

APPEAL NUMBER

2020-00105

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (ministry) reconsideration decision dated 19 March 2020, which determined that the appellant was not eligible for persons with disabilities designation (PWD) because the appellant had not met all of the legislated criteria under section 2 the *Employment and Assistance for Persons with Disabilities Act*.

The ministry determined that the appellant had fulfilled only two of the criteria, having reached 18 years of age and demonstrated that, in the opinion of a medical practitioner or nurse practitioner, the appellant's impairment is likely to continue for at least 2 years.

The ministry determined that the appellant had not fulfilled the remaining criteria. It determined that the appellant had not demonstrated that they have a severe mental or physical impairment; that their severe mental or physical impairment, in the opinion of a prescribed professional, directly and significantly restricts their ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and as a result of direct and significant restrictions, they require help to perform those activities.

The ministry also found that it has not been demonstrated that the appellant is in 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*. As there was no information or argument provided by the appellant regarding alternative grounds for designation, the panel considers this matter not to be at issue in this appeal.

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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 and 2.1

PART E – SUMMARY OF FACTS

Evidence before the ministry at reconsideration consisted of the following:

1. The appellant's PWD Application

The Application contained:

- A Medical Report (MR) completed by a general practitioner (GP) who has indicated they have seen the appellant 2-10 times in the past 12 months.
- An Assessor Report (AR) dated 04 January 2020, completed by the same GP who indicates they have seen the appellant 2-10 times in the past 12 months and known the appellant for 5 months.
- A completed Self Report (SR) dated 02 January 2020, signed by the appellant.

The panel will first summarize the evidence from the PWD Application as it relates to the PWD criteria at issue in this appeal.

Diagnoses

In the MR, the GP provides the following diagnoses:

- Recurrent arrhythmia onset December 2018
- Back Pain onset 2016

Severity of mental impairment

MR:

The GP has ticked 'no' in response to whether there are difficulties with communication other than lack of fluency in English.

The GP did not enter a diagnostic code for any mental impairment and indicates that the appellant has no significant deficits with cognitive and emotional functioning.

AR:

In the AR, the GP has responded to the question "What are the applicant's mental or physical impairments that impact his/her ability to manage Daily Living Activities?" with a description of the appellant's physical impairments (see below).

The GP indicates that the appellant's ability to communicate is good in all listed areas (speaking, reading, writing and hearing) and provides no comments.

The GP assessed, without comment, the appellant's cognitive and emotional functioning as having the following minimal impacts on daily functioning in the area of emotion and no impacts in all other listed areas.

SR:

The appellant does not speak to a mental impairment in their self-report but does indicate that not being able to do the things they used to do has been very stressful mentally and emotionally.

Severity of physical impairment

MR:

Under Health History, the GP indicates that the appellant:

- has tachycardia, which required hospitalization in 2018;
- responded to medication, which normalized their heart rate, until November 2019 when their heart rate became too low;
- medication was then adjusted and, in the event that this doesn't work, a procedure may be required;
- the appellant has reported shortness of breath and fatigue since the diagnosis, she can walk 1-2 blocks but struggles to do strenuous work, including standing for long periods, lifting and basic housework; and
- the appellant was in a car accident in 2016 and has resultant chronic low back pain that also interferes with

activity and lifting.

For functional skills, the GP indicated by checkbox selection that the appellant can:

- walk 1-2 blocks unaided;
- climb 5+ steps unaided;
- lift 15-35 pounds unaided; and
- remain seated without limitation.

AR:

The GP has responded to the question "What are the applicant's mental or physical impairments that impact his/her ability to manage Daily Living Activities?" as follows: *shortness of breath on exertion and fatigue related to [their] heart rhythm.*

The GP indicates that the appellant is independent and takes significantly longer (50%) with walking indoors and outdoors and climbing stairs (*short of breath*); the appellant is independent and takes significantly longer for standing (*only for 30 minutes*), and takes requires periodic assistance with lifting (>25 lbs.); and is independent for carrying and holding.

SR:

The appellant indicates that they have a heart condition and the electrical part of their heart doesn't work properly anymore; they require medication daily and testing every few months. They state that this has been a difficult time for them and not being able to do the things they used to do has been very stressful.

