

--

PART C – DECISION UNDER APPEAL
<p>The decision under appeal is the Ministry of Social Development and Poverty Reduction (ministry) reconsideration decision dated 1 October 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 <i>Employment and Assistance for Persons with Disabilities Act</i>.</p> <p>The ministry determined that the appellant had demonstrated that she has reached 18 years of age.</p> <p>The ministry further determined that the appellant had not demonstrated that she has a severe mental or physical impairment; that her impairment, in the opinion of a medical practitioner or nurse practitioner, is likely to continue for at least 2 years; 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.</p>

PART D – RELEVANT LEGISLATION
<p><i>Employment and Assistance for Persons with Disabilities Act</i> (EAPWDA) – section 2</p> <p>Employment and Assistance for Persons with Disabilities Regulation (EAPWDR) – section 2</p>

PART E – SUMMARY OF FACTS

The appellant did not attend the hearing. After confirming that the appellant was notified, the hearing proceeded under section 86(b) of the Employment and Assistance Regulation.

Evidence before the ministry at reconsideration consisted of the following:

1. The appellant's PWD Application

The Application contained:

- A Medical Report (MR) dated 15 September 2017, completed by a general practitioner (GP) who indicates he has known the appellant for 1 year and has seen her 2-10 times in the past 12 months.
- An Assessor Report (AR) dated 18 March 2018, completed by the same GP.
- A Self Report (SR) dated 27 April 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 GP provides the following diagnoses:

- Complex regional pain syndrome – onset 2010
- Migraine – onset 2012
- Anxiety – MVA (Age 13) 2010 – onset 2016
- PTSD – MVA (Age 13) 2010 – onset 2016

Duration

The GP has not indicated whether the appellant's condition is likely to continue for two years or more from today. The GP has written '?' in place of ticking 'yes' or 'no'. The GP comments: *Unknown. Workup is ongoing. History has been x 7 yrs. With no significant improvement.*

Severity of mental impairment

MR:

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

The GP does not tick 'yes', 'no' or 'unknown' to indicate whether the appellant has significant deficits with cognitive and emotional functioning, but has indicated the causes of emotional disturbance, motivation, impulse control, attention or sustained concentration and other (*some psychomotor agitation*).

AR:

The GP has responded to the question "What are the applicant's mental or physical impairments that impact his/her ability to manage Daily Living Activities?" as follows: *Pain with activity. Difficulty concentrating during headache periods. Recurring MVA episodes of nightmares – reducing in frequency to ~ weekly.*

The GP indicates that the appellant's ability to communicate is good in all listed areas: speaking, reading, writing (*some pain with physically writing*) and hearing.

The GP assesses the appellant's cognitive and emotional functioning as having moderate impacts on daily functioning in the areas of emotion attention/concentration, minimal impacts on impulse control, insight and judgement, memory and motivation. The GP assesses no impacts in all other listed areas of cognitive and emotional functioning. No comments are provided.

SR:

The appellant states that she has been dealing with PTSD, depression and anxiety since she was 13 and was

struck by a truck while riding her bicycle. She states that she experiences migraines, difficulty communicating and psychomotor agitation.

Severity of physical impairment

MR:

Under Health History, the GP writes: *migraines weekly. Continuously migrating pain in back, legs, ankles, shoulders. Occasional swelling of feet and toes. This has resulting (sic) in persistent pain, reducing the ability to sit or stand for prolonged periods of time. This is impactful for both employment and study.*

For functional skills, the GP indicates that the appellant can walk 4+ blocks unaided, climb 5+ steps unaided, lift 15-35 pounds unaided and remain seated for less than 1 hour.

In Part F, Additional Comments the GP provides the following: *Well documented MVA with L [left] fibular [fracture] & growth plate involvement. Well healed but developed CRPS [at] the left leg. Has seen orthopaedics, children & women's complex pain services in [omitted], paediatric neurology, psychology. Currently considering physiatry rehab referral.*

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

AR:

The GP has responded to the question "What are the applicant's mental or physical impairments that impact his/her ability to manage Daily Living Activities?" as follows: *Pain with activity. Difficulty concentrating during headache periods. Recurring MVA episodes of nightmares – reducing in frequency to ~ weekly.*

The GP indicates that the appellant is independent with all areas of mobility and physical ability, including: walking indoors, walking outdoors (*Some restriction*), climbing stairs, standing, lifting (*light loads*) and carrying and holding (*light loads*). The GP comments: *If physically active one day requires rest day.*

