

PART C – DECISION UNDER APPEAL

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Poverty Reduction (the ministry) dated December 12, 2018, which held that the appellant did not meet 3 of the 5 statutory requirements of section 2 of the *Employment and Assistance for Persons with Disabilities Act* (EAPWDA) for designation as a person with disabilities (PWD). The ministry found that the appellant met the requirements of having reached 18 years of age and of a medical practitioner confirming that the appellant's impairment is likely to continue for at least 2 years.

However, the ministry was not satisfied that:

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

Information before the ministry at reconsideration

- 1) The appellant's PWD application comprised of:
 - A Medical Report (MR) dated August 20, 2018, completed by a general practitioner (GP) who has known the appellant since 2014, and has seen the appellant 11 or more times in the past 12 months;
 - An Assessor Report (AR) also dated August 20, 2018, completed by the same GP; and
 - The appellant's self-report (SR) section of the PWD application, dated June 24, 2018.
- 2) The appellant's Request for Reconsideration, which included a questionnaire signed and dated November 29, 2018 by the GP. The GP is asked to agree or disagree with prepared statements. The option for comments is also provided, though the GP has provided none.

Information provided on appeal and admissibility

- 1) The appellant's Notice of Appeal (NOA) dated December 17, 2018, in which the appellant states that he disagrees the ministry's decision because he has mobility issues as well as other things that should be considered.
- 2) At the hearing, the appellant described his medical conditions and the impact they have on his functioning.
- 3) At the hearing, the ministry responded to questions but did not provide additional evidence.

In accordance with section 22(4) of the *Employment and Assistance Act* (EAA), the panel may admit oral and written testimony that is in support of the information and records available at the time of reconsideration.

The panel considered the appellant's NOA as argument and accepted it on that basis. The oral testimony of the appellant was admitted as supporting information which on balance either reiterated or augmented the information available at reconsideration. In reaching this conclusion, the panel finds that while the appellant introduced the terms arthritis and sciatica at the hearing, these references are consistent with the GP's diagnoses of foraminal narrowing in the cervical and lower back.

The arguments of both parties are set out in Part F of this decision.

Summary of relevant evidence

Diagnoses and Health History

In the PWD application, the GP reports:

- Specific diagnosis: Chronic Pain Syndrome and Degenerative Disc Disease/Neuroforaminal Narrowing of the C5 + C6 + LB, all with an onset date of 2014.
- The severity of the medical conditions relevant to the impairment is described as "severe disabling condition."
- The appellant can't lift more than 15 lbs.

Physical Impairment

- The GP assesses the appellant's physical functional skills as:
 - able to walk 2 to 4 blocks unaided on a flat surface;
 - able to climb 2 to 5 steps unaided, "L leg + back pain + neural [illegible] + neck pain + H/Aches";
 - limited to lifting 5 to 15 lbs.; and,
 - no limitation with remaining seated.
- No prostheses or aids are required.
- All listed aspects of mobility and physical ability are managed independently, with commentary in brackets:
 - walking indoors and outdoors (2x longer);
 - climbing stairs (needs rail);
 - standing; and,
 - lifting (< 15 lbs.), and carrying and holding (< 15 lbs. Bending and lifting > 15 lbs. prevented by pain.)

In the SR, the appellant reports that arthritis in his neck causes headaches all the time and limited movement in his neck. Degenerative disc disease in his lower back limits his lifting, bending and walking. All of these affect his appetite and sleep, and he is getting depressed.

At the hearing, the appellant stated that due to arthritis in his neck, loss of discs in his lower back, and closing of the nerves in his neck and lower back (sciatica), he cannot lift, bend, or lift his leg more than half way, and he has constant headaches. He tries to walk everyday but some days is unable, noting that occasionally there is a disconnect between his brain and leg, and he cannot move his leg. If walking 4 blocks, he hobbles and is not comfortable. If he performs activities that involve bending and lifting, his lower back pops out leaving him laid up for days in bed, which sometimes happens 1-2 times a week. Lifting 15lbs. is not enough for either of the vocations for which he is qualified.

Mental Impairment

In the MR, the GP reports:

- No significant deficits with the 11 listed areas of cognitive and emotional function.
- No difficulties with communication.
- Social functioning is not restricted.

In the AR, the GP reports:

- Good ability with all listed forms of communication.
- Where asked to assess the impact on daily functioning for 14 listed aspects of cognitive and emotional functioning, the GP drew a line through the page.
- A line is also drawn through the page respecting social functioning.

