

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (ministry) reconsideration decision dated 18 April 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.

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

Evidence before the ministry at reconsideration consisted of the following:

1. The appellant's PWD Application

The Application contained:

- A Medical Report (MR) dated 25 January 2019, completed by a general practitioner (GP) who indicates she has seen the appellant 2-10 times in the past 12 months and known the appellant since 2005.
- An Assessor Report (AR) dated 25 January 2019, completed by the same GP.
- A Self Report (SR) dated 6 December 2018, 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:

- Chronic Fatigue Syndrome – onset 2009

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 and specifies that the deficits are evident in the area of motivation. The GP comments: *fatigue causes [decreased] motivation*

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?" as follows: *Poor motivation due to overwhelming fatigue.*

The GP indicates that the appellant's ability to communicate is good in the areas of speaking, writing and hearing and satisfactory in the area of reading (*some dyslexia*).

The GP assesses the appellant's cognitive and emotional functioning as having moderate impacts on daily functioning in the areas of attention/concentration and motivation. The GP assesses minimal impacts in the areas of emotion, memory and other emotional or mental problems. The GP assesses no impacts in all other listed areas of cognitive and emotional functioning. The GP comments: *Most of her symptoms are related to fatigue. Tells me she has poor memory. She can remember appointments.*

SR:

The appellant does not speak to a mental impairment in her self-report but indicates that she has "brain fog" that makes it difficult to remember things and focus on simple tasks. Her ability to multi-task is affected. She reports that she is hypersensitive to lights and sounds and this often leads to migraines.

Severity of physical impairment

MR:

Under Health History, the GP writes that the appellant has chronic fatigue syndrome and has been referred to internal medicine. The GP indicates that the appellant has low motivation at times and extreme fatigue if she overdoes things. The GP also indicates issues with anger management for which the appellant is on medication.

For functional skills, the GP indicates that the appellant can walk 4+ blocks unaided, climb 5+ steps unaided, has no lifting limitations and can remain seated without limitation. The GP has provided no "Functional Skills" comments in Part D.

In Part F, Additional Comments the GP writes: *she has a diagnosis of chronic fatigue syndrome, which affects her day to day functioning. Fatigue [decreases] her motivation to do things.*

The GP indicates that the appellant does not require any aids or prostheses 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: *poor motivation due to overwhelming fatigue.*

The GP indicates that the appellant is independent with all areas of mobility and physical ability, including: walking indoors and outdoors, climbing stairs, standing, lifting and carrying and holding. No comments are provided.

SR:

The appellant indicates that her condition affects every aspect of her life, making it difficult to even get out of bed to have dinner with her family. She reports that she is exhausted regardless of how much sleep she gets, and that basic chores feel like heavy-duty work. She reports light and sounds sensitivity and an inability to work even six hours per week. She indicates that she depends on her mother to make meals and that even eating and showering is a chore for her to complete.

Ability to perform DLA

MR:

The GP indicates that the appellant has not been prescribed medication that interferes with her ability to perform DLA (NSAIDs) the duration of which is indicated as: *life long.*

The GP does indicate that the appellant's impairment does not restrict her ability to perform DLA. The GP goes on to indicate that the appellant is restricted periodically in relation to meal preparation and daily shopping. In response to the prompt to explain, the GP writes: *Lives with family, doesn't do shopping or meal prep as they do it for her. No reason why she can't do it.*

AR:

The GP indicates that the appellant is independent in all personal care activities, all basic housekeeping tasks, all shopping activities, all pay rent and bills activities, all medications activities and all transportation activities. The GP indicates that the appellant is independent with safe storage of food and requires continuous assistance with meal planning food preparation and cooking. The GP comments: *Her family does cooking and shopping for food. [Patient] not motivated to do it. No reason why she can't do it.*

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 indicates that the appellant is not restricted in her ability to manage personal self-care, 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 task of safe storage of food; the pay rent and bills tasks of budgeting, banking and bill payment; 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 requires continuous assistance with meal planning.

The GP reports that the appellant is independent with 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 indicates that the appellant's ability to communicate is good in the areas of speaking, writing and hearing and satisfactory in the area of reading (*some dyslexia*).

In assessing social functioning, the GP indicates that the appellant is independent with developing and maintaining relationships, interacting appropriately with others, dealing appropriately with unexpected demands and securing assistance from others. The GP indicates that the appellant has good functioning in her immediate and extended social networks.

Help required

MR:

The GP indicates that the appellant does not require any aids or prostheses.

AR:

The GP indicates that the appellant receives assistance from family.

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

2. Appended documents

Included with the PWD application is Consult Record from an internal medicine doctor (the "specialist"), dated 11 November 2018, who indicates that the appellant's symptoms are in keeping with chronic fatigue and is optimistic about improvement over the next several months.

3. Request for Reconsideration

The appellant submitted a signed Request for Reconsideration dated 10 April 2019. At reconsideration, the appellant submitted a 3 page hand-written statement expanding on the information provided in the SR.

At reconsideration the appellant also submitted a letter from her mother, dated 10 April 2019, in which the appellant's mother reports that the appellant has never fully recovered from H1N1 that she contracted at 16 years old. She reports that the appellant lacks stamina and it takes days to recover when she exerts herself. She indicates that the appellant suffers from migraines and menstrual cramps in addition to chronic fatigue syndrome. The appellant's mother indicates that she helps the appellant with cooking and cleaning most of the time.