Ability to perform DLA

MR:

The GP indicates that the appellant has been prescribed medication that interferes with their ability to perform DLA, commenting that the medication to control the appellant's heart rhythm keeps their heart rate low, the side effect of which is that it is more difficult to exercise and do anything strenuous because normally the heart rate would increase during those activities. The expected duration of the medication is lifelong, unless it is no longer effective and a procedure is required.

The GP does not indicate in the MR whether the appellant's impairment restricts their ability to perform DLA in accordance with the instructions provided in the PWD application form.

AR:

The GP indicates that the appellant is independent in all listed personal care activities (dressing, grooming, bathing, toileting, feeding, regulating diet, and transfers on/off chair and in/out of bed.)

The GP indicates that the appellant is independent with all basic housekeeping tasks and takes significantly longer (50%) with both laundry and basic housekeeping (*can sweep with breaks*).

The GP indicates that the appellant is independent with the shopping activities of going to and from stores, reading prices and labels, making appropriate choices and paying for purchases; the appellant requires periodic assistance from another person carrying purchases home (*if > 25 lbs., help from family*).

The GP indicates that the appellant is independent with all listed meals activities (meal planning, food preparation, cooking and safe storage of food).

The GP indicates that the appellant is independent with all pay rent and bills activities.

The GP indicates that the appellant is independent with all medications activities.

The GP indicates that the appellant is independent with all transportation activities.

Help required

MR:

The GP indicates that the appellant does not require any prostheses or aids for their impairment.

AR:

The GP indicates that the appellant receives assistance from family.

The GP indicates that the appellant does not receive assistance from assistance animals.

2. Medical Records and Reports

- a. Cardiac Catheterization Report, dated 27 December 2018
- b. Discharge Summary Report, dated 29 December 2018
- c. Cardiology Consultation Report, dated 1 February 2019
- d. Cardiology Consultation Report, dated 2 October 2019
- e. Cardiology Consultation Report, dated 28 November 2019
- f. Discharge Summary Report, dated 29 November 2019
- g. Medical Imaging Echo Report, dated 22 December 2018
- h. Medical Imaging Echo Report, dated 24 December 2018
- i. Holter Monitor Report, dated 16 January 2019
- j. Holter Monitor Report, dated 31 July 2019
- k. Holter Monitor Report, dated 13 November 2019

Additional Documents before the Ministry at Reconsideration:

1. A letter from an advocacy organization indicating that they would assist the appellant with reconsideration, accompanied by a signed consent to disclosure of information form signed by the appellant.
2. Signed request for reconsideration dated 19 February 2020, requesting an extension.

Additional Information before the Panel on Appeal:

1. Notice of Appeal

In the Notice of Appeal dated 02 April 2020: *The condition I have is a permanent severe heart condition that I will have till the day I die. There is no cure for it. Yes I do take medication for it but I will also need surgery at one point.*

Appeal Submissions

The appellant submitted a Sleep Apnea Study report, dated 16 March 2019, which indicates that the appellant suffers from sleep apnea and consideration of a referral to a sleep physician should be considered.

The appellant submitted a letter from a sibling, in which the sibling argues that the appellant is a hardworking person who successfully raised two children as a single parent. The sibling stated that the appellant tried to go back to work and could not do it, that the appellant does not have the quality of life they are used to and both needs and deserves disability assistance.

The appellant did not make oral submissions to the panel, as they did not attend the hearing. After confirming that the appellant was notified, the hearing proceeded under section 86(b) of the Employment and Assistance Regulation.

The ministry relied on the reconsideration decision in its submissions to the panel.