The questionnaire does not address mental functioning.

DLA

The GP reports the following (information in the questionnaire is italicized):

- The appellant has been prescribed medication and/or treatments that interfere with the ability to perform DLA – “↓ cognitive capacity with Gabapentin.”
- Degenerative disc disease of the L and C Spine, with foraminal narrowing, causing neck, shoulder and lower back pain + daily headaches are the impairments that impact the appellant’s ability to manage DLA.
- Information respecting the DLA “move about indoors and outdoors” is as described above under the heading Physical Impairment.
- All listed tasks for the DLA “shopping” are managed independently, with carrying purchases home being limited to < 15 lbs. [illegible].
- All listed tasks of the DLA “meals” are managed independently, with “alternating between sitting + standing” noted for food preparation and cooking.
- All listed tasks of the DLA “pay rent and bills” are managed independently as are the tasks for the DLA medications, with the GP noting that the appellant “forgets at times” to take medication as directed.
- The DLA “transportation” is managed independently, with getting in and out of a vehicle taking 2 x longer. Use of public transit is N/A.
- Respecting the DLA “personal care”:
 - Grooming, toileting, feeding self, regulating diet, and transfers on/off chair are managed independently.
 - Dressing requires periodic assistance, 2 days a week, from another person due to pain severity. *Requires help 3-4 days per week, pain level is such that he cannot bend and lift leg far enough to put pants on independently.*
 - Bathing requires continuous assistance from another person. *Needs help in/out of bath most days, being unable to lift his leg independently. Also needs help a couple days per week to wash his head and neck because he is unable to lift his arms up.*
 - Transfers in/out of bed require periodic assistance, 2 days a week, from another person.
- Respecting the DLA “basic housekeeping,” both basic housekeeping and laundry require continuous assistance from another person. *Needs help to clean bathroom. Needs help most of the time to vacuum, wash floors, clean the toilet and bathtub because repetitive twisting/reaching movements and bending exacerbate pain, preventing him from most cleaning activities. Needs help with most of the laundry because he cannot bend over the machines to transfer clothes.*

At the hearing, the appellant stated that the information provided in the questionnaire reflects the worsening of his condition since the date the PWD application was completed. This is why the need for assistance with dressing has increased to 3-4 times a week. The appellant also stated that he does not require assistance for transfers in/out of bed because his bed is high enough off of the ground to get into bed and he is able to pivot and roll to get himself out of bed.

Need for Help

The GP indicates that the appellant requires assistance for DLA from family and health authority professionals, and comments that the appellant’s spouse helps with housework. In the questionnaire, the GP reports the need for help with dressing, bathing and housekeeping.

PART F – REASONS FOR PANEL DECISION

Issue on Appeal

The issue on appeal is whether the ministry's decision to deny the appellant designation as a PWD was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. That is, was the ministry reasonable when determining that the requirements of section 2(2) of the EAPWDA were not met because:

- a severe physical or mental impairment was not established;
- the appellant's DLA are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and
- as a result of those restrictions, in the opinion of a prescribed professional, the appellant does not require an assistive device, the significant help or supervision of another person, or the services of an assistance animal to perform DLA?

Relevant Legislation

EAPWDA

2 (1) In this section:

"assistive device" means a device designed to enable a person to perform a daily living activity that, because of a severe mental or physical impairment, the person is unable to perform;

"daily living activity" has the prescribed meaning;

"prescribed professional" has the prescribed meaning.

(2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act if the minister is satisfied that the person has a severe mental or physical impairment that

- (a) in the opinion of a medical practitioner or nurse practitioner is likely to continue for at least 2 years, and
- (b) in the opinion of a prescribed professional
 - (i) directly and significantly restricts the person's ability to perform daily living activities either
 - (A) continuously, or
 - (B) periodically for extended periods, and
 - (ii) as a result of those restrictions, the person requires help to perform those activities.

(3) For the purposes of subsection (2),

- (a) a person who has a severe mental impairment includes a person with a mental disorder, and
- (b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires
 - (i) an assistive device,

- (ii) the significant help or supervision of another person, or
- (iii) the services of an assistance animal.

(4) The minister may rescind a designation under subsection (2).

