

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction's ("ministry") reconsideration decision dated March 18, 2019, 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 requirements for age, severe impairment, restrictions to daily living activities, and need for help, but was not satisfied that a medical practitioner has confirmed that the impairment is likely to continue for at least 2 years.

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*. As there was no information or argument provided for PWD designation on alternative grounds, the panel considers that 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:

- information from the ministry's record of decision indicating that the PWD application was received by the ministry on December 5, 2018 and denied on January 30, 2019. On January 31, 2019, the appellant requested reconsideration and on March 4, 2019, the ministry received the appellant's signed Request for Reconsideration ("RFR"). The ministry reviewed the RFR on March 18, 2019.
- the RFR signed by the appellant on February 22, 2019. In her hand-written submission, the appellant states her argument and describes her bowel and bladder problems. The appellant indicates that she requires physiotherapy to improve her condition by strengthening her pelvic muscles. The appellant states that she attended physiotherapy sessions in the past and experienced an improvement in her condition after a few sessions. The appellant explains that she had to stop her physiotherapy sessions because she could no longer afford them. The appellant reports that her bladder and bowel problems have worsened since she stopped physiotherapy and she has severe anxiety and depression from being housebound due to her symptoms.
- the ministry's Decision Summary with attached letter, dated January 30, 2019.
- the appellant's PWD application comprised of:
 - the applicant information (self-report - "SR") dated January 26, 2019.
 - a Medical report ("MR") dated November 14, 2018, completed by the appellant's general practitioner ("GP") who has known her since 2008; and
 - an Assessor Report ("AR") dated November 14, 2018, also completed by the GP.

Summary of relevant evidence from the application:

Diagnoses

In the MR, the appellant is diagnosed with ulcerative colitis (onset 2012), and depression and anxiety (onset 2018). Under *Health History*, the GP indicates the appellant had colectomy and ileostomy surgery, then a reversal of the stoma in 2014. The appellant had an abscess in 2017 that required surgical drainage.

The appellant has ongoing pain and suspected autonomic dysfunction with bowel movements. The appellant's mood issues worsened since being profoundly ill due to ulcerative colitis. The appellant had to interrupt her schooling and is unable to work due to toileting issues. The appellant also experiences strained family dynamics due to long term substance abuse by a family member.

Degree and Course of Impairment

In section C of the MR, the GP is asked to indicate whether the applicant's impairment is likely to continue for two years or more. The GP specifies, "uncertain" on the form and provides the following explanation: "reassess in two years - patient will access pelvic floor physio." The appellant has also moved out of her family home to improve anxiety and mood issues. In section F of the MR - *Additional Comments*, the GP writes, "access pelvic floor physio, move out of stressful home environment, aim to re-assess in 2 years."

In the SR, the appellant states that within the past 2 years, she has been unable to use her pelvic muscles to have proper bowel movements. The appellant explains that she has to push very hard on her stomach to try and alleviate the blockage. The appellant describes the impact of the condition on her life

- a letter from a physiotherapist (undated) describing the appellant's medical condition, symptoms, and disruptive home environment, and stating that the appellant's bladder and bowel control has worsened due to the stress of her situation. Initial treatment included pain management education, pelvic floor relaxation and awareness, and acupuncture which the appellant responded to. The physiotherapist states that the appellant was "given an ultimatum, that if pelvic floor control was not obtained she may have to get the stoma again."

The physiotherapist recommends "ongoing support" for the appellant including bi-weekly follow-up with her physician and a referral for counselling. The physiotherapist states that ongoing pelvic floor physiotherapy "is essential" for the appellant to achieve success with bowel and bladder continence and other aspects of her health.

- a letter from a medical specialist (gastroenterologist) dated February 1, 2019, describing the appellant's history

with ulcerative colitis including removal of her colon and further surgeries between 2012 and 2014 and again in 2017. The appellant continues to have bowel and bladder issues which seriously impact her quality of life. After multiple investigations and assessments, it was decided that nothing more could be done in terms of medications or surgery. The appellant was referred for pelvic floor physiotherapy and responded very well to the three sessions she attended.

The specialist reports that the appellant was unable to continue with pelvic floor therapy due to the cost, and her condition has therefore deteriorated. At the present time, the appellant has been without treatment for six months. The specialist states that the appellant requires physiotherapy in order to resume her normal activities and hopefully enter the workforce. The specialist states that the appellant needs more funding to pay for the physiotherapy "the duration of which I don't know." The appellant has been asked to get in touch with the physiotherapist to find out "what they recommend, whether it is a three or six month course." The appellant agrees that she "does not really need long term disability...but she does need funding to get this physiotherapy done over whatever time period is recommended."

Additional submissions

Subsequent to the reconsideration decision, neither party submitted any new evidence requiring an admissibility determination in accordance with section 22(4) of the *Employment and Assistance Act*. The appellant filed a Notice of Appeal with hand-written statement which the panel accepts as argument.

The appellant attended the hearing with a family member and friend as her support persons. The ministry brought an observer to the hearing (a ministry employee) and the appellant consented to the observer being present. Both parties presented argument at the hearing and the ministry relied on the reconsideration decision and did not submit any new evidence.

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 is a reasonable application of the legislation in the circumstances of the appellant. Specifically, was the ministry reasonable in finding that the eligibility criterion for duration of impairment in subsection 2(2)(a) of the EAPWDA was not met?

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.

