

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 3, 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* for designation as a person with disabilities (PWD). The ministry found that the appellant met the age and duration requirements, but was not satisfied that:

- the appellant has a severe physical and/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, 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 information before the ministry at the time of reconsideration consisted of the following:

- The information before the ministry at the time of reconsideration included the appellant's PWD application comprised of a Medical Report (MR) and an Assessor Report (AR) both completed by the appellant's general practitioner (the "GP") and dated September 29, 2018. The GP has known the appellant since 1990 and saw the appellant 11 or more times in the past 12 months prior to completing the PWD application. The PWD application also included the appellant's Self-Report (SR) dated September 26, 2018.
- An itemized list of the appellant's medication dated from June 2018- September 2018.
- The evidence included the appellant's Request for Reconsideration (RFR) dated November 10, 2018. In the RFR the appellant described his mobility challenges, which included, in part, the following:
 - "In my walking ability, I have not been able to walk without a cane".
 - "I have difficulty using stairs, lifting, shopping".
 - "I am able to cook for myself using microwave mostly".
 - "Can only shower once a week".

Diagnoses

In the MR, the GP diagnosed the appellant with diabetes (onset 1990) and reactive arthritis (onset 2017).

Physical Impairment

In the MR, the GP indicated the following about the appellant:

- "[the appellant] has been having arthritis of his lower legs primarily – in particular his ankles and feet. The inflammation is severe, to the extent that he has trouble walking around even with the use of a cane on bad days".
- He can walk unaided less than 1 block, with a cane can climb 5 steps, can lift 5-15 lbs and remain seated without limit.

In the AR, the GP indicated the following about the appellant:

- The appellant uses a cane to walk indoors/outdoors and climb stairs.
- Standing, lifting, and carrying/holding are performed independently.

In the SR, the appellant stated, in part, the following:

- He has extensive medical history.
- He had to use a walker and cane due to his reactive arthritis.
- In the past two weeks his feet have become inflamed and sore, and he has pain in his right thumb, toes, shoulder and neck.

Mental Impairment

In the MR, the GP indicated the following about the appellant:

- There are no difficulties with communication.
- There are no significant deficits with cognitive and emotional function.

In the AR, the GP indicated the following about the appellant:

- The ability to communicate (speak, read, hear and write) is good.
- Under 'cognitive and emotional functioning' and 'social functioning', the GP indicated "N/A"

- The section regarding immediate and extended social networks was left blank by the GP.

In the SR, the appellant made no mention of a mental impairment.

Daily Living Activities

In the MR, the GP indicated the following about the appellant:

- He does not use medication that interferes with his ability to perform his DLA.

In the AR, the GP indicated the following about the appellant:

- All DLA listed under the categories of 'personal care', 'basic housekeeping', 'meals', 'pay rent/bills', 'medications', 'transportation' and 'social functioning' are performed independently.
- All DLA listed under 'shopping' requires the use of a cane to perform. This includes: 'going to/from stores', 'reading prices and labels', 'making appropriate choices', 'paying for purchase' and 'carrying purchases home'.

Help

In the MR, the GP indicated the following about the appellant:

- "The inflammation is severe, to the extent that he has trouble walking around even with the use of a cane on bad days".
- In response to 'does the applicant require any prostheses or aides for his impairment?', GP indicated 'yes' and commented "uses a cane at times".

In the AR, the GP indicated the following about the appellant:

- In response to 'The help required for DLA is provided by', the GP indicated family and friends.
- For assistance provided through the use of assistive devices the GP indicated a cane.
- No assistance is provided by assistance animals.

In the SR, the appellant did not mention needing help from others or the use of assistance animals and mentioned the use of a cane and walker for mobility. In the RFR, the appellant stated that he gets help with cooking.

Evidence on Appeal

Notice of Appeal (NOA), signed and dated December 10, 2018, which stated, in part, that the appellant has arthritis that leaves him only able to go to the washroom, and that he has been able to do very little walking without a cane.

The panel finds that the NOA contains the appellant's argument and notes that no additional evidence or information was provided.

