

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction's ("ministry") reconsideration decision dated March 27, 2020, 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 her 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 on February 7, 2020 and denied on February 18, 2020. On February 25, 2020, the appellant requested reconsideration and submitted her signed *Request for Reconsideration* ("RFR") on March 13, 2020. On March 27, 2020, the ministry completed the review of the RFR.

2. An RFR signed by the appellant on March 6, 2020, with a hand-written submission in which the appellant provides argument for the reconsideration. The appellant states that she has been struggling with depression, anxiety, and chronic body pain for over three years. She gets a lot of help from a family member with housework and carrying groceries.

The appellant states that her fingers are swollen and sore when she writes and her hands become numb when she works on the computer. The appellant describes waking up every morning with pain, and she cannot make a fist because her fingers won't curl due to pain and inflammation. The appellant explains that she had to cut back to part-time work hours because she needs more time to get out of bed and get dressed in the morning because of pain. The appellant reports that wearing pants and shoes are a struggle and she cries because she doesn't feel normal.

The appellant states that her fibromyalgia is getting worse and her depression is not getting any better. The appellant reports that sometimes her pain medication does not help, and she uses heating pads and goes to physiotherapy but it doesn't help with the pain. The appellant reports having low motivation and she doesn't like to communicate with anyone at work. The appellant reports that her work is impacted because she cannot perform her regular duties properly due to needing a lot of breaks, to try and take her mind off the pain.

3. The PWD application comprised of:

- the *Applicant Information* (self-report - "SR") dated January 27, 2020, with hand-written submission;
- a *Medical Report* ("MR") dated January 30, 2020, completed by the appellant's general practitioner ("doctor") who has known the appellant since February 2019 and has seen the appellant 2 -10 times in the past 12 months; and an
- *Assessor Report* ("AR") dated January 30, 2020 also completed by the doctor who based the assessment on an office interview with the appellant and file/chart information, specifically "review EMR charts through her past medical history."

Summary of relevant evidence from the application:

Diagnoses

In the MR, the appellant is diagnosed with fibromyalgia (onset, 2012), anemia - thalassemia (onset, "since birth"), and anxiety and depression (onset, 2017).

Under *Health History*, the doctor writes, "she is suffering from multiple musculoskeletal and neurologic symptoms like lots of pain and numbness in arms which interferes with her job. Patient has done some trigger point injections for pain relief." The doctor writes that anemia - thalassemia "causes some easy fatigue and tiredness." The appellant has been "suffering from mood symptoms and anxiety and has been on some medicines. This mental disorder interferes with her job and limits her daily function." The appellant also suffers from obesity.

Functional skillsSelf-report

The appellant states that she is in “constant pain” and the pain she experiences before taking her medication “is to the point where I can’t bend down to put my shoes on” due to severe back spasms. The appellant reports that when she works on the computer, she gets “numbness and a tingling feeling in my right arm going down my legs” that limits her performance. The appellant says that she has to stop what she is doing and “massage my arm harder to get back to work.” The appellant reports missed days at work because she “didn’t want to leave [the] house” due to depression.

Medical Report

Under section D, *Functional Skills*, the doctor indicates the appellant can walk 2 to 4 blocks unaided on a flat surface and climb 5 or more steps unaided. The appellant cannot lift any weight at all. The appellant has no limitation with remaining seated and no difficulties with communication.

Under section D-6, when asked if there are any significant deficits with cognitive and emotional function, the doctor indicates *yes* and checks 4 of the 12 listed functions: *Emotional disturbance, Motivation, Impulse control, and Attention/sustained concentration*. The doctor leaves the *Additional Comments* section blank.

Assessor Report

Under section B-2, *Ability to Communicate*, the doctor indicates the appellant's ability to communicate is *good* in all areas: *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*.

For section B-4, *Cognitive and Emotional Functioning*, the doctor provides information on impacts to functioning that are due to the appellant's mental impairment:

- *No impact* in 9 of the 14 areas listed: *Bodily functions, Consciousness, Insight and judgment, Executive, Motor activity, Language, Psychotic symptoms, Other neuro-psychological problems, and Other emotional or mental problems*;
- *Moderate Impact* in 3 areas: *Impulse control, Attention/concentration, and Memory*;
- *Major Impact* in 2 areas: *Emotion, and Motivation*.

Daily Living ActivitiesSelf-report

The appellant writes that she “can take care of [herself]” but there are days when she does not want to leave the house.