Admissibility

The panel finds that the information provided in the appellant's Notice of Appeal and the letter from the appellant's sibling both consist of argument, which does not require an admissibility determination in accordance with section 22 (4) of the *Employment and Assistance Act*. The panel finds that the Sleep Apnea Study Report is admissible in accordance with section 22 (4) of the *Employment and Assistance Act* because they speak to the appellant's medical conditions and are reasonably required for a full and fair disclosure of all matters related to the decision

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PART F – REASONS FOR PANEL DECISION

The issue in this appeal is whether the ministry reconsideration decision that determined that the appellant did not meet three of the five statutory requirements of Section 2 of the *EAPWDA* for PWD designation is reasonably supported by the evidence or is a reasonable application of the legislation in the circumstances of the appellant. Specifically, the ministry determined that the information provided did not establish that:

- the appellant has a severe mental or physical impairment;
- the appellant's severe mental or physical impairment, in the opinion of a prescribed professional, directly and significantly restricts their ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and
- as a result of those restrictions, they require significant help or supervision of another person to perform those activities.

The following section of the *EAPWDA* applies to this appeal:

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 following section of the *EAPWDR* applies to this appeal:

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.

Severity of impairment

The legislation requires that for PWD designation, the minister must be "satisfied" that the person has a severe mental or physical impairment. The legislation makes it clear that the determination of severity is at the discretion of the minister, considering all the evidence, including that of the appellant. Diagnosis of a serious medical condition or the identification of mental or physical deficits does not in itself determine severity of impairment. The legislation is also not about employment, rather it is about disability relating to daily living activity.

Severity of physical impairment

In the reconsideration decision, the ministry determined that a severe impairment of physical functioning had not been established. The ministry considered the diagnoses, functional skills assessment and the mobility and physical ability assessments provided by the GP in the MR and AR. The ministry concluded that the assessments provided by the GP demonstrated some limitation to the appellant's physical functioning, particularly the ability to walk long distances, but found that the limitations described were not indicative of a severe physical impairment.

The panel finds that the ministry's determination was reasonably supported by the evidence. The panel notes the ministry's approach to assessing severity in light of the nature of the impairment and extent of its impacts on functioning as evidenced by restrictions/limitations to daily functioning, the ability to perform DLA and the help required. The panel finds the ministry's approach and the conclusions flowing therefrom to be reasonable. The panel notes that the GP's assessments of the appellant's functional capacity and mobility and physical ability assessments in the MR and AR indicate that the appellant is able to function independently, with some limitation in their ability to walk distances, stand for more than 30 minutes and lift items weighing more than 25 lbs. The panel finds that the assessments provided by the GP do not reflect the level of limitation required to support a finding that a severe physical impairment has been established.

Concerning employment, the panel notes that the appellant has emphasized their inability or reduced ability to work. However, the panel notes that employability or vocational ability is not a criterion for PWD designation nor is it a DLA set out in the regulation. As discussed by the ministry at the hearing, PWD assistance is not intended for individuals who suffer restrictions related to employment, but other programs, such as CPP disability assistance, exist for this purpose. The ministry representative explained that part of the job of Employment and Assistance Workers is to assist their clients in determining which of the many federal and provincial programs and funding they may be eligible for based on their particular needs and restrictions.

The panel notes that the decision it is tasked with making is not whether the appellant suffers from an impairment arising from their heart condition, but whether that the ministry's determination that a severe impairment has not been established was reasonably supported by the evidence and a reasonable application of the legislation. The panel accepts the evidence that the appellant suffers from an impairment as they assert; however, the information provided does not establish a severe impairment as is required by the legislation. Considering the evidence and submissions before it, the panel finds that the ministry's determination, that a severe physical impairment has not

been established, is reasonable.

Severity of mental impairment

In the reconsideration decision, the ministry determined that the information provided does not establish a severe mental impairment. The ministry noted that the GP's assessments indicate that the appellant does not have any difficulties with communication, no significant deficits with cognitive and emotional functioning and their abilities with speaking, reading, hearing and writing are good. The ministry considered that the GP indicates a minor impact to cognitive and emotional functioning in the area of emotion and no impacts in the other 13 listed areas. The ministry also considered that the GP's assessments do not describe a mental health condition, mental impairment or brain injury. The ministry concluded that the information provided had not established a severe impairment in mental functioning.

