

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction's ("ministry") reconsideration decision dated December 11 2019, in which the ministry found that the appellant was not eligible for designation as a Person with Disabilities ("PWD") under section 2 of the *Employment and Assistance for Persons with Disabilities Act* ("EAPWDA"). The ministry found that the appellant meets the age and duration requirements, but was not satisfied that:

- the appellant has a severe mental or physical impairment;
- the appellant's impairment, in the opinion of a prescribed professional, directly and significantly restricts the ability to perform daily living activities ("DLA") either continuously or periodically for extended periods; and
- as a result of restrictions caused by the impairment, the appellant requires an assistive device, the significant help or supervision of another person, 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"). As there was no information or argument provided for PWD designation on alternative grounds, the panel considers that matter not to be at issue in this appeal.

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

The evidence and documentation before the minister at the reconsideration consisted of:

1. Information from the ministry's record of decision indicating that the PWD application was received by the ministry on September 23, 2019 and denied on October 1, 2019. On November 4, 2019, the appellant requested reconsideration and submitted a signed Request for Reconsideration ("RFR") on November 28, 2019. On December 11, 2019, the ministry reviewed the RFR.
2. A blank RFR signed by the appellant on November 7, 2019, with attached copy of the PWD application with additional commentary added to the self-report section. In the amended report, the appellant indicates ongoing medical tests including hospital appointments scheduled for November and December 2019. The appellant reports not receiving all results prior to completing the self-report.
3. The PWD application comprised of:
 - the applicant information (self-report - "SR") dated August 20, 2019;
 - a Medical Report ("MR") dated September 13, 2019, completed by the appellant's general practitioner ("GP") who has known the appellant for less than 2 years and has seen the appellant 11 or more times in the past 12 months; and an
 - Assessor Report ("AR") dated September 13, 2019 also completed by the GP who based the assessment on an office interview with the appellant. In describing the services provided to the appellant, the GP indicates "lung function test" and writes, "to see specialist in future if symptom does not resolve."

Summary of relevant evidence from the application:

Diagnoses

In the SR, the appellant describes the disability as "COPD, stomach problems, anxiety."

In the MR, the appellant is diagnosed with chronic obstructive pulmonary disease ("COPD"), date of onset June 2018.

Under *Health History*, the GP writes, "patient is short of breath every time. Finds it hard to do chores, work in the yard, unable to get things done as gets easily out of breath." The GP indicates the appellant had a pulmonary function test twice in the last 2 years with a diagnosis of COPD.

Functional skills**Self-report**

The appellant reports having problems going "up and down stairs" without taking a break, and this is getting worse as the weeks go on. The appellant also reports having problems attending medical tests in a neighbouring community due to transportation issues.

Medical Report

Under section D, *Functional Skills*, the GP indicates the appellant can walk 1-2 blocks unaided on a flat surface and climb 5 or more steps unaided. The appellant has no limitations with lifting or remaining seated and no difficulties with communication.

The GP writes "N/A" and crosses out the checklist for significant deficits with cognitive and emotional function. *Additional Comments* is left blank with a strike mark through this section of the form.

Assessor Report

In describing the appellant's impairments in section B-1, the GP comments that the appellant takes a lot of time to walk up the stairs as the appellant "easily gets out of breath."

Under section B-2, *Ability to Communicate*, the GP assesses the appellant's ability in all areas of communication as *Good* (speaking, reading, writing, and hearing).

Under section B-3, *Mobility and Physical Ability*, the GP marks the appellant as independent with all functions: *Walking indoors, Walking outdoors, Climbing stairs, Standing, Lifting, and Carrying and holding*. The GP comments that the appellant "is independent" but "takes it one step per time" due to running out of breath.

For section B-4, *Cognitive and Emotional Functioning*, the GP does not provide any information on any impacts due to a mental impairment. The GP draws a strike mark through this section of the form.

