

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (“the ministry”) reconsideration decision dated November 15, 2019, which found that the appellant did not meet three of the five statutory requirements of Section 2 of the *Employment and Assistance for Persons with Disabilities Act* for designation as a person with disabilities (“PWD”). The ministry found that the appellant met the age requirement and that the impairment is likely to continue for at least two years. However, the ministry was not satisfied that the evidence establishes that:

- the appellant has a severe physical or mental impairment;
- the appellant's daily living activities (“DLA”) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and,
- as a result of these restrictions, the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

PART D – RELEVANT LEGISLATION

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

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

PART E – SUMMARY OF FACTS**Evidence before the Ministry at Reconsideration**

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

- the appellant's PWD Application comprised of the appellant's self report ("SR") dated August 29, 2019, a medical report ("MR") and an assessor report ("AR") both dated August 21, 2019, both completed by the appellant's family physician ("the GP"), who has known the appellant for 3 years and who has seen the appellant between 2 - 10 times in the past 12 months;
- the appellant's request for reconsideration submitted November 15, 2019 with the following attachments:
 - appellant's 2-page submission, contents of which will be included with the SR;
 - April 26, 2016 orthopaedic clinic report written by orthopaedic surgeon Dr. X;
 - November 24, 2016 injury report written by Dr. Y;
 - August 20, 2019 letter from orthopaedic surgeon Dr. Z noting that:
 - since 2015 the appellant has experienced severe knee pain that is not improving;
 - it is a difficult problem to treat and she is not a candidate for joint replacement due to lack of arthritis in the joint;
 - if arthroscopy does not offer significant relief a referral to a pain specialist for nerve ablation procedure may help;
 - April 18, 2019 letter from Dr. Z noting that:
 - the appellant has run the gamut of treatment options;
 - since the injury the pain has been severe and has worsened over time;
 - the appellant experiences pain all day long and it keeps her up at night;
 - the appellant uses narcotics but they only take the edge off the pain;
 - the appellant forces self to walk but is in a lot of pain;
 - May 9, 2019 orthopaedic clinic report written by Dr. Z indicating that the appellant received a corticosteroid injection in the knee.

PWD Application Summary**Diagnosis**

In the MR the GP noted that the patient suffers from a left kneecap fracture.

Physical Impairment

In her SR the appellant reported that:

- in August 2015 the appellant suffered a shattered kneecap arising from a workplace accident that ended their current employment;
- friends and family assisted in setting up a new business but due to pain and restricted mobility the appellant was unable to do the necessary labour so it was shut down;
- most nights are sleepless due to the pounding and stabbing pains in the left knee;
- it is difficult to get out of bed in the morning and the appellant must take several breaks daily with leg elevated, treating the injury with massage, ice, pain killers and oils;
- the pain persists every day of the week;
- the appellant can work only some days and then for a maximum of 1 hour before a break is needed;
- the appellant requires daily pain medication which must not be taken if operating a vehicle;
- the appellant can no longer horseback ride, hike or do other outside activities and can no longer feed the horses;
- a friend stops in daily to help with household chores and maintenance, including firewood and dishes;

- climbing a flight of stairs takes twice as long as usual and requires both handrail and cane.

In the MR the GP reported that the appellant:

- can walk 1-2 blocks unaided, can't climb unaided, can lift 7-16 kg and can remain seated less than one hour;
- experiences severe left knee pain that increases with movement, causing significant disability, affecting ability to do DLA.

In the AR the GP reported that the appellant:

- uses a cane when walking indoors and outdoors and when standing and climbing stairs;
- requires periodic assistance from another person when lifting, carrying and holding;
- needs more time to do any physical or mobility activity.

Mental Impairment

No mental impairment was indicated by the appellant or the GP.

Daily Living Activities (DLA)

Although directed not to complete this section if addressing DLA in the AR, in the MR the GP indicated that the appellant's activity is periodically restricted in the following areas: personal self care, daily shopping, mobility inside and outside the home and use of transportation. The GP added: *"Due to left knee pain, it takes [the appellant] a long time to the above activities"*.

In the AR the GP indicated that the appellant:

- is independent in all areas of personal care, laundry, making appropriate shopping choices, paying for purchases, food areas (meal planning, food preparation, cooking, safe storage of food), paying bills and dealing with medications ;
- takes significantly longer than typical going to and from stores, carrying purchases home (*"can't sit for a long time, needs breaks"*), getting in and out of vehicles, using transit and arranging transportation;
- requires periodic assistance from another person to accomplish basic housekeeping (*"her son helps her"*);
- takes a long time to do any mobility activities due to severe knee pain.

