

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 August 8, 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* for designation as a person with disabilities (PWD). The ministry found that the appellant met the age and duration requirements, but was not satisfied that:

- the appellant has a severe physical and/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, 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 FACTS

With the consent of both parties, the hearing was conducted as a written hearing, pursuant to section 22(3)(b) of the *Employment and Assistance Act*.

The evidence before the ministry at the time of the Reconsideration Decision included:

- The information before the ministry at the time of reconsideration included the appellant's PWD application comprised of a Medical Report (MR) [dated May 28, 2019], which was completed by the appellant's general practitioner (the 'GP') who had known the appellant for 2.5 years and seen him 11 or more times in the past 12 months. An Assessor Report (AR) [dated May 15, 2019], which was completed by a registered nurse (the 'RN'), who had first contact with the appellant to complete the PWD application. The PWD application also included the appellant's Self-Report (SR) dated April 18, 2019.
- 2-page Chart Summary from the appellant's GP, which includes ultrasound and X-ray reports.
- A prepared statement from the appellant (the 'statement'), which quoted or reiterated many of the statements or points made in the SR, MR and AR. It also argued that the EAPWDA does not require "medial professionals to provide a calculation regarding the occurrence of an individual's symptoms and resulting need for supports" and therefore by requiring such information, "the ministry has created an additional criterion for the provision of PWD designation that is not specified within legislation".
- Request for Reconsideration (RFR) which was signed and dated July 29, 2019.

Diagnoses

In the MR, the GP diagnosed the appellant with Type II diabetes (onset not provided) and Osteoarthritis (onset January 2007).

Physical Impairment

In the MR, the GP indicated the following about the appellant:

- "started to have multiple joint pain since 2007, pain involves both knees, ankles and shoulders". He is not able to stand more than 15 minutes, walking 1-2 blocks [brings] in the pain [and] sitting more than 30 minutes [is] difficult. He is also having recurring back pain [for] which he needs regular medication".
- The joint pain makes DLA "difficult like walking, standing, sitting, bending, kneeling and lifting objects. His daily activity progressively limited. It is getting harder to do home chores with standing or bending. It takes longer time to do that. Not able to carry objects over 5lbs [and going] shopping is also difficult.
- He has diabetes with high blood sugar on many occasions which could be one reason why he has significant pain in the lower limbs (diabetic neuropathy).
- "He is highly medicated for pain control. These medications produce side effects...[which] contribute to his limitation to function or movement".
- He can walk 1-2 blocks and climb 2-5 steps unaided, lift under 5 lbs and remain seated less than 1 hour.

In the AR, the RN indicated the following about the appellant:

- "Arthritis affects most of joints neck, shoulders, right wrist and knees...affects ability to walk, bend, lift, do housework...unable to sleep..."
- He is independent but takes significantly longer to walking indoors, walk outdoors and climb

stairs.

- He is independent but uses an assistive device to stand.
- He needs periodic assistance and takes significant longer with lifting and carrying/holding.
- "Uses the walls for balance in the house. Can only walk about 10 minutes -- one block when he has to stop to rest...would rest 10-15 minutes then can walk again. On a good day he can walk a total of 3 blocks with 15 minute rest between each block. He is unable to walk down hills due to knee pain...uses hand rails on stairs. Can go about 14 steps total then pain—pain in his knees prevents him from doing more steps".
- "Standing restricted to 10 minutes – has to lean against something when standing."
- "Lifting restricted to 15-20 lbs but only able to carry 5-10lbs about 20 feet otherwise requires help."
- "Client has bad arthritis worsening over the past year restricting his mobility bending lifting – pain on a daily basis – joints are stiff – has not been referred to a surgeon for knee/hip replacements yet but client no longer able to comfortably do basic activity."
- "Arthritis is progressive – his symptoms will not resolve – when they become severe he will be referred to an orthopedic surgeon."