Daily Living Activities

Medical Report

The GP check marks *Yes*, the appellant is prescribed medications or treatments that interfere with the ability to perform DLA. The GP indicates the appellant uses inhaler medication and will need to use it for life.

Assessor Report

In describing the impairments that impact the appellant's ability to manage DLA, the GP notes that the appellant takes a lot of time to get dressed and go shopping due to getting out of breath easily.

The GP marks the appellant as independent with all areas of the DLA listed on the form:

- *Personal Care, Basic Housekeeping, and Shopping* (comment for *Shopping*, "takes much longer time to get these done");
- *Meals, Pay Rent and Bills, Medications, and Transportation* (comment for *Transportation*, "takes a lot of time").

The GP draws a strike mark through *Additional comments (including a description of the type and amount of assistance required and identification of any safety issues)*.

The GP draws a strike mark through *Social Functioning* and does not provide any information for any of the social skills and abilities listed in this section.

Need for help

In the MR, the GP check marks *No*, the appellant does not require prostheses or aids for the impairment.

In the AR, section A, the GP indicates that the appellant lives alone. In section D - *Assistance Provided by other people*, the GP writes, "N/A." The GP draws a strike mark through *Assistance provided through the use of Assistive Devices*. The GP check marks *No* the appellant does not have an assistance animal.

4. The ministry's *Decision Summary* with attached letter dated October 1, 2019, indicating the appellant does not meet all of the criteria for PWD designation.

Additional information

Neither party provided new evidence requiring an admissibility determination in accordance with section 22(4) of the *Employment and Assistance Act*. Subsequent to the reconsideration decision, the appellant filed a *Notice of Appeal* with a hand-written statement that the panel accepts as argument. The ministry relied on the reconsideration decision to provide argument at the hearing.

Oral testimony

Neither the appellant nor the ministry provided new evidence requiring an admissibility determination. The panel accepts both parties' oral testimony as argument on appeal.

PART F – REASONS FOR PANEL DECISION

The issue on appeal is whether the ministry's decision that found the appellant ineligible for PWD designation is reasonably supported by the evidence or is a reasonable application of the legislation in the circumstances of the appellant. The panel's role is to determine whether the ministry was reasonable in finding that the following eligibility criteria in section 2 of the EAPWDA were not met:

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

The ministry based the reconsideration decision on the following 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.

(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.

Analysis

Severe mental or physical impairment

To be eligible for the PWD designation, the legislation requires several criteria to be met including the minister being satisfied that the applicant has a severe mental or physical impairment. The ministry found the appellant was not eligible for PWD because not all of the criteria were met. "Severe" is not defined in the legislation but the diagnosis of a serious medical condition does not in itself establish a severe impairment of mental or physical functioning.

Mental impairment

To assess the severity of a mental impairment, the ministry considers the extent of any impact on daily functioning as evidenced by limitations/restrictions with mental functions and emotion. The ministry does not only look at the diagnosis or a medical practitioner's comment that the condition is "severe" but considers the bigger picture including whether there are restrictions with DLA requiring mental/social functioning and whether significant help is required to manage DLA.

Arguments - mental impairment

Appellant

In the SR, the appellant notes that anxiety is disabling. At the hearing, the appellant reported that anxiety is "worse lately" and is being treated with "heavy duty anxiety meds." which the GP has prescribed.

In discussion with the ministry at the hearing, the appellant indicated not knowing why the GP did not include anxiety on the PWD medical forms. The appellant argues that anxiety should be on the forms because the GP has prescribed medication for anxiety. The appellant notes that anxiety (along with stomach problems) was one of the initial reasons for seeing the GP. In response to a question from the panel, the appellant confirmed not being referred to a psychiatrist or other mental health professional for anxiety.

Ministry

The ministry argues that the information provided in the PWD application does not establish a severe mental impairment because the GP does not describe a mental health condition or indicate any deficits and impacts with cognitive, emotional, or social functioning. The ministry also notes that the appellant has good communication skills in all areas listed in the MR and AR. At the hearing, the ministry stressed that it must base the reconsideration on the information provided, with any medical diagnoses requiring confirmation by a physician.