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

(a) authorized under an enactment to practise the profession of

(i) medical practitioner,

(ii) registered psychologist,

(iii) registered nurse or registered psychiatric nurse,

(iv) occupational therapist,

(v) physical therapist,

(vi) social worker,

(vii) chiropractor, or

(viii) nurse practitioner, or

(b) acting in the course of the person's employment as a school

psychologist by

(i) an authority, as that term is defined in section 1 (1) of the Independent School Act, or

(ii) a board or a francophone education authority, as those terms are defined in section 1 (1) of the School Act, if qualifications in psychology are a condition of such employment.

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

Analysis

On reconsideration, the ministry accepts that the appellant meets all of the requirements for PWD designation except for the duration criterion set out in subsection 2(2)(a) of the EAPWDA. The ministry agrees that the appellant meets the age requirement and has a severe mental or physical impairment that, in the opinion of a prescribed professional, significantly restricts her ability to perform daily living activities and as a result of these restrictions, she requires significant help to perform her activities. Therefore, four criteria under section 2 of the EAPWDA are not at issue in this appeal.

Impairment likely to continue for at least 2 years

Arguments

The appellant argues that three doctors have confirmed that she needs physiotherapy. The appellant submits that she “won’t be healthier in 2 years...will definitely be worse” if she cannot resume her physiotherapy sessions. The appellant does not foresee that the treatment “would take long” because she saw improvements within a few months with her previous physiotherapy sessions. At the hearing, the appellant reported that physiotherapy costs up to \$300 per visit and she cannot afford that cost because she only receives government assistance of \$600-\$700 per month. The appellant explained that the physiotherapist charges her the full fee, and not just a patient-pay portion.

The ministry’s position is that the GP’s information as well as the information provided for the reconsideration, does not indicate the appellant’s impairment is likely to continue for at least two years as required by the legislation. The ministry argues that the GP’s indication of uncertainty regarding the expected duration of the impairment “does not establish the *likelihood* that your impairment will continue for two years or more.” The ministry argues that the GP does not address the expected duration of the impairment in the remainder of the PWD application.

The ministry argues that the letter from the specialist “does not speak to the expected duration” of the appellant’s impairment because the specialist does not know how many months of physiotherapy will be required and has asked the appellant to discuss the expected course of treatment with the physiotherapist. The ministry argues that the appellant’s medical practitioners do not foresee a lengthy course of treatment because the appellant’s condition improved with the three sessions of physiotherapy she had before.

The ministry acknowledges the appellant is suffering with a severe condition that causes her profound disability but notes that an application for “permanent disability” must meet all of the legislative criteria. At the hearing, the ministry discussed funding options for physiotherapy sessions that income assistance clients may qualify for. The ministry encouraged the appellant to look into coverage in which the client only pays a smaller “user fee” for a specified number of sessions.

Legislative requirement

The legislation requires a medical practitioner to confirm that the applicant's impairment is likely to continue for at least two years. The legislation does not specify the starting point for the assessment of the two year period but in section A of the MR, the medical practitioner is asked to indicate whether the impairment is likely to continue for two years or more "from today." The GP signed the MR on November 14, 2018. Therefore, in the appellant's case, the ministry requires her medical practitioner to indicate the impairment will likely persist until November 14, 2020 or beyond.

Evidence on duration of impairment

In section A of the MR, the GP indicates how long the appellant's conditions have existed, but in section C - *Degree and Course of impairment*, the GP writes, "uncertain" when asked if the impairment is likely to continue for two years or more. In the MR, the GP indicates the appellant will be re-assessed in two years, once the results of the recommended pelvic floor therapy are known, as well as the extent of improvement in her mood disorders following the move away from her stressful home environment.

In the AR, the GP assesses the appellant's functional skills, ability to manage daily living activities, and need for help with her daily activities. The GP does not provide any information on the likely duration of the appellant's impairments.

The letter from the physiotherapist recommends regular follow-up visits with the appellant's GP, counselling sessions, and "ongoing" pelvic floor physiotherapy, considered essential for the improvement of her condition. The physiotherapist does not comment on the likely duration of the appellant's impairment or the anticipated course of treatment.

The specialist, in the recent letter of February 1, 2019, does not indicate how long the appellant's impairment is likely to continue. The specialist firmly supports the need for additional physiotherapy sessions but she leaves it up to the physiotherapist to recommend the specific course of treatment ("whether it is a three or six month course"). The specialist states that the appellant responded very well to the three sessions of physiotherapy she had before. Both the specialist and the appellant agree that funding for short-term physiotherapy, rather than long term disability, will improve the appellant's quality of life.

Panel's decision

The panel finds that the ministry reasonably determined the appellant's impairment does not meet the legislative requirement for duration of impairment. While the appellant has had ulcerative colitis since 2012 and mental health conditions since 2018, the legislative test under subsection 2(2)(a) of the EAPWDA is forward looking and requires a medical practitioner to confirm that the impairment is likely to persist for at least two more years. The appellant's medical practitioners anticipate that her impairments will improve over the short-term with pelvic floor physiotherapy and a healthier living situation outside her family home. The GP's evidence is that the appellant will be re-assessed in two years. The panel therefore finds that the ministry reasonably determined the criterion for duration of impairment in subsection 2(2)(a) of the EAPWDA was not met.

Conclusion

Considering the information in its entirety, the panel finds that the ministry's reconsideration decision that found the appellant ineligible for the PWD designation is reasonably supported by the evidence. The legislation requires all of the legislative criteria to be met but the evidence indicates the appellant meets four of the five criteria. The panel confirms the ministry's 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)

2019-04-16

PRINT NAME

Barbara Insley

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019-04-16

PRINT NAME

Connie Simonsen

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019-04-16