

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction's (the ministry) reconsideration decision dated January 2, 2019 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 requirement and that the appellant's impairment is likely to continue for at least two years. However, the ministry was not satisfied that the evidence establishes 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 these restrictions, the appellant requires the significant help or supervision of another person, the use of an assistive device, 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

[Redacted]

PART E – SUMMARY OF FACTS

With the consent of the parties, the appeal hearing was conducted in writing in accordance with Section 22(3)(b) of the *Employment and Assistance Act*.

Information before the ministry at reconsideration:

A PWD application comprised of the appellant's self-report (SR) dated August 8, 2018, a Medical Report (MR) and an Assessor Report (AR) both dated August 8, 2018 and completed by the appellant's general practitioner (GP) who has known the appellant for less than 2 years, and seen the appellant 11 or more times in the past 12 months. The GP indicates that he had an office interview with the appellant and used her file/chart information, specifically "EMR".

The appellant's Request for Reconsideration (RFR) dated December 3, 2018 which indicated that there is a 7-8 week waiting period to see a doctor.

An updated note from the GP dated December 20, 2018 which explains that since the appellant and the GP had filled out the disability paperwork in August 2018, "she is NOW requiring full assistance with stairs, shopping, etc." In regard to her COPD, the GP writes that the appellant's disability is worse and that "she DOES have impairment that directly restricts a person's ability to preform Daily Living Activities: personal care, meal prep, housework, shopping, mobility and transport."

A revised MR, Part "E" – Daily Living Activities indicating that activities of; Personal self care, Meal preparation, Basic housework, Daily shopping, Mobility inside and outside the home and Use of transportation are all restricted. Management of medications, Management of finances and Social functioning are not restricted. No other details are provided.

Notice of Appeal:

The appellant states that the original forms were not completed or updated.

Summary of the PWD Application:

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 appellant's GP identified the following specific diagnoses giving rise to the appellant's impairment; COPD (respiratory) with an onset of March 2016 and chronic pain.

In the AR, where asked to describe the appellant's mental or physical impairments that impact her ability to manage daily living activities, the GP wrote shortness of breath and chronic pain.

Physical Impairment:

In the MR, when asked if the appellant requires any prostheses or aids for her impairment, the GP indicates "No". For functional skills, the GP reports that the appellant is able to walk less than 1 block unaided, climb 5+ steps unaided, lift under 5 lbs and remain seated less than 1 hour. In terms of health history, the GP writes decreased mobility, increased fatigue and pain.

In the AR, the GP describes the appellant as independent for walking indoors, standing, lifting and carrying and holding while requiring periodic assistance from another person for walking outdoors and climbing stairs.

In her Self-Report, the appellant writes that she cannot walk more than 10 meters depending on the incline without resting and has puffers. The appellant states that she has Iron Supplification –producing 10 times the norm and her organs can't handle it. Splotches from red to black, split and bleed over her body and she doesn't want to be seen. She has seen an Oncologist/Hematologist and has blood tests as needed. The appellant states she is very tired but can't sleep and the antihistamine she is taking does not work. Following ear surgery 2 years ago which affected her sinuses, she has difficulty swallowing and holding down food. She also describes the loss of her muscles and muscle strength. and states that she relies on a cane or someone's elbow to move around as she can get really dizzy and if she falls, she can't get up. She states that she has lost all her muscles and has no strength left that she relates to her sinuses as she has not been able to swallow or hold food down. The appellant writes that due to osteoarthritis in her neck and lumbar area, she wears a bamboo brace and uses a cane, and has had cortisone shots in her right knee and left shoulder and that both hands are curling.

Mental Impairment:

In the MR, the GP indicates the appellant has no difficulties with communication, and does not have any significant deficits with cognitive and emotional function.

In the AR, the GP notes the appellant's good ability to communicate with speaking, reading and writing while indicates poor ability for hearing. With respect to cognitive and emotional functioning, the GP reports no impacts for each listed item. The appellant is noted to have good function with her immediate and extended social networks.