In the self report, the appellant indicated the following:

- "I cannot kneel down, bend down or lift my arms above my head due to pain in my shoulders, knees, legs and hips".
- "I can walk approximately 1-2 blocks before I must sit...I avoid stairs if possible but when I have to I can only do 6-7 stairs before experiencing pain in my knees".
- "I can sit for about 30 minutes at best before pain sets in. I find being in a vehicle challenging due to sitting and transferring in and out".
- Joints are stiff in the morning so sitting upright for 15 minutes is required before moving.

Mental Impairment

In the MR, the GP indicated the following about the appellant:

- No difficulties with communication.
- No significant deficits with cognitive and emotional function.

In the AR, the RN indicated the following about the appellant:

- He has good speaking, reading, writing and hearing is satisfactory.
- No impacts with all listed areas of cognitive and emotional functioning except bodily functions and motivation which have moderate impact.
- He is independent with all listed DLA in the areas of pay rent/bills, medications and social functioning.
- "motivation poor due to pain [and] restricted activity."
- Due to pain he sleeps only 2-3 hours at a time for a total of about 6 hours per night.

In the self-report, the appellant made no mention of a mental impairment.

Daily Living Activities

In the MR, the GP indicated the following about the appellant:

- Medications that interfere with the ability to perform DLA have been prescribed.
- 'Basic housework', 'daily shopping', 'mobility inside the home' and 'mobility outside the home' are continuously restricted.
- It is unknown if 'personal self-care' is restricted.
- "Pain every day especially mornings and not able to move from bed. Knee [illegible] paining, can't walk long distances, not able to stand more than 5 minutes before pain".

In the AR, the RN indicated the following about the appellant.

- He independently performs all listed tasks of 'social functioning', 'pay rent/bills' and 'medications' and good functioning with immediate and extended social networks.
- He independently performs all listed tasks of 'personal care' however takes significantly longer with dressing, toileting (uses counter to help with getting off the toilet and stand up) and transfers in/out of bed (cannot move quickly due to stiffness). Bathing takes significantly longer and requires the use of an assistive device (bath bar and slip-proof mat).
- He requires periodic assistance with laundry (he cannot carry a full basket so his sister helps when there is a lot of laundry) and continuous assistance with basic housekeeping ("no longer able to do any household chores that require bending or reaching or repetitive shoulder movement").
- He is independent with all tasks of shopping except carrying purchases home which requires periodic assistance and going to and from stores which requires periodic assistance and takes significantly longer.
- "Client has a pull shopping cart. If he doesn't need to get many groceries he will use the pull cart otherwise he will have to get a taxi or have his sister shop with him. Shopping will take him over one hour – lives about 2 blocks from the store".
- Meals- 'meal planning' requires continuous assistance, 'food preparation' and 'cooking' requires periodic assistance and 'safe storage of food' is performed independently. "Sister plans and cooks all the meals – cannot lift pans from sink to stove – no longer able to lift cast iron pans – unable to use can opener due to right wrist pain – not able to bend to get food in/out of the oven".
- Transportation – independently performs 'using transit schedules and arranging transportation' and independently performs 'getting in/out of vehicle' which also takes significantly longer. Periodic assistance is required with 'using public transit'. "Grabs the sides of the vehicle to help him get in/out. The bus driver lowers the step so he can get into and off the bus more easily – has to use rails on the ramp".

In the self-report, the appellant indicated the following:

- "I rely on the walls for support to help stabilize when standing up and counter tops to help me mobilize inside. I rely on chairs arms to get out of a chair and I use the walls and counters in the bathroom".
- "I had to purchase lighter dishes and cookware and need the use of both hands to lift pots and pans off the stove. " and "I keep my meals to quick and easy dishes due to increased pain and discomfort in my knees from standing."
- "When attempting to clean the bathroom I use the tub to get upright. This is extremely painful due to the pain in my wrists".
- He cannot shop for long so he learned where everything is so he can get in and out quickly. He cannot carry more than 5lbs so he uses a fold up cart to carry his groceries home.
- For laundry "I only do a small amount at one time".
- "When I use the city bus, the driver will assist with a lift to help me get in."

