

APPEAL NUMBER  
2020-00101

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

The decision under appeal is the Ministry of Social Development and Poverty Reduction (ministry) reconsideration decision dated 18 March 2020, which determined that the appellant was not eligible for persons with disabilities designation (PWD) because they 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 demonstrated that they have reached 18 years of age and that their impairment, in the opinion of a medical practitioner or nurse practitioner, is likely to continue for at least 2 years.

The ministry further 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.

### **PART D – RELEVANT LEGISLATION**

*Employment and Assistance for Persons with Disabilities Act* (EAPWDA) – section 2

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR) – section 2

## PART E – SUMMARY OF FACTS

Evidence before the ministry at reconsideration consisted of the following:

### 1. The appellant's PWD Application

The Application contained:

- A Medical Report (MR) dated 19 November 2019, completed by a nurse practitioner (NP) who indicates they have seen the appellant 2-10 times in the past 12 months and known the appellant since September 2018.
- The same MR with revisions dated 10 March 2020, initialed by the same NP.
- An Assessor Report (AR) dated 19 November 2019, completed by the same NP.
- A Self Report (SR) dated 19 November 2019, 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 NP provides the following diagnoses:

- Mood disorders – onset 2016
- Anxiety disorders – onset 2016
- Ischemic heart disease – onset Feb. 2019
- Degenerative disc disease (cervical) – onset 2018
- Chronic fatigue syndrome – onset 2016

#### Severity of mental impairment

MR:

Under Health History, the NP writes that the appellant reports to have been suffering from anxiety/mood disorder and chronic fatigue since 2016. The appellant feels anxious frequently and has been prescribed two medications, one of which they have not taken due to worries about the side effects. Due to chronic pain and fatigue the appellant has decreased levels of activity and function, which aggravate anxiety and disturb sleep causing low energy.

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

The NP indicates that the appellant has significant deficits with cognitive and emotional functioning and specifies that the deficits are evident in the area of emotional disturbance and motivation. No comments are provided.

AR:

In the AR, the NP has not responded to the question "What are the applicant's mental or physical impairments that impact his/her ability to manage Daily Living Activities?".

The NP indicates that the appellant's ability to communicate is good in all areas. The NP comments: *No problem.*

The NP assesses the appellant's cognitive and emotional functioning as having no major impacts; moderate impacts in the area of emotion; no minimal impacts; and no impacts in the remaining 13 areas of cognitive and emotional functioning.

SR:

The appellant does not describe a mental impairment in response to the prompt to "Please describe your disability". The appellant indicates that their quality of life has been impacted by chronic pain and this is something they live with mentally and physically.

Severity of physical impairment

MR:

Under Health History, the NP writes that a 2018 MRI showed cervical spinal canal stenosis and C7 exit foraminal narrowing. The appellant has severe pain in their neck, radiating to the left shoulder blade and left arm with paresthesia in the arm. The appellant reported their pain at 6/10 with medication and 8-10/10 without medication. The appellant has received 3 injections from a pain specialist with another scheduled for December 2019.

For functional skills, the NP indicates that the appellant can walk 4+ blocks with a right knee brace, climb 5+ steps with a right knee brace, lift under 2 to 7 kg. and remain seated 1-2 hours.

The NP indicates that the appellant does not require aids or prostheses for their impairment in the original MR, no amendment or revision of this portion of the PWD application has been included in the revised MR.

AR:

The NP has not responded to the question "What are the applicant's mental or physical impairments that impact his/her ability to manage Daily Living Activities?"

The NP indicates that the appellant uses an assistive device (knee brace) for walking indoors and outdoors, climbing stairs and standing. The appellant is independent with lifting and carrying and holding.

SR:

The appellant indicates that they suffer from cervical spine damage, due to an old injury, that had worsened over time. The appellant reports bilateral symptoms associated with this condition. They provide details of treatment by a pain specialist and neurologist.

Ability to perform DLA

MR:

The NP indicates that the appellant has not been prescribed medication that interferes with their ability to perform DLA.

In accordance with the instructions provided in the PWD application, the NP had not initially completed Part E – Daily Living Activities in the MR because they have completed Part C – Daily Living Activities in the AR. This section has been revised by the NP. The NP's revision indicates that the appellant is not restricted with personal self-care, meal preparation, management of medications, mobility inside of the home, transportation, finances and social functioning. The NP indicates that the appellant is restricted with mobility outside of the home, daily shopping and basic housework. The NP has not indicated whether these restrictions are continuous or periodic. The NP's notes on the revised MR indicate that the appellant attended the NP's office to request revision of the functional skills and daily living activities information in the PWD form for reconsideration.

AR:

The NP indicates that the appellant is independent in all activities of daily living.

The NP indicates that the appellant has good functioning in their immediate social networks and extended social networks.

Help required

MR:

The NP indicates that the appellant uses a right knee brace. The NP also states that the appellant reports that their family helps with grocery shopping, financial assistance and supporting daily activities as needed.

AR:

The NP indicates that the appellant does not need assistance and routinely uses "braces" to compensate for their impairment.

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

## **2. Request for Reconsideration**

The appellant submitted a signed Request for Reconsideration dated 18 February 2019. At reconsideration, the appellant submitted several documents, including:

- The revised MR (discussed above)
- Medical reports, including a surgical report for right knee surgery in 2013 and cervical spine MRI reports from 2018 and 2019
- Internet information detailing medical conditions of the spine

Additional information before the panel on appeal consisted of the following:

### **Notice of Appeal**

In the Notice of Appeal dated 24 March 2020, the appellant indicates that a Release of Information form for a lawyer will be submitted.

