



**PART C – DECISION UNDER APPEAL**

The decision under appeal is the Ministry of Social Development and Poverty Reduction’s (“ministry”) reconsideration decision dated December 7, 2018, in which the ministry found that the appellant is not eligible for designation as a Person with Disabilities (“PWD”) under section 2 of the *Employment and Assistance for Persons with Disabilities Act* (“EAPWDA”). The ministry found that the appellant meets the age and duration requirements, but was not satisfied that:

- the appellant has a severe mental or physical impairment;
- the appellant’s 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 restrictions caused by the impairment, the appellant requires an assistive device, the significant help or supervision of another person, or the services of an assistance animal to perform DLA.

The ministry also found that the appellant is not one of the prescribed classes of persons who may be eligible for PWD designation on the alternative grounds set out in section 2.1 of the *Employment and Assistance for Persons with Disabilities Regulation* (“EAPWDR”). As there was no information or argument provided by the appellant regarding alternative grounds for designation, the panel considers this matter not to be at issue in this appeal.

**PART D – RELEVANT LEGISLATION**

*Employment and Assistance for Persons with Disabilities Act* (EAPWDA), section 2

*Employment and Assistance for Persons with Disabilities Regulation* (EAPWDR), section 2

## PART E – SUMMARY OF FACTS

The evidence and documentation before the minister at the reconsideration consisted of:

1. Information from the ministry's record of decision indicating the PWD application was received on September 7, 2018 and denied on November 2, 2018. The appellant submitted a Request for Reconsideration ("RFR") on November 26, 2018. The ministry reviewed the RFR on December 7, 2018.
2. The RFR, signed by the appellant on November 26, 2018 [*panel note: no submission provided*].
3. The appellant's PWD application comprised of:
  - a self-report ("SR") dated June 28, 2018;
  - a Medical report ("MR") dated August 8, 2018, signed by the appellant's GP who has known the appellant for 2 years, and has seen her 2-10 times in the past 12 months (comment: "difficult to get patient to come in to follow up"); and
  - an Assessor Report ("AR") dated August 2, 2018, completed by a social worker who has known the appellant for 1.5 years, and has seen her 2-10 times in the past 12 months. The social worker based the assessment on an office interview with the appellant and a discussion with the GP. The social worker indicates that the service she provides is a team-based approach (working with the GP and patients) to improve the social determinants of health.
4. The ministry's *Decision Summary* with attached letter, dated November 2, 2018.

*Summary of relevant evidence from the application:*

### *Diagnoses*

In the MR, the GP indicates "mechanical back pain with arthritis" (onset approximately 2007), and "?mental health disorder" [onset approximately 1993]. Under *Comments*, the GP writes, "patient states she was kicked in the back...and has had a back disorder since then." The appellant's CT scan shows "some chronic type changes and degenerative disc disease." The appellant was treated for schizophrenia in the 1990s and early 2000s and has been "off her medications and has refused to see psychiatry since 2009 and doubts she ever had schizophrenia, complaining that an abusive partner led to the diagnosis." The appellant "refuses to see psychiatry or mental health and seems to be coping without medication and there is some uncertainty to her diagnosis."

### *Functional skills*

In the SR, the appellant states that she has been getting a lot of pain for approximately 6 years.

In the MR, the GP indicates *unknown* for how far the appellant can walk unaided, and *unknown* how many stairs she can climb. The information in the MR indicates the appellant has limitations with lifting (*under 5 lbs*) with the comment, "2 pounds." The length of time the appellant can remain seated is marked as *less than 1 hour* and *unknown*. The appellant has *other* difficulties with communication (comment: "patient rarely presents in clinic, difficult to contact as she doesn't have regular phone access"). The GP indicates *unknown* for *significant deficits with cognitive and emotional function* (comment: "possible psychotic symptoms though patient denies these. Difficult to assess patient"). Under *Additional Comments*, the GP states that the appellant is a "challenging patient" because she refuses to undergo a psychiatric assessment and "hasn't been [illegible] enough for mental health certification." The GP states that the appellant's back pain "may not qualify her for PWD but I do wonder if the patient's psychiatric history qualifies her for PWD."

In the AR, the social worker reports that the appellant experiences back, hip, and leg pain that is chronic in nature and affects the appellant "negatively." The appellant's *Ability to Communicate* is rated as *good* in all areas (speaking, reading, writing, and hearing). For the 6 activities listed under *Mobility and Physical Ability*, the appellant is independent with all of them (*Walking Indoors, Walking Outdoors, Climbing Stairs, Standing, Lifting, and Carrying*

[Redacted]

*and holding*. The appellant takes significantly longer than typical with *Walking outdoors* (comment: "takes 2-3 times longer due to pain"), *Climbing stairs* (comment: "pain when climbs upstairs"); *Lifting* (comment: "under 2 lbs.; pain"), and *Carrying and holding*. Under *Comments*, the social worker writes that "moving about accomplishing tasks takes 2-3 times longer due to chronic pain, fatigue, stopping to rest."

