

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction's ("ministry") reconsideration decision dated April 26, 2021, in which the ministry found 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 met the age and duration requirements but was not satisfied that:

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

The ministry also found that the appellant was 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 22, 2021 and denied on February 25, 2021. On March 28, 2021, the appellant submitted the *Request for Reconsideration* ("RFR"). The ministry granted the appellant's request for an extension until April 26, 2021 to provide additional information. The ministry notes that no additional information was submitted for the reconsideration. On April 26, 2021, the ministry completed the review of the RFR.
2. An RFR signed by the appellant on March 25, 2021, with a hand-written note asking for an extension to fill out the form. The appellant indicates not knowing how to fill out the RFR.
3. The PWD application comprised of:
 - the *Applicant Information* (self-report - "SR") not dated, in which the appellant lists the symptoms she experiences including panic attacks, constant tiredness, difficulty breathing when anxious, depression, hopelessness, and feeling overwhelmed. The appellant also lists physical symptoms including body aches, headaches, cramps and bloating, fatigue, sluggishness, and feeling drained of energy. The appellant says that her cognitive symptoms include difficulty with concentration, decisions, and remembering things. The appellant provides her argument for the reconsideration and indicates she is taking medication for anxiety and depression.
 - a *Medical Report* ("MR") dated January 11, 2021, signed by the appellant's general practitioner ("doctor") who has known the appellant since 2016 and has seen the appellant 11 or more times in the past 12 months; and an
 - *Assessor Report* ("AR") dated January 11, 2021, also completed by the doctor who based the assessment on an office interview with the appellant and file/chart information. The doctor states that their office provides the appellant with counselling, medication, and parenting support.
4. A letter from the ministry dated April 26, 2021, with attached *Denial Decision Summary* advising that the appellant did not meet all of the criteria for PWD designation.

Summary of relevant evidence from the application:

Diagnoses

In the MR, the appellant is diagnosed with Mood disorder, Anxiety disorder, Depression, and Fibromyalgia, (onset for all conditions 2019).

In section B - *Health History*, the doctor explains that a "severe Anxiety disorder" causes the appellant to have panic attacks, tension headaches and low mood. The doctor says the appellant's depression is moderate and chronic.

Functional skillsSelf-Report

The appellant describes how her employment ("working more hours") increases anxiety and depression causing panic attacks and physical pain.

Medical Report

In section B - *Health History*, the doctor states that the appellant has “good days and bad days” due to anxiety and depression. The doctor says the appellant is “able to function” on good days. On bad days, the appellant has difficulty concentrating, feels fatigue and low energy, and is dysfunctional but not suicidal.

Under Section D - *Functional Skills*, the doctor crossed out questions 1 to 5 which assess physical abilities and any difficulties with communication. The doctor wrote “N/A.”

For question D-6, the doctor checked that the appellant has significant deficits with cognitive and emotional function in the areas of *Executive, Memory, Emotional disturbance, Motivation, and Attention*; comment: “the above tend to increase when she is having a bad day.”

Under *Additional Comments*, the doctor describes the appellant’s inability to work “on days that patient is dysfunctional” with an impact on finances. The demands of parenting children without any support cause her added stress and anxiety.

Assessor Report

Under Section B-2, *Ability to Communicate*, the doctor indicates a *good* ability for the 4 areas listed: *Speaking, Reading, Writing, and Hearing*.

Under section B-3, *Mobility and Physical Ability*, the doctor marked the appellant *independent* for the 6 areas listed: *Walking indoors, Walking outdoors, Climbing stairs, Standing, Lifting, and Carrying/holding*.

In section B-4, *Cognitive and Emotional Functioning*, the doctor was asked to indicate what impacts the appellant’s impairments have on various cognitive and emotional functions. The doctor left the form blank.

Daily Living ActivitiesSelf-report

The appellant states that her ability to work is affected by increased mood symptoms and pain.

Medical Report

The doctor check marked *yes* when asked if the appellant is prescribed medications or treatments that interfere with the ability to perform DLA. The doctor indicates the appellant is prescribed an anti-depressant medication at night and needs to keep taking the medication for more than a year.

In Section E - *Daily Living Activities*, the doctor checked *no*, the impairment does not restrict the appellant’s ability to perform DLA. However, on the list of specific DLA, the doctor indicates that 5 of the 10 DLA are periodically restricted:

- *Personal self-care*
- *Meal preparation*
- *Management of medications*
- *Basic housework*
- *Social Functioning*

When asked to explain the periodic restrictions, the doctor wrote: “mood is biphasic. On days she is having severe anxiety or depression is dysfunctional. On good days function is normal.” The periodic restrictions with *Social functioning* are “as above.”