Prior to the hearing the appellant submitted a letter for support from his landlord. The unsigned and undated letter stated, in part, the following:

- Since December 2017 the appellant's ability to care for himself has deteriorated and he has made several trips to the hospital.
- He has fallen several times and is unable to get up.
- For the appellant, the landlord has been cooking, doing laundry, cleaning and lending money for the bus and personal hygiene products.

Evidence at the Hearing

At the hearing the appellant submitted a letter from his GP, signed and dated December 20, 2017, which stated, in part, “[the appellant] has not been able to work in December 2017 as he has had an inflammatory process in his right foot not yet diagnosed causing significant pain”.

At the hearing the appellant reiterated the information contained in the letter from his landlord, the SR, the RFR and NOA. The appellant’s testimony focused on his diabetes and the impact of his arthritis on his diabetes. He also added, in part, the following:

- His treatments (injections) and medication for his arthritis do not help.
- His arthritis medication elevates his sugar levels and he has difficulty managing his sugar levels. Therefore he has had to cut down on his arthritis medication.
- He used to work in construction but cannot now because he has to check his sugar levels 5 times per day which his employer likely will not allow.
- If he walks to the bus stop he will have to rest for 2-3 days.
- It takes him 20-25 minutes to walk 1 block.
- He cannot clean his premises.
- He can shower only once per week and has difficulty getting to the washroom in the middle of the night so he keeps a bottle by his bedside.
- His pain killers help him function.
- He is unclear why his GP did not elaborate on his extensive medical history or how his arthritis impacts his daily functioning.
- His GP has retired and he no longer has a family doctor to turn to for help with his PWD application.
- He cannot afford to live on what he currently receives. He cannot afford to be sick or take care of himself.

The ministry was not in attendance at the hearing. After confirming that the ministry was notified, the hearing proceeded under Section 86(b) of the Employment and Assistance Regulation.

Admissibility of Additional Information

Section 22(4) of the *Employment and Assistance Act* (EAA) provides that panels may admit as evidence (i.e. take into account in making its decision) the information and records that were before the minister when the decision being appealed was made and “oral and written testimony in support of the information and records” before the minister when the decision being appealed was made – i.e. information that substantiates or corroborates the information that was before the minister at reconsideration. These limitations reflect the jurisdiction of the panel established under section 24 of the EAA – to determine whether the ministry’s reconsideration decision is reasonably supported by the evidence or a reasonable application of the enactment in the circumstances of an appellant. That is, panels are limited to determining if the ministry’s decision is reasonable and are not to assume the role of decision-makers of the first instance. Accordingly, panels cannot admit information that would place them in that role.

The panel found that the unsigned and undated letter from the appellant’s landlord provided additional detail or disclosed information that was in support of the information or corroborated the information addressed in the reconsideration. Accordingly, the panel has admitted this new information as being in support of information and records that were before the ministry at the time of reconsideration, in accordance with s. 22(4) of the *Employment and Assistance Act*.

The panel found that the December 20, 2017 letter from the appellant’s GP provided additional detail or disclosed information that was in support of the information or corroborated the information addressed in

the reconsideration. Accordingly, the panel has admitted this new information as being in support of information and records that were before the ministry at the time of reconsideration, in accordance with s. 22(4) of the *Employment and Assistance Act*. However the panel places little weight on this information as it does not speak to whether or not the appellant has a severe impairment, that his severe impairment directly and significantly restricts his ability to perform his DLA either continuously or periodically for extended periods, or that as a result of his severe impairment the appellant requires help to perform his DLA.

PART F – REASONS FOR PANEL DECISION

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. In particular, was the ministry reasonable when concluding it was not satisfied that

- the appellant has a severe physical and/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 help, as it is defined in the legislation, 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 practice 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

Severe Impairment

In the reconsideration decision, the ministry was not satisfied that the information provided establishes a severe physical or mental impairment. Determining a severe physical or mental impairment requires weighing the evidence provided against the nature of the impairment and its reported functional skill limitations. A diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a severe impairment. An "impairment" is a medical condition that results in restrictions to a person's ability to function independently or effectively. To assess the severity of an impairment, the ministry must consider the nature of the impairment and the extent of its impact on daily functioning.

