

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the Ministry) Reconsideration Decision dated September 19, 2019, which found that the Appellant did not meet two of the five statutory requirements of Section 2 of the *Employment and Assistance for Persons with Disabilities Act* (EAPWDA) for designation as a person with disabilities (PWD). While the Ministry found that the Appellant met the age requirement and had a severe mental impairment which was likely to continue for at least two years, the Ministry was not satisfied that the evidence establishes that:

- 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.

The Ministry also found that the Appellant is not one of the prescribed classes of persons who may be eligible for PWD designation on the alternative grounds set out in Section 2.1 of the *Employment and Assistance for Persons with Disabilities Regulation* (EAPWDR) and the Appellant did not appeal the decision on this basis.

PART D – RELEVANT LEGISLATION

EAPWDA, Section 2

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

PART E – SUMMARY OF FACTS

The evidence before the Ministry at the time of the Reconsideration Decision included the PWD Application comprised of a Self Report (SR) dated June 10, 2019, a Medical Report (MR) dated June 20, 2019 and completed by a General Practitioner (GP) who has known the Appellant for more than 10 years and has seen the Appellant 2 – 10 times in the past year, and an Assessor Report (AR) also dated June 20, 2019, and also completed by the GP.

The evidence also included:

1. A Request for Reconsideration (RFR) dated September 5, 2019, which states that the Appellant:
 - Cannot remain seated for more than an hour at a time because their anxiety makes them very jittery;
 - Is unable to read or write for many consecutive days because “*(the Appellant gets) so anxious at the idea that it will send (them) into a panic*”;
 - Re-reads the same passage when they try to read because they cannot process the information;
 - Is too anxious to speak to people, especially ones the Appellant doesn’t know, because of their anxiety;
 - Believes their memory has been severely impacted by their anxiety because they forget entire conversations;
 - Has experienced impacts to their emotional functioning, including a severe emotional disturbance and severe lack of motivation due to their anxiety and depression;
 - Often cannot leave the house due to anxiety and depression, which impacts the Appellant’s DLA; and
 - Requires continuous assistance from a parent, who has taken a leave of absence from work to help the Appellant, with meal preparation, basic housework, cooking, food preparation, daily shopping, management of finances, paying rent and bills, and filling and refilling prescriptions, for all of which DLA the Appellant requires continuous assistance;
2. A diagnosis and treatment plan, dated June 11, 2019, prepared by a medical practitioner on behalf of the Appellant, diagnosing the Appellant with a general anxiety disorder (GAD), referencing a personal crisis for which the Appellant was hospitalized for 10 days and prescribing a treatment plan involving medication and regular counselling, and identifying “*no acute safety concerns*” and no requirement for a follow-up appointment; and
3. Sixteen specialist referral reports (SRRs), dated between April 30, 2012 and May 9, 2018, prepared by a specialist in gastroenterology and internal medicine on behalf of the Appellant for referrals made by the Appellant’s GP, identifying several physical impairments, including Crohn’s disease (CD) and recommended treatments, but otherwise referring to physical impairments unrelated to the GP’s physical impairment diagnosis as set out below. No mental impairments are referenced in any of the specialist referral reports.

Diagnoses

In the MR, the Appellant's GP provides the following specific diagnoses: mood disorder, with an onset of 2018, anxiety disorder, with an onset of 2015, and Chron's (sic) disease, with an onset of 2012.

Mental Impairment

The Ministry is satisfied that the information provided establishes a severe mental impairment.

Physical Impairment

The Ministry is not satisfied that the information provided establishes a severe physical impairment.

In the section of the MR where the prescribed professional is asked to indicate how the Appellant's medical condition impairs the Appellant physically, the GP writes "*(The Appellant was diagnosed with) Chron's (sic) in 2012, with debilitating (abdominal) pain, diarrhea, dural fistula (at the) age (of) [REDACTED] years. (The Appellant) tried some medications (that were) not effective and (they) eventually started on (illegible) and more recently has been stable with (their) Inflammatory bowel disease (IBD). This has led to (their increased) anxiety and mood disorders ...*". In another section of the MR, the GP has indicated that the Appellant has no restrictions or limitations with respect to their ability to walk unaided on a flat surface, how many stairs they can climb unaided, the Appellant's ability to lift objects, or how long the Appellant can remain seated. In the section of the MR where the prescribed professional is asked to provide any additional information considered relevant to understanding the significance of the Appellant's medical condition, the nature of the Appellant's impairment, and the impact the impairment has on the Appellant's daily functioning, the GP has written "*Nothing additional*".

Where asked in the AR what impairments impact the Appellant's ability to manage DLA, the GP has not identified any physical impairments.