In her Self-Report, the appellant writes, "It basically comes down to, everything I loved to do, I can't and it's frustrating, my cooking, gardening, going to the library, my independence".

Daily Living Activities:

In the MR, the GP reports that the appellant has been prescribed medication that interferes with her ability to perform DLA noting; Atrovent, Ventolin and Tylenol with codeine.

The GP reports in the original MR, Part "E" - Daily Living Activities that the appellant's impairment does not directly restrict her ability to perform DLA.

In the revised MR, Part "E" - Daily Living Activities, it indicates that activities of; Personal self care, Meal preparation, Basic housework, Daily shopping, Mobility inside and outside the home and Use of transportation are all restricted. Management of medications, Management of finances and Social functioning are not restricted.

In the AR, the GP indicates that the appellant is independent with all aspects of DLA under: Shopping, Meals, Pay Rent and Bills and Medications.

Some DLA restrictions are noted with the following DLA:

- Under Personal Care; dressing, grooming, toileting, feeding self, regulating diet, transfers in/out of bed and transfers on/off chair are noted as independent; while bathing requires periodic assistance from another person (needs help getting in/out).
- Under Basic Housekeeping; laundry is noted as independent while basic housekeeping requires periodic assistance from another person.
- Under Transportation; getting in and out of a vehicle and using transit schedules and arranging transportation requires periodic assistance from another person while using public transit takes significantly longer than typical.

In her Self-Report, the appellant wrote that she needs help to get in/out the shower and she can't cook or garden.

Assistance Required:

The MR indicates "No" in response to: Does the applicant require any prostheses or aids for her impairment.

The AR notes that help is provided by friends. Under assistance provided through the use of assistive devices, a cane, toileting and bathing aids are indicated as appropriate items. Further it is noted that the appellant uses rails in the bathroom.

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 designation as a person with disabilities is reasonably supported by the evidence or is a reasonable application of the legislation in the circumstances of the appellant.

The ministry found that the appellant met the age requirement and that the appellant's impairment is likely to continue for at least two years.

However, the ministry was not satisfied that the evidence establishes that:

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

The following Section of the EAPWDA apply 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 apply to this appeal:

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.

Severe Impairment:

In the reconsideration decision, the ministry was not satisfied that the information provided is evidence of 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.

"Impairment" is a medical condition that results in restrictions to a person's ability to function independently or effectively for a reasonable duration. To assess the severity of impairment, the ministry must consider the nature of the impairment and the extent of its impact on daily functioning as evidenced by limitations/restrictions of physical functioning, mental functioning, ability to perform DLA, and help required with DLA.

Severity of Physical Impairment:

The appellant argues that her COPD, osteoarthritis and chronic pain limit her mobility and restrict her ability to walk more than 10 meters without resting and to stand or sit for more than 10 minutes. If she falls, she can't get up and the appellant asserts that she has lost all her muscles and has no strength left. Both of the appellant's hands are said to curl. The appellant's position is that her COPD has become worse as confirmed by her GP and that she requires "full assistance with stairs and shopping, etc."

The ministry argues that in the MR, the GP reports that the appellant is able to walk less than 1 block unaided, climb 5+ steps unaided, lift under 5 lbs and remain seated less than 1 hour. In the AR, the GP describes the appellant as independent for walking indoors, standing, lifting and carrying and holding while requiring periodic assistance from another person for walking outdoors and climbing stairs. Based on the information provided in these two reports, the ministry finds it difficult to establish a severe degree of impairment in these areas. The GP

reports that the appellant requires periodic assistance when walking outdoors, but does not indicate the nature, frequency or duration of assistance required making it difficult for the ministry to establish she requires significant assistance periodically for extended periods, resulting in a severe degree of impairment.