For *Cognitive and Emotional Functioning*, the social worker does not provide any check marks to indicate *to what degree the applicant's mental impairment or brain injury restricts or impacts his/her functioning*. The social worker comments: "unknown if there are cognitive or emotional functioning deficits. Patient denies any mental health concerns; some history of psychiatric issues."

#### DLA

In the MR, the GP indicates the appellant has not been prescribed any medications or treatments that interfere with her ability to perform DLA. For the specific DLA listed in section 2 of the MR, the GP checks that 4 out of 10 activities are restricted [*panel note: the GP does not indicate whether the restriction is continuous or periodic*]:

- Basic housework;
- Mobility inside the home;
- Mobility outside the home; and
- Social functioning (comment: "patient has had some abnormal interactions with physician and our social worker").

In the MR, the GP indicates that restrictions for the remaining 6 DLA are *unknown*:

- *Personal self-care* (the GP also checks that the restriction is continuous);
- *Meal preparation*;
- *Management of medications* (the GP also checks that the restriction is continuous);
- *Daily shopping*;
- *Use of transportation*; and
- *Management of finances*.

In the AR, the social worker assesses all areas for 7 of the 8 listed DLA as independent: *Personal Care*, *Basic Housekeeping*, *Shopping*, *Meals*, *Pay Rent and Bills*, *Medication*, and *Transportation*. The appellant takes significantly longer than typical with the following tasks:

- *Personal Care* - Dressing (comment: "bending causes pain, takes 2-3 times longer than typical");
- *Basic Housekeeping* - Laundry and Basic Housekeeping;
- *Shopping* - Going to and from stores, and Carrying purchases home;
- *Transportation* - Using public transit;
- *Additional Comments*: "any ADLs (activities of daily living) that require movement take 2-3 times longer than typical due to ongoing chronic pain in back, legs, hips, as [the appellant] lives alone she must complete ADLs independently, but it takes her longer to complete due to pain, needing to take rests...moving about causes increased pain in back and [the appellant] must stop to rest frequently."
- *Additional Information*: The appellant explains to the social worker that back pain affects her ability to complete DLA as she must walk slowly; she cannot lift "more than a couple of pounds"; she must stop to rest; and she becomes fatigued and experiences ongoing chronic pain.

For the *Social Functioning* DLA, the social worker does not provide any check marks to indicate whether the appellant is independent with social decisions, relationships, dealing with unexpected demands and securing assistance from others. The social worker does not indicate whether the appellant has good functioning, marginal functioning, or very disrupted functioning with her social networks, or whether she requires support/supervision to be maintained in the community, or experiences any safety issues as a result of restricted social functioning. Under *Additional Information*, the social worker writes that the appellant "is very socially isolated, and having difficulty creating and maintaining relationships."

*Need for help*

In the MR, the GP checks *No*, the appellant does not require any prostheses or aids for her impairment. The GP does not provide any comment for *what assistance does your patient need with Daily Living Activities?*

In the AR, *Part D - Assistance Provided for Applicant*, the social worker checks that help with DLA is provided by friends (comment: "limited involvement with family"). The social worker does not provide any information for the item: *if help is required but there is none available, please describe what assistance would be necessary*. The social worker does not indicate that assistance is provided through the use of assistive devices (the chart is left blank). The social worker indicates that the appellant does not have an assistance animal.

***Additional information***

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

## PART F – REASONS FOR PANEL DECISION

The issue on appeal is whether the ministry's decision to deny the appellant PWD designation is reasonably supported by the evidence or a reasonable application of the legislation in the circumstances of the appellant. Was the ministry reasonable in finding that the following eligibility criteria in section 2 of the EAPWDA were not met:

- the appellant has a severe mental or physical impairment;
- the appellant's impairment, in the opinion of a prescribed professional, directly and significantly restricts her ability to perform DLA either continuously or periodically for extended periods; and
- as a result of restrictions caused by the impairment, the appellant requires an assistive device, the significant help or supervision of another person, or the services of an assistance animal to perform DLA?

The ministry based the reconsideration decision on the following legislation:

### EAPWDA

**2 (1)** In this section:

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

"**daily living activity**" has the prescribed meaning;

"**prescribed professional**" has the prescribed meaning.