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

Notice of Appeal

In the Notice of Appeal dated 06 May 2019, the following reasons for appeal are provided: *They failed to recognise the incapacitating nature of my Chronic Fatigue Syndrome. The symptoms of which make me independable in both my personal and work life.*

Appeal Submissions

The appellant did not make appeal submissions.

The ministry relied on the reconsideration decision.

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*.

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 that the appellant does not require aids or prosthesis. The ministry considered the functional skills assessment by the GP noting that the appellant is able to walk 4+ blocks unaided, climb 5+ steps unaided, lift without limitation and remain seated without limitation. The ministry argued that although the appellant indicates that she is weak and exhausted, the GP does not indicate that she takes significantly longer than typical to manage nor that she is continuously or periodically restricted to the point where she requires the assistance of another person or assistive device to manage any aspects of physical functioning. The ministry concluded that the assessments provided by the GP and in the self-report provided did not establish a severe physical impairment.

The panel finds that the ministry's determination was reasonable. 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 to function independently in all areas, with all assessments being at the highest end of the assessment options provided. The panel also notes that the information provided by the appellant in the SR is not entirely consistent with the information provided by the GP. For instance, the appellant indicates that she is always exhausted and even short outings are difficult for her, whereas the GP indicates no restrictions with mobility, she is independent with walking indoors and outdoors, and can walk 4+ blocks unaided. As well, the appellant indicates that she can lift up to 40 lbs. for a short duration while the GP indicates no lifting limitations. As a result, the panel finds it unclear as to the presence of any restriction to the appellant's abilities with respect to lifting and mobility and finds the evidence insufficient to establish a severe impairment. The panel finds that a severe physical impairment has not been established. As well, the panel notes that the appellant has emphasized her inability 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 finds that the ministry's determination, that a severe physical impairment has not been established, is reasonably supported by the evidence.

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, hearing and writing are good while reading is satisfactory. The ministry noted that the GP indicated no major impacts to cognitive and emotional functioning, 2 moderate impacts (attention/concentration and memory), 2 minimal impacts (emotion and memory) and no impacts in the other listed areas. The ministry noted that the appellant is independent in all areas of social function and has good functioning in her immediate and extended social networks. As well, the ministry noted the absence of information relating to support/supervision required to maintain in the community. 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 finds that assessments in the MR and AR do not reflect restrictions in the appellant's ability to function effectively or independently as a result of a mental health condition or mental impairment and there is no suggestion of restriction in the appellant's social functioning ability. The panel notes the absence of a mental health diagnosis in the diagnoses section of the MR. The panel notes the GP's assessments relating to decision-making indicate that the appellant is independent in all areas, except for meal planning. The panel also notes the absence of an assertion by the appellant of a mental basis for her PWD application along with her reports of poor memory and brain fog arising from Chronic Fatigue Syndrome. 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 GP has indicated in the MR that her impairment does not restrict her ability to perform DLA, that the GP indicates periodic restrictions to meals and shopping tasks and does not indicate any assistance required. The ministry noted that the GP's AR assessment indicates continuous restrictions with meal planning, food preparation and cooking. The ministry also considered the appellant's self report in relation to her ability to perform DLA and the assistance she receives from family. The ministry argued that it is the duty of family member to assist one another and that this does not establish that help is required as a result of the appellant's impairment. The ministry further argued that the GP has indicated that there is no reason why the appellant cannot manage her DLA. The ministry concluded that the information provided 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 indicated in the MR that the appellant's impairment does not restrict her ability to perform DLA and has assessed her as being largely independent in both the MR and AR. The panel finds that, in relation to the only areas where some restriction is assessed (periodic restriction with meals and shopping) in the MR, the GP has provided contradictory information (independence with shopping and continuous assistance with some meals tasks) in the AR. The panel also notes that in relation to these areas where there is some suggestion of restriction, the GP has indicated in both the MR and AR that there is no reason that the appellant cannot perform these tasks. The panel concludes that the ministry's determination that the evidence is insufficient to show 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, 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. Furthermore, the panel notes that the GP has commented that there is no reason that the appellant cannot perform the tasks that her family assists with. 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.

PART G – ORDER	
THE PANEL DECISION IS: (Check one) <input checked="" type="checkbox"/> UNANIMOUS <input type="checkbox"/> BY MAJORITY	
THE PANEL <input checked="" type="checkbox"/> CONFIRMS THE MINISTRY DECISION <input type="checkbox"/> RESCINDS THE MINISTRY DECISION	
If the ministry decision is rescinded, is the panel decision referred back to the Minister for a decision as to amount? <input type="checkbox"/> Yes <input type="checkbox"/> No	
LEGISLATIVE AUTHORITY FOR THE DECISION:	
<i>Employment and Assistance Act</i>	
Section 24(1)(a) <input checked="" type="checkbox"/> or Section 24(1)(b) <input checked="" type="checkbox"/>	
and	
Section 24(2)(a) <input checked="" type="checkbox"/> or Section 24(2)(b) <input type="checkbox"/>	

PART H – SIGNATURES	
PRINT NAME Jennifer Smith	
SIGNATURE OF CHAIR	DATE (YEAR/MONTH/DAY) 2019/06/14

PRINT NAME Marlene Russo	
SIGNATURE OF MEMBER	DATE (YEAR/MONTH/DAY) 2019/06/14
PRINT NAME Joseph Rodgers	
SIGNATURE OF MEMBER	DATE (YEAR/MONTH/DAY) 2019/06/14