

APPEAL NUMBER

2020-00136

### **PART C – DECISION UNDER APPEAL**

The decision under appeal is the Ministry of Social Development and Poverty Reduction (ministry) reconsideration decision dated 5 May 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), dated 31 January 2020, 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 27 February 2020, completed by the same GP who indicates they have seen the appellant 2-10 times in the past 12 months.
- A completed Self Report (SR) dated 5 February 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:

- Chronic depression/anxiety/Bipolar disorder - onset unspecified
- Previous Methadone program
- Seizure disorder onset 2013
- Cirrhosis/previous hepatitis C
- Mild portal hypertension, no varices
- Non-obstructing renal [illegible] onset 2018
- Type 2 Diabetes Mellitus
- Smoker
- COPD [chronic obstructive pulmonary disease]
- Cholecystectomy
- Degenerative Disc Disease

#### 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 and comments *anxious* and *patient reports*.

The GP indicates that the appellant has significant deficits with cognitive and emotional functioning in the areas of memory, emotional disturbance and motivation.

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?" by writing: *social isolation secondary to bipolar disorder, chronic depression and anxiety. Impacts [their] oral nutrition intake, financial impact as has not worked. Last worked > 35 years ago and work for months only.*

The GP indicates that the appellant's ability to communicate is good in the areas of speaking and hearing and satisfactory in the areas of reading and writing. No comments are provided.

The GP assessed, without comment, the appellant's cognitive and emotional functioning as having major impacts in the areas of bodily functions (*sleep*) and emotion; moderate impacts in the areas of attention/concentration, memory, motivation and other emotional problems; minimal impacts are indicated in all other listed areas.

The GP indicates that the appellant has marginal functioning in immediate social networks and very disrupted functioning in extended social networks.

SR:

The appellant indicates in their self report that being bipolar is not easy to live with.

Severity of physical impairment

MR:

Under Health History, the GP has provided a listing of medical documents appended to the PWD application, including:

- Two letters from a pain clinic
- Two letters relating to the appellant's Hepatitis C diagnosis and treatment
- Hospital records relating to seizure disorder, Hepatitis C, methadone maintenance
- Hospital records relating to previous addiction and methadone maintenance

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

- walk 4+ blocks unaided;
- climb 5+ steps unaided;
- lift 5-15 pounds unaided; and
- remain seated without limitation.

The GP has indicated *patient reports* beside each assessment.

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 indicated in the previous section. No physical impairments are mentioned or described.

The GP indicates that the appellant is independent with walking indoors and outdoors, climbing stairs, standing carrying and holding (@ home) and requires periodic assistance with lifting.

SR:

The appellant indicates that Hepatitis C makes them tired. It's hard for them to walk long distances or stand for a short time and their diabetes is affecting their legs and hands.

Ability to perform DLA

MR:

The GP indicates that the appellant has been prescribed medication that interferes with their ability to perform DLA, and provides a list of the medications prescribed. The expected duration of the medication is lifelong.

The GP indicates in the MR that the appellant's impairment restricts their ability to perform DLA and indicates that social functioning is restricted with the comments: *periodic, related to mental health diagnosis and anxiety. Interpersonal relations with family and friends.* The GP has also commented that they are unable to comment further regarding the degree of restriction. The GP has indicated that all other listed DLA are not restricted.

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 (laundry and basic housekeeping).

The GP indicates that the appellant is independent all shopping activities (going to and from stores, reading prices and labels, making appropriate choices, paying for purchases and carrying purchases home).

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.

The GP indicates that the appellant is independent with social functioning activities in the areas of appropriate social decisions, interacting appropriately with others and securing assistance from others. The GP indicates that the appellant requires periodic support with social functioning in the areas of developing and maintaining relationships (*finds difficult*) and dealing appropriately with unexpected demands (*finds chances difficult to adapt to*).

Help required

MR:

The GP indicates that the appellant does not require any prostheses or aids for their impairment but was verbally advised by a doctor at the pain clinic to use a walker and the appellant does not want to.

AR:

The GP indicates that the appellant receives assistance from family (daughter).

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

**Additional Documents before the Ministry at Reconsideration:**

1. A letter from an advocacy organization recounting the appellant's diagnoses and providing commentary regarding the appellant's ability to perform DLA.
2. A letter (undated) to the legal advocate from a physician at a pain clinic
3. A letter dated 20 January 2020, from the GP confirming that the appellant is a patient at their clinic and providing a list of diagnoses.
4. A list of the appellant's prescriptions signed by the GP, dated 20 January 2020.
5. A medical imaging report dated 12 September 2018.

