and seen her 11+ times in the past 12 months
- An Assessor Report (AR) dated 03 August 2018, completed by a chiropractor (DC) who indicates she has seen the appellant 2-10 times in the past 12 months and known the appellant for approximately 2 months.

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 diagnosis:

- A musculoskeletal shoulder injury – onset October 2017

Severity of mental impairment

MR:

The GP has ticked 'no' in response to whether there are difficulties with communication.

The GP indicates that it is unknown whether the appellant has significant deficits with cognitive and emotional functioning.

AR:

In the AR, the DC has indicated that the appellant reports depression and low motivation

The DC indicates that the appellant's ability to communicate is good in all listed areas - speaking, reading, writing (*difficulties writing with R [right]*) and hearing. The DC comments: *and Able to communicate. Emotional during appointment. She reports discomfort when writing with R [right] (dominant).*

The DC assesses the appellant's cognitive and emotional functioning as having major impacts on daily functioning in the area of emotion; moderate impacts to bodily functions; minimal impacts to consciousness, insight and judgement, attention/concentration, memory and other emotional or mental problems. No impacts are reported in the areas of impulse control, executive, motor activity, psychotic symptoms and other neuropsychological problems.

The DC reports that the appellant would benefit from counselling as she is in chronic pain and will require assistance to overcome barriers to recovery, as she presents with "yellow flags".

SR:

The appellant reports that she is getting depressed because she can't live her normal life and has to ask for help. She reports decreased motivation due to pain that causes her to want to lie in bed all day and sleep or watch a movie.

Severity of physical impairment

MR:

Under Health History, the GP writes: *patient describes subjective neck pain [and] shoulder pain on the right side. Reports difficulty with lifting and ROM [range of motion]. MRI of R shoulder – no internal derangement. Ultrasound of R [right] shoulder – normal. A small amount of bursal fluid is present.*

For functional skills, the GP indicates that the appellant can walk 4+ blocks unaided, climb 5+ steps unaided and

remain seated without limitation. The GP indicates that the appellant's lifting capacity is unknown.

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

AR:

The DC states that the appellant reports a right shoulder injury in September 2017, is now in chronic pain and reports depression and low motivation that is impacting her ability to recover.

The DC indicates that the appellant is independent with walking indoors and outdoors, climbing stairs and standing. The DC indicates that the appellant requires periodic assistance with lifting and carrying and holding (*Reports pain with anything heavier than a glass of water*). The DC provides the additional comments: *Physical exam showed full shoulder ROM, all orthopaedic testing normal.*

The DC reports that the physical exam concluded full range of motion and no loss of strength. The DC indicates that the appellant would benefit from an active care plan.

SR:

The appellant indicates that she is in constant pain from a shoulder injury. She reports being unable to lift over 10 lbs., unable to complete personal and household tasks and unable work more than a few days per month. The appellant states that she requires assistance with many tasks and is getting depressed because she has to ask for help.

Ability to perform Daily Living Activities (DLA)

MR:

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

The GP indicates that the appellant's impairment does not restrict her ability to perform DLA.

AR:

The DC indicates that the appellant requires periodic assistance with the personal care tasks of dressing and grooming (*brushing hair*); the basic housekeeping tasks of laundry and basic housekeeping; the shopping task of carrying purchases home (*larger shops require assistance*); and the meals tasks of food preparation (*pain when chopping veggies*). The DC reports that the appellant is independent with the remaining 6 personal care tasks; the remaining 4 shopping tasks; the remaining 2 meals tasks; all pay rent and bills tasks; and all transportation tasks. The DC has not assessed medications tasks (*patient reports no medications*).

The DC provides the following additional comments:

- *Patient reports requiring assistance with getting dressed (i.e. bra) and grooming (i.e. brushing hair, washing hair).*
- *Vacuuuming and sweeping she finds difficult due to pain with R arm.*
- *Large grocery shops she reports requiring assistance carrying bags into house and car.*
- *Patient reports difficulties chopping and preparing veggies. She requires assistance lifting full pots/pans as well as mixing/stirring.*

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 GP makes no indication as to whether the appellant is restricted in her ability to manage personal self-care, meal preparation, medications, finances and transportation.