Help

In the MR, the GP indicated the following about the appellant:

- Requires no prostheses or aids for her impairment.

In the AR, the GP indicated the following about the appellant:

- Assistance is provided by family and friends.
- No assistance is provided by assistance animals
- Assistance provided through the use of assistive devices (bath bar and shopping cart).

- “His sister helps him a lot by preparing meals and doing most of the household chores. This client is basically only able to manage his own personal care without help”.
- “Without the help of his sister and friends who also assist him, he would not be able to manage [DLA]”.
- “Sister moved in with him about 2 years ago and has gradually taken over chores as client has had more difficulty”.

In the self-report, the appellant indicated the following:

- “I rely on family for house cleaning”.

Evidence on Appeal

Notice of Appeal (NOA), signed and dated August 12, 2019, which stated, in part, that the appellant’s sister lives with him to assist in his daily cleaning, household chores that he is unable to do due to his medical condition.

The panel found that the information in the NOA consists of the appellant’s argument and does not require an admissibility determination.

PART F – REASONS FOR PANEL DECISION

The issue on 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. The ministry found that the evidence does not establish that the appellant has a severe mental or physical impairment and that her DLA are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods. Also, as a result of those restrictions, it could not be determined that the appellant requires the significant help or supervision of another person.

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, 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.

Panel Decision**Severe Impairment**

In the reconsideration decision, the ministry was not satisfied that the information provided establishes a severe physical or mental impairment. Determining a severe physical or mental impairment requires weighing the evidence provided against the nature of the impairment and its reported functional skill limitations. A diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a severe impairment. An "impairment" is a medical condition that results in restrictions to a

person's ability to function independently or effectively. To assess the severity of an impairment, the ministry must consider the nature of the impairment and the extent of its impact on daily functioning.

The panel finds that employability is not a consideration for eligibility for PWD designation because employability is not a criterion in section 2(2) of the EAPWDA nor is it listed among the prescribed daily living activities in section 2 of the EAPWDR.

Physical Impairment

The appellant argued that due to his medical condition his movement is severely impaired, which includes kneeling, walking, climbing stairs, bending, standing and lifting.

The ministry argued that based on the information provided in the PWD application, a severe impairment of the appellant's physical functioning has not been established.

In its reconsideration decision, the ministry noted the narrative provided by the GP in the MR, and that the GP indicated that the appellant cannot stand more than 15 minutes, walking 1-2 blocks brings pain, sitting more than 30 minutes is difficult and that he is limited to lifting less than five pounds.

The ministry noted that in the AR, the RN indicated that the appellant takes longer in almost all of his mobility and physical ability activities, including walking indoors/outdoors, climbing stairs, lifting, carrying and holding, and that he is able to walk 1 block in ten minutes and then needs to rest for 10-15 minutes but on good days he can walk up to 3 blocks. The ministry noted that the RN did describe the frequency of his good days. The ministry noted that the RN also stated that the appellant can climb 14 steps before pain, stand for 10 minutes provided he leans against something and he can lift 15-20 lbs and carry 5-10 for 20 feet. The ministry reviewed the appellant's SR as well, which, the panel finds, is similar to the RN's assessment. The ministry noted that the RN stated that the appellant's symptoms are not yet severe and that he has not been referred to an orthopedic surgeon.

The ministry concluded that the appellant's symptoms are not yet severe and the restrictions in physical functioning indicate a moderate rather than severe degree of impairment.