Medical Report

The doctor check marks *No* when asked if the appellant is prescribed medications or treatments that interfere with her ability to perform DLA.

Assessor Report

In Part C, *Daily Living Activities*, the doctor marks the appellant as independent with all areas, for 7 (out of 8) DLA listed on the form:

- *Personal Care*: the appellant is independent with *Dressing, Grooming, Bathing, Toileting, Feeding self, Regulating diet, Transfers (in/out of bed), and Transfers (on/off chair)*;
- *Basic Housekeeping*: the appellant is independent with *Laundry, and Basic Housekeeping*;
- *Meals*: the appellant is independent with *Meal planning, Food preparation, Cooking, and Safe storage of food*;
- *Pay Rent and Bills*: the appellant is independent with *Banking, Budgeting, and Pay rent and bills*;
- *Medications*: the appellant is independent with *Filling/refilling prescriptions, Taking as directed, and Safe handling and storage*;
- *Transportation*: the appellant is independent with *Getting in and out of a vehicle, Using public transit, and Using transit schedules and arranging transportation*;
- *Social Functioning*: the appellant is independent with *Appropriate social decisions; Able to develop and maintain relationships; Interacts appropriately with others; Able to deal appropriately with unexpected demands; and Able to secure assistance from others*. The doctor checks that the appellant has *good functioning* with both their immediate and extended social networks.

Restricted DLA

For one DLA, *Shopping*, the doctor checks one restriction indicating that:

- The appellant needs continuous assistance with *Carrying purchases home*. The doctor leaves the section for *Additional Comments* blank.
- The doctor indicates the appellant is independent with all other areas of *Shopping: Going to and from stores, Reading prices and labels, Making appropriate choices, and Paying for purchases*.

Need for help

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

In the AR, the doctor indicates the appellant lives with family. In section D - *Assistance Provided by other people*, the doctor check marks *Family and Friends*. The doctor leaves the section on *Assistance provided through the use of Assistive Devices* blank. For *Assistance provided by Assistance Animals*, the doctor checks *No*.

4. The ministry's *Decision Summary* with attached letter dated February 18, 2020, stating that the appellant does not meet all of the criteria for PWD designation.

Additional information

The appellant provided new evidence requiring an admissibility determination in accordance with section 22(4) of the *Employment and Assistance Act* ("EAA"). Subsequent to the reconsideration decision, the appellant filed a *Notice of Appeal* with a handwritten submission which the panel accepts as argument. The appellant also submitted a letter from her doctor received by the Tribunal on April 22, 2020.

The letter, dated April 21, 2020, states that the appellant is suffering from a “severe impairment” due to anxiety, depression, fibromyalgia, and chronic body pain.

The letter states that the appellant’s impairments:

...are directly and significantly restricting a number of ongoing daily living activities including personal self-care (restricted range of motion), housework, shopping, using public transit (difficult to stand and hang on due to pain and fatigue), walking (maximum 1 block), climbing stairs (maximum 6 stairs), lifting (maximum 5 lbs.), remaining seated (maximum 2 hours due to severe pain, fatigue, and anxiety related restlessness), concentration, short-term memory, executive functioning, interacting with others.

Because of those restrictions she needs significant ongoing help with housework, shopping, reminding to attend appointments, and psychological counselling for emotional support.

Admissibility of doctor’s letter

The ministry did not raise any objections to the panel admitting the letter as evidence. The panel admits the letter under section 22(4) of the EAA as evidence that is reasonably required for a full and fair disclosure of all matters related to the decision under appeal. The panel finds that the letter is relevant to determining whether the legislative criteria are met because it provides information about limitations with the appellant’s physical and mental functioning and restrictions to DLA.

The ministry relied on the reconsideration record and did not submit any new evidence.

Procedural matters

The appellant attended the hearing with an advocate who provided argument for the appeal. The ministry brought an observer to the hearing for training purposes. The appellant consented to the observer listening in on the teleconference.

Submissions at the hearing

The appellant explained that her pain condition started in 2017 after she was involved in two car accidents that were not her fault. In response to questions, the appellant said she had x-rays for her back and neck after the accident and “they came out negative.” The appellant explained that she went to the hospital for subsequent pain symptoms and asked for an MRI scan of her neck and back. The appellant was not given an MRI and was told there is a one year wait.