Panel's decision - mental impairment

The panel has considered the evidence in its entirety and finds that the ministry's decision on mental impairment is reasonably supported by the evidence. The appellant indicates suffering from worsening anxiety for the past year, with the GP not only aware of the condition, but treating it with anxiety medication. The GP does not diagnose or even mention anxiety in the PWD medical reports and the only medication indicated is an inhaler for the appellant's COPD. In addition, the GP strikes out the sections of the forms that deal with cognitive/emotional/social deficits or impacts from a mental impairment, further solidifying the ministry's position that the appellant does not have a mental impairment.

The appellant's anxiety has not been confirmed by a medical practitioner or nurse practitioner as required under section 2(2) of the EAPWDA. The panel concludes that the ministry reasonably determined there is insufficient evidence of a mental impairment or significant restrictions with the appellant's cognitive, emotional, and social functioning. The panel finds that the ministry's determination that a "severe" mental impairment under section 2(2) of the EAPWDA was not established on the evidence is a reasonable application of the legislation.

Physical impairment

To assess whether the applicant has a severe physical impairment, the ministry considers the information on the degree of restrictions to physical functioning, restrictions to DLA involving movement, and whether the applicant requires significant help or any assistive devices to manage DLA.

Arguments - physical impairment

Appellant

The appellant's position is that the physical impairment is still being assessed but no new reports were available at the time of the PWD application because the appellant had not yet received the results of tests or had to postpone some appointments due to a lack of medical transportation and related financial hardship. The appellant submits not being able to work or walk very far, and can barely make it up and down stairs without breaks due to shortness of breath. The appellant also reports having stomach problems due to a "stomach bug" with symptoms of weakness, and was prescribed medication for that as well as for pneumonia.

Ministry

The ministry submits that the information provided in the PWD application does not demonstrate a severe physical impairment because the GP assesses the appellant as independent with all areas of mobility and physical ability as well as all areas of DLA. The ministry argues that the restriction reported for walking (maximum 1-2 blocks unaided) is not indicative of a severe impairment of physical functioning. The ministry notes that although the GP states that the appellant gets out of breath easily and takes longer than typical with climbing stairs, no detail was provided to describe how much longer the appellant takes to walk up the stairs.

At the hearing, the ministry affirmed that COPD is the only diagnosis in the PWD medical reports and there is no information from the GP about the appellant's stomach problems. The ministry suggested that the appellant may want to pursue the *Persons with Persistent Multiple Barriers* ("PPMB") application to access medical transportation (if approved) and a crisis grant for shelter costs.

Panel's decision - physical impairment

The panel finds that the ministry's decision on physical impairment is reasonably supported by the evidence. Considering the rating scales for physical functional skills in the MR, the appellant is assessed as having a moderate degree of restriction with walking (maximum 1-2 blocks unaided), and the least degree of restriction for all of the other abilities listed including climbing stairs.

Despite getting out of breath easily and walking/climbing stairs slowly ("one step per time") the GP specifically comments in the AR that the appellant is independent with all physical functions including walking (indoors and outdoors), climbing stairs, standing, lifting, and carrying and holding. The GP assesses all of the appellant's physical functions on the basis of a sole diagnosis (COPD) and the stomach problems noted by the appellant are not mentioned in the GP's reports (MR and AR).

The panel concludes that the ministry reasonably determined there is insufficient evidence of restrictions to support a finding of "severe" physical impairment. The panel finds that the ministry's determination that the appellant does not have a severe physical impairment under section 2(2) of the EAPWDA is reasonably supported by the evidence.

Restrictions in the ability to perform daily living activities

Subsection 2(2)(b)(i) of the EAPWDA requires the ministry to be satisfied that, in the opinion of a prescribed professional, a severe impairment directly and significantly restricts a person's ability to perform DLA either continuously, or periodically for extended periods. In this case, the prescribed professional is the GP who filled out the PWD medical reports.