Assistance Required

In the MR the GP noted that the appellant requires a cane and a knee brace and the appellant's son helps in doing some house activities.

In the AR the GP noted that the appellant:

- needs help in doing any physical or mobility activity;
- help for DLA is provided by family members;
- requires a cane and brace at all times.

Additional Information Received after Reconsideration

No additional documentary evidence was submitted by the appellant.

The appellant provided additional oral information at the hearing, summarized as follows:

- the appellant is in constant pain and requires daily pain relief medication in the form of narcotics, anti-inflammatories and steroids. The appellant cannot drive while on pain relief medication ;
- typically the pain is at level 8 or 9 on a scale of 1-10;
- the notation in the MR indicating that the appellant did not take medication that interferes with DLA is an oversight by the GP;
- the corticosteroid injection administered by Dr. Z on May 9, 2019 alleviated the pain somewhat, but the injection administered a few weeks ago did not help at all;
- the pain has had a huge impact and as a result DLA are severely restricted;
- the appellant lives “off the grid” in a cabin several kilometres from the nearest town. Power comes from solar panels on the roof, water is hauled by bucket from a river or lake located 30 feet down a steep incline, heat is provided by firewood which must be brought to the house, plumbing consists of an outhouse some distance from the cabin;
- help is provided by a friend who hauls water, brings in firewood, cleans the dog kennel, carries groceries and shops for groceries because the appellant’s vehicle is not longer insured;
- the appellant’s son lives approximately 50 km south of the appellant and works in another city 60 km east of the appellant’s residence. The son tries to come once each week to assist the appellant.

Admissibility of Additional Oral Information

EAA Section 22 (4) states: “A panel may consider evidence that is not part of the record as the panel considers is reasonably required for a full and fair disclosure of all matters related to the decision under appeal.”

The panel considered the appellant’s additional oral information and determined that all of it should be admitted under EAA Section 22(4) because it provided additional disclosure of the matters related to the appeal, supported the information considered by the ministry at reconsideration and provided details relevant to the appellant’s circumstances.

PART F – REASONS FOR PANEL DECISION

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

- the appellant has a severe impairment;
- the appellant's DLA are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and,
- as a result of these restrictions, the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

Relevant legislation:

EAPWDA:

2 (1) In this section:

"**assistive device**" means a device designed to enable a person to perform a daily living activity that, because of a severe mental or physical impairment, the person is unable to perform;

"**daily living activity**" has the prescribed meaning;

"**prescribed professional**" has the prescribed meaning.

(2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act if the minister is satisfied that the person is in a prescribed class of persons or that the person has a severe mental or physical impairment that

(a) in the opinion of a medical practitioner or nurse practitioner is likely to continue for at least 2 years, and

(b) in the opinion of a prescribed professional

(i) directly and significantly restricts the person's ability to perform daily living activities either

(A) continuously, or

(B) periodically for extended periods, and

(ii) as a result of those restrictions, the person requires help to perform those activities.

(3) For the purposes of subsection (2),

(a) a person who has a severe mental impairment includes a person with a mental disorder, and

(b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires

(i) an assistive device,

(ii) the significant help or supervision of another person, or

(iii) the services of an assistance animal.

EAPWDR:

2 (1) For the purposes of the Act and this regulation, "daily living activities",

(a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following activities:

(i) prepare own meals;

(ii) manage personal finances;

- (iii) shop for personal needs;
- (iv) use public or personal transportation facilities;
- (v) perform housework to maintain the person's place of residence in acceptable sanitary condition;
- (vi) move about indoors and outdoors;
- (vii) perform personal hygiene and self care;
- (viii) manage personal medication, and
- (b) in relation to a person who has a severe mental impairment, includes the following activities:
 - (i) make decisions about personal activities, care or finances;
 - (ii) relate to, communicate or interact with others effectively.
- (2) For the purposes of the Act, "**prescribed professional**" means a person who is
 - (a) authorized under an enactment to practise the profession of
 - (i) medical practitioner,
 - (ii) registered psychologist,
 - (iii) registered nurse or registered psychiatric nurse,
 - (iv) occupational therapist,
 - (v) physical therapist,
 - (vi) social worker,
 - (vii) chiropractor, or
 - (viii) nurse practitioner, or
 - (b) acting in the course of the person's employment as a school psychologist by
 - (i) an authority, as that term is defined in section 1 (1) of the *Independent School Act*, or
 - (ii) a board or a francophone education authority, as those terms are defined in section 1 (1) of the *School Act*,
 if qualifications in psychology are a condition of such employment.