The hospital said they could do a CT scan of the appellant’s neck but would only do one for her back if the neck scan showed a pinched nerve or other abnormality that could cause back pain. The CT scan for the appellant’s neck was negative. The appellant was told that a CT scan is not as detailed as an MRI, so the appellant asked her doctor for an “urgent MRI” but is still on the waiting list. The appellant explained that she got on the waiting list when she had her previous (long term) doctor. She had to start the waiting period over again when she began seeing her current doctor who ordered the MRI five months ago.

The appellant testified that she has a lot of pain in her whole body, especially her back, and has been struggling with anxiety and depression for more than two years. The appellant said she cannot handle simple chores without using a heating pad to comfort her back. The appellant said she takes pain medication at night but still wakes up with pain in the middle of the night. The appellant described spending most of the day on the couch with her heating pad. Her family member “drags the computer to the couch” so that the appellant can work. The appellant experiences more pain and numbness from typing and needs to take a lot of breaks to stretch her arms and legs.

The appellant explained that thalassemia is chronic fatigue that makes her drowsy and tired a lot. The appellant said she tries to walk but can't because of pain in her body. The appellant described a typical day from the time she wakes up in the morning. The appellant slowly tries to roll onto her side and "can't get up like a normal person"; she needs to use her hands and legs to get up. The appellant then takes a shower "in really hot water" to ease her muscle pain. Then she goes to the couch to relax and start her job.

The appellant explained that she can't use her heating pad while making breakfast so she sometimes waits for her family member to get up and help her. The appellant said that her family member helps a lot with cooking because they "see the amount of pain [the appellant] has every single day." The appellant explained that if she tries to cook she has to rest her arm on the counter and cannot straighten her back properly due to pain. The appellant said that she tries to take a lunch break but can only manage to "grab a quick sandwich or throw a pizza in the oven" and she can "no longer make amazing meals at home."

The appellant reported having difficulty using her arms to put on clothing and said she had to switch to simpler pull on items because the pain "makes me cry." The appellant stated that she cannot bend over to unload the dishwasher and she cannot carry two empty plates because it hurts her back. The family member cooks dinner.

The appellant testified that she tried to go to the gym but her trainer said it was not worth doing the exercises due to the amount of pain she was in. The appellant explained that she has tried both physiotherapy and Registered Massage Therapy ("RMT") but they did not really help. The appellant said that her back felt stiff even after heat treatment, and the physiotherapist used a vibrating machine which helped at first but then hurt the appellant's back. The appellant explained that she stopped RMT because her back "could not handle even a light finger touch." The appellant also saw a chiropractor and tried acupuncture "to feel a little bit normal," but she reports that the pain "is getting worse and worse."

The appellant explained that she was getting her groceries delivered and the delivery person would lift the groceries onto the countertop as the appellant cannot bend over. The appellant's family member would put away the groceries for her. The appellant explained that she now has to go to the store because the delivery slots are all taken up during the COVID-19 pandemic and alternate delivery services are too expensive.

The appellant explained that she goes to a local store as she can only drive a short distance. The appellant reports that driving is painful and she is unable to "shoulder check" due to pain. The appellant described going "quickly in and out of the store" and she cannot walk through the full store due to back spasms. The appellant's family member carries and unpacks the groceries as the appellant must retreat to the couch with her heating pad after a short outing.

The appellant testified that her family member vacuums and operates the dishwasher. The family member cleans the bathroom and is "doing all the work" because the appellant is in too much pain. The appellant is tired and in pain when walking and "feels like a hook is pulling my spine down."

The appellant explained that there "is not a lot of information on the PWD application" because her doctor "was in a rush with so many patients to see and filled it out quickly." The appellant explained that she had an appointment with the doctor to obtain a new letter for this appeal. The appellant testified that she has no diagnosis for her back pain and the doctor will not refer her to any specialists until she has an MRI. The doctor told her he "cannot give any answer at this time" and "it is best to wait for the MRI and use the heating pad to help get through the day."

The appellant explained that the doctor gave her two prescriptions for pain medication but the morning pill made her too drowsy and she can only take the one that she uses at night. The appellant said that the medication has not helped and she will see the doctor again, to increase the dose. The appellant said that her doctor gave her the strongest medication possible.

The appellant testified that the stress of her situation is not helping her anxiety and depression but she cannot take medications for these conditions because they made her “feel like a zombie” and she cannot take the medication for her back pain if she is on medication for depression/anxiety. The appellant stated that her doctor said it would be “good to talk to a psychiatrist” but the appellant has no benefits at this time to pay for an assessment. The appellant confirmed she has not had an assessment or counselling with a psychiatrist or psychologist.