The term "directly" means there must be a causal link between the severe impairment and the restrictions to DLA. 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, the restriction must be for extended periods.

Inherently, an analysis of periodic restrictions must also include how frequently the activity is restricted. All other things being equal, a restriction that arises twice a month 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 evidence on the duration and frequency of the restriction in order to be satisfied that this criterion is met.

DLA are defined in section 2(1) of the EAPWDR and are also listed in the MR, with additional details in the AR. Therefore, a practitioner completing these forms has the opportunity to indicate which, if any, DLA are significantly restricted by the applicant's impairments either continuously or periodically for extended periods, and to provide additional narrative. DLA, as defined in the legislation, does not include the ability to work.

Arguments - DLA

Appellant

At the hearing, the appellant indicated being "capable of doing stuff around the house" but does not have to move around very much due to living in small accommodations. The appellant "will go get groceries but that's about it", and is unable to do yard work due to shortness of breath.

Ministry

The ministry argues that the appellant's DLA are not restricted either continuously or periodically for extended periods based on the opinion of a prescribed professional (the appellant's GP). The ministry notes that the DLA assessments by the GP (in the AR) indicate the appellant is independent with all DLA. The ministry notes that the GP does not describe how much longer than typical the appellant takes with shopping and transportation to confirm that the restriction is significant.

Panel's decision - restrictions to Daily Living Activities

The panel has considered the evidence from the GP in its entirety, and finds that the ministry's determination that DLA are not significantly restricted is reasonably supported by the evidence. While the appellant must use inhaler medication to manage shortness of breath, the GP assesses the appellant as independent with all DLA (in the AR). The appellant, as well, acknowledges being able to do daily chores and shop for groceries and the restriction to *Shopping* and *Transportation* reported by the GP ("taking much longer") is not explained in any detail.

According to the GP, the appellant is able to independently manage all DLA despite taking longer with *Shopping* and *Transportation*. The panel therefore finds that the ministry's determination that the criteria in subsection 2(2)(b)(i) of the EAPWDA are not met, is reasonable based on the evidence from the prescribed professional.

Help to perform daily living activities

Subsection 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.

Arguments

The appellant does not report receiving help from others or using any assistive devices to perform DLA. The ministry notes that the GP indicates the appellant does not require any prostheses or aids for the impairment or receive assistance from other people to perform DLA. The ministry's position is that because it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required.

Panel's decision - help with Daily Living Activities

Under the legislation, confirmation of direct and significant restrictions to DLA is a precondition for needing help to perform DLA. The panel found that the ministry's determination that significant restrictions to DLA were not established by the information provided is reasonable.

The panel notes that there is insufficient evidence in the record to confirm that the appellant requires significant help with DLA. The GP assesses the appellant as independent with all DLA; writes "N/A" when asked to describe assistance provided by other people, and draws a line through a question about assistive devices in the AR. On review of the evidence, the panel finds that the ministry's conclusion that the criteria for help under subsection 2(2)(b)(ii) of the EAPWDA are not met is reasonable based on the evidence.

Conclusion

The panel considered the information in its entirety and finds that the ministry's reconsideration decision that found the appellant ineligible for PWD designation is reasonably supported by the evidence. The legislation requires all of the criteria to be met. The ministry found that only two of the criteria (age and duration of impairment) were met.

Based on the functional skills and DLA assessments by the appellant's GP and the record as a whole, the panel finds that the ministry reasonably concluded that the information provided does not demonstrate a severe impairment of mental or physical functioning, significant restrictions to DLA, and significant help required for DLA. The panel confirms the ministry's decision. The appellant is not successful on appeal.

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

Margaret Koren

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2020-01-14

PRINT NAME

Dawn Martin

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2020-01-14

PRINT NAME

Linda Smerychynski

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2020-01-14