



**PART C – DECISION UNDER APPEAL**

The decision under appeal is the Ministry of Social Development and Poverty Reduction (ministry) reconsideration decision dated 2 January 2019, which determined that the appellant was not eligible for persons with disabilities designation (PWD) because she had not met all of the legislated criteria under section 2 the *Employment and Assistance for Persons with Disabilities Act*.

The ministry determined that the appellant had demonstrated that she has reached 18 years of age and that her impairment, in the opinion of a medical practitioner or nurse practitioner, is likely to continue for at least 2 years.

The ministry further determined that the appellant had not demonstrated that she has a severe mental or physical impairment; that her severe mental or physical impairment, in the opinion of a prescribed professional, directly and significantly restricts her ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and as a result of direct and significant restrictions, she requires help to perform those activities.

The ministry also found that it has not been demonstrated that the appellant is in 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*. 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 and 2.1

## PART E – SUMMARY OF FACTS

Evidence before the ministry at reconsideration consisted of the following:

### 1. The appellant's PWD Application

The Application contained:

- A Medical Report (MR) completed by a general practitioner (GP) who has indicated he has seen the appellant 2-10 times in the past 12 months.
- An Assessor Report (AR) dated 24 May 2018, completed by the same GP who indicates he has seen the appellant 11+ times in the past 12 months and known the appellant since 2010.
- A Self Report (SR) dated 04 December 2017, 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:

- Pericarditis onset June 2017
- Ankle arthritis onset June 2016
- Lupus onset June 2016
- Fibromyalgia onset June 2016
- Torn Achilles tendon onset June 2016
- 

#### 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 indicates that the appellant has significant deficits with cognitive and emotional functioning in the areas of memory, emotional disturbance, motivation and under "other" identified: *poor physical capacity*.

AR:

In the 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?" with a description of the appellants physical impairments (see below).

The GP indicates that the appellant's ability to communicate is good in all listed areas (speaking, reading, writing and hearing) and provides the comments: *she has periods of reduced cognition and ability to reason and solve problems*.

The GP assessed, without comment, the appellant's cognitive and emotional functioning as having the following levels of impact on daily functioning:

- major impacts in the areas of bodily functions, attention/concentration, and motor activity;
- moderate impacts to consciousness, emotion, insight and judgement, executive, memory, motivation and other emotional or mental problems; and
- minimal impacts to impulse control, language, psychotic symptoms and other neuropsychological problems.

SR:

The appellant does not speak to a mental impairment in her self-report.

#### Severity of physical impairment

MR:

Under Health History, the GP indicates that the appellant had developed pericarditis and is now recovering from this, she has significant exertional limitations due to poor cardiac output, suffers from shortness of breath, chest pain and generalized weakness. The GP further indicates that the appellant is not improving much and may have a permanent condition. The GP indicates that the appellant has fibromyalgia, multi-joint arthritis and an autoimmune disease, the working diagnosis for which is SLE. The GP states that the appellant is suffering from significant lung function decline and shortness of breath with exertion.

For functional skills, the GP indicated by checkbox selection that the appellant can:

- walk 1-2 blocks unaided;
- climb 2-5 steps, and 5+ steps unaided (2 selections);
- lift 5-15 pounds and under 5 lbs. unaided (2 selections); and
- remain seated without limitation.

The GP indicates that the appellant requires a cane 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 – multi-joint arthritis joints, inflammatory arthritis, tendonopathy, shortness of breath – chest pain, pericarditis, fibromyalgia – generalized pain with poor exertion tolerance.*

The GP indicates that the appellant uses an assistive device (cane) and takes significantly longer with walking indoors and outdoors, uses an assistive device (cane) for climbing stairs (*able to do with difficulty*), uses an assistive device for standing (*requires constant support*), and takes significantly longer with lifting and carrying and holding (*carrying capacity < 5 lbs.*). The GP comments: *She has poor physical capabilities. She has significant shortness of breath on exertion. She has significant pain to most motor skills.*

SR:

The appellant indicates that she has debilitating pain throughout her body, including her right ankle, kidney area, chest, skull and joints in her hands and arms. She states that there are traces of fluid around her heart and she has suffered pneumonia in the past.