In Part E, Additional Information, the GP provides the following commentary: *As mentioned previously [appellant] experiences left foot, ankle, knee, hip & back pain following periods of prolonged standing or with moderate to strenuous physical activity. This results in her having to take essentially every second day off work from any of her entry level employment positions she has attempted in recent years, by report. Dx [diagnoses] of PTSD, regional complex pain syndrome, anxiety, depression, chronic migraine-type headaches.*

SR:

The appellant indicates that she is dealing with chronic pain and has been unable to maintain employment because severe pain causes her to cancel shifts or leave early.

Ability to perform DLA

MR:

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

The GP does not indicate whether the appellant's impairment restricts her ability to perform DLA. The GP goes on to indicate that the appellant is restricted periodically with meal preparation, basic housework, daily shopping, and mobility outside of the home.

In explaining 'periodic', the GP comments" *pain which limits above functioning is 2-3 times per week with occasional [illegible] flares of worsening pain.*

In explaining impacts to social functioning, the GP comments: *minimal impact.*

In explaining the degree of restriction, the GP comments: *restriction some about as pain related primarily.*

In relation to assistance needed with DLA, the GP comments: *N/A for function. Therapeutic pet for anxiety may be of assistance.*

AR:

The GP indicates that the appellant is independent in all personal care activities, all basic housekeeping tasks, all shopping activities, all meals activities, all pay rent and bills activities (*lives with mother – not tested but [no] concerns*), and all transportation activities. The GP indicates that the appellant is independent with the medications tasks of filling/refilling prescriptions and safe handling and storage and requires periodic assistance taking as directed (*has forgotten to take medications*).

The GP has commented '*pain*' in relation to basic housekeeping and '*pain with activity*' in relation to carrying purchases home. The GP has also provided the following Additional Comments: *the main impediment arises when she is standing for prolonged periods or if physical activity of a moderate to strenuous nature is required. She will experience persistent pain [at] L [left] foot, knee, hip back.*

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 indicates that the appellant is periodically restricted in her ability to manage meal preparation and daily shopping and is independent with personal self care, finances, medications and transportation.

AR:

The GP indicates that the appellant is independent with decision making DLA tasks.

The GP reports that the appellant is independent with making appropriate social decisions.

Relate to, communicate or interact with others effectively

MR:

The GP indicates that the appellant has no difficulties with communication and is independent with social functioning.

AR:

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

In assessing social functioning, the GP indicates that the appellant is independent with developing and maintaining relationships, interacting appropriately with others, dealing appropriately with unexpected demands and securing assistance from others. The GP indicates that the appellant has good functioning in her immediate and extended social networks.

Help required

MR:

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

AR:

The GP indicates that the appellant receives assistance from her mother.

The GP indicates that the appellant uses crutches (*minimal use*).

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

2. Appended documents

Included with the PWD application are:

- A Complex Pain Service report dated 27 May 2014.

-
- A letter from the appellant's registered massage therapist (RMT) dated 6 May 2016.
 - A letter from the appellant's psychologist dated 30 April 2016.

3. Request for Reconsideration

The appellant submitted a signed Request for Reconsideration dated 31 August 2018, indicating that she required an extension as her doctor was away and she would be out of town visiting family.

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

Notice of Appeal

In the Notice of Appeal dated 12 October 2018, the following reasons for appeal are provided: *I did not get a chance to submit my reconsideration because I was in and out of hospital due to illness.*

Appeal Submissions

The appellant did not attend the hearing.

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*.

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 four 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 medical practitioner or nurse practitioner, is likely to continue for at least 2 years;
- 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.

Duration

The legislation requires that minister assess the anticipated duration of an individual's impairment in consideration of the opinion of a medical practitioner or nurse practitioner, which must confirm that the impairment is likely to continue for at least 2 years.

The ministry concluded that this criterion had not been met because the GP did not confirm that the appellant's impairment is likely to continue for at least two years, as required by the legislation. The panel notes that all that would be required in order for this criterion to be met would be the GP ticking 'yes' in the MR. However, the GP has opted not to do so, instead writing in a '?'. The panel finds that, because the legislation specifically requires an opinion from a medical practitioner or nurse practitioner that the impairment is likely to continue for at least two years and this has not been provided, the ministry's determination on this criterion was reasonable.

