

APPEAL NUMBER

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (“the ministry”) reconsideration decision dated March 15, 2019, which found that the appellant did not meet three of the five 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 her 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.

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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

The evidence before the ministry at the time of the reconsideration decision included:

- the appellant's PWD Application comprised of the appellant's self report ("SR") dated October 10, 2018, a medical report ("MR") dated January 24, 2019, and an assessor report ("AR") dated October 8, 2018, both completed by the appellant's family physician ("the GP"), who has known the appellant for 3 years and who has seen the appellant between 2 - 10 times in the past 12 months;
- the appellant's request for reconsideration submitted February 19, 2019 with the following attachments:
 - undated letter written by a staff person at the safe home in which the appellant resided at the time of reconsideration;
 - February 24, 2019 letter from the GP noting that:
 - the appellant's greatest impairment is cognitive but formal diagnosis cannot be made without psychological testing which is not easily available in the region in which she lives;
 - the appellant was in "special education" classes throughout her school years and has never worked beyond school-arranged workplaces during her teens;
 - she is quite vulnerable now that her spouse has separated from her and requires significant assistance from safe home staff with finding housing and completing forms.

PWD Application Summary

Diagnosis

In the MR the GP notes that the patient suffers from Depression and Osteoarthritis (OA) in her right knee.

Physical Impairment

In her SR the appellant reported that:

- her ability to climb stairs is very limited
- she walks a very short distance
- she has depression
- opening and closing of her hands [is impaired]
- she can't get out of the bathtub without help.

In the MR the GP reported that the appellant:

- can walk less than 1 block and climb 5+ steps unaided but slowly with taking breaks and using a cane;
- experiences no limitations with lifting or remaining seated;

In the AR the GP reported that the appellant:

- uses a cane when walking indoors and outdoors and when climbing stairs, taking 50% longer than usual;
- is independent in the majority of DLA.

Mental Impairment

In the MR the GP noted that the appellant has significant deficits in cognitive and emotional functioning in motivation, executive and memory. The GP added: "*depression has been severe for 10+years*".

In the AR the GP noted that the appellant experiences 5 major impacts to cognitive and emotional functioning: emotion, attention/concentration, executive, memory and motivation, and minimal impact in the area of impulse control. No impacts on daily functioning are reported in the remaining 8 areas of cognitive and emotional

functioning.

Daily Living Activities (DLA)

In the AR the GP indicated that the appellant:

- is independent in all areas of personal care, basic housekeeping, meals (planning, preparing, storing and cooking), medications and transportation
- requires periodic assistance with paying rent and bills, banking and budgeting

The GP also indicated that the appellant requires periodic support and/or supervision 3 areas of DLA, namely: interacting appropriately with others, dealing appropriately with unexpected demands and securing assistance from others. The GP described the support/supervision required in the following comment: *"will require ongoing support from social work/safe home workers to find housing/budget/navigate legal system to attempt to secure financial support owed her by husband."* Marginal functioning in immediate and extended social networks was also noted by the GP.

Assistance Required

In the AR the GP noted that assistance with DLA is provided by community service agencies: *"social work/safe home workers"*. She also noted that the appellant routinely uses a cane to help compensate for her physical impairment.

Additional Information Received after Reconsideration

Documentary:

The appellant submitted 1 document in support of her appeal:

- May 24, 2019 Folstein Mini Mental Status Assessment (FMMSE) completed by a licensed practical nurse indicating a score of 23/30. At the hearing the appellant's advocate (L) advised that the GP had reviewed the FMMSE and could be contacted for further reference or questions.

Oral:

1. By the Appellant:

- The appellant advised the panel that she can't stand for long periods and when she gets up after sitting her knee pops out of joint. She added that she has a hard time going up the stairs to her apartment (12-13 stairs), and takes them 1 at a time. She has an appointment with a knee surgeon but there is a 2 year waiting list for surgery.
- Housework takes a long time to complete.
- She also has OA in her hands, which makes it difficult to complete her chores: *"I just slowly work at my [DLA] throughout the day"*.
- When she wakes up she needs to remain in bed for 15-20 minutes in order to be able to crawl out of bed.
- In the past she used her cane when she went out for walks but the cane was lost when she moved and she will buy a new one when she can afford it.
- Her community worker L contacts her at least twice per week and does all her paperwork for her.