The panel finds that employability is not a consideration for eligibility for PWD designation because employability is not a criterion in section 2(2) of the EAPWDA nor is it listed among the prescribed daily living activities in section 2 of the EAPWDR.

Physical Impairment

The appellant's position is that his reactive arthritis has inflamed his feet and ankles to the point that they are sore and painful, and he cannot walk without the assistance of a cane. He stated that if he walks to the bus stop he is bedridden for 2-3 days after. He argued his diabetes is difficult to manage as his arthritis medication elevates his sugar levels.

The ministry argued that based on the information provided in the PWD application, a severe impairment of the appellant's physical functioning has not been established.

The ministry noted that in the MR, the GP indicated that the appellant uses a cane for his impairment and that the appellant can walk less than 1 block unaided and climb 5+ steps with his cane, lift between 5-15lbs and remain seated without limitation.

The ministry noted that in the AR, the GP indicated that the appellant completes the physical functions of walking indoor/outdoor and climbing stairs with the use of a cane, whereas standing, lifting and carrying/holding are performed independently. The ministry noted that the GP provided no information to explain how often the appellant requires the use of a cane and for how long. The ministry concluded that it is not certain that the appellant experiences a severe degree of physical impairment that significantly impairs his ability to function independently while using a cane.

The panel finds that the ministry reasonably concluded that the information provided by the GP regarding the appellant's physical functioning does not support a finding of a severe physical impairment. The panel also noted that there is a difference between the analysis provided by the GP in the PWD application and the testimony of the appellant and his landlord. The panel notes that the appellant stated his landlord cooks, cleans and does laundry for him, and that if he walks to the bus stop he is immobile for 2-3 days, which the GP did not address in the PWD application. The panel finds that without an explanation or supporting evidence from a prescribed professional, only minimal weight can be placed on the information provided in the RFR and the letter from the landlord.

In terms of physical mobility, the panel noted that the GP assessment indicated that the appellant is able to walk indoor/outdoor and climb stairs with his cane and the GP also stated that the cane is used on "bad days" and "at times" but did not provide information as how long or how often a cane is used. It is reasonable to conclude that the phrases "bad days" and "at times" describe isolated or infrequent use of the cane. The panel also noted that at the hearing the appellant's testimony painted a more severe picture of his impairment but no supporting evidence from the GP was provided to confirm the appellant's position. The panel considered that the appellant stated that the GP who completed that PWD application is now retired and therefore he has had difficulty obtaining additional information. However the GP who completed the PWD application has known the appellant since 1990 and therefore should

be well aware of the appellant's physical condition and any deterioration of his physical condition. When given the opportunity to describe the appellant's physical impairment (in the PWD application) the GP's overall assessment described good physical functioning when using a cane.

Given the assessments of the appellant's functional ability, and mobility and physical ability in the PWD application and the lack of additional or supporting information that was provided at appeal, the panel finds that the ministry was reasonable in its determination that the evidence does not support a finding that the appellant suffers from a severe physical impairment and that the legislative criteria outlined in Section 2(2) of the EAPWDA have not been met.

Mental Impairment

The appellant did not present a position regarding mental impairment.

The ministry's position is that based on the assessments provided in the PWD application, a severe impairment of mental functioning has not been established.

In its reconsideration decision, the ministry noted that the GP indicated that there are no difficulties with communication, there are no significant deficits with cognitive and emotional functioning. The ministry notes that in the AR, the GP indicated that there were no impacts to cognitive and emotional functioning (the GP indicated "N/A") and that speaking, hearing, writing and reading are good.

The panel noted that the GP did not provide a diagnosis of a mental impairment, the appellant is independent with performing all listed items under 'medication' and 'pay bills/rent', and he indicated "N/A" or left blank all listed aspects of social functioning.

Given that the assessment of the appellant's mental functioning provided by the GP does not indicate a severe mental impairment, that there is no diagnosis of a mental impairment, and the fact that no additional or supportive information from the GP was provided at appeal in this regard, the panel finds that the ministry was reasonable in its determination that the evidence does not support a finding that the appellant suffers from a severe mental impairment and the legislative criteria outlined in Section 2(2) of the EAPWDA have not been met.