#### Ability to perform DLA

MR:

The GP indicates that the appellant has not been prescribed medication that interferes with her ability to perform DLA but has also indicated the duration of which is indicated as: *Unknown. Could be permanent.*

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 continuously in relation to mobility inside and outside of the home. The GP makes no indication as to whether the appellant is restricted in any of the other DLA listed in the MR.

In relation to assistance needed with DLA, the GP comments: *Cane for short distance. Scooter or vehicle for longer distances.*

AR:

The GP indicates that the appellant is independent in the following personal care activities: dressing, grooming, bathing, toileting, feeding self and regulating diet. She uses an assistive device (cane) for transfers on/off chair and in/out of bed.

The GP indicates that the appellant is independent with all basic housekeeping tasks.

The GP indicates that the appellant is independent with the shopping activities of reading prices and labels, making appropriate choices and paying for purchases; the appellant requires periodic assistance from another person going to and from stores and uses an assistive device carrying purchases home.

The GP indicates that the appellant is independent with the meals activities of meal planning and safe storage and

requires continuous assistance with meal preparation and cooking.

The GP indicates that the appellant is independent and requires periodic assistance with all pay rent and bills activities.

The GP indicates that the appellant is independent with all medications activities.

The GP indicates that the appellant requires periodic assistance with the transportation activity of getting in/out of a vehicle, uses an assistive device (stability aids, cane, grips) for getting in/out of a vehicle and using public transit and is independent with using transit schedules and arranging transportation.

#### Section 2(1)(b) of the EAPWDR

The following DLA are applicable to a person who has a severe mental impairment:

#### *Make decisions about personal activities, care or finances*

MR:

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

AR:

The GP indicates that the appellant is independent with the personal care tasks of regulating diet; the shopping tasks of readings labels, making appropriate choices, and paying for purchases; the meals tasks of safe storage of food and meal planning; the medications tasks of filling/refilling prescriptions, taking as directed and safe handling and storage; and the transportation tasks of using transit schedules and arranging transportation. The GP indicates that the appellant is both independent and requires periodic assistance with the "Pay Rent and Bills" tasks of budgeting, banking and bill payment.

The GP reports that the appellant requires periodic support/supervision for making appropriate social decisions.

#### *Relate to, communicate or interact with others effectively*

MR:

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

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 requires:

- periodic support/supervision with developing and maintaining relationships, dealing appropriately with unexpected demands and securing assistance from others; and
- continuous assistance interacting appropriately with others.

The GP indicates that the appellant has marginal functioning in her immediate and extended social networks.

#### Help required

MR:

The GP indicates that the appellant requires a cane for short distances and scooter or vehicle for longer distances.

AR:

The GP indicates that the appellant receives assistance from family and uses the following assistive devices: cane, walker, scooter, and braces.

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

## **2. Request for Reconsideration**

The appellant submitted Request for Reconsideration dated 17 December 2018. The appellant sought to clarify and

[REDACTED]

expand upon the information provided. The appellant stated that the information provided by the doctor in the assessments was an indication of her maximum abilities on a good day. (The implication being that the doctor was providing hearsay based upon her expression of maximum abilities.) She further indicated that she has learned in early December that she has reduced lung capacity, 60% and working capacity 50%. The appellant provided a significant amount of information about the conditions with which she has been diagnosed and the difficulties she experiences with DLA and the treatment interventions she employs to deal with her symptoms. The appellant also indicates that her GP has diagnosed her with Depression. She argues that she is trying very hard and her ability to work and earn enough to support herself is very limited. She further argues that her condition is worse than her mother and uncle at her age and they were both designated with disabilities by that time.

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

#### **Notice of Appeal**

In the Notice of Appeal dated 14 January 2019, the following reasons for appeal are provided: *I disagree with the ministry's decision on the basis that within their own forms that the severity of disability can be periodically, meaning compounded moderate disabilities can severely impact a person's life. Combining the different ailments that I have, I CAN NOT do all the daily living activities within a day, which DOES EFFECT MY LIFE SEVERELY. Discrepancies within the reports.*

#### **Appeal Submissions**

The appellant submitted several documents in an Appeal Submission, including: a detailed Pulmonary Function Study dated 10 May 2018, photos of the appellant's hands and feet, a ministry Medical Report – Employability form and a diagram indicating areas of pain. At the hearing the appellant submitted a letter from her employer dated 29 January 2019.