In the reconsideration decision, the GP notes that the appellant requires "full assistance" when climbing stairs, yet provides no further information regarding the assistance required. While the appellant indicates that she requires a rest every 10 metres of walking, the duration of these rests is not clear to the ministry and the GP has not indicated that the appellant requires additional time when walking outside. Although, the GP specifies that the appellant experiences chronic pain, a diagnosis of osteoarthritis is not provided. The ministry also notes that the GP did not include information regarding the appellant's over production of iron, her sinus, and swallowing or balance issues. The ministry acknowledges that the appellant has restrictions in her functional skills and mobility; however, finds that insufficient information has been provided to establish that these restrictions result in a severe degree of physical impairment.

The legislation requires that the minister be "satisfied" that the person's impairment is severe. For the ministry to be "satisfied," the panel considers it reasonable for the ministry to expect that the information provided by the prescribed professional, the GP in this appeal, to present a comprehensive overview of the nature and extent of the impacts of the medical conditions on physical functioning, supported by explanations, descriptions or examples in the spaces provided in the MR and in the AR forms.

The panel finds that the information provided by the GP does not project a clear picture of the appellant's mobility and physical ability restrictions. While considering the updated information, the panel finds that the GP indicates that the appellant's COPD is worse and that this impairment directly restricts her ability to perform DLA and her mobility yet the GP doesn't include any details as to the degree of reduction in physical functioning or what "full assistance" might entail in the appellant's circumstances or for what duration is the assistance required. When the panel analyzes the original information, it is noted that the GP indicates in the MR that the appellant does not require any prostheses or aids for her impairment and can climb 5+ steps unaided, while in the AR it indicates that periodic assistance is required from another person for walking outdoors and climbing stairs, without explanation.

The panel recognizes that the GP diagnoses the appellant with COPD and chronic pain; however, the appellant has stated that other medical conditions including osteoarthritis, previous ear surgery and iron supplification, which were not confirmed by the GP, contribute to her impairments. This evidence does not clarify the nature and degree of the appellant's restrictions to her physical functioning.

The panel therefore finds that the ministry reasonably determined that there is not sufficient evidence to establish that the appellant has a severe physical impairment under Section 2(2) of the EAPWDA.

Severity of Mental Impairment:

The appellant while frustrated that she cannot do the things she loves to do, does not argue that she has a severe mental impairment.

The ministry notes that in the MR, the GP does not provide a diagnosis of a medical condition that explicitly gives rise to a mental impairment and does not identify any deficits with the appellant's cognitive and emotional function. In the AR the GP indicates that the appellant's impairment has no impact on any area of daily cognitive and emotional functioning, including bodily functions (eating problems, sleep disturbance). The MR indicates that the appellant has no difficulties with communication and the AR notes her level of ability with speaking, reading and writing are good while her hearing is poor.

Based on all the information provided, the ministry cannot establish that the appellant has a severe mental impairment.

The panel also recognizes that the appellant is independent with all listed areas of social functioning and has good functioning with both her immediate and extended social networks. Therefore, the panel finds that the ministry reasonably determined that the assessments provided by the prescribed professional did not establish a severe mental impairment pursuant to Section 2(2) of the EAPWDA.

Restrictions in the Ability to Perform DLA:

The appellant argues that according to her GP in his updated report she requires "full assistance" with stairs, shopping, etc." The GP indicates that the appellant's COPD is worse and that she has an impairment that directly restricts her ability to perform Daily Living Activities such as: personal care, meal prep, housework, shopping, mobility and transport. This information is further supported by the GP's revised MR, Part "E" – DLA, which indicates that activities of; Personal self care, Meal preparation, Basic housework, Daily shopping, Mobility inside and outside the home and Use of transportation are all restricted.