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

**(a)** in the opinion of a medical practitioner or nurse practitioner is likely to continue for at least 2 years, and

**(b)** in the opinion of a prescribed professional

**(i)** directly and significantly restricts the person's ability to perform daily living activities either

**(A)** continuously, or

**(B)** periodically for extended periods, and

**(ii)** as a result of those restrictions, the person requires help to perform those activities.

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

**(a)** a person who has a severe mental impairment includes a person with a mental disorder, and

**(b)** a person requires help in relation to a daily living activity if, in order to perform it, the person requires

**(i)** an assistive device,

**(ii)** the significant help or supervision of another person, or

**(iii)** the services of an assistance animal.

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

### EAPWDR

#### Definitions for Act

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

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

**(i)** prepare own meals;

**(ii)** manage personal finances;

**(iii)** shop for personal needs;

**(iv)** use public or personal transportation facilities;

**(v)** perform housework to maintain the person's place of residence in acceptable sanitary condition;

**(vi)** move about indoors and outdoors;

**(vii)** perform personal hygiene and self-care;

**(viii)** manage personal medication, and

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

**(i)** make decisions about personal activities, care or finances;

**(ii)** relate to, communicate or interact with others effectively.

## **Analysis and panel's decision**

### *Severe mental or physical impairment*

To be eligible for the PWD designation, the legislation requires several criteria to be met including the minister being satisfied that the applicant has a severe mental or physical impairment. The ministry accepts that the appellant experiences some degree of restriction but argues that the information from the GP and the social worker on functional skills and abilities does not support the conclusion that the appellant's impairments are severe in nature.

Regarding a mental impairment, the ministry argues that a severe impairment is not established on the evidence from the GP and the social worker as both professionals indicate that deficits/impacts with cognitive and emotional functioning are *unknown*. The ministry notes that the appellant is reportedly difficult to assess and she denies any mental health concerns and refuses assessment and treatment despite a reported history of psychiatric investigations.

Regarding a physical impairment, the ministry argues that the assessment of severity is the opinion of the appellant ("patient feels she should be on PWD"; patient states that she was "kicked in the back") and is not confirmed by the GP who indicates that limitations and restrictions are *unknown* for most areas of mobility and DLA. Similarly, the ministry argues that the information from the social worker does not confirm a severe physical impairment because the appellant can perform all of her physical functions and physical DLA independently despite taking 2-3 times longer due to pain.

The panel finds that the ministry's determination that a severe mental or physical impairment is not established is reasonably supported by the evidence. "Severe" is not defined in the legislation but the diagnosis of a serious medical condition does not in itself establish a severe impairment of mental functioning. To assess the severity of a mental impairment, the ministry must consider the extent of any impact on daily functioning as evidenced by limitations/restrictions in mental functions; restrictions with DLA requiring mental/social functioning; and whether significant help is required to manage DLA. Similarly, to assess whether the applicant has a severe physical impairment, the ministry considers the degree of restrictions to physical functioning, DLA involving movement, and whether the applicant requires significant help or any assistive devices to manage DLA.

Regarding the appellant's mental impairment, the information from the GP is that the appellant was treated for schizophrenia in the past but the appellant disputes the diagnosis and refuses to access mental health resources. There is therefore "uncertainty" around her diagnoses. The GP indicates that the appellant's communication difficulties are caused by her infrequent attendance at the clinic and lack of phone access. There is insufficient direct evidence of a mental impairment causing difficulties with communication and the social worker assesses the appellant's ability to communicate as *Good* in all areas.

The GP indicates the appellant has "possible psychotic symptoms" but any significant deficits/impacts with cognitive and emotional function are *unknown* to both the GP and the social worker because the appellant is difficult to assess and denies any mental health concerns. Both professionals agree that the appellant has restrictions with social functioning. The GP reports "abnormal interactions with physician and our social worker" and checks that *Social functioning* is restricted. Whether the restriction is continuous or periodic is not indicated and no further detail is provided. The social worker comments that the appellant has limited involvement with family; is "very socially isolated"; and has difficulty creating and maintaining relationships, but information on specific areas of social functioning and the appellant's social networks (*Section 3* of the AR) is not provided.

Regarding the appellant's physical impairment, the GP indicates that a CT scan shows "some" evidence of arthritic changes and disc disease but a severe degree of impairment is not reported. In addition, the GP indicates that most of the appellant's physical functional skills (distance she is able to walk, etc.) are *unknown* and the appellant's back pain may not be severe enough to "qualify her for PWD." The only significant physical restriction that the GP reports is for *Lifting*; the appellant is able to lift two pounds. This indicates the greatest degree of restriction on the rating scale in the MR.

[Redacted]

In the AR, the appellant is assessed as independent with all of her physical functional skills, including *Lifting* (limited to “under 2 lbs.”) despite chronic pain, fatigue, and needing to stop frequently to rest. While the appellant also reports “a lot of pain” in her RFR and indicates in her appeal submission that she continues to experience pain, the panel finds that the ministry reasonably determined there is insufficient information to confirm a severe impairment of physical functioning. As noted, the appellant is able to perform all of the listed physical functions and skills independently despite experiencing pain and taking 2-3 times longer. The panel finds that the ministry reasonably determined that a severe impairment under section 2(2) of the EAPWDA (mental or physical impairment) is not established on the evidence.