The panel finds that the ministry reasonably concluded that the information provided by the GP and RN regarding the appellant's physical functioning does not support a finding of a severe physical impairment. That is, the ability to walk 1-2 blocks unaided, climb 2-5 steps unaided or up to 14 steps with a rail, lift 15-20lbs, carry 5-10 lbs for 20 feet, and remain seated without limits does not indicate severely impaired physical functioning. Moreover the panel was swayed by the RN's statement that the appellant's symptoms are not yet severe and when they will be he will be referred to an orthopedic surgeon. The panel finds that the RN assessment indicates that the appellant's symptoms restrict his mobility and physical functioning but that this restriction is not yet severe.

The appellant argued that the requirement by the ministry to include a measure of the frequency and duration of a restriction or the assistance required is unreasonable as it creates an additional criterion that is not legislatively required. Though frequency and amount is not specified in the legislation as such, panel disagrees with the appellant's assessment. The panel finds that the inclusion of information related to frequency and duration allows the ministry to assess whether or not a periodic restriction is for or periodic assistance is required for, extended periods which is legislatively required and also speaks to the significance of the impairment or restriction. As such, the panel finds that the assessment of frequency and duration allows for sound and responsible decision.

Given the overall assessments of the appellant's functional ability, and mobility and physical ability in the

PWD application and the lack of any additional information provided at appeal, the panel finds that the ministry was reasonable in its determination that the evidence does not support a finding that the appellant suffers from a severe physical impairment and that the legislative criteria outlined in Section 2(2) of the EAPWDA have not been met.

Mental Impairment

The appellant did not argue that he suffers from a mental impairment. Therefore the panel will not provide an analysis.

Restrictions in the ability to perform DLA

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 that the legislative criteria are met, is dependent upon the evidence from prescribed professionals. The term "directly" means that there must be a causal link between the severe impairment and the restriction. The direct restriction must also be significant. Finally, there is a component related to time or duration – the direct and significant restriction may be either continuous or periodic. If periodic, it must be for extended periods. Any analysis of periodicity must also include, but shall not be limited to, the consideration of how frequently the activity is restricted. All other things being equal, a restriction that only arises once a year is less likely to be significant than one that occurs several times a week. Accordingly, in circumstances where the evidence indicates that a restriction arises periodically, it is appropriate for the ministry to require, as a part of the overall evidence, verification of the duration and frequency of the restriction in order to be "satisfied" that this legislative criterion is met.

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.

The appellant argued that due to his medical condition he is restricted in performing his DLA because he cannot kneel, bend, stand or lift and therefore cannot perform tasks that require these movements or repetitive movements of the shoulders.

The ministry concluded that the information provided does not establish that an impairment directly and significantly restrict DLA continuously or periodically for extended periods.

In the reconsideration decision, the ministry noted the GP's narrative and that he indicated that the appellant is continuously restricted with basic housework, daily shopping, and mobility inside/outside the home. The ministry also noted that the GP did not indicate that assistance was required with DLA. However the panel finds that section E of the MR does not require that the assessor indicate that assistance is required and therefore it is unreasonable for the ministry to expect such information.

In the reconsideration decision the ministry noted that in the AR, the RN reported that assistance is required with DLA and provided the following assessment:

- In terms of laundry, the ministry is not satisfied that requiring assistance for heavy loads, while maintaining independence with smaller loads represents a significant restriction. The panel agrees with the ministry's assessment.
- In terms of continuous assistance with basic housekeeping, the ministry concluded that it is not clear what assistance is required since the appellant indicated in his SR that he switched to a smaller vacuum cleaner and clean the bathtub and therefore is unclear what cleaning tasks he is

unable to do. The panel disagrees with the ministry's assessment and finds it unreasonable because the legislative requirement is that the information regarding any restriction with DLA and therefore assistance with DLA must be in the opinion of a prescribed professional. In this case, pointing to the SR is erroneous and the focus should be on the RN's assessment, who indicated that the appellant is unable to *any* household chores that require bending or reaching or repetitive shoulder movement.