The panel finds that the ministry's determination that a severe mental impairment has not been established was reasonable. The panel notes that there is no mental health diagnosis provided in the GP's assessments. The panel finds that assessments in the MR and AR do not reflect restrictions in the appellant's ability to function effectively or independently as a result of a mental health condition. As well, the panel notes the absence of information relating to support/supervision required to maintain the appellant in their community or any safety issues. The panel notes the GP's assessments relating to decision-making indicate that the appellant is independent in all areas. The panel also notes that the appellant does not assert that they have a mental impairment in any of the documents provided. The panel finds that the ministry's determination, that a severe mental impairment has not been established, is reasonably supported by the evidence.

Direct and significant restrictions in the ability to perform DLA

The legislation specifies that the minister assess direct and significant restrictions in the ability to perform DLA in consideration of the opinion of a prescribed professional, in this case the GP. This does not mean that other evidence should not be considered, but it is clear that a prescribed professional's evidence is fundamental. At issue in this assessment is the degree of restriction in the appellant's ability to perform the DLA listed in section 2(1)(a) and (b) of the EAPWDR. The panel notes that, according to the legislation, the direct and significant restriction in the ability to perform DLA must be due to a severe mental or physical impairment.

The ministry was not satisfied that the appellant has a severe impairment that, in the opinion of a prescribed professional, directly and significantly restricts their ability to perform the DLA set out in the legislation. In reaching this conclusion, the ministry noted that the appellant has been prescribed medication that impacts their ability to perform DLA. The ministry noted that the GP's AR assessment indicates that the appellant takes significantly longer with basic housekeeping tasks and requires assistance to lift more than 25 lbs. The ministry noted that the frequency and duration of periodic assistance required to carry purchases home had not been described. The ministry argued that it considers that the appellant's ability to lift up to 25 lbs. as sufficient to lift a variety of shopping items. The ministry argued that the GP had assessed the appellant as independent with the large majority of listed areas of daily living activities. The ministry argued that the information provided by the appellant's prescribed professionals is not enough evidence to confirm that a severe impairment significantly restricts the appellant's ability to perform DLA continuously or periodically for extended periods.

The panel finds that the ministry's determination, that the assessments provided do not establish that a severe impairment significantly restricts the appellant's ability to perform DLA continuously or periodically for extended periods, was reasonable. The panel notes that the legislation specifies that direct and significant restrictions to DLA must be in the opinion of a prescribed professional. The panel notes that the GP has assessed the appellant as being largely independent, albeit with housekeeping tasks taking 50% longer and assistance required for heavy lifting. The panel also notes that the GP has indicated some need for periodic assistance with lifting for shopping tasks but, as noted by the ministry, has not provided sufficient detail as to the nature, frequency or extent of such assistance to establish that periodic assistance is required for extended periods as set out in the legislation. The panel concludes that the ministry's determination, that the information provided by the GP does not establish that the appellant's overall ability to perform DLA is significantly restricted either continuously or periodically for extended periods, is reasonable.

Help for daily living activity required

The legislation requires that, as a result of being directly and significantly restricted in the ability to perform DLA

either continuously or periodically for extended periods, a person must also require help to perform those activities. The establishment of direct and significant restrictions under section 2(2)(b)(i) is a precondition of meeting the need for help criterion. Help is defined in subsection (3) as the requirement for an assistive device, significant help or supervision of another person, or the services of an assistance animal in order to perform a DLA.

In the reconsideration decision, the ministry determined that as it had not been established that the appellant's ability to perform DLA were significantly restricted, it cannot be determined that significant help is required. While the information provided demonstrates that the appellant does receive assistance from family, the panel has concluded that the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established. As such, the panel finds that the ministry reasonably concluded that under section 2(2)(b)(ii) of the EAPWDA it cannot be determined that the appellant requires help to perform DLA.

Such a decision does not mean that there are no other available resources or programs available to the appellant, either now or in the future. This is particularly so given the adjustment or implementation of these programs and resources in response to the pandemic.

Conclusion

The panel finds that the ministry's reconsideration decision, determining that the appellant had not met all of the legislated criteria for PWD designation, was a reasonable application of the legislation in the circumstances of the appellant and was reasonably supported by the evidence. The panel confirms the ministry's reconsideration decision. The appellant is not successful on appeal.

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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

Jennifer Smith

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2020/04/27

PRINT NAME

Kent Ashby

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2020/04/27

PRINT NAME

Melissa McLean

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2020/04/27