

PART C – DECISION UNDER APPEAL

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Poverty Reduction (the ministry) dated June 25, 2019, which held that the appellant did not meet 3 of the 5 statutory requirements of section 2 of the *Employment and Assistance for Persons with Disabilities Act* (EAPWDA) for designation as a person with disabilities (PWD). The ministry found that the appellant met the requirements of having reached 18 years of age and of a medical practitioner confirming that the appellant's impairment is likely to continue for at least 2 years.

However, the ministry was not satisfied 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 those restrictions, in the opinion of a prescribed professional, the appellant requires an assistive device, the significant help or supervision of another person, or the services of an assistance animal to perform DLA.

PART D – RELEVANT LEGISLATION

Employment and Assistance for Persons with Disabilities Act (EAPWDA), section 2

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR), section 2

PART E – SUMMARY OF FACTSInformation before the ministry at reconsideration

- The appellant's PWD application, comprised of:
 - A Medical Report (MR) and an Assessor Report (AR), both dated December 13, 2018, completed by a general practitioner (GP) who has known the appellant for one year and relied on an interview with the appellant and file/chart information (facet block report, pain assessment) to complete the application; and,
 - The self-report (SR) section of the PWD application, dated November 5, 2018.
- December 12, 2018 Radiology Report.
- Pain Disability Index, Brief Pain Inventory and a Pain and Sleep Questionnaire completed by the appellant.
- The appellant's Request for Reconsideration submission dated May 27, 2019, with the following attachments:
 - Page 17 of the AR as completed by the GP, with amendments by the appellant who writes that the amendments were rechecked by the GP [the page is not signed by the GP].
 - Copies of blank pages 19 and 20 of the AR (Part C – Daily Living Activities) upon which the appellant has provided information respecting the DLA basic housekeeping.

Information provided on appeal and admissibility

- Notice of Appeal (NOA) dated July 10, 2019.
- The appellant's appeal submission comprised of:
 - A 5-page form [not a ministry form] entitled Persons with Disabilities Designation Application (Application Form) on which the appellant has placed check marks beside listed headings for daily activities, mental and emotional skills, social skills, communication, and assistance. The appellant writes that "All items with a ✓ mark indicate issues."
 - An August 12, 2019, 2-page letter signed and stamped by the GP.
 - An August 12, 2019, 2-page letter from a former ministry employee. The relationship between this person and the appellant is not stated.
- September 9, 2019, letter from the ministry stating: "The ministry has reviewed the additional information from the appellant. Had the ministry had this information at the time of the reconsideration decision, the ministry may have found his (sic) request had met the criteria for Persons with Disabilities designation." The ministry does not comment on the admissibility of the additional information.

In accordance with section 22(4) of the *Employment and Assistance Act* (EAA), the panel may admit oral and written testimony that is in support of the information and records available at the time of reconsideration.

The panel determined that the information in the Application Form relating to the appellant's physical impairment was admissible on the basis that it related to medical conditions diagnosed in the MR and supported information previously provided by the appellant. The panel did not admit information in the Application Form relating to emotional, social and cognitive function as no mental diagnoses or mental health information from the GP or the appellant was before the ministry at reconsideration.

The arguments of the ministry and the appellant are set out in Part F of this decision.

Summary of relevant evidence

Diagnoses and Health History

In the PWD application, where asked to specify diagnoses related to the applicant's impairment and indicate the severity of the medical conditions relevant to the impairment, the GP reports:

- Lower back pain – onset 1979.
 - Radiologic findings: anterior wedging at L2, narrowing at disc space L5-S1, and facet arthritis L5-S1.
 - Clinical exam: no radiculopathy or neurogenic claudication or myelopathy.
 - Mobility: gait mostly normal.
 - Subjective pain: Brief Pain Inventory Score 59; Pain Disability Index 61. Objective and subjective findings do not correlate as disability due to pain severe but clinical findings mild.

- COPD [chronic obstructive pulmonary disease] – onset 2018
 - Mild on spirometry.
 - Patient continues to smoke.
 - Medication started 2 days ago.

Impairment: Family/home responsibilities, recreation and social activity, occupation, self-care, and sleep.

Subjective impairment severe 7-9/10 (1 = no disability, 10 = worst disability). Patient says she is not able to work anymore because of back ache.

In her NOA, the appellant writes "My condition has escalated."

Physical Impairment

In the MR, the GP reports that no prostheses or aids are required for the appellant's impairment and assesses the appellant's functional skills as:

- able to walk 4+ blocks unaided on a flat surface;
- able to climb 5+ steps unaided;
- limitations in lifting are unknown.; and
- can remain seated for 1 to 2 hours.

In the MR, the GP reports that walking indoors and outdoors, climbing stairs, standing, lifting, and carrying/holding are managed independently.