2. By L:

At the hearing additional oral information was given on the appellant's behalf by L, summarized as follows:

- L has been working with the appellant since she and her spouse separated. The ex-spouse attended to all the family's finances.

- L helps with grocery shopping, food choices and “anything social”.
- One month ago the appellant moved into low income housing.

Admissibility of Additional Information

The ministry did not object to the admissibility of the document or oral evidence of the appellant. The panel admitted all of the appellant’s additional information under EAA Section 22 (4)(b) as evidence in support of the information that was before the ministry at reconsideration because all of it was directly related to the information considered by the ministry at reconsideration and did not contain substantively new information.

PART F – REASONS FOR PANEL DECISION

The issue in this appeal is whether the ministry reasonably determined that the appellant was ineligible for designation as a PWD. The ministry determined that the appellant did not meet all of the required criteria for PWD designation set out in the *Employment and Assistance for Persons with Disabilities Act*, Section 2.

Specifically, the ministry determined that the information provided did not establish that:

- the appellant has a severe 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.

Relevant 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.

EAPWDR:

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 Physical Impairment

The appellant argues that she suffers a severe physical impairment arising from OA in her knee and hands.

The ministry's position is that the information provided by the appellant, L and the GP related to the appellant's functional skills are not indicative of a severe physical impairment.

Panel Decision

A diagnosis of a serious medical condition does not in itself determine PWD eligibility. Under the legislation, eligibility for PWD hinges on an "impairment" and its severity. "Impairment" is more than a diagnosed medical condition. An impairment is a medical condition that results in restrictions to a person's ability to function independently, appropriately, effectively or for a reasonable duration.

To assess the severity of impairment one must consider the nature of the impairment and the extent of its impact on daily functioning, as evidenced by functional skill limitations and the degree to which the ability to perform DLA is restricted. The legislation makes it clear that the determination of severity is at the discretion of the minister, taking into account all of the evidence, including the evidence of the appellant. However, the legislation is also clear that the fundamental basis for the analysis is the evidence from a medical practitioner or a "prescribed professional" – in this case, the appellant's GP. The legislation requires that for PWD designation, the minister must be satisfied that the person has a severe mental or physical impairment.

The appellant indicates that it takes her a long time to complete her household chores, and her OA makes it difficult for her to get out of bed in the morning. At the time of reconsideration she used a cane to assist with walking outdoors, but for at least the last month she has walked without the assistance of a cane. In the MR the GP indicated that the appellant takes 50% longer to walk and climb and can lift and remain seated without limitation. This information is consistent with the GP's assessment in the AR.

The panel acknowledges that the appellant suffers pain and stiffness as a result of OA in her knee and hands which negatively impacts her mobility and her ability to function on a daily basis. However the information provided by the GP and the oral information provided by the appellant at the hearing indicate that her functional abilities and mobility are at best moderately impaired as a result of her OA. The panel therefore finds that the ministry reasonably determined that the information provided is not reflective of a severe physical impairment.

Severe Mental Impairment

The appellant argues that her mental functioning is severely impaired due to depression and cognitive impairment.

The ministry's position is that insufficient information has been provided to establish a severe mental impairment.

Panel Decision

1. Depression

The information provided by the GP in Section B-4 the AR indicates that the appellant has experienced severe depression for more than 10 years, which has caused significant deficits with cognitive and emotional functioning in the areas of emotion, attention/concentration, memory, executive and motivation. In her written comments the GP noted that depression has affected the appellant's motivation, memory and planning ability but the GP did not describe the extent to which these areas have been affected, making it difficult to determine the severity of restriction and/or functioning. Determination of severity of mental functioning is further complicated by the GP's assessment of the appellant's ability to perform DLA, where she indicated that the appellant is independent in all areas except paying rent, banking and budgeting.

In the area of social functioning the GP noted that the appellant requires periodic support/supervision from social or community workers to find housing, budget and navigate the legal system in the context of her marital separation. However, the oral evidence provided by the appellant and L indicates that she now has stable housing and is regularly supported by L as she adapts to new responsibilities as a single person.

2. Suspected Cognitive Impairment

In her February 24, 2019 letter the GP noted that the appellant may have a cognitive impairment that makes her unable to work, but also remarked that the appellant is not qualified for admission to an inpatient psychiatric facility. This statement supports the ministry's position that the appellant's mental impairment is not within the category of "severe".