At the hearing, the appellant and her representative argued that the appellant is able to function independently some days but about 2-3 days per week she cannot function at all and must crawl to the bathroom and be served food in bed. The appellant argued that her health has declined in the past 3 years and she is not able to support herself. She stated that she was fired from her previous job because she could not do the work and that her current employer is a family friend who has made a lot of concessions to keep the appellant employed. The appellant indicated that she works 1-2 days per week and if she could not do this she would be in major depression. The appellant argued that the photos she submitted show the swelling to her hands and feet, which limit her ability to function. She stated that she has been seeing a specialist and is one marker short of a Lupus diagnosis. She stated that she has a lung capacity of 55% and working capacity just under 50%, which means she cannot even laugh.

The ministry relied on the reconsideration decision. The ministry representative at the hearing provided no substantive submissions, being unfamiliar with the decision and like decisions.

#### **Admissibility**

The panel finds that the information provided in the appellant's Notice of Appeal consists of argument, which does not require an admissibility determination in accordance with section 22 (4)(b) of the *Employment and Assistance Act*. The panel finds that the Appeal Submissions and Employer's letter are admissible in accordance with section 22 (4)(b) of the *Employment and Assistance Act* because they speak to the appellant's medical conditions and ability to function and are in support of information and records before the ministry at reconsideration. The panel notes that the ministry did not object to the admission of any of the appellant's documents.

## PART F – REASONS FOR PANEL DECISION

The issue in this appeal is whether the ministry reconsideration decision that determined that the appellant did not meet three of the five statutory requirements of Section 2 of the *EAPWDA* for PWD designation is reasonably supported by the evidence or is a reasonable application of the legislation in the circumstances of the appellant. Specifically, the ministry determined that the information provided did not establish that:

- the appellant has a severe mental or physical impairment;
- the appellant's severe mental or physical impairment, in the opinion of a prescribed professional, directly and significantly restricts her ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and
- as a result of those restrictions, she requires significant help or supervision of another person to perform those activities.

The following section of the *EAPWDA* applies to this appeal:

### Persons with disabilities

2 (1) In this section:

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

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

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

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

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

(b) in the opinion of a prescribed professional

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

(A) continuously, or

(B) periodically for extended periods, and

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

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

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

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

(i) an assistive device,

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

(iii) the services of an assistance animal.

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

The following section of the *EAPWDR* applies to this appeal:

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

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

(i) prepare own meals;

(ii) manage personal finances;

(iii) shop for personal needs;

(iv) use public or personal transportation facilities;

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

(vi) move about indoors and outdoors;

(vii) perform personal hygiene and self care;

(viii) manage personal medication, and

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

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

- (ii) relate to, communicate or interact with others effectively.
- (2) For the purposes of the Act, "**prescribed professional**" means a person who is
- (a) authorized under an enactment to practise the profession of
- (i) medical practitioner,
  - (ii) registered psychologist,
  - (iii) registered nurse or registered psychiatric nurse,
  - (iv) occupational therapist,
  - (v) physical therapist,
  - (vi) social worker,
  - (vii) chiropractor, or
  - (viii) nurse practitioner, or
- (b) acting in the course of the person's employment as a school psychologist by
- (i) an authority, as that term is defined in section 1 (1) of the *Independent School Act*, or
  - (ii) a board or a francophone education authority, as those terms are defined in section 1 (1) of the *School Act*,
- if qualifications in psychology are a condition of such employment.

### **Severity of impairment**

The legislation requires that for PWD designation, the minister must be "satisfied" that the person has a severe mental or physical impairment. The legislation makes it clear that the determination of severity is at the discretion of the minister, considering all the evidence, including that of the appellant. Diagnosis of a serious medical condition or the identification of mental or physical deficits does not in itself determine severity of impairment.

### Severity of physical impairment

In the reconsideration decision, the ministry determined that a severe impairment of physical functioning had not been established. In making this determination, the ministry noted that the GP has indicated in the MR that the appellant uses a cane, in the AR that the appellant uses a cane, walker, scooter and braces and that the appellant indicated that she uses walking poles and a cane. The ministry found this information to be inconsistent and concluded that it was difficult to determine whether the appellant used any assistive device other than a cane. The ministry considered the functional skills assessment and the mobility and physical ability assessments provided by the GP. The ministry noted the information provided by the appellant in the SR and Request for Reconsideration and found that a medical practitioner or prescribed professional had not confirmed the information in the Request for Reconsideration. The ministry concluded that the assessments provided by the GP demonstrated limitations to the appellant's physical functioning but established a moderate rather than severe physical impairment.