The ministry argues that while the appellant's GP provides a revised Part "E" indicating she is restricted in her DLA, it is noted that the GP did not indicate if these restrictions are periodic or continuous, the degree the appellant is restricted in these tasks or what assistance she needs with her DLA making it difficult to establish that she is significantly restricted in these activities, either continuously or periodically for extended periods. In the AR, the GP reports that the appellant is independent in all aspects of personal care, shopping, meals, finances and medication. The GP notes that the appellant requires periodic assistance with basic housekeeping, getting in/out of vehicles, and using a transit schedule/arranging transportation. However, the GP does not note the nature, frequency or duration of assistance that she requires. The GP indicates that the appellant requires additional time bathing as she needs help getting in/out; however, the additional time or the nature of the help required is not reported. While the GP notes in the Reconsideration that the appellant requires "full" assistance with shopping no other information is provided such as the nature or degree of assistance required or how the impairment results in this need for assistance. Therefore, insufficient evidence is provided to establish a significant restriction in this area, either continuously or periodically for extended periods.

Based on the information provided by the GP, insufficient information has been provided to establish that the appellant has a severe impairment that, in the opinion of a prescribed professional, significantly restricts her ability to perform daily living activities set out in the legislation.

The panel notes that, according to the legislation, the direct and significant restriction in the ability to perform DLA must be the result of a severe impairment, a criterion not established in this appeal. The legislation under Section 2(2)(b)(i) of the EAPWDA requires the minister to assess severity considering the opinion of a prescribed professional, in this case the GP, as to direct and significant restrictions. This does not mean that other evidence should not be factored in as required to provide explanation of the professional evidence, but the legislative language is clear that a prescribed professional's evidence is fundamental to the ministry's determination whether it is "satisfied." And for the minister to be "satisfied," it is reasonable for the ministry to expect that a prescribed professional provides a clear picture of the extent to which the ability to perform DLA is restricted, as assessed in terms of the nature and duration of help required, in order for the ministry to determine whether the restrictions are "significant."

The panel acknowledges that the appellant has been prescribed medication that interferes with her ability to perform DLA and while the GP's updated MR has indicated that she does have impairment that directly restricts her ability to perform DLA such as: personal care, meal prep, housework, shopping, mobility and transport; this change from the original MR where it is indicated that her impairment does not restrict her ability to perform any DLA is attributed by the GP to the appellant's worsening condition of COPD. The panel finds that it is not clear as to the extent the appellant's ability to perform DLA is restricted and whether the restriction in each given area is significant. The panel finds that there is no explanation as to what the GP meant by "full assistance" in order to help describe the type of assistance required for meal preparation, basic housework, daily shopping, mobility inside the home or for the use of transportation and whether it is required continuously or periodically for extended periods.

The panel finds that the ministry reasonably determined that there is insufficient evidence from the prescribed professional to show that the appellant's overall ability to perform her DLA is significantly restricted either continuously or periodically for extended periods. Therefore, the panel finds that that the legislation pursuant to Section 2(2)(b)(i) of the EAPWDA was not established by the evidence.

Help Required:

The appellant argues that she routinely uses assistive devices such as a cane, toileting and bathing aids and handrails. She also relies on friends for help.

The ministry has determined that as it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required from other persons or a device.

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 a DLA.

While the panel acknowledges that the appellant uses appropriate aids to help compensate for her impairment, based on the evidence, the panel finds that the ministry reasonably determined that as direct and significant restrictions in the appellant's ability to perform DLA have not been established, it cannot be determined that the appellant requires help to perform DLA as a result of those restrictions, as defined by Section 2(3)(b) of the EAPWDA.

Conclusion

The panel finds that the ministry's reconsideration decision, which determined that the appellant was not eligible for PWD designation under Section 2 of the EAPWDA, was reasonably supported by the evidence and that this was a reasonable application of the legislation, therefore confirms the decision. The appellant's appeal, therefore, is not successful.

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

Lynn Twardosky

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2019/FEB/28

PRINT NAME

Marnee Pearce

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019/FEB/28

PRINT NAME

Joe Rodgers

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019/FEB/28