Introduction

To be eligible for designation as a PWD an applicant must meet the 5 legislative criteria set out in EAPWDA Section 2 (2). The ministry found that the appellant had met the first 2 criteria, namely:

1. is at least 18 years of age; and
2. the impairment is likely to continue for 2 or more years.

At reconsideration the ministry found that the remaining 3 criteria were not met, namely that:

3. the appellant has a severe physical or mental impairment;
4. in the opinion of a prescribed professional the severe impairment directly and significantly restricts ability to perform DLA either continuously or periodically for extended periods, and
5. as a result of those restrictions the person requires help in the form of an assistive device, the significant help of another person or the services of an assistive animal.

This appeal decision will address Criteria 3, 4 and 5.

3 A. Severe Physical Impairment

The appellant argues that she suffers a severe physical impairment arising from a knee injury that fractured the patella.

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

Panel Decision

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

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

In the MR the GP noted that the appellant’s mobility is significantly restricted in 3 out of 4 functional categories. First, the GP indicated that the appellant can walk only 1-2 blocks unaided, but at Page 61 of the appeal record the GP appeared to contradict this assessment: “Needs cane and brace at all times”. The GP also noted that the appellant cannot climb stairs and can remain seated for less than 1 hour.

In the AR the GP noted that the appellant uses a cane for walking indoors and outdoors, climbing and standing. At Page 58 of the appeal record the GP added: “it takes [the appellant] a long time to do **any mobility activities** due to **severe knee pain**”. At Page 60 the GP noted: “[The appellant] would need help in doing **any physical or mobility activity**”. At Page 62 the GP provided the following additional information: “Chronic left knee pain is causing **disability and inability to do her DLA**”. (Emphasis added.)

In the SR the appellant noted that:

- when breaks are needed throughout the day they are accompanied by lying in bed, putting up the leg;
- massaging, icing, pain killers and oils are needed to calm down the pounding pain;
- pain medication is needed daily;
- a cane and brace are mostly needed to get around and a friend stops in daily to help with household chores, maintenance and outdoor chores;
- it takes twice as long as a normal person to climb stairs and a handrail and cane are necessary to accomplish any climbing.

The appellant’s oral evidence at the hearing added further detail to the severity of the physical impairment:

- the appellant is in constant pain at a level of 8 or 9 on a scale of 1-10 and requires daily pain relief medication in the form of narcotics, anti-inflammatories and steroids, and the appellant cannot drive while on pain relief medication ;
- the corticosteroid injection administered by Dr. Z on May 9, 2019 helped alleviate the pain somewhat, but the injection administered a few weeks ago did not help at all;
- the pain has had a huge impact and as a result DLA are severely restricted;
- the appellant lives “off the grid” in a cabin several kilometres from town. Power comes from solar panels on the roof, water is hauled by bucket from a river or lake located 30 feet down a steep incline, heat is provided by firewood which must be brought to the house, plumbing consists of an outhouse some distance from the cabin;
- help is provided by a friend who hauls water, brings in firewood, cleans the dog kennel, carries groceries and shops for groceries.

The panel finds that the above-referenced comments of the GP in the MR and AR together with the information provided by the appellant in the SR and oral evidence establish that the appellant's physical impairment severely affects their mobility and functional ability. It is clear that the appellant suffers chronic and severe pain and cannot function physically in the environment in which the appellant resides without the constant use of assistive devices and the daily help of another person. The panel therefore finds that the ministry's determination that the appellant does not suffer from a severe physical impairment is not reasonably supported by the evidence.

3 B. Severe Mental Impairment

No evidence was provided by either the appellant or the GP to support a finding that the appellant suffers from a severe mental impairment.

The panel finds that the ministry reasonably determined that the information provided does not establish that the appellant suffers from a severe mental impairment.

4. Restrictions in Ability to Perform DLA

The appellant argues that ability to perform DLA is significantly restricted as a result of the appellant's severe physical impairment.