EAPWDR

Definitions for Act

2 (1) For the purposes of the Act and this regulation, "**daily living activities**",

(a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following activities:

- (i) prepare own meals;
- (ii) manage personal finances;
- (iii) shop for personal needs;
- (iv) use public or personal transportation facilities;
- (v) perform housework to maintain the person's place of residence in acceptable sanitary condition;
- (vi) move about indoors and outdoors;
- (vii) perform personal hygiene and self-care;
- (viii) manage personal medication, and

(b) in relation to a person who has a severe mental impairment, includes the following activities:

- (i) make decisions about personal activities, care or finances;
- (ii) relate to, communicate or interact with others effectively.

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

(a) authorized under an enactment to 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.

(3) The definition of "parent" in section 1 (1) applies for the purposes of the definition of "dependent child" in section 1 (1) of the Act.

Panel Decision

Physical Impairment

The appellant's position is that arthritis in his neck and degenerative disc disease in his lower back limits his functioning to the point that he is disabled and is unable to work. The appellant argues that the ministry has not taken all of his medical issues into account.

The ministry's position is that a diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a severe impairment and that the information, including the appellant's own information, respecting the appellant's physical functioning does not establish a severe physical impairment. Noting that employability or ability to work is not taken into consideration, the ministry finds that the assessment of physical functional skills, including taking 2x longer with walking, is not considered indicative of a severe impairment of physical functioning. The ministry further notes that handrails are not considered an assistive device and that the appellant is assessed as being independent with all listed areas of mobility and physical ability. Respecting the GP's comment in the questionnaire that the appellant's "medical condition is severe", the ministry notes that the questionnaire speaks largely to restrictions of DLA, not specific impacts on physical functioning upon which severity of physical impairment is assessed.

The panel finds that while the appellant is reported as independently managing most aspects of physical functioning, the supporting narrative from the GP, and the limitations within which the appellant independently functions, do not support the ministry's conclusion that a severe physical impairment is not established. While the statement in the questionnaire that the appellant's "medical condition is severe" may not specifically address physical functional abilities, when considered together with the GP's assessment in the MR of "a severe disabling condition" and of limitations to both upper and lower body functioning due to pain, including being limited to independently walking 2 to 4 blocks and climbing 2 to 5 steps and having reduced range of motion of arms and the left leg, and daily headaches, a more complete picture of the severity of impairment is provided. The panel also notes that limitations in the ability to bend, which the GP indicates is prevented by pain are not directly assessed as part of the assessment of physical functional skills in the PWD application. With the exception of the information respecting being bedridden at times, which is not consistent with the information from the GP and on that basis is given little weight, the appellant's own information supports the GP's assessment of limitations to all aspects of his physical functioning due to both mechanical and nerve related problems of his upper back, neck and shoulders as well as his lower back. While the limitations to aspects of physical functioning may be considered less than severe when viewed discretely, when taken together, the panel finds that the ministry was not reasonable in concluding that the information does not establish a severe impairment of physical functioning.

Mental Impairment

In his SR the appellant comments that he is getting depressed, but otherwise did not address mental impairment.

The ministry's position is that a severe mental impairment is not established based on the GP's information in the PWD application and the questionnaire or the appellant's SR because there are no reported difficulties with communication or significant deficits with cognitive and emotional functioning.

The panel concludes that the ministry's determination is reasonable. There is no diagnosis of a mental impairment and the GP reports that there are no significant deficits with cognitive and emotional function or problems with communication. Additionally, the GP indicates that social functioning is not an issue by striking through the social functioning sections of the PWD application. While the GP reports that medication impacts cognitive capacity relating to the ability to perform DLA, with the exception of noting that the appellant forgets to take his medication as directed "at times," the appellant is reported as independently managing this DLA task as well as all other listed tasks of DLA that relate to cognitive functioning. The panel acknowledges the appellant's comment that he is getting depressed but concludes that the assessments of cognitive, emotional and social functioning were reasonably viewed by the ministry as not establishing a severe mental impairment.

Restrictions in the ability to perform DLA

Section 2(2)(b)(i) of the EAPWDA requires that the minister be satisfied that in the opinion of a prescribed professional, a severe mental or physical impairment directly and significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods. While other evidence may be considered for clarification or support, the ministry's determination as to whether or not it is satisfied, is dependent upon the evidence from prescribed professionals. The term "directly" means that there must be a causal link between the severe impairment and the restriction. The direct restriction must also be significant. Finally, there is a component related to time or duration – the direct and significant restriction may be either continuous or periodic. If periodic, it must be for extended periods. Inherently, any analysis of periodicity must also include consideration of the frequency. All other things being equal, a restriction that only arises once a year is less likely to be significant than one that occurs several times a week. Accordingly, in circumstances where the evidence indicates that a restriction arises periodically, it is appropriate for the ministry to require evidence of the duration and frequency of the restriction in order to be "satisfied" that this legislative criterion is met.