Admissibility of oral evidence

The ministry did not raise any objections to the panel admitting the appellant’s testimony. The panel admits the oral submissions under section 22(4) of the EAA as evidence that is reasonably required for a full and fair disclosure of all matters related to the decision under appeal. The panel finds that the appellant provided background information (leading up to her disability) and details about her functions, restrictions, and interactions with her doctor.

The ministry relied on the reconsideration record and did not submit any new evidence at the hearing.

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 her 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.

(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,

Analysis

Severe mental or physical impairment

To be eligible for 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 to DLA requiring mental/social functioning and whether significant help is required to manage DLA.

Arguments - mental impairment

Appellant

In the SR, the appellant argues that her anxiety and depression are not getting any better and her health is “deteriorating steadily” because of constant pain. The appellant reports that she has lost her motivation and depression “hits me at work”, making it difficult to communicate with anyone. The appellant said that she cries because she “doesn’t feel normal.” The appellant submits that the stress of her situation including the negative impact on her capacity to work is not helping her depression and anxiety.

The advocate submits that the new information from the doctor (letter submitted on appeal) confirms that the appellant’s mental impairment is severe. The advocate explained that the appellant did not understand the information requirements at the reconsideration and submitted a self-report with her RFR rather than further information from her doctor. The advocate accepts that the original PWD medical reports are lacking in detail but argues the letter indicates the appellant’s emotional and cognitive deficits and need for counselling for emotional support. The appellant argues the doctor was in a rush when he filled out the PWD reports and did not accurately capture her struggles with anxiety and depression.

Ministry

The ministry argues that the information provided in the PWD application does not establish a severe mental impairment. The ministry argues that the information in the application suggests a moderate rather than severe impairment of mental functioning because the appellant has no deficits with communication or social functioning, and her mood disorder has a moderate to major impact in only a few areas of cognitive and emotional functioning. The ministry notes that the AR indicates most areas of functioning are within the “no impact range”.

Panel's decision - mental impairment

The panel has considered the evidence in its entirety and finds that the ministry's determination of no severe mental impairment is reasonably supported by the evidence. In the MR, the appellant is diagnosed with anxiety and depression that are said to "limit her daily function." No other details are provided in the comments but "significant deficits" are reported in the areas of *Emotional disturbance, Motivation, Impulse control, and Attention/concentration*.

In the AR, the appellant's mood disorder has a major impact in only two areas (*Emotion and Memory*). No deficit for *Memory* was reported in the MR and *Impulse control* and *Attention/concentration* are only moderately impacted according to the information in the AR. In the AR, most areas of cognitive and emotional functioning are marked as *No impact*.

As well, the appellant is assessed as independent with daily activities that require concentration or motivation such as personal care, and managing personal finances and medications. The appellant indicates that her restrictions with communication (writing submissions, and working on the computer) as well as personal care stem more from physical symptoms such as numbness in her hands and body pain.

In the letter admitted as evidence on appeal, the doctor specifically describes the appellant's mental impairment as "severe" and indicates that the appellant experiences "anxiety related restlessness", and "significant" restrictions in concentration, short-term memory, executive functioning, and interacting with others. The doctor states that the appellant needs to be reminded to attend appointments and she requires psychological counselling for emotional support.

There is still no indication that the appellant has been referred for a psychological assessment, or any cognitive testing for her memory, attention, and executive deficits. The appellant states she could not get an assessment or counselling because she would have to pay for it, but if the appellant has a severe mental impairment the doctor could refer her to a psychiatrist covered under the provincial health plan.

The doctor has not provided a reason for the differences in the assessment between the PWD medical reports and the follow up letter. The appellant argues the doctor was rushed when he filled out the original reports but the panel notes that he still had the opportunity to provide consistent information about *Memory* and to indicate a deficit with *Executive function* as these areas are listed (with tick boxes and space for brief comments) in both the MR and AR.

The restriction with *Executive function* is the only new restriction (for cognitive and emotional function) that the doctor indicates. The evidence that the appellant's mood disorder has *No impact* on most areas of cognitive and emotional functioning (as reported in the AR) is not refuted by the doctor. For these reasons, the panel gives more weight to the information in the PWD medical reports..