The doctor provided no information for *Daily shopping*.

The doctor checked *no*, the remaining DLA are not restricted either continuously or periodically:

- *Mobility inside the home*
- *Mobility outside the home*
- *Use of transportation*
- *Management of finances*

Assessor Report

In Section B - *Mental or Physical Impairment*, the doctor states that “depression and anxiety based on stress levels” and “good and bad days” are the medical conditions that impair the appellant’s ability to manage DLA.

In Section C - *Daily Living Activities*, the doctor left the form blank when asked to indicate the degree of restriction for 3 DLA: *Personal Care*, *Basic Housekeeping*, and *Shopping*. Under *Additional comments* for these DLA the doctor states that the appellant’s “severe anxiety” causes panic attacks and the appellant has chronic moderate depression and aches and pains in her body from fibromyalgia. On “certain days” based on stress levels, the appellant’s panic attacks and low mood result in difficulty concentrating, fatigue, a lack of energy. On these days the appellant “does not look after herself or tend to the house or do basic chores.” The appellant is “able to pull herself through.”

The doctor marked the appellant *independent* with the remaining DLA listed in the AR:

- *Meals*
- *Pay Rent and Bills*
- *Medications*
- *Transportation*
- *Social Functioning*

For *Social Functioning*, the doctor checked that the appellant has *good functioning* with her immediate social network and *marginal functioning* with her extended social networks. The doctor does not state whether any supports are needed to maintain the appellant in the community. The doctor did not note any safety issues.

Need for help

Medical Report

Under *Health History* (Part B), the doctor marked *no*, the appellant does not need any prostheses or aids for the impairment. In Part F - *Additional Comments*, the doctor states that the appellant has “no support.”

Assessor Report

In the AR, the doctor indicates the appellant lives alone. In section D - *Assistance Provided for Applicant*, the doctor left the form blank when asked if the appellant has help with DLA or needs help when none is available.

In the section of the form for *Assistance provided through the use of Assistive Devices*, or *Assistance Animals* the doctor drew a line through the spaces for check marks and comments. The doctor left section E - *Additional Information* blank.

Additional submissions

Neither party provided additional documents or oral evidence that require an admissibility determination under section 22(4) of the *Employment and Assistance Act*. Subsequent to the reconsideration decision, the appellant signed the *Notice of Appeal* and did not provide a written submission. The ministry relied on the reconsideration decision and both parties provided argument at the hearing. The panel considers the arguments in Part F - *Reasons for panel decision*.

Procedural matters

The hearing was adjourned twice from the original hearing date of June 9, 2021. The panel granted an adjournment at hearing when the notification to the parties contained a mistake in the teleconference instructions. The panel granted a second adjournment at hearing when the appellant stated she wanted to have her advocate attend the hearing. The ministry expressed their support of both adjournments. The appellant attended the re-scheduled hearing with an advocate. The advocate stated that she knew the appellant through a community assistance program.

PART F – REASONS FOR PANEL DECISION

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

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

The ministry based the reconsideration decision on the following legislation:

EAPWDA

2 (1) In this section:

"assistive device" means a device designed to enable a person to perform a daily living activity that, because of a severe mental or physical impairment, the person is unable to perform;

"daily living activity" has the prescribed meaning;

"prescribed professional" has the prescribed meaning.

(2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act if the minister is satisfied that the person is in a prescribed class of persons or that the person has a severe mental or physical impairment that

- (a)** in the opinion of a medical practitioner or nurse practitioner is likely to continue for at least 2 years, and
- (b)** in the opinion of a prescribed professional

- (i)** directly and significantly restricts the person's ability to perform daily living activities either

- (A)** continuously, or

- (B)** periodically for extended periods, and

- (ii)** as a result of those restrictions, the person requires help to perform those activities.

(3) For the purposes of subsection (2),

- (a)** a person who has a severe mental impairment includes a person with a mental disorder, and
- (b)** a person requires help in relation to a daily living activity if, in order to perform it, the person requires
 - (i)** an assistive device,
 - (ii)** the significant help or supervision of another person, or
 - (iii)** the services of an assistance animal.

(4) The minister may rescind a designation under subsection (2).

