

APPEAL NUMBER

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (ministry) reconsideration decision dated 6 May 2019, which determined that the appellant was not eligible for persons with disabilities designation (PWD) because he 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 he has reached 18 years of age and that his 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 he has a severe mental or physical impairment; that his severe mental or physical impairment, in the opinion of a prescribed professional, directly and significantly restricts his ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and as a result of direct and significant restrictions, he 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 18 January 2019, completed by a nurse practitioner (NP) who indicates she has seen the appellant 2-10 times in the past 12 months and known the appellant since September 2018.
- An undated Assessor Report (AR) completed by the same NP.
- A Self Report (SR) dated 14 January 2019, 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 NP provides the following diagnoses:

- Anxiety/Depression – onset November 2018
- Severe Sleep Apnea – onset December 2018
- Degenerative Disc Disease – onset 2018
- Arthritis – onset 2017

Under Health History, the NP writes:

In relation to "severe anxiety and depression":

- *loss of motivation and interest for self care activities*
- *impaired concentration making it difficult to complete tasks in a reasonable amount of time*
- *reduced interest in social engagement*

In relation to "severe sleep apnea":

- *causing daytime fatigue, lack of sleep, requires pacing of daytime activities*

In relation to "degenerative disc disease/arthritis":

- *will attach CT results*
- *likely cause of pain leading to reduced mobility*

Severity of mental impairment

MR:

The NP has ticked 'no' in response to whether there are difficulties with communication other than lack of fluency in English.

The NP indicates that the appellant has significant deficits with cognitive and emotional functioning and specifies that the deficits are evident in the area of emotional disturbance, motivation, attention or sustained concentration. No comments are provided.

AR:

In the AR, the NP 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: *Severe depression and anxiety leading to loss of motivation and impaired concentration. Severe sleep apnea resulting in insomnia and fatigue making it difficult to complete ADLs [activities of daily living] in a reasonable time.*

The NP indicates that the appellant's ability to communicate is good in the areas of speaking, reading and writing and satisfactory in the area of hearing. The NP comments: *May take longer to formulate words and articulate needs. May take longer to comprehend written words.*

The NP assesses the appellant's cognitive and emotional functioning as having major impacts in the areas of bodily functions and emotion; moderate impacts in the areas of impulse control, attention/concentration, executive, memory, motivation and other emotional/mental problems; minimal impact in the areas of language; and no impacts in the remaining 5 areas of cognitive and emotional functioning.

SR:

The appellant indicates that he suffers from depression and anxiety as well as sleep disturbance. He states that he lacks motivation, gets confused and agitated easily and has difficulty with memory, concentration, planning and organization. He further indicates that he has with difficulty putting thoughts into words and getting thoughts out clearly. He avoids social situations and tends to isolate and he gets overwhelmed and sometimes has difficulty asking for assistance.

Severity of physical impairment

MR:

For functional skills, the NP indicates that the appellant can walk 1-2 blocks unaided, climb no steps unaided (*uses handrail*), can lift under 2kg and remain seated for less than one hour. The NP has provided no "Functional Skills" comments in Part D.

The NP indicates that the appellant requires aids or prostheses for his impairment and specifies: *severe sleep apnea, recommendations for CPAP machine.*

AR:

The NP 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: *Severe depression and anxiety leading to loss of motivation and impaired concentration. Severe sleep apnea resulting in insomnia and fatigue making it difficult to complete ADLs in a reasonable time.*

The NP indicates that the appellant is independent with standing (*up to 30 minutes*), lifting (*limited up to 5 lbs.*) and carrying and holding (*limited up to 5 lbs.*); requires periodic assistance walking indoors and outdoors (*able to walk approx. 1 block*); and requires continuous assistance climbing stairs (*always has to use handrails*).

SR:

The appellant indicates that he suffers from multi-level degenerative disc disease, with numbing to parts of each foot. He states that he has tingling in his legs and arms as well as constant pain in his mid and lower back.

Ability to perform DLA

MR:

The NP indicates that the appellant has not been prescribed medication that interferes with his ability to perform DLA.

In accordance with the instructions provided in the PWD application, the NP has not completed Part E – Daily Living Activities in the MR because she has completed Part C – Daily Living Activities in the AR.

AR:

Personal Care

The NP indicates that the appellant is independent in the personal care tasks of grooming, bathing, toileting feeding, regulating diet, and transfers in/out of bed and on/off chair. The NP indicates that grooming and bathing take significantly longer than typical (*longer than normal*). The NP indicates that the appellant requires an assistive

device for dressing (*sits to get dressed*) and takes significantly longer than typical for this task.

Basic Housekeeping

The NP indicates that the appellant requires continuous assistance with laundry (*difficult carrying basket*) and takes significantly longer with basic housekeeping.