The doctor had the opportunity to add comments throughout the PWD medical reports, and although he writes in the MR that the appellant's mental impairments interfere with her daily function, he has not provided greater detail in either the original reports or the new letter. No difficulties with social interaction were indicated in the original medical reports; and the only cognitive restriction that is detailed in the new letter is that the appellant needs reminders to attend appointments.

The panel finds that needing reminders for appointments is not sufficient to confirm a severe mental impairment, and there is insufficient information about how deficits with attention and executive function impact the appellant's daily functioning. The appellant explains in her submissions that she has difficulty concentrating on her work due to pain from her physical impairment but does not report any deficits with executive tasks.

The panel has considered the information in the PWD application as well as the letter from the doctor and finds that the ministry was reasonable in finding that a severe impairment of mental functioning has not been established because there is insufficient detailed information about restrictions to 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 she has a severe physical impairment because she is in constant pain and has restricted movement as well as trouble sleeping due to aching muscles, especially in her back; swollen fingers, and tingling and numbness in her arm and legs. This makes it difficult for her to do anything except sit on the couch with her heating pad to try and relieve the pain. The appellant argues that her impairment is severe because she cannot function without taking strong pain medication every night.

The appellant states that she cannot make a fist with her fingers due to inflammation and she is unable to lift dishes or grocery items and needs continuous assistance from her family. The appellant submits that walking is very painful, "like a hook is pulling my spine down."

The advocate submits that the new information from the doctor (letter submitted on appeal) confirms that the appellant's physical impairment is severe. The advocate explained that the appellant did not understand the information requirements at the reconsideration and submitted a self-report with her RFR rather than further information from her doctor. The advocate accepts that the original PWD medical reports are lacking in detail but argues that the letter provides a more detailed assessment of the appellant's physical functions.

The appellant argues the doctor was in a rush when he filled out the PWD reports and did not accurately capture her struggle with pain. The appellant argues that until she gets an MRI scan, no one will really know what is wrong with her back. The advocate notes that fibromyalgia does not show up in a diagnostic test such as an x-ray, CT scan, or blood test.

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 except *Lifting*, as well as all areas of DLA except *Carrying purchases (Shopping)*. The ministry acknowledges that the appellant experiences pain, cannot lift heavy weight, and gets help from her family but argues there is no other information from the doctor to confirm the appellant's descriptions of a severe physical impairment.

Panel's decision - physical impairment

The panel finds that the ministry's decision on physical impairment (no *severe* impairment) is reasonably supported by the evidence. The panel has considered the ratings provided by the doctor in the MR for physical functional skills and notes that the appellant is assessed as having a moderate degree of restriction with *Walking* (maximum 2-4 blocks unaided) and the lowest degree of restriction for *Climbing stairs* (5 or more steps unaided) and *Remain seated (No limitation)*. In the MR, the appellant has the greatest level of restriction with *Lifting* as the doctor checked *No lifting* at all. The doctor writes in the MR (*Health History*) that the appellant is suffering pain from fibromyalgia, and fatigue and tiredness due to thalassemia.

In the AR, the doctor assesses the appellant as independent with all of the physical functions listed: *Walking indoors, Walking outdoors, Climbing stairs, Standing, Lifting, and Carrying/holding*. *Lifting* and *Carrying/holding* are marked as independent in the AR despite the appellant not being able to lift any weight at all (in the MR), and not being able to carry groceries without continuous assistance from her family (AR). There is no explanation for the apparent contradictions in the information for *Lifting* and *Carrying/holding*.

The letter from the doctor admitted as evidence on appeal, contains further inconsistencies for *Lifting*, as well as *Walking* and *Remain seated*. The doctor indicates an improvement in the appellant's ability to lift heavy objects as she is now restricted to lifting a maximum of 5 lbs; whereas she could not lift at all in the MR. The appellant's ability to walk unaided has decreased as she can only walk a maximum of one block (in the letter); whereas in the MR, she could walk 2 to 4 blocks unaided.

According to the letter, the appellant's ability to sit for an unlimited period has slightly decreased. The appellant is now restricted to sitting for a maximum of 2 hours "due to severe pain, fatigue and anxiety related restlessness." There has been no change in her ability to climb stairs. The appellant can climb a maximum of 6 stairs unaided. Being able to walk 1 to 2 blocks unaided is still a moderate degree of impairment according to the rating scale in the MR, and remaining seated up to 2 hours is on the end of the scale with the lowest degree of restrictions.