AR:

The DC indicates that the appellant is independent with all decision-making tasks.

The DC has not completed the social functioning portion of the AR.

Relate to, communicate or interact with others effectively

MR:

The GP indicates that the appellant has no difficulties with communication.

AR:

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

The DC has not completed the social functioning portion of the AR.

Help required

MR:

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

AR:

The DC indicates that the appellant receives assistance from friends and family (*she utilizes family/friends when possible, if they aren't available she will find a way to do the task herself, or not do it.*)

The DC indicates that the appellant uses a sling on bad days and comments: *she finds relief & comfort using a sling for R arm on bad days.*

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

2. Request for Reconsideration

The appellant submitted a signed Request for Reconsideration dated 6 November 2018, the appellant stated that her doctor doesn't listen to her and didn't know how to fill out the forms. In a 1-page typed letter submitted with the Request for Reconsideration, the appellant reported that she was injured at work more than 1 year ago and had to continue working to pay her bills. She states that it is getting more difficult to dress and do chores at home, and she is in tears every day after work. The appellant argues that her injury does qualify and provides details of the symptoms she experiences. She argues that nothing helps, and she will lose the use of her arm.

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

Notice of Appeal

In the Notice of Appeal dated 29 November 2018, the appellant provided the following reasons for appeal: *Because they are saying my doctor and chiropractor as stating that she said. How else would they know how it goes in the house, they don't live with me. I am in pain every day and in tears after work and most days even if I don't work.*

Appeal Submissions

The appellant argued that she suffers from both a severe mental and physical impairment. Her submission was that she suffers from chronic pain and is unable to work for more than 2 hours without suffering. She stated that she is unable to perform many daily tasks and has difficulty with others. The appellant stated that she gets help from family on a daily basis.

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 by the appellant at the hearing consisted of argument, reiteration and some elaboration of detail and is, therefore, admissible in accordance with section 22 (4)(b) of the *Employment and Assistance Act* because it is in support of information and records before the ministry at reconsideration.

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 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 GP has indicated that the appellant does not require aids or prosthesis. The ministry considered the functional skills assessment by the GP noting that the appellant is able to walk 4+ blocks unaided, climb 5+ steps unaided, has unknown lifting ability and can remain seated without limitation. The ministry argued that these assessments provided by the GP are not indicative of a severe physical impairment. The ministry also considered the results of the appellant's MRI and ultrasound, noting no internal derangement and normal results. The ministry argued that the DC's assessments indicate that the appellant is independent with a majority of mobility and physical ability areas. The ministry noted that both the GP and DC use language that indicates that the information provided is based on the appellant's self-assessments rather than medical assessments. The ministry concluded that the assessments provided by the GP and the DC did not establish a severe physical impairment.

The panel finds that the ministry's determination was reasonable. The panel notes the ministry's approach to assessing severity in light of the nature of the impairment and the extent of impacts, as evidenced by restrictions/limitations to functioning, ability to perform DLA and help required. Given the focus on restrictions and help required in the legislation, the panel finds this approach and the conclusions flowing therefrom to be reasonable. The panel notes that the GP's and DC'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 for the most part, with some patient-reported difficulty with lifting despite normal orthopaedic and medical imaging test results. The panel finds the appellant's abilities and limitations with lifting to be unclear. The panel also notes that the appellant takes issue with the ministry's finding that the language used by the GP and DC in their reports indicates that the information provided is based on the appellant's self-assessment rather than medical assessments. The appellant argued that, because the GP and DC do not live with her, there is no other way for the medical professionals to know about her limitations. While the panel accepts that the appellant would be expected to report her symptoms and limitations to her medical practitioners, the portions of the MR and AR that use 'patient reports'-type language are not consistent with the portions of the AR and MR that do not use this language and seem to more clearly reflect medical assessments. The panel notes that the medical imaging referred to by the GP indicate "normal" result and "no internal derangement"; furthermore, the GP has indicated that the appellant's impairment does not restrict her ability to perform DLA. Similarly, the DC indicates in the AR that the appellant has full range of motion in her shoulder, no decreased strength, and orthopaedic testing was negative. The panel finds that the ministry's determination, that a severe physical impairment has not been established, is reasonably supported by the evidence. As well, the panel notes that the appellant has emphasized her inability to work. However, the panel notes that employability or vocational ability is not a criterion for PWD designation nor is it

a DLA set out in the regulation. The appellant's ability to work is not a consideration in determining a severe impairment of physical or mental functioning.