Shopping

The NP indicates that the appellant uses an assistive device and takes significantly longer than typical going to and from stores (*uses shopping cart for assistance*) and uses an assistive device for reading prices and labels (*uses glasses*). The NP indicates that the appellant is independent with making appropriate choices and paying for purchases and requires continuous assistance carrying purchases home (*independent if 5 lbs.*)

Meals

The NP assesses the appellant as independent with the meals tasks of meal planning, cooking and safe storage of food and indicates that he takes significantly longer and uses an assistive device for food preparation (*sits down to complete food prep.*)

Rent and Bills

The NP assesses the appellant as independent with all pay rent and bills activities.

Medications

The NP assesses the appellant as independent with all medications activities (*N/A for refill*).

Transportation

The NP indicates that the appellant uses an assistive device and takes significantly longer getting in/out of a vehicle (*uses door handle*) and is independent with the transportation tasks of using public transit and using transit schedules and arranging transportation.

Social Functioning

The NP indicates that the appellant is independent with developing and maintaining relationships, interacting appropriately with others and securing assistance. The NP indicates that the appellant requires continuous support/supervision with appropriate social decisions (*tries to engage with friends and supports has a difficult time finding motivation to do so*) and dealing appropriately with unexpected demands (*can become overwhelmed [with] unexpected demands*).

The NP indicates that the appellant has good functioning in his immediate social networks and marginal functioning in his extended social networks.

Help required

MR:

The NP indicates that the appellant requires aids or prostheses for his impairment and specifies: *severe sleep apnea, recommendations for CPAP machine.*

AR:

The NP indicates that the appellant receives assistance from family and friends.

The NP indicates that the appellant routinely uses a breathing device to help compensate for his impairment, specifying: *CPAP machine.* The NP indicates that equipment required but not being used is: *CPAP machine.*

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

2. Appended documents

1. Respiratory report completed 17 December 2018.
2. CT report completed 3 February 2018.

3. Request for Reconsideration

The appellant submitted a signed Request for Reconsideration dated 25 April 2019. At reconsideration, the appellant submitted a 3-page submission. This submission is a signed letter from the appellant's advocate to the NP (who completed the PWD forms), asking the NP to indicate her agreement/disagreement with a number of statements regarding the appellant's abilities. The NP has indicated her agreement/disagreement with the statements provided and signed the letter.

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

Notice of Appeal

In the Notice of Appeal dated 13 May 2019, the following reasons for appeal are provided: *I do what I can to perform daily activities by myself but in constant pain in legs, arms and back. And feel tired and worn out from my severe sleep apnea condition.*

Appeal Submissions

The appellant submitted a 4-page appeal submission, dated 27 May 2019. In this submission, the appellant argues that he meets all of the required criteria set out in the legislation and points to information in the PWD application and reconsideration submission in support of this argument. He asserts that he should be approved for PWD designation.

The ministry relied on the reconsideration decision.

Admissibility

The panel finds that the information provided in the appellant's Notice of Appeal and Appeal Submission do not contain any new information requiring an admissibility determination in accordance with section 22(4)(b) of the *Employment and Assistance Act*. Both the Notice of Appeal and Appeal Submission are comprised of reiteration of information that was before the ministry at reconsideration and argument in relation to that information.

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 his ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and
- as a result of those restrictions, he 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 NP has indicated that the appellant does require aids or prosthesis. The ministry considered the functional skills assessment by the NP noting that the appellant requires a CPAP machine but does not consider this to establish a severe physical impairment. The ministry notes that the appellant is able to walk 1-2 blocks unaided, climb no steps unaided, lift up to 5 lbs. and remaining seated for less than 1 hour. The ministry argued that a handrail is not an assistive device in accordance with the legislation because they are intended as a precaution for everyone rather than designed to enable a person with a severe mental or physical impairment to perform a DLA. The ministry argued that it is unclear why the appellant would require assistance walking indoors as he is able to walk 1 block without assistance. The ministry noted the appellant's assertion that he can only sit and stand for 30-45 minutes that mobility and physical abilities takes 2 times longer than typical; however, the minister argued that these limitations do not reflect a significant restriction. The ministry acknowledged that the appellant does have some physical functioning limitations, but concluded that these restrictions were reflective of a moderate rather than severe restriction.

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 NP's assessments of the appellant's functional capacity and mobility and physical ability assessments in the MR and AR indicate that the appellant has some limitations in with respect to walking distances and lifting more than 5 lbs. However, the panel finds the ministry's assessment that these limitations reflect a moderate rather than severe impairment to be reasonable. The panel notes that the information provided in relation to the appellant's ability to perform DLA indicates that he is largely independent with DLA tasks relating to physical function. The panel finds that a severe physical impairment has not been established. 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 NP's assessments indicate that the appellant's abilities with