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 and concluded that it was not reflective of a severe impairment. The ministry noted that the GP has provided information as to the appellant's ability to work and study, but clarified that the PWD application does not assess employability or vocational ability and a medical barrier to employment is not a legislated criterion for severity. The ministry also considered the DLA assessment provided by the GP and concluded that this assessment did not reflect a severe impairment. The ministry noted the additional documents provided with the PWD application, but determined that they would be afforded little weight due to their age. The ministry concluded that, while the appellant experiences pain and does experience some restrictions, the appellant is able to independently perform DLA and only requires crutches on occasion. The ministry stated that an impairment is 'a medical condition that results in restrictions to a person's ability to function independently, appropriately, effectively or for a reasonable duration' and the ministry found that the evidence provided does not sufficiently describe or portray a severe 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 extent of its impacts on functioning 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. However, the panel also notes that the definition of impairment (quoted above) employed by the ministry is not set out in the legislation, rather this definition is located in the PWD application. As such, the panel notes that this definition is not binding. The panel notes that the GP'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 her ability to remain seated. The panel also notes that the commentary provided by the GP suggests that the appellant is able to function independently but requires rest due to pain after prolonged sitting or standing and moderate to strenuous activity. As well, the panel notes that the appellant, psychologist and the GP have discussed the appellant's 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 panel finds that the information provided in the appellant's materials does not establish a severe physical impairment. As such, the panel finds that the ministry's determination, 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 GP's assessments indicate that the appellant does have some deficits with cognitive and emotional functioning in the MR but that the impact of these deficits on the appellant's daily functioning in the AR reflect no major impacts to cognitive and emotional functioning, only moderate or minimal impacts. The ministry noted that the appellant is not restricted with social function. The ministry also noted that the GP has indicated he is considering a 'psychiatry' referral but was not satisfied that considering a referral establishes a severe impairment. The ministry also considered the psychologist's letter, but noted that it provides a list of the appellant's symptoms without explaining their degree and it lacks detail. The ministry also found it unclear as to whether the letter was reflective of the appellant's current condition given its date. The ministry concluded that the information provided had not established a severe impairment of mental functioning.

The panel finds that the ministry's determination that a severe mental impairment has not been established was reasonable. The panel notes that the ministry has made an error with respect to the GP's note about considering a 'psychiatry' referral, as the GP's note in the MR relates to a 'physiatry' referral and not a 'psychiatry' referral. However, the panel finds that this is a non-material error. 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 a mental health condition and the GP's information indicates both independence and minimal impairment of the appellant's social functioning ability. The panel notes the presence of mental health diagnoses in the appellant's documents, but finds that the information provided does not indicate that these diagnoses establish a severe impairment. The information that has been provided reflects minimal or no impact on the appellant's daily functioning. The panel notes the GP's assessments relating to decision-making and communicating and interacting with others indicate that the appellant is independent in all areas. 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. 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 the GP's assessment indicates that the appellant is independent in almost every area. The ministry noted that the GP indicates that the appellant suffers from pain and anxiety, can only carry light loads and requires rest following a day of activity. The ministry also considered the GP's commentary, noting that the appellant's main impediment arises with prolonged sitting or standing and she experiences persistent pain from moderate to strenuous activity. The ministry argued that the information provided does not establish that a severe impairment significantly restricts the appellant's DLA, as she is independent in most areas.

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 GP has not indicated in the MR whether the appellant's impairment restricts her ability to perform DLA and has assessed her as being largely independent in the MR and completely independent in the AR with respect to DLA. The panel finds that, in relation to the only areas where some periodic restriction is assessed in the MR, the GP has provided inconsistent information in the AR by indicating that the appellant is independent in all areas. It is unclear to the panel as to whether the assessments in the AR, which was completed several months after the MR, reflects an updated assessment of the appellant's abilities with respect to DLA. The panel also notes that, in the MR, the GP's assessment is that the appellant experiences some restriction to DLA 2-3 times per week. However, the panel finds that there is insufficient detail provided to establish whether this frequency of restriction meets the threshold set out in the legislation of "periodically for extended periods". 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 demonstrates that the appellant does receive assistance from family and occasionally uses crutches, 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)

☒ 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)

2018/11/05

PRINT NAME

MELISSA McLEOD

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2018/Nov/05

PRINT NAME

DONALD (DAN) McLEOD

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2018/NOV/05