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 the absence of a description or diagnosis relating to a mental impairment in the GP's assessment. The ministry also considered that the GP'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 considered that the GP indicates that it is unknown whether the appellant has significant deficits with cognitive and emotional functioning. The ministry noted that the DC indicated, in the AR, that the appellant has good ability in all listed area of communication and reports depression and low motivation. Despite the GP not indicating that there are any diagnoses of mental impairment or brain injury, the DC has completed section 3C of the AR indicating 2 major impacts to the appellant's cognitive and emotional functioning, 1 moderate impact, 5 minimal impacts and no impacts in the other 6 listed areas. The ministry argued that the language used by the DC indicates that the information in section 3B and accompanying commentary are based on the appellant's self-assessment rather than medical assessment. The ministry noted that the DC did not assess the appellant's social function. The ministry concluded that the information provided had not established a severe impairment in mental functioning.

The panel finds that the ministry's determination that a severe mental impairment has not been established is reasonable. The panel finds that assessments in the MR and AR do not provide any diagnosis relating to a mental impairment or brain injury. Further, the MR and AR assessments do not reflect restrictions in the appellant's ability to function effectively or independently as a result of a mental health condition and there is no suggestion of restriction in the appellant's social functioning ability. The panel notes the DC's assessments relating to decision-making indicate that the appellant is independent in all areas. However, the DC also indicates that the appellant reports suffering from depression and low motivation and that she would benefit from counselling to assist with barriers to her recovery. The panel also notes the assertion by the appellant of a mental basis for her PWD application, but finds that the assessments provided do not support a conclusion that the appellant suffers from a severe mental impairment. 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 GP and DC. 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 his ability to perform DLA. In reaching this conclusion, the ministry noted that the appellant has not been prescribed medication that impacts her ability to perform DLA. The ministry noted that the GP's MR assessment indicates that the appellant is not restricted with DLA. The ministry' noted that the DC's AR report indicates that the appellant is periodically restricted with some tasks but does not indicate the frequency or duration of assistance required. Further, the ministry argued that the information provided by the DC was based on the appellant's self-assessment rather than medical assessment. The ministry concluded that the information in the assessments and self-reports does not establish that a severe impairment significantly restricts the appellant's 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 appellant argued that the GP didn't complete this section of the report and didn't know how to complete the report. The panel finds, however, that the GP clearly did complete this section of the report by indicating that the appellant's impairment does not restrict her ability to perform DLA. The panel notes that the MR instructions state, "If yes, please complete the following table:

The panel finds, therefore, that because the GP indicated no restrictions to DLA it was not necessary for her to complete the table indicating which DLA were restricted. The panel also notes that in the AR the DC has assessed the appellant as being largely independent with DLA. The panel finds that, in relation to the only areas where some periodic restriction is assessed in the AR, there is no information as to periodicity. The panel finds that the information provided is insufficient to determine whether the appellant's restrictions with these tasks would meet the legislated language of "directly and significantly restricted continuously or periodically for extended periods." Furthermore, the panel notes that the appellant's self-reporting, in the SR, Request for Reconsideration and at the hearing are consistent with 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. This means that 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. The appellant argued that the information provided by the DC and the appellant herself clearly state that she does receive help and the ministry is wrong in its conclusion on this criterion. While the information provided by the appellant and DC demonstrates that the appellant does in fact receive assistance from friends and family and does use a sling on bad days, the panel notes that in order to meet this criterion, the DLA criterion in the previous section must also be met. The need for help must be as a result of significant restrictions to DLA. In this appeal, the panel has found that the ministry's conclusion that significant restrictions to DLA have not been established is reasonable. Because the panel has already concluded 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 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) 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)

2018/12/20

PRINT NAME

Jane Nielsen

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2018/12/20

PRINT NAME

Anne Richmond

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2018/12/20