In her SR, the appellant reports ongoing pain that has worsened since 1979, when her back, pelvis and leg were broken, and that COPD makes it "very difficult breathing on walks or stairs." She cannot stand or sit for any length of time without extreme pain, cannot pick her grandchildren up, and has trouble reaching, bending over, and rotating her arm left to right.

In her reconsideration submission, the appellant reports that she can barely make it a block or climb more than a few stairs. The shortness of breath and back pain are just too severe. COPD impedes almost everything she does and she is constantly coughing. Prescription puffers do provide relief at times. Due to financial restraints and the inability to earn more money, she cannot access proper care.

In the revised page 17 of the AR, the appellant reports that she is not independent walking outdoors, for which she needs continuous help from another person, and that she needs periodic assistance from another person with climbing stairs, lifting ("can't") and carrying/holding.

In the Application Form, the appellant identifies issues with all listed aspects of mobility inside including: finding a comfortable position to lie in; getting in and out of bed/the tub/chairs; walking from room to room; sitting in chairs; climbing and descending stairs; and, bending to pick things up off the floor. She has issues with climbing and descending stairs or ramps and walking on uneven pavement/ground, and cannot walk more than 2 blocks without aid of rest.

In the August 12, 2019, letter signed by the GP, indicates that the GP concurs with the appellant's own assessment in the Application Form. Additionally, all tasks the appellant is able to do take significantly longer to complete. A walker would be helpful and handicap equipment for the washroom is required.

DLA

In the MR and AR, the GP reports the following.

- The appellant has not been prescribed medications that interfere with the ability to perform DLA – may cause sedation.
- All listed aspects of mobility and physical ability (relates to the DLA move about indoors and outdoors), personal care, basic housekeeping, shopping, pay rent and bills, medications, and transportation are managed independently.
- For the DLA meals, food preparation and cooking require periodic assistance from another person. Meal planning and safe storage of food are managed independently.
- The section relating to social functioning has been crossed out by the GP.

In his SR, the appellant writes that she is not independent, being totally dependent on others for rides to appointments, paying bills, getting groceries, and other daily life errands. She cannot lift a box of dishes, her baby grandchildren, heavy grocery bags, a vacuum etc. She can only manage light housekeeping; it is much too difficult to vacuum, scrub a bathroom, wash windows, change fitted bed sheets, carry a basket of laundry upstairs, mop floors, and other such routine tasks.

In Section C – Daily Living Activities of the AR completed by the appellant, the appellant indicates that she requires continuous assistance with laundry and basic housekeeping. No information is provided respecting personal care, shopping, meals, pay rent and bills, medications, and transportation.

In the Application Form, the appellant describes her disability as “COPD – flare ups every day. 3 broken vertebrae compounded with arthritis – cannot operate. Left femur broken compounded with arthritis.” The appellant describes how her disability affects her ability to take care of herself as “Anxious – High blood pressure (on medication) Heart races (on medication).” She has identified issues and listed all aspects of house cleaning, mobility inside and outside the home, as well as with most aspects of using transportation, meal preparation, and personal hygiene and self-care. The appellant reports the need for assistance/supervision from another person for 14-21 hours per week and that she requires toilet rails, shower/bathtub rail, wall bars, and jar openers.

As noted above, in the August 12, 2019, letter the GP concurs with the appellant’s information in the Application Form. The letter also states that the appellant’s impairment directly and significantly restricts her ability to perform DLA, a restriction that is continuous and for extended periods.

Need for Help

In the AR, the GP identifies the need for periodic assistance from another person with basic housekeeping, food preparation and cooking.

In the August 12, 2019 letter, the appellant is reported as needing significant help and assistance and that a walker would be helpful. The GP also concurs with the appellant’s self-reported need for assistive devices.

PART F – REASONS FOR PANEL DECISION**Issue on Appeal**

The issue on appeal is whether the ministry's decision to deny the appellant designation as a PWD was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. That is, was the ministry reasonable when determining that the requirements of section 2(2) of the EAPWDA were not met because:

- a severe physical or mental impairment was not established;
- the appellant's DLA are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and
- as a result of those restrictions, in the opinion of a prescribed professional, the appellant does not require an assistive device, the significant help or supervision of another person, 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 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.

Panel Decision

Physical Impairment

On appeal, the appellant argues that her condition has escalated as described in the Application Form, the letter signed by the GP, and the letter of support which establish that she has a severe impairment.

At reconsideration, the ministry argued that the level of independent physical functioning assessed by the GP does not describe a severe degree of physical impairment. In reaching this conclusion, the ministry notes that the GP reports that no assistive aids are required and that employability or vocational ability is not taken into consideration. On appeal, the ministry's position is that it "may" have found the appellant met the requirements for PWD designation.

Panel Analysis

The legislation, section 2 of the EAPWDA, requires that the minister "is satisfied" that a person has a severe physical or mental impairment which gives the ministry discretion when making the determination. In exercising its decision-making discretion the ministry must consider all of the evidence and assess the relative weight to be placed on evidence where there is conflicting information.