EAPWDR

Definitions for Act

2 (1) For the purposes of the Act and this regulation, "daily living activities",

(a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following activities:

- (i)** prepare own meals;
- (ii)** manage personal finances;
- (iii)** shop for personal needs;
- (iv)** use public or personal transportation facilities;
- (v)** perform housework to maintain the person's place of residence in acceptable sanitary condition;
- (vi)** move about indoors and outdoors;
- (vii)** perform personal hygiene and self-care;
- (viii)** manage personal medication, and

(b) in relation to a person who has a severe mental impairment, includes the following activities:

- (i)** make decisions about personal activities, care or finances;
- (ii)** relate to, communicate or interact with others effectively.

(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 five criteria were met. "Severe" is not defined in the legislation but in the ministry's view, 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 there are any safety issues. The panel finds that an assessment of severity based on mental and social functioning is a reasonable interpretation of the legislation.

Arguments***Appellant***

In the self-report, the appellant argues she has difficulty moving forward due to depression. At the hearing, the advocate described the appellant's social situation stating that the obstacles the appellant faces to get through the day include a lack of family support and community resources and a low level of education. The advocate described the appellant's inability to focus on employment tasks, and when the appellant attends programs it is clear that she really struggles to get there due to her health issues and life stressors.

The advocate described the appellant as "young and bright, with a lot going for her" and argues that PWD assistance would help the appellant "get on her feet and move forward over the next couple of years." The advocate argued that the appellant "definitely needs assistance with DLA" because the only thing the appellant can manage is "caregiving for her children."

In response to questions from the panel, the appellant explained that she went through a lengthy process to get the PWD forms filled out by the doctor. The forms were left with the doctor for 4 months and when the appellant picked them up, the receptionist said that the parts that were left empty needed to be filled out by the appellant, not the doctor. The ministry confirmed at the hearing that the doctor was to provide the information for those sections.

The appellant said she is disappointed with her doctor and doesn't know why they did not pay attention to the appellant's health or fill out the forms completely. The appellant described a long history with the doctor who knows the appellant well. The doctor has treated the appellant for panic attacks many times and knows that the appellant "keeps forgetting things and gets breathless/anxious." The appellant added that she mentioned her tiredness to the doctor and that her hands sweat when she works a lot.

The appellant said that the doctor asked her some questions about DLA over the phone such as whether she can make food for her children. The appellant agrees that she can cook and do household tasks for her children because she has to look after them. The appellant said she takes care of her children's needs but gets "breathless and overwhelmed and has problems 4 days a week."

Ministry

The ministry argues there was not enough information in the application to establish a severe mental impairment because the doctor did not complete section B of the AR to indicate the impact of the impairment on the appellant's daily functioning. As well, neither the appellant nor the doctor indicated how often the appellant has "bad days" and no significant impairment with social functioning was reported. The ministry acknowledges that the appellant is

anxious and depressed but argues there was not enough information about the episodic nature of the appellant's mood disorders.

Panel's decision - mental impairment

Section 2(2) of the legislation requires evidence of a severe impairment. The information from the appellant is that she feels depressed and has panic attacks and cognitive symptoms on bad days that prevent her from moving forward in life. The doctor diagnosed the appellant with mood disorders and despite not filling out the section of the AR dealing with impacts to emotional and cognitive functioning, the doctor indicates the appellant has significant deficits to several areas of cognitive and emotional function including *Executive, Memory, Motivation, Emotion, and Attention/concentration*. The information from the doctor indicates the appellant is anxious and depressed at baseline but the deficits to her cognitive and emotional functioning "tend to increase when she is having a bad day" (MR).

The doctor emphasized that the severity of the appellant's symptoms fluctuates and she is able to function on good days but is dysfunctional on bad days (MR). In the PWD forms neither the appellant nor the doctor indicates how often the appellant has "bad days." The appellant suggested at the hearing that she is impaired by her mood disorders "4 days a week" and while the panel finds the appellant believable there was no information from the doctor on how often the appellant is unable to function or what she does on the days she is "dysfunctional."

The panel finds that the ministry was reasonable to conclude the appellant does not have a severe mental impairment based on the evidence provided. As the ministry noted, the appellant asked for an extension for the RFR but did not submit any additional information from her doctor. When asked if she had any follow up with her doctor regarding the ministry's refusal of the PWD application, the appellant indicated that any follow up she had was to adjust her medications and refer her for a cardiac test.

The panel finds that the ministry reasonably concluded there was not enough detailed information to establish a severe impairment of cognitive, emotional, and social functioning. The panel finds that the ministry has applied the