The GP also suggested that in the past the appellant was only able to manage because she was entirely dependent upon her spouse, from whom she is now separated. Following reconsideration but prior to the hearing the appellant submitted a copy of a Folstein MMSE completed by the appellant on May 24, 2019. No explanation or conclusion was given by the licensed practical nurse who conducted the assessment. In the absence of an analysis of the results the panel cannot afford any weight to the MMSE and cannot rely upon it to support a determination of severe cognitive impairment.

In the reconsideration decision the reconsideration officer noted the GP's February 24, 2019 letter but did not include any reference to the appellant's suspected cognitive impairment or any of the other information included in the letter in its analysis of the severity of mental impairment. On this point the ministry failed to consider all of the available relevant evidence. Despite this omission by the ministry the panel finds that the ministry reasonably determined that there is insufficient information to establish a severe level of mental impairment for the reasons set out in the preceding paragraphs.

Restrictions in Ability to Perform DLA

The appellant argues that her ability to perform DLA is significantly restricted as a result of her severe physical and mental impairments.

The ministry's position is that a severe impairment has not been established that directly and significantly restricts the appellant's ability to perform DLA, and that the information submitted by the prescribed professionals is not sufficient to establish that the appellant's DLA are directly and significantly restricted either continuously or for extended periods.

Panel Decision

The legislative requirement respecting DLA set out in section 2(2)(b) of the EAPWDA is that the minister be satisfied that as a result of a severe physical or mental impairment a person is, in the opinion of a prescribed professional, directly and significantly restricted in the ability to perform DLA either continuously or periodically for extended periods. While other evidence may be considered, the ministry's determination as to whether or not it is satisfied is dependent upon the evidence from prescribed professionals. DLA are defined in section 2(1) of the EAPWDR and are listed in both the PR and the AR sections of the PWD application with the opportunity for the prescribed professional to check marked boxes and provide additional narrative.

In the AR the GP noted that the appellant has not been prescribed medications or treatment that interferes with her ability to manage DLA. The GP also indicated that the appellant is independent in all DLA except banking, budgeting and paying rent and bills. It appears from the evidence that prior to the breakdown of her marriage the appellant was entirely dependent upon her ex-spouse in these areas. This gap has now been filled by community resources that have been made available to the appellant, particularly the assistance provided by L. Community resource persons are also providing periodic support to the appellant in the areas of impaired social functioning noted by the GP in Section C of the AR.

A severe impairment was not established in the appellant's circumstances. Because this precondition was not met and because the GP indicated that the appellant is independent in the majority of areas of DLA listed in the AR the panel finds that the ministry reasonably determined that the information fails to establish that the appellant suffers from a severe impairment that in the opinion of a prescribed professional directly and significantly restricts DLA continuously or periodically for extended periods.

Help in Performing DLA

The appellant argues that she requires the significant help of another person and the use of an assistive device (cane) to perform DLA.

The ministry's position is that because the information did not establish that the appellant's DLA are significantly restricted it cannot be determined that an assistive device or significant help is required.

Panel Decision

The information before the ministry at reconsideration and the supporting information provided by the appellant prior to and during the hearing establishes that the appellant requires the significant help of a community worker to deal with shopping, filling out forms, paying bills and banking. However, given the appellant's oral evidence that she has been managing without a cane for the past month the evidence does not support a finding that she requires a cane to perform DLA.

Even though the appellant has established her need for the significant help of another person in relation to DLA

the legislation requires the establishment of direct and significant restrictions with DLA as a precondition of the "need for help" criterion. Because the panel found that the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established, the panel also finds that the ministry reasonably concluded that it cannot be determined that the appellant requires help to perform DLA as required by section 2(2)(b)(ii) of the EAPWDA.

CONCLUSION

Having reviewed and considered all of the evidence and relevant legislation, the panel finds that the ministry's reconsideration decision, which determined that the appellant was not eligible for PWD designation, was reasonably supported by the evidence, and confirms the decision. The appellant is not successful on appeal.

APPEAL NUMBER

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

Joan Bubbs

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2019/Jun/04

PRINT NAME

On behalf of Laurie Kent

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019/Jun/04

PRINT NAME

Linda Smerychynski

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019/Jun/04