While the appellant was originally assessed by the GP as independently managing all aspects of mobility and physical ability at levels that were reasonably viewed as not in keeping with a severe physical impairment, the information on appeal, as confirmed by the GP, is that the appellant physically functions at a markedly reduced level. Specifically, walking is limited to 1 or 2 blocks before rest is required, steps cannot be managed, lifting requires assistance, and mobility indoors is impaired. Based on the current assessment of physical functioning, which was not available to the ministry at reconsideration, the panel concludes that the ministry's decision that the information did not establish a severe physical impairment was not reasonable.

Mental Impairment

The appellant does not expressly argue that she has a severe mental impairment but does report issues with emotional, social and cognitive functioning in the Application Form.

The ministry's position at reconsideration is that it is not satisfied that the information provided is evidence of a severe mental impairment as the GP reports that the appellant has no communication difficulties or significant deficits with cognitive and emotional function and that there is no impact on daily cognitive and emotional functioning. On appeal, the ministry's position is that it "may" have found the appellant met the requirements for PWD designation.

Panel Analysis

The panel notes that the GP has not diagnosed a mental impairment or brain injury or reported any impact on cognitive, emotional or social functioning in the PWD Application and on that basis, the panel did not admit the portions of the Application Form in which the appellant identified issues in these areas. The panel also notes that the August 12, 2019, letter signed by the GP does not address mental functioning or impairment. For these reasons, the panel concludes that the ministry was reasonable to determine that a severe mental impairment was not established.

Restrictions in the ability to perform DLA

The appellant's position is that she is not independent and requires significant ongoing assistance from others to manage her DLA, including basic housekeeping, shopping, and transportation and that she requires assistive devices to manage personal care.

Noting that the legislation requires that restrictions in the ability to perform DLA be both significant and either continuous or periodic for extended periods, at reconsideration the ministry argued that as there is no description of the type, frequency or duration of assistance required for basic housekeeping, food preparation and cooking, and as all other DLA tasks are managed independently, significant restrictions are not established, either continuously or periodically for extended periods. On appeal, the ministry's position is that it "may" have found the appellant eligible for PWD designation based on the additional information.

Panel Analysis

Section 2(2)(b)(i) of the EAPWDA requires that the minister be satisfied that, in the opinion of a prescribed professional, a severe mental or physical impairment directly and significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods. While other evidence may be considered for clarification or support, 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 MR and the AR sections of the PWD application with the opportunity for the prescribed professional to check marked boxes and provide additional narrative. DLA, as defined in the legislation, does not include the ability to work. While there is likely some crossover between restrictions impacting the ability to work and those impacting the ability to perform DLA, the demands of employment are routinely more demanding in terms of frequency and duration than managing DLA, and more importantly, only restrictions on the ability to perform the DLA set out in the legislation are considered under section 2(b)(i) of the EAPWDA.

In this case, the GP is the only prescribed professional providing information respecting the appellant's ability to perform DLA. The GP's assessments in the MR and the AR clearly identified the ability to perform DLA with a

degree of independence not reflective of significant restrictions that were either continuous or periodic for extended periods. However, the current information provided by the appellant in the Application Form, with which the GP concurs, is that the appellant is continuously dependent on other people for tasks related to basic housekeeping, shopping and transportation, that activities of personal care require the use of assistive devices, and that the ability to move about indoors and outdoors is limited in terms of walking distance (1-2 blocks) and by the inability to manage stairs. Additionally, for activities the appellant can independently perform, she takes significantly longer.

Based on the current information respecting the ability to manage DLA, which was not available at reconsideration, the panel concludes that the ministry decision that direct and significant continuous restrictions in the ability to perform DLA were not established was not reasonable.

Help to perform DLA

Section 2(2)(b)(ii) of the EAPWDA requires that, *as a result of direct and significant restrictions in the ability to perform DLA*, a person requires help to perform "those activities." Help is defined in subsection (3) as the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform DLA.

The establishment of direct and significant restrictions with daily living "activities" is a precondition of requiring "help to perform those activities." In this case, the panel found the ministry unreasonable in concluding that direct and significant restrictions with DLA were not established. Given the current information describing the need for assistance from other people regularly to assist with shopping, housekeeping and transportation as well as the need for assistive devices to manage personal care, the panel concludes that the ministry unreasonably concluded that the significant help of another person and assistive devices were not required as a result of direct and significant restrictions with DLA.

Conclusion

The panel finds that the ministry's reconsideration decision, which determined that the appellant was not eligible for PWD designation, was not reasonably supported by the evidence, and therefore rescinds the decision. The appellant is 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

Jane Nielsen

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2019/09/17

PRINT NAME

Shirley Heafey

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019/09/17

PRINT NAME

Barbara Insley

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019/09/17