The Appellant has not identified any physical impairments that impact their ability to perform DLA in the SR.

Restrictions in the Ability to Perform DLA

In the section of the MR where the prescribed professional is asked whether the applicant has been prescribed any medications or treatments that interfere with their ability to perform DLA, the GP has ticked "Yes", and written "*ability → (tremors). Trazodone → drowsiness in the mornings, takes a while to focus and start (their) day ... Medications are anticipated to be used (illegible) at this time. May be some reduction in strength*". The GP has also indicated that the Appellant's impairment directly and continuously restricts their ability to perform DLA in the areas of personal self care, meal preparation, basic housework, daily shopping, and management of finances, and periodically for use of transportation, adding the comment with respect to the periodic restrictions associated with using transportation "*Due to social anxiety, (the Appellant) periodically needs to take other forms of transportation, or avoid it at all times*". Where asked what assistance the Appellant needs with DLA, the GP has written "*No assistance required in this field*". Where asked to provide any additional information that the prescribed professional considers relevant to understanding the significance of the applicant's

medical condition, the nature and extent of the person's impairment and the impact these have on the applicant's daily functioning, the GP has written "*nothing additional*".

In the AR, the GP states that the Appellant has a good ability to speak and hear and a poor ability to read and write, adding "*Due to lack of concentration these are significantly impacted. Limited capacity when anxious and depressed*". Where asked what mental or physical impairments impact the applicant's ability to manage DLA, the GP has written "*(Decreased) focus, (decreased) concentration and motivation, anxiety symptoms; Depression. Hard to get out of bed*". With respect to whether the Appellant requires assistance in performing DLA, the GP states that the Appellant is independent with respect mobility and physical ability, and to DLA in the areas of self-feeding and transferring in and out of a bed or chair, reading prices and labels when shopping, paying for purchases and carrying them home, the safe storage of food, taking medications as directed, the safe handling and storage of medications, getting in and out of a vehicle and using transit schedules and arranging transportation. The GP states that the Appellant takes significantly longer than typical with dressing, grooming, bathing, toileting, regulating their diet, basic housekeeping activities, going to and from stores, making appropriate choices, meal planning, food preparation and cooking. The GP also indicates that the Appellant needs periodic assistance from another person in banking, budgeting, paying rent and bills, filling and refilling prescriptions and using public transit, adding that the Appellant is "*not able to use public transportation due to anxiety*". The GP has not responded to the question "Explain/Describe the amount of assistance required", but has provided the following additional comments: "*Patient says that (they) need assistance, motivation, reminders to do self-care ... (The Appellant) needs excess time to (perform the personal care) DLA ([increased] motivation, time, etc.) to get it started. Avoids shopping due to anxiety and can be impulsive and not make appropriate choices. Patient needs periodic assistance in executive functioning. Is periodically not able to use public transit due to anxiety*".

In the SR, the Appellant states that they struggle with DLA and that their social life has been restricted because they are unable to leave the house. The Appellant writes "*At times I am unable to complete household responsibilities (ex. cooking, cleaning, laundry, etc.) or to maintain my personal (hygiene) (ex. unable to shower, wash face, etc.). Often, previously enjoyable activities are no longer enjoyable, or I do not have the motivation to do them. I am often distracted and struggle to concentrate. Often this lack of concentration is filled with negative thoughts and worse case scenarios and I struggle to come out of it. This lack of concentration (means that I) cannot read or write. I often cannot sit still during (these times) as well.*"

Need for Help

In the MR the GP indicates that the Appellant does not require any prostheses or aids for impairment.

In the AR, the GP writes "*(The Appellant) relies on (a parent) who left (their) job to assist (the Appellant in taking) care of (themselves)*", and that the Appellant "*continuously relies on ... family (for) meal (preparation) and (planning) because (they) will not eat if not provided with meals, and would make extreme unhealthy choices.*" The GP also states that the Appellant needs periodic assistance with executive functioning. The GP has indicated that the Appellant does not have an assistance animal. In the SR, the Appellant states that a parent left their job to support the Appellant because the Appellant struggles with DLA.

Additional Information Submitted after Reconsideration

In the Appellant's Notice of Appeal (NOA) dated September 26, 2019, the Appellant states that they believe that their anxiety, depression and Crohn's disease directly and significantly restricts their DLA and that they require assistance as a result of these restrictions.

At the hearing, the Appellant provided a copy of an SRR dated October 4, 2019 (the October 4 SRR), prepared by the same specialist in gastroenterology and internal medicine identified above. The October 4 SRR provides details of a colonoscopy and several biopsies which indicate that the Appellant's Crohn's colitis is no longer in remission and is mildly to moderately active. The SRR also provides details regarding prescribed treatments, including medications, and a treatment plan, but does not address any mental impairments. The Ministry did not object to the Panel admitting the information contained in the October 4 SRR.