### **Appeal Submissions**

The appellant subsequently sought four extensions for written submissions, dated 17 April 2020, 6 May 2020, 1 June 2020 and 22 June 2020. All four requests were granted by the Tribunal Chair. Written submissions were not provided by the appellant.

The ministry relied on the reconsideration decision.

### **Admissibility**

The panel finds that the information provided in the appellant's Notice of Appeal does not contain any new information requiring 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's reconsideration decision, in which the ministry 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.

#### Severity of physical impairment

In the reconsideration decision, the ministry determined the appellant does not have a severe physical impairment. In making this determination, the ministry noted that the NP has indicated that the appellant does require a right knee brace for some of the activities (walking and stair climbing) in the functional skills assessment. However, the ministry went on to note that the NP did not indicate the appellant's ability in these areas without the knee brace. The ministry considered that the appellant can lift 5 to 15 lbs. and remain seated for 1-2 hours and argued that these assessments are not indicative of a severe impairment in physical functioning. The ministry noted that the NP's assessment is that the appellant requires a knee brace for mobility and physical activities but argued that the information provided did not allow the ministry to establish the appellant's level of functioning without the knee brace. The ministry acknowledged that the appellant does have some physical functioning limitations but concluded that these restrictions were reflective of a moderate rather than severe restriction.

The panel finds that the ministry's determination was reasonable. 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 functioning, ability to perform DLA and help required. Given the focus on restrictions and help required in the legislation, the panel finds the ministry's approach to assessment on reconsideration and the conclusions on this criterion to be reasonable. The panel notes that the NP's assessments of the appellant's functional capacity and mobility and physical ability assessments in the MR and AR indicate that the appellant requires a knee brace but can perform at the highest end of the scales provided for walking and stair climbing. In addition, the panel finds the ministry's determination, that lifting 5 to 15lbs and remaining seated 1-2 hours are not reflective of a severe impairment, is reasonable. The panel finds that the ministry's determination, that a severe physical impairment has not been established, is reasonably supported by the evidence.

#### 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 NP's assessments indicate that the appellant has no difficulties with communication. The ministry also noted that the NP indicated deficits to cognitive and emotional functioning in the MR in relation to emotional disturbance and motivation and in the AR the NP indicated moderate impacts to emotion and no impacts in any of the other 13 listed areas. The ministry further noted that while the NP indicated deficits to motivation in the MR, the NP indicated no impacts to this area in the AR. The ministry argued that one moderate impact, with no impacts in the other 13 listed areas, did not indicate a severe impairment of mental functioning. The ministry also noted that the NP indicated that the appellant is independent with all areas of social

functioning and has good functioning in their immediate and extended networks. 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 the NP's assessments in the MR and AR indicated some deficits with respect to cognitive and emotional functioning; however, according to those same assessments, these deficits do not appear to manifest in a manner that impairs the appellant's ability to function effectively or independently. The panel notes the NP's assessments relating to decision-making activities indicate that the appellant is independent in all areas. The panel also notes that the appellant has been assessed as entirely independent with respect to social functioning and without any communication difficulties. The NP does not provide any information regarding safety issues or support required to maintain in the community. 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 NP. 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 DLA. In reaching this conclusion, the ministry noted that the NP has indicated that there are no medications/treatments that interfere with the appellant's ability to perform DLA. The ministry noted that the NP indicates in the revised MR that the appellant is restricted with respect to basic housework, daily shopping and mobility outside of the home but argued that the NP has failed to indicate the frequency of impacts to these activities. As well, the ministry argued that the NP has not provided information regarding the frequency or duration of any assistance provided for shopping, finances or other daily activities. The ministry also argued that the NP's assessments indicate their independence with the majority of DLA. The ministry concluded that not enough evidence had been provided to establish 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 here that the revised MR provided in the reconsideration submission is not consistent with the assessments provided by the same NP in the AR, to which no revision has been made. The assessments in the MR indicate some restriction to DLA and some assistance from family, while the assessments in the AR indicate that the appellant is independent with all DLA and does not require any assistance from others. Even relying primarily on the revised MR, the panel finds that the NP has assessed the appellant as being largely independent with performing DLA and has provided insufficient information regarding the degree and frequency of both restrictions and assistance. The panel finds that a holistic view of the information provided by the NP demonstrates that the appellant wears a knee brace and has some assistance from family, but there is no indication as to whether the appellant experiences continuous or periodic restrictions to DLA nor how frequently assistance is required (or provided) by the appellant's family. The panel finds that these assessments do not demonstrate direct and significant restrictions to DLA continuously or periodically for extended periods. In particular, the panel notes an insufficiency of information from the NP relating to these assessments. The panel also notes that the appellant reports in the SR that they are able to take care of their self, personal care, shopping, etc. The panel concludes that the ministry's determination that the evidence is insufficient to show that the appellant's overall ability to perform DLA is significantly restricted either continuously or periodically for extended periods is reasonable.

### **Help 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. According to the legislation, at section 2(1), 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.*

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 indicates that the appellant does receive some assistance from family and does wear a knee brace, 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 also 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. As such, the panel finds that the ministry's conclusion that this criterion has not been met is reasonable.

### **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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2020-00101

**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)

2020/08/17

PRINT NAME

Keith Lacroix

SIGNATURE OF MEMBER

DATE(YEAR/MONTH/DAY)

2020/08/17

PRINT NAME

Inge Morrissey

SIGNATURE OF MEMBER

DATE(YEAR/MONTH/DAY)

2020/08/17