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 that the legislative criteria are met, 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. Any analysis of periodicity must also include consideration of how frequently the activity is restricted. 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 argued that due to his medical conditions he cannot walk, attend to personal hygiene or toileting, cook (other than with a microwave) or clean.

The ministry argued that it is not satisfied that the information provided establishes that the impairment directly and significantly restrict DLA continuously or periodically for extended periods.

The ministry noted that the GP indicated that most listed DLA are performed independently and social functioning was "N/A". The ministry noted the GP indicated that all listed items under 'shopping' are performed with the use of a cane.

The ministry concluded that as the majority of DLA are performed independently and help from others was not identified, the information from the prescribed professional does not establish that impairment significantly restricts DLA either continuously or periodically for extended periods. Therefore, the legislative criteria have not been met.

The panel notes that appellant testified that he was confused as to why his GP did not elaborate on his medical history or the restrictions he experiences with DLA. The panel also notes that the GP who completed the PWD application has known the appellant since 1990 and has seen the appellant at least 11 times in the 12 months prior completing the application. It is reasonable to conclude that the GP has proficient knowledge of the appellant's medical history, and therefore would be an expert regarding the appellant's deterioration of health and how his medical conditions restrict his ability to perform DLA. However the GP did not elaborate on the appellant's 'extensive' medical history, and indicated that the appellant has good physical functioning and mobility with the use of a cane, and that they vast majority of the appellant's DLA are performed independently. The information provided by the GP failed to link the diagnosis of reactive arthritis and diabetes to restrictions with performing DLA or the need for cane to complete DLA. For example, the GP did not explain why the appellant needs to use a cane to 'read labels' or 'make appropriate choices' when shopping.

The panel considered the assessment by the GP in the PWD application of independence with almost all of the DLA, the lack of information regarding the causal link between a physical or mental impairment and a restriction to perform some DLA either continuously or periodically for extended periods, and that insufficient additional or supporting information was provided from a prescribed professional at appeal to support the appellant's position. The panel finds that the evidence provided by the GP does not describe or indicate that a severe impairment restricts the appellant's ability to perform his DLA either continuously or periodically for extended periods. Given the evidence as a whole, the panel finds that the ministry reasonably concluded that the evidence does not establish that an impairment significantly restricts DLA continuously or periodically for extended periods, pursuant to Section 2(2)(b)(i) of the EAPWDA.

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 appellant indicated that he receives help from his landlord and that he uses a cane as an assistive device.

The ministry argued that because it has not been established that DLA are significantly restricted, it cannot be determined that help is required.

The panel notes that, in the MR and AR, the GP did indicate that assistance is required from friends and family and an assistive device. However the GP did not indicate what assistance friends and family provided, how often or for how long. The GP indicated that the uses of a cane was on "bad days" or "at times" but did not indicate how often or how long the appellant uses his cane for mobility .

Given that confirmation of direct and significant restrictions with DLA is a precondition of the need for help criterion and because the panel found 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 it cannot be determined that the appellant requires help to perform DLA 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 is a reasonable application of the applicable enactment, and therefore 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 checked="" type="checkbox"/> CONFIRMS THE MINISTRY DECISION <input type="checkbox"/> RESCINDS THE MINISTRY DECISION	
If the ministry decision is rescinded, is the panel decision referred back to the Minister for a decision as to amount? <input type="checkbox"/> Yes <input type="checkbox"/> No	
LEGISLATIVE AUTHORITY FOR THE DECISION:	
<i>Employment and Assistance Act</i>	
Section 24(1)(a) <input checked="" type="checkbox"/> or Section 24(1)(b) <input checked="" type="checkbox"/>	
and	
Section 24(2)(a) <input checked="" type="checkbox"/> or Section 24(2)(b) <input type="checkbox"/>	

PART H – SIGNATURES	
PRINT NAME Neena Keram	
SIGNATURE OF CHAIR	DATE (YEAR/MONTH/DAY) 2019/

PRINT NAME Kulwant Bal	
SIGNATURE OF MEMBER	DATE (YEAR/MONTH/DAY) 2019/
PRINT NAME Carla Tibbo	
SIGNATURE OF MEMBER	DATE (YEAR/MONTH/DAY) 2019/