*Restrictions in the ability to perform DLA*

Subsection 2(2)(b)(i) of the EAPWDA requires the ministry to be satisfied that, in the opinion of a prescribed professional, a severe impairment directly and significantly restricts a person’s ability to perform DLA either continuously, or periodically for extended periods. In this case, the prescribed professionals are the GP and the social worker who completed the PWD medical reports. The term “directly” means there must be a causal link between the severe impairment and the restriction to DLA. The direct restriction must also be significant.

Finally, there is a component related to time or duration: the direct and significant restriction may be either continuous or periodic. If periodic, the restriction must be for extended periods. Inherently, an analysis of periodic restrictions must also include how frequently the activity is restricted. All other things being equal, a restriction that arises once a year is less likely to be significant than one that occurs several times a week. Accordingly, in circumstances where the evidence indicates that a restriction arises periodically, it is appropriate for the ministry to require evidence on the duration and frequency of the restriction in order to be satisfied that this criterion is met.

DLA are defined in section 2(1) of the EAPWDR and are also listed in the MR, with additional details in the AR. Therefore, a practitioner completing these forms has the opportunity to indicate which, if any, DLA are significantly restricted by the applicant’s impairments either continuously or periodically for extended periods, and to provide additional narrative. DLA, as defined in the legislation, does not include the ability to work.

The ministry argues that the information from the prescribed professionals does not confirm that DLA are significantly restricted because the GP mostly indicates *unknown* when asked to assess restrictions; the degree of restriction is not indicated for DLA that are marked as restricted; and the social worker assesses all areas of DLA as independent.

Considering the information in the MR, the appellant is not prescribed any medications or treatments that interfere with her ability to perform DLA. The GP indicates restrictions with four DLA: *Basic housework*, *Mobility inside the home*, *Mobility outside the home*, and *Social functioning* but does not indicate whether restrictions are continuous or periodic for extended periods as required by the legislation. The GP indicates that *Personal self-care* and *Management of Medications* are continuously restricted but at the same time, the GP checks that it is unknown whether these DLA are restricted. The GP provides no other information for DLA such as whether significant help is required to perform DLA - the GP checks *No*, the appellant does not require any prostheses or aids for her impairment. The panel therefore finds that the ministry reasonably determined there is insufficient information in the MR to establish that DLA are significantly restricted either continuously, or periodically for extended periods.

In the AR, the social worker assesses all areas of 7 of the 8 listed DLA as independent but indicates that DLA that require movement take the appellant 2-3 times longer to perform due to chronic back, leg, and hip pain. Dressing is particularly difficult for the appellant because bending causes pain. While the social worker indicates that the appellant “must complete ADLs independently” because she lives alone, there is no indication that the appellant uses any assistive devices as *Section D* of the AR is left blank.

As noted, information for *Social Functioning* in section C of the AR is not provided but the social worker comments that the appellant is socially isolated and has difficulty creating and maintaining relationships. The social worker does not indicate whether the appellant’s social functioning is significantly restricted either continuously or periodically for extended periods as required by the legislation and as a severe mental impairment is not confirmed in the PWD medical reports, there is insufficient evidence that social functioning is directly restricted as well.

The panel finds that the ministry reasonably determined that the information in the MR and AR does not establish that DLA are significantly restricted as required by the legislation. Based on the information from prescribed professionals, the panel therefore finds that the ministry reasonably determined the criteria in subsection 2(2)(b)(i) of the EAPWDA are not met.

#### *Help to perform DLA*

Subsection 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 information in the MR and AR indicate the appellant does not use aids for her impairment, or assistive devices or an assistance animal to perform DLA. She receives help from friends but performs DLA independently because she lives alone. The ministry's position is that because it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required. Under the legislation, confirmation of direct and significant restrictions to DLA is a precondition for needing help to perform DLA. As the panel found that the ministry reasonably determined that significant restrictions to DLA were not established by the information provided, the panel also finds that the ministry reasonably concluded that the criteria for help under subsection 2(2)(b)(ii) of the EAPWDA are not met.

#### **Conclusion**

Based on the functional skills and DLA assessments by the GP and the social worker, and considering the evidence in its entirety, the panel finds that the ministry's reconsideration decision, which determined that the appellant is not eligible for PWD designation, is reasonably supported by the evidence. The panel confirms the decision. The appellant is not successful on appeal.



**PART G – ORDER**

THE PANEL DECISION IS: (Check one)

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

Margaret Koren

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2019/01/29

PRINT NAME

Katherine Wellburn

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019/01/29

PRINT NAME

William (Bill) Reid

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019/01/29