At the hearing, the Ministry stated that their DLA are directly and significantly restricted and that they need continuous assistance from their parent to perform DLA. The Appellant explained that their anxiety makes them unable to use a public toilet, which keeps them from leaving the home unless absolutely necessary. The Appellant also stated that they have problems keeping up with personal hygiene, preparing meals etc., and that the Appellant's parent, with whom they live, is still off work to look after the Appellant, has now been off work since May 2019, and will have to continue to be off work indefinitely in order to assist the Appellant with their DLA.

When asked by a Panel member to provide a summary of challenges with DLA and need for help on the Appellant's worst days, the Appellant stated that they can't get out of bed in the morning, and that they have no motivation to look after their personal hygiene, to plan or prepare meals, or to do any basic housekeeping without the help of their parent. In terms of the frequency of their periodic restrictions, the Appellant stated that they have a severe panic attack about once every five days, that they experience the significant lack of motivation to perform DLA about 4 days of every week, and that about 90% of the time they are unable to use public transit due to anxiety and the fear of needing to use a bathroom while travelling to one of their frequent medical appointments. The Appellant also provided details of the side effects of the medications they have been taking, including one new one which makes the Appellant anxious because it has to be taken directly into the bloodstream and another which causes tremors and makes the Appellant feel like they have to be walking, making them unable to sit for any length of time.

At the hearing, the Ministry explained that in did not see enough evidence in the Appellant's PWD application to confirm that a severe mental or physical impairment significantly restricts the Appellant's ability to perform DLA because of the way that the application was completed. The Ministry explained that the prescribed professionals who complete the MR and the AR have to complete the application and indicate restrictions that exist on the applicant's worst days. The Ministry also stated that "*if a psychiatrist had filled out the AR section it would have been better*" and that the Ministry was not saying that the Appellant was not severely impaired, just that the application did not provide enough information for the Ministry to confirm the direct and significant restrictions.

Admissibility of Additional Information

Section 22(4) of the EAA provides that panels may admit as evidence (i.e. take into account in making its decision) the information and records that were before the Ministry when the decision being appealed was made and "*oral and written testimony in support of the information and records*" before the Ministry when the decision being appealed was made – i.e. information that substantiates or corroborates the information that was before the Ministry at reconsideration. Because a panel can only accept oral and written testimony in support of the information and records before the Ministry when the decision was made, there is limited discretion for a panel to admit new evidence. Once the panel has determined which additional evidence is admissible under EAPWDA Section 22(4), instead of asking whether the decision under appeal was reasonable at the time it was made, panels must determine whether the decision under appeal was reasonable based on all admissible evidence.

The Panel considered the written information in the NOA to be argument.

The Panel admitted the new information contained in the October 4 SRR as written testimony in support of the records before the Ministry at reconsideration and the Appellant's oral testimony at the hearing with respect to the frequency of their periodic restrictions in performing DLA to be oral testimony in support of the information that was before the Ministry at reconsideration.

PART F – REASONS FOR PANEL DECISION

The issue under appeal is whether the Ministry's Reconsideration Decision, which found that the Appellant is not eligible for 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. Having been satisfied that the Appellant had a severe mental impairment, was it reasonable for the Ministry to determine that the evidence, in the opinion of a prescribed professional, does not establish that the Appellant's DLA are directly and significantly restricted either continuously or periodically for extended periods? Was it reasonable for the Ministry to determine that as a result of those restrictions, it could not be determined that 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?

The criteria for being designated as a PWD are set out in Section 2 of the EAPWDA as follows:

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 EAPWDR provides as follows:

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 ...

Severe Physical Impairment

The Ministry's position is that the functional skill limitations as assessed by the GP do not describe a severe degree of physical impairment. Therefore, the Ministry is not satisfied that the information provided is evidence of a severe physical impairment. The Appellant's position is that, in addition to

initially causing their anxiety and depression when it first appeared in 2012, their Crohn's disease has also resulted in a severe physical impairment.

Panel Decision

The Panel notes that the Appellant has argued that their anxiety makes them jittery to the point that they “cannot remain seated for more than an hour at a time”. While functional skill capabilities (in this case the Appellant's ability to remain seated) can be directly or indirectly affected by mental impairments, an individual's functional skill capabilities, such as whether they require assistive devices or are otherwise limited in performing physical tasks like walking, sitting, lifting and carrying, primarily serve to indicate the degree to which a person has a physical impairment.