The panel finds that the ministry's determination was reasonably supported by the evidence. 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. 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 function independently, with some limitation in her ability to walk distances and lift and carry items over 5 lbs. The panel also notes that the information provided by the GP in the MR is not identical to the information in the AR or the SR, but finds that the information does indicate that the appellant requires a cane for shorter distances and other mobility aids such as walking poles or a scooter for longer distances.

The panel notes that the ministry is in error in the reconsideration decision when it suggests that the MR only references the use of a cane as the MR clearly also states that the appellant uses a scooter for longer distances. The panel does not find the description of mobility aids to be conflicting, but also finds that the ministry's error is not substantive in the circumstances. The panel notes the consistent reporting of mobility limitations but finds that the assessments provided by the GP do not reflect the level of limitation reported by the appellant and finds that a severe physical impairment has not been established.

Concerning employment, the panel notes that the appellant has emphasized her inability or reduced ability 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 notes that its decision is not whether it agrees with the ministry's determination but whether that determination was reasonably supported by the evidence and a reasonable application of the legislation. Considering all accepted submissions and the discussion above, the panel finds that the ministry's determination, that a severe physical impairment has not been established, is reasonable.

#### 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 not have any difficulties with communication and her abilities with speaking, reading, hearing and writing are good. The ministry considered that the GP indicates 3 major impacts to cognitive and emotional functioning, 7 moderate impacts and 4 minimal impacts. The ministry noted that the appellant requires continuous support interacting with others and periodic support for all other areas of social function and has marginal functioning in her immediate and extended social networks. The ministry considered that the frequency and duration of the appellant's periodic reductions in cognition and need for assistance with social function had not been described in the assessments provided. The ministry also noted that while the appellant stated that the GP had diagnosed depression, the GP had not confirmed this diagnosis. The ministry concluded that the information provided had not established a severe impairment in mental functioning.

The panel finds that the ministry's determination that a severe mental impairment has not been established was reasonable. The panel notes that there is no mental health diagnosis provided in the GP's assessments. 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, while there is some suggestion of periodic supervision in the appellant's social functioning ability, no information regarding the nature or frequency of this support/supervision has been provided. As well, the panel notes the absence of information relating to support/supervision required to maintain the appellant in her community or any safety issues. The panel notes the GP's assessments relating to decision-making indicate that the appellant is independent in all areas. The panel also notes that the appellant herself indicated that she was primarily concerned with the ministry's conclusions regarding her physical impairment in its assessment of her PWD application, as she understands from her discussions with her GP that if her physical health improves her mental health will follow. 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 appellant has not been prescribed medication that impacts her ability to perform DLA. The ministry noted that the GP's AR assessment indicates continuous restrictions with food preparation and cooking and periodic assistance with going to/from stores, banking, budgeting and paying rent and bills and getting in/out of a vehicle. The ministry argued that because the frequency and duration of periodic assistance had not been described, it was difficult to determine whether these periods represent significant restriction to overall functioning. The ministry also noted that the appellant uses an assistive device for transfers in/out of bed and on/off a chair, carrying purchases home and using public transit. The ministry argued that the information provided is indicative of a moderate level of restriction and does not establish that a severe impairment significantly restricts the appellant's DLA continuously or periodically for extended periods.

The panel finds that the ministry's determination, that the assessments provided do not establish that a severe impairment significantly restricts the appellant's ability to perform DLA continuously or periodically for extended



periods, was reasonable. The panel notes that the legislation specifies that direct and significant restrictions to DLA must be in the opinion of a prescribed professional. The panel notes that the GP has assessed the appellant as being largely independent, albeit with the use of a cane. The panel also notes that the GP has indicated some need for periodic assistance but, as noted by the ministry, has not provided sufficient detail as to the nature, frequency or extent of such assistance to establish that periodic assistance is required for extended periods as set out in the legislation.

The panel finds that, in relation to the areas where some restriction is assessed, the GP has provided insufficient detail. The panel concludes that the ministry's determination, that the information provided by the GP does not establish 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 uses mobility aids such as a cane, and for longer distances a scooter, 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.

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**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)  
2019/02/04

PRINT NAME  
Kent Ashby

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)  
2019/02/04

PRINT NAME

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)