**Additional Information before the Panel on Appeal:**

**1. Notice of Appeal**

In the Notice of Appeal, dated 11 May 2020, the appellant states: *I live with chronic pain daily to where I cannot focus with arthritis is in my toes to my neck. I live with chronic depression, bi-polar and more. I live w[ith] PTSD daily.*

**Appeal Submissions**

At the hearing, the appellant was accompanied by their adult child who spoke as a witness. The witness indicated that their parent does need help because they cannot walk or lift anything heavy. The witness indicated that their parent has called them several times saying they have fallen on their way to the store. Their parent is bipolar. The witness wants to help their parent more but cannot because they have their own children. The witness stated that their parent cannot work; they are not mentally or physically capable of working.

The appellant also spoke on their own behalf at the hearing and argued that the ministry's decision was unreasonable because they have a hard time walking and cannot stand for long periods; their legs give in and their ankles and feet are swollen. The appellant indicated that they also have problems with their hands. They have rheumatoid arthritis and have a hard time moving, sometimes for days or weeks. There are days when they cannot carry their basket to do laundry. The appellant also stated that they have a hard time with bipolar and tend to be

isolated and very sensitive; they don't get along with people well. They are depressed and have a hard time relating to people, staying in their home a week or more sometimes.

When asked by the panel whether they disagreed with the GP's assessment of their ability to perform DLA, the appellant indicated that they sometimes forget to take medications, cannot carry purchases home from the store and have a hard time with basic housekeeping and laundry. The appellant also indicated that they have a hard time getting out of a chair and sometimes need to roll out of bed. The appellant also indicated that in order to bathe, they must bath and not shower. The appellant indicated a general agreement with the remainder of the GP's assessments. The appellant also stated that they had difficulty getting the PWD forms completed adequately by their new GP as their old GP of 39 years had retired. The appellant stated that the new GP does not want to be their doctor and took about 5 minutes with the forms.

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 testimony at the hearing does not require an admissibility determination in accordance with section 22 (4)(b) of the *Employment and Assistance Act*.

## 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, including the need for periodic assistance with lifting. The ministry concluded that the assessments provided by the GP and other medical documentation demonstrated that the appellant suffers from chronic widespread pain but that they are independent with their DLA and do not take significantly longer to manage their activities. The minister considered that the appellant's self reported documents indicated some restriction to DLA, but noted that the presence of such limitations was not confirmed by the GP or in the specialist reports.

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 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 lift items weighing more than 15 lbs. The panel notes that the commentary provided in the advocate's letter at reconsideration does not contain information confirmed by a medical practitioner and is not consistent with the information provided in the medical documentation. The panel finds that the advocate's letter does not contain reliable medical evidence as to the appellant's level of impairment. The letter from the pain clinic does confirm that the appellant is struggling to function on a daily basis but provides no further detail. The panel finds that the assessments provided in the appellant's documents do not reflect the level of limitation required to support a finding that a severe physical impairment has been established. While the appellant's documents indicated that they have been diagnosed with multiple serious medical conditions, the documents do not indicate that these conditions result in a restriction in the appellant's ability to function independently, effectively or for a reasonable duration. 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.

#### Severity of mental impairment

In the reconsideration decision, the ministry determined that the information provided does not establish a severe mental impairment. In reaching this conclusion, the ministry considered the GP's reporting of deficits to cognitive



and emotional functioning as well as the GPs assessment of impacts or restrictions to functioning in the AR. The ministry found it unclear the appellant was restricted in their ability to perform DLA, as the impacts assessed by the GP were not reflected in the assessments provided in the AR.

The panel finds that the ministry's determination that a severe mental impairment has not been established was reasonable. The panel notes that there are several mental health diagnosis provided in the GP's assessments. Despite this, 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 functionally independent in the vast majority of listed areas, with some need for periodic support with relationships and unexpected demands. The panel finds that the ministry's determination, that a severe mental impairment has not been established, is reasonably supported by the evidence.

### Conclusion

The panel notes that the decision it is tasked with making is not whether the appellant suffers from an impairment arising from their medical diagnoses, but whether 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 arising from physical and mental health conditions 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 impairment has not been established, is reasonable.

### **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 diagnosed with multiple medical conditions but functions primarily independently and is not restricted in most areas. The ministry noted that the GP's assessment indicates that the appellant requires assistance to lift more than 15 lbs. and requires periodic assistance with some developing relationships and dealing with unexpected demands. The ministry found that the assistance the appellant requires is not extensive nor is it required 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 independent for all physical tasks, with the exception of lifting more than 15 lbs. The panel also notes that the GP has indicated some need for periodic assistance with some aspects of social functioning; however, the GP 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 notes here that the appellant's evidence is that the GP did not spend sufficient time with the application and does not want to be their doctor. The panel accepts this evidence from the appellant as asserted but is limited to making findings that are consistent with the legislative requirements. For this criterion, the legislation very clearly specifies that restrictions to DLA must be in the opinion of a prescribed professional and the panel finds that the GP's information is insufficient to establish such restrictions. 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, and a walker had been suggested but is not being used, the panel has concluded (above) 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)

2020/06/04

PRINT NAME

John Pickford

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2020/06/04

PRINT NAME

Robert Fenske

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2020/06/04