In its Reconsideration Decision, the Ministry writes “to assess the severity of a physical impairment the Ministry must consider the nature of the impairment and the extent of its impact on daily functioning as evidenced by limitations / restrictions in mobility, physical ability, and functional skills”. The Panel finds that Ministry's practice of assessing the severity of a PWD applicant's physical impairments largely based on a prescribed professional's assessment of functional limitations to be reasonable.

The Panel notes that the GP has indicated in the MR that the Appellant has no restrictions or limitations with respect to their ability to walk unaided on a flat surface, how many stairs they can climb unaided, the Appellant's ability to lift objects, or (despite the Appellant's testimony to the contrary vis a vis the impact of medication relating to their mental impairment) how long the Appellant can remain seated. In addition, the Panel notes that the GP has indicated in the MR that the Appellant's Crohn's disease has led to their increased anxiety and mood disorders (i.e. a mental impairment) but has not identified any severe physical impairments resulting from that medical condition.

Based on the records and information available at the time that the Reconsideration Decision was made, including all admissible evidence in support of the information and records, the Panel finds that the Ministry reasonably determined that the Appellant does not have a severe physical impairment.

Restrictions in the Ability to Perform DLA

The Ministry position is that, based on the assessments provided by the GP, while the Appellant experiences some restrictions to DLA as a result of a medical condition, there is not enough evidence to confirm that a severe mental or physical impairment significantly restricts the Appellant's ability to perform DLA either continuously or periodically for extended periods. The Appellant's position is that their anxiety, depression and Crohn's disease directly and significantly restricts their ability to perform DLA.

Panel Decision

Section 2(2)(b) of the EAPWDA requires that the Ministry be satisfied that a prescribed professional has provided an opinion that an applicant's severe impairment directly and significantly restricts their DLA, continuously or *periodically for extended periods* (emphasis added). In this case, the GP is the prescribed professional. DLA are defined in Section 2(1) of the EAPWDR and are also listed in the MR and, with additional details, in the AR.

In its Reconsideration Decision, the Ministry acknowledges that the Appellant's GP indicates that "*(the Appellant is) periodically restricted with using transportation, noting "Due to social anxiety, (the Appellant) periodically needs to take other forms of transportation, or avoid it at all times." The GP also indicates (that the Appellant is) continuously restricted in (their) ability to perform personal self care, meal preparation, basic housework, daily shopping and management of finances" [emphasis added].* The Ministry goes on to say "*While (the GP) identifies that (the Appellant experiences) continuous restrictions in these DLA, (the GP) does not provide any information to describe the degree of the restrictions*".

The Panel notes that the GP has stated that the Appellant is continuously restricted in a significant number of DLA. The Panel further notes that the Appellant stated at the hearing that their periodic restrictions with respect to using public transportation (unable to use it 90% of the time), inability to find the motivation to get out of bed, look after their personal hygiene, plan and prepare meals or do basic housekeeping (4 days a week) and the frequency of their anxiety attacks (once every five days or 6 times a month). The Panel finds that these frequencies of severe impairment would be reasonably expected to provide evidence of "extended periods" of periodic restrictions.

Having reviewed all of the evidence, the Panel finds that the Ministry was not reasonable in determining that as a result of their severe mental impairment the Appellant is not directly and significantly restricted either continuously or periodically for extended periods in their ability to perform DLA.

Help with DLA

The Ministry's position is that it cannot be determined that significant help is required because it has not been established that DLA are significantly restricted. The Appellant's position is that they cannot manage DLA without the continuous assistance of a live-in family member.

Panel Decision

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 one or more DLA.

The Panel also notes that the Ministry acknowledges that the GP has reported that the Appellant requires periodic assistance with paying rent and bills, filling/refilling prescriptions and using public transit. The Ministry goes on to say that the GP does not provide any information to explain the frequency or the degree of the assistance that the Appellant requires to help manage their DLA, and that as a result, the Ministry is unable to establish that the Appellant requires a significant degree of assistance for extended periods of time.

The Panel notes that the Appellant's GP has reported that the Appellant requires periodic assistance with a large number of DLA (paying rent and bills, filling/refilling prescriptions and using public transit) and that the Appellant continuously relies on family for meal preparation and planning. In addition, the Appellant explained at the hearing that the parent who provides assistance with DLA does so continuously and lives with the Appellant full-time in order to be there to provide the required assistance. Therefore, having reviewed all of the evidence, the Panel finds that the Ministry was not reasonable in

determining that it could not be demonstrated that the Appellant requires significant help in order to perform DLA.

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 the PWD designation under Section 2 of the EAPWDA, was not reasonably supported by the evidence, and therefore rescinds the decision. Therefore, the Appellant's appeal is successful.

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

Simon Clews

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2019/10/19

PRINT NAME

Jennifer Armstrong

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019/10/19

PRINT NAME

Kulwant Bal

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)