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

Panel Decision

As noted earlier in this appeal decision the panel found that the ministry's determination that the appellant does not suffer from a severe physical impairment was not reasonably supported by the evidence. However, the legislative requirement respecting restrictions to DLA set out in section 2(2) (b) of the EAPWDA differs from the finding of a severe impairment. The determination of severe impairment is at the ministry's discretion, based on the evidence of the prescribed professional and the evidence provided by the appellant. Section 2(2)(b) requires that the minister be satisfied that as a result of a severe physical or mental impairment a person is, **in the opinion of a prescribed professional**, directly and significantly restricted in the ability to perform DLA either continuously or periodically for extended periods. While other evidence may be considered, the ministry's determination as to whether or not this criterion is satisfied is dependent upon the evidence from prescribed professionals. DLA are defined in section 2(1) of the EAPWDR and are listed in both the PR and the AR sections of the PWD application with the opportunity for the prescribed professional to check marked boxes and provide additional narrative.

In the MR the GP indicated that the appellant is periodically restricted in 5 of the 10 listed categories of DLA. However the GP did not provide a detailed explanation of "periodic", noting: "*Due to left knee pain it takes [the appellant] a long time to do the above activities*". The GP did not clarify what was meant by "a long time".

In the AR the GP indicated that the appellant is independent in all 8 categories of personal care, in doing laundry, shopping-related activities, meals (planning preparation, cooking and safe storage), paying bills and use of medication (filling prescriptions, taking as directed and handling/storing medication safely). The GP indicated that the appellant takes significantly longer than usual to go to and from stores and to carry purchases home, but did not specify what was meant by "*needs breaks*", "*needs more time*" and "*takes [the appellant] a long time*".

The evidence from the GP does not provide enough information to determine whether restriction to DLA is continuous or periodic for extended periods. None of the information provided by the other prescribed professionals (Doctors X, Y and Z) relates to restrictions to the appellant's ability to perform DLA.

The DLA-related information provided by the prescribed professional, in this case the GP, indicates that the appellant is independent in the majority of areas of DLA listed in the MR and AR. Accordingly the panel finds that the ministry reasonably determined that the information related to performance of DLA fails to establish that the appellant suffers from a severe impairment that in the opinion of a prescribed professional directly and significantly restricts DLA continuously or periodically for extended periods.

5. Assistance in Performing DLA

The appellant argues that the significant help of another person and constant use of assistive devices (cane and knee brace) are required to perform DLA.

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

Panel Decision

The information before the ministry at reconsideration and the oral information provided by the appellant prior to and during the hearing establishes that the appellant requires the significant help of a friend and a family member in order to provide the necessities of life: hauling of water, clearing of snow to enable power by solar panels, toting of firewood to heat the home and grocery shopping. Also, the appellant requires a cane and knee brace at all times for all activities requiring mobility.

Even though the appellant has established the need for two assistive devices and the significant help of another person in relation to DLA the legislation requires the establishment of direct and significant restrictions to performance of DLA as a precondition of the "need for help" criterion. Because the panel found that the ministry reasonably determined that in the opinion of a prescribed professional direct and significant restrictions in the appellant's ability to perform DLA have not been established, the panel also finds that the ministry reasonably concluded that it cannot be determined that the appellant requires help to perform DLA as required by section 2(2) ((b) (ii) of the EAPWDA.

CONCLUSION

Having reviewed and considered all of the evidence and relevant legislation, the panel finds that although the ministry did not reasonably determine that the appellant does not suffer from a severe impairment, the ministry's remaining determinations set out in Criteria 4 and 5, namely that the information provided by the prescribed professional does not establish significant restrictions to performance of DLA and as a result of significant restrictions assistance is required to perform DLA were not met, were reasonably supported by the evidence, and confirms the decision. The appellant is not successful on appeal.

APPEAL NUMBER

PART G – ORDER

THE PANEL DECISION IS: (Check one) UNANIMOUS BY MAJORITY

THE PANEL CONFIRMS THE MINISTRY DECISION RESCINDS THE MINISTRY DECISION

If the ministry decision is rescinded, is the panel decision referred back to the Minister for a decision as to amount? Yes No

LEGISLATIVE AUTHORITY FOR THE DECISION:

Employment and Assistance Act

Section 24(1)(a) or Section 24(1)(b)

and

Section 24(2)(a) or Section 24(2)(b)

PART H – SIGNATURES

PRINT NAME

Joan Bubbs

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2020/Jan/03

PRINT NAME

Kevin Ash

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2020/Jan/03

PRINT NAME

Roy Wares

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2020/Jan/03