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

The appellant's position is that the ministry has wrongly determined that his ability to perform DLA is not significantly restricted on a daily basis.

The ministry's position is that while the appellant experiences restrictions to DLA requiring reaching and bending, there is not enough evidence to confirm a severe impairment that significantly restricts the ability to perform DLA continuously or periodically for extended periods. Respecting the PWD application, the ministry does not consider restrictions occurring 2 days per week or taking twice as long as typical in performing a DLA to be indicative of a significant restriction. The ministry also finds it difficult to establish why the appellant would experience continuous restrictions with basic housekeeping given the GP's assessments of the ability to lift and walk. The ministry also notes that the appellant is independent with the majority of listed areas of DLA and that no

restrictions are identified for social functioning. The ministry considers the questionnaire as essentially reiteration of the restrictions outlined in the PWD application, with the exception of the frequency of restrictions with dressing, which increased to 3 to 4 days per week. The ministry notes that the questionnaire does not indicate restrictions to shopping, meals, paying rent and bills, medications or transportation.

The panel notes that while the appellant reports that he is unable to work either in his previous vocation or in another vocation for which he has been trained, section 2(b)(i) of the EAPWDA requires that a person's severe physical or mental impairment directly and significantly restricts the person's ability to perform the DLA defined in the legislation. While there is potentially some crossover between restrictions impacting the ability to work and those impacting the ability to perform DLA, only the restriction on the ability to perform the DLA set out in the legislation is considered under section 2(b)(i) of the EAPWDA. And, as noted above, the restriction is to be in the opinion of a prescribed professional, which in this case, is the GP.

In this case, the GP has assessed the appellant as independently managing most DLA tasks independently without the need for any assistance, including all listed tasks of the following DLA - shopping, meals, pay rent and bills, medications, and transportation. While a few of these tasks are reported to take significantly longer to perform, there is either no description of how much longer or the appellant is reported as taking or the appellant takes two times longer than typical, which the panel concludes was reasonably viewed by the ministry as not establishing a significant restriction.

DLA tasks that the appellant is not able to manage independently are those that require the appellant to lift his leg and/or involve significant bending. Of those tasks, only three (both tasks of the DLA basic housekeeping and one task of the DLA personal care, bathing) require continuous assistance. The ministry questions the need for continuous assistance with the DLA basic housekeeping based on the physical functional skills assessment. The panel finds that the GP's narrative in the PWD application (and the questionnaire) identifies the inability to bend as significantly contributing to the restriction with basic housekeeping. When this aspect of functioning/mobility is considered, given the amount of bending and twisting routinely required for basic housekeeping tasks, it is the finding of the panel that the information is reasonably viewed as establishing a continuous significant restriction that is directly related to the appellant's physical impairment.

Respecting the DLA personal care, only the activity of bathing is reported as requiring continuous assistance, with the appellant either independently managing the other activities, including transfers in/out of bed, as described by the appellant, or requiring periodic assistance that is not established as being for extended periods. The panel concludes that the frequency and nature of the assistance required for personal care could reasonably be determined not to rise to the point of significantly restricting his ability to perform the DLA.

Based on the overall level with which the appellant is assessed as performing the DLA defined in the legislation, with only one DLA, basic housekeeping, directly and significantly restricted continuously, the panel concludes that the ministry was reasonable to determine that there is not enough evidence to establish that in the opinion of a prescribed professional the appellant's impairment significantly restricts the ability to perform DLA either continuously or periodically for extended periods.

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 establishment of direct and significant restrictions with daily living "activities" is a precondition of requiring "help to perform those activities." In this case, the panel concluded that a direct and significant restriction was established for only one daily living "activity", basic housekeeping, and therefore found that the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform daily living "activities" have not been established. Accordingly, the panel also finds that the ministry reasonably concluded that it cannot be determined that the appellant requires help to perform "those activities" as a result of direct and significant restrictions with daily living "activities" as required by section 2(2)(b)(ii) of the EAPWDA.

Conclusion

The panel finds that the ministry's reconsideration decision, which determined that the appellant was not eligible for PWD designation, was reasonably supported by the evidence, and therefore confirms the 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

Jane Nielsen

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2019/01/09

PRINT NAME

Wesley Nelson

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019/01/09

PRINT NAME

Margarita Papenbrock

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019/01/14