- In terms of periodic assistance with shopping, the appellant uses a shopping cart for smaller shopping trips and a taxi or the help of his sister for larger shopping trips. The ministry concluded that it is not clear that this represents a significant restriction as the appellant maintains the ability to do small shopping trips independently. The panel finds that the ministry assessment is reasonable because, with some adjustments, the appellant is still able to independently perform this DLA and therefore his is not significantly restricted.
- In regards to continuous assistance with meal planning, the ministry concluded that it is not explained why continuous assistance is required and therefore it is not clear that he is significantly restricted with meal planning as a result of his medical condition. The panel additionally notes that the GP indicated that the appellant is not restricted with meal preparation yet the RN stated that meal planning requires continuous assistance. The RN stated that the appellant's sister plans and cooks all meals but did not state why or state why her assessment differs from the GP. The panel agrees with the ministry that no evidence was provided to explain the causal link between the appellant's medical condition and the restriction with meal planning and further finds that no explanation was provided to explain the inconsistency in the opinion of the two prescribed professional who completed the PWD application.
- The ministry argued that though the RN indicated that the appellant is periodically restricted with preparing food and cooking, the GP indicated that he was not restricted in this area. The panel finds that there is an inconsistency in the information provided by the GP and RN and that there was no explanation given to rectify this inconsistency. The panel finds that without information to rectify this inconsistency it would be difficult to make a determination regarding the restriction and assistance required for preparing food and cooking.
- The ministry argued that though the RN indicated that the appellant is periodically restricted with the use of public transit, the GP indicated that he was not restricted in this area. The panel finds that there is an inconsistency in the information provided by the GP and RN and that there was no explanation given to rectify this inconsistency. The panel finds that without information to rectify this inconsistency it would be difficult to make a determination regarding the restriction and assistance required with the use of public transit.

The panel finds that the ministry reasonably concluded that the evidence does not confirm that the appellant has a severe impairment that significantly restricts his ability to perform his DLA continuously or periodic for extended periods. The panel notes that the information provided established that the appellant is able to perform most of his DLA independently but may take significantly longer. Of those DLA that the appellant requires periodic assistance with and take significantly longer, the RN did not indicate how much longer and therefore it is difficult to determine if the assistance that is required is significant and that it is required periodically for *extended* periods as prescribed by the legislation. The panel finds that it was reasonable for the ministry to determine that to simply indicate that periodic assistance is required, without providing the details of the assistance required, is insufficient to meet the legislative requirements. In this case, the panel accepts that the appellant requires continuous assistance with his basic housework, however, that in and of itself is insufficient to meet the legislative requirements.

In terms of social functioning, the ministry noted that all tasks are performed independently and that the appellant has good functioning with immediate and extended social networks.

The panel considered the assessment by the GP and RN in the PWD application of independence with almost all of the DLA, the lack of information regarding the frequency and duration of the periodic assistance required and that insufficient additional or supporting information was provided from a prescribed professional at appeal to support the appellant's position. The panel finds that the evidence provided by the GP and RN does not describe or indicate that a *severe impairment* restricts the appellant's ability to perform his DLA either continuously or periodically for extended periods. Given the evidence as a whole, the panel finds that the ministry reasonably concluded that the evidence does not establish that an impairment significantly restricts DLA continuously or periodically for extended periods, pursuant to Section 2(2)(b)(i) of the EAPWDA.

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 appellant indicated that he requires assistance with his DLA which comes from his sister.

The ministry argued that because it has not been established that DLA are significantly restricted, it cannot be determined that help is required.

The panel notes that, in the AR, the RN did indicate that assistance is required from family and friends, and that the appellant uses bathing aids and a shopping cart. However, given that confirmation of direct and significant restrictions with DLA is a precondition of the need for help criterion and 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

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 is a reasonable application of the applicable enactment, and therefore 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

Neena Keram

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2019/09/27

PRINT NAME

Carla Tibbo

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019/09/27

PRINT NAME

Rosalie Turcotte

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019/09/27