The doctor's assessments of the appellant's physical functions were conducted approximately 3 months apart, January 30, 2020 (MR and AR), and April 21, 2020 (letter from doctor). It is not clear from the information as a whole why the appellant's ability to lift weight has improved during this brief period of time while the distance she can walk and her ability to remain seated have decreased. The appellant testified that her impairment is getting worse all the time because of "constant pain", but the information from the doctor, including the new information on appeal, does not indicate the appellant's condition is getting worse and does not confirm a severe impairment of physical functioning.

The panel concludes that the ministry reasonably determined there is insufficient evidence of functional restrictions to support a finding of *severe* physical impairment. The evidence indicates that most physical functions are not restricted except for *Walking* and *Lifting* which the appellant can still do independently. In fact, the information as a whole indicates the appellant is independent with all physical functions. 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. This means that restrictions to DLA must be confirmed by the appellant's doctor or one of the practitioners named in the legislation such as an occupational therapist.

The term "directly" means that the severe impairment must cause or result in restrictions to activities. The direct restriction must also be significant. This means that not being able to do DLA without a lot of help or support will have a large impact on the person's life.

Finally, there is a time or duration factor: the restriction may be either continuous or periodic. Continuous means that the activity must generally be restricted all the time. If periodic (e.g., the activity is restricted a few times a week but not every day), the restriction must be for longer periods of time (e.g., the whole day on the days that the person cannot do the activity without help or support). Accordingly, where the evidence indicates that a restriction arises periodically, it is appropriate for the ministry to require information on the duration and frequency of the restriction, and the help or support that is needed, 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, the doctor or other 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 details. **DLA, as defined in the legislation, does not include the ability to work.**

*Arguments - DLA**Appellant*

In the submission on appeal, the appellant argues she needs help from family with "groceries, cooking, and housework." The appellant testified that she can take a shower as long as the water is very hot to keep heat on her back, but she has trouble with fasteners on clothing and had to switch to clothing that she can pull on. The appellant explained that she only manage quick, simple cooking tasks (sandwich or pizza) because she has to rest her arm on the counter and cannot straighten her back due to pain and stiffness.

The appellant states she cannot bend down to load and unload the dishwasher and she cannot even carry two plates. The appellant said she can drive a short distance to a local grocery store but she cannot carry or load her purchases; driving is painful as well, and the appellant is unable to "shoulder check." The appellant said that her family member is doing most of the cooking and all of the housework, and if she did not have this help, things would not get done.

In her self-report and RFR, the appellant describes being in so much pain due to back spasms that she cannot bend down to put her shoes on. The appellant wrote that she can "take care of herself" but sometimes she does not want to leave the house or communicate with anyone due to pain and depression. The appellant writes that staying at home is her "safe zone" where she does not have to "fake a smile and fake looking great "when inside her body is "screaming from pain."

At the hearing the, advocate stated that the information about DLA in the AR is "admittedly not good" but argues that the letter from the doctor, submitted on appeal, contains more detailed information about the appellant's restrictions. The appellant argues that the doctor was rushed when he filled out the PWD medical reports and did not provide an accurate description of her limitations with daily activities.

Ministry

The ministry argues that the appellant's DLA are not restricted either continuously or periodically for extended periods based on the doctor's opinion in the PWD application. The ministry notes that the DLA assessments in the AR indicate the appellant is independent with all but one area of daily activities (*Carrying purchases home*).

Panel's decision - restrictions to Daily Living Activities

The panel has considered the evidence from the doctor in its entirety including the additional letter, and finds that the ministry's decision that DLA are not significantly restricted is reasonably supported by the evidence. In the MR, the doctor reports that the appellant is not prescribed any medications that interfere with DLA. The appellant indicates that she only takes medication at night.

In the AR, the appellant is assessed as independent with all areas of *Personal care* even though the appellant said she has difficulty with dressing (using fasteners on clothing and putting on shoes). The appellant is assessed as independent with all areas of *Basic housekeeping* and *Meals* even though her evidence is that she cannot manage these activities on her own because of restricted movement and too much pain. The appellant is assessed as independent with all areas of Transportation even though she said that driving is difficult and painful for her.

Despite having a mental impairment with low motivation, the appellant is assessed as independent with *Pay rent and bills*, and *Medications*. The appellant describes not wanting to go out or communicate with anyone but the doctor indicates she is independent with all areas of *Social functioning* and has good functioning with her social networks.