speaking, reading and writing are good while hearing is satisfactory. The ministry noted that the NP indicated deficits to cognitive and emotional functioning in the MR in relation to emotional disturbance, motivation and attention/concentration and in the AR the NP indicated major impacts to emotion and bodily functions, moderate impacts to impulse control, attention/concentration, executive, memory, motivation and "other". The ministry argued that it could not determine why a moderate impact to impulse control, executive and memory are indicated in the AR as the MR does not indicate deficits in these areas. The ministry argued that it is difficult to determine the appellant's functioning in these areas. The ministry noted that in the reconsideration submission, the NP has agreed that there are major impacts to attention or concentration and motor activity. The ministry argued that no information is provided to explain this major impact to motor activity (increased or decreased goal-oriented activity, co-ordination, agitation, ritualistic or repetitive action and bizarre behaviour) in relation to the diagnosis of anxiety and depression. The minister further argued that in the AR, the NP indicated no impact in relation to motor activity. The ministry argued that, while there are some areas in which the NP has indicated major impacts to the appellant's functioning, he is independent with most DLA. Specifically, the ministry noted the appellant's independence with tasks that would typically be difficult for a person who experienced significant difficulties with motivation, depression/anxiety and concentration. As well, the ministry noted the absence of information relating to support/supervision required by the appellant with respect to social functioning areas. The ministry concluded that the information provided had not established a severe impairment in mental functioning.

The panel finds that the ministry's determination that a severe mental impairment has not been established was reasonable. The panel notes that the NP's assessments in the MR and AR indicated some deficits with respect to cognitive and emotional functioning; however, according to those same assessments, these deficits do not appear to manifest in manner that impairs the appellant's ability to function effectively or independently. The panel notes the NP's assessments relating to decision-making indicate that the appellant is independent in all areas. The panel also notes that the appellant has been assessed as largely independent with social function and with no communication difficulties. The NP does not provide any information regarding safety issues or support required to maintain in the community. 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 NP. 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 NP has indicated that there are no medications/treatments that interfere with the appellant's ability to perform DLA. The ministry noted that the NP indicates that the appellant takes significantly longer with some DLA and indicates in his self-report that these activities take twice as long. However, the ministry argued that this extra time does not represent a significant restriction to these DLA. The ministry also noted the appellant's assessed need to sit while dressing, use a shopping cart to go to and from stores, use glasses to read prices and labels and use the door handle to get in and out of a vehicle. The ministry argued that these items are not assistive devices in accordance with the legislation because they are not devices designed to enable a person to perform DLA that the person is unable to perform because of a severe mental or physical impairment. The ministry also noted the need for continuous assistance with carrying purchases over 5 lbs. and laundry. The ministry argued that the appellant is able to perform these activities to some degree without assistance and that a 5 lb. lifting limitation does not amount to a significant restriction to performing laundry tasks. The ministry concluded that not enough evidence had been provided to establish that a severe impairment significantly restricts the appellant's ability to perform 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 NP, in both the PWD assessments

and in the reconsideration submission, has assessed the appellant as being largely independent with performing DLA. The panel notes here that the reconsideration submission prompts the NP to agree or disagree with the appellant's statement that he requires continuous assistance or is unable to perform several DLA. In relation to some of these prompts the NP indicates that she does not agree (grooming, dressing, bathing); in relation to others she has modified her agreement by commenting "reduced ability" (food preparation and cooking); and in relation to laundry, carrying purchases home and social functioning the NP indicates her agreement. The panel finds that a holistic view of the information provided by the NP demonstrates some restriction is assessed in relation to lifting over 5 lbs. and some reduced ability in relation to some aspects of meals preparation and some aspects of social functioning. However, the panel finds that these assessments do not demonstrate direct and significant restrictions to DLA continuously or periodically for extended periods. In particular, the panel notes an insufficiency of information from the NP relating to type/amount of assistance required and/or how much longer the appellant requires to complete tasks. The appellant himself indicates that some tasks take twice as long; however, this information is not in the opinion of a prescribed professional and is, in some instances, inconsistent with the information that has been provided by the prescribed professional. The panel concludes that the ministry's determination that the evidence is insufficient to show that the appellant's overall ability to perform 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. According to the legislation, at section 2(1), 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.*

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. Furthermore, the ministry determined that the appellant's medical practitioner had not confirmed the need for assistive devices.

While the information provided indicates that the appellant does receive assistance from family and friends, the panel has concluded above that the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established. As such, the panel also 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. In reaching this conclusion, the panel makes two additional findings. First, the panel finds the ministry's conclusions regarding the use of eye glasses, handrails, etc. as not meeting the legislated definition of "assistive device" to be a reasonable application of the legislation. Second, the panel finds that the ministry's determination that the appellant's medical practitioner had not confirmed the need for assistive devices is not a reasonable application of the legislation. The panel finds that the legislation does not require that a medical practitioner must confirm the need for an assistive device. In the context of this appeal, the ministry's unreasonable application of this requirement is moot as significant restrictions to DLA must be found as a pre-condition to the 'help' criterion to being met and significant restrictions to DLA have not been established. As such, the panel finds that the ministry's conclusion that this criterion has not been met is reasonable.

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.

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

Jennifer Smith

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2019/06/20

PRINT NAME

Robert Kelly

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019/06/20

PRINT NAME

Wendy Marten

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019/06/20