In the AR, the appellant is assessed as independent with all areas of Shopping except *Carrying purchases home*, for which she needs continuous assistance from another person due to not being able to lift any weight. Based on the information in the AR the panel finds that the ministry reasonably determined that one restriction in one DLA does not meet the legislated criteria of *significant* restrictions that are occur continuously, or that happen *periodically for extended periods*.

The panel finds that the additional information from the doctor (the letter admitted into evidence) does not confirm the appellant has significant restrictions with DLA. The doctor writes that due to a restricted range of motion, the appellant has direct and significant restrictions with housework and shopping, and she has difficulty using public transit because it is "difficult to stand and hang on due to pain and fatigue". The doctor writes that the appellant needs "significant ongoing help" with housework and shopping, and she is "significantly restricted" in interacting with others due to her chronic conditions.

The panel notes that the doctor has not provided any detail about the appellant's restricted range of motion in either the PWD medical reports or the letter except to say that she has fibromyalgia and "chronic body pain", and numbness that interferes with her work duties. The doctor noted in the MR (*Health history*) that the appellant had received trigger point injections for pain relief and all of her physical functions were assessed as independent in those reports. The doctor did not indicate any restrictions with public transit in the AR, and it appears from the evidence for *Remain seated* (no restriction or only slightly restricted) that the appellant would be able to take the bus if she has a seat.

In the letter, the doctor appears to indicate continuous restrictions with housework and shopping due to the appellant's need for "significant ongoing help" but there is no explanation for why the appellant was assessed as independent with these DLA in the PWD medical reports (with the exception of *Carrying purchases*) but now has significant restrictions. The information in the letter indicates the appellant can now lift a maximum of 5 lbs. This suggests that she would be able to manage light housekeeping tasks and lighter weight grocery items.

As noted, the appellant was not assessed as having any restrictions with *Social functioning* in the AR; in particular, no problems “interacting with others” were reported. Neither the letter nor the PWD medical reports indicate any difficulties with communication or problems with relationships. In the AR, the appellant has good functioning with her social networks. The doctor does not indicate any worsening of the appellant’s mental or physical conditions and describes them as chronic.

The panel has considered the evidence in its entirety and finds that the doctor’s assessments of DLA are inconsistent (without explanation), and lack sufficient detail to confirm that the appellant is significantly restricted in her ability to perform DLA, either continuously or periodically for extended periods as required by the legislation. The panel gives more weight to the PWD medical reports in which the doctor had the opportunity to describe restrictions to DLA and provide comments even if he was “in a rush.” The AR indicates the appellant is independent with all but one DLA task. 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 a 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 argues that DLA such as cleaning, vacuuming, shopping, and cooking would not get done without help from her family member who “does everything” because he can see that the appellant is in so much pain. The ministry acknowledges that the appellant receives help from family and friends but notes that the doctor does not indicate a need for any assistive devices. At the hearing the ministry noted that grocery delivery services can be arranged by anyone, and are not just for persons with disabilities. The ministry’s position in the reconsideration decision 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 has considered all of the information from the doctor and finds that the ministry reasonably determined there is not enough evidence from the doctor to confirm that the appellant needs significant help with DLA. The doctor assesses the appellant as independent with the majority of DLA in the AR, and does not explain in the letter for the appeal why the appellant now needs “significant ongoing help” with housework and shopping (other than carrying purchases). In both the MR and AR, the doctor does not indicate any need for assistive devices, and he indicates in the AR that the appellant does not have an assistance animal. On review of the evidence in its entirety, 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 two of the criteria (age, and duration of impairment) were met but the ministry was not satisfied that the appellant has a severe impairment that significantly restricts DLA to the extent that she requires significant help to perform DLA.

Based on the DLA assessments by the appellant's doctor and the record as a whole, the panel finds that the ministry reasonably concluded that the information provided does not demonstrate that the appellant has a severe impairment that significantly restricts DLA, and that the appellant needs significant help or support to manage DLA. In particular, the appellant is independent with the majority of physical and mental functions and with almost all DLA as assessed in the PWD medical reports. The doctor has not given a reason for the differences in his assessment for the appeal, and has not provided sufficient detail about restrictions in the appellant's ability to function. The panel confirms the reconsideration decision. The appellant is not successful on appeal.

APPEAL NUMBER: 2020-00111

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)

2020-05-11

PRINT NAME

David Kendrick

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2020-05-11

PRINT NAME

Janet (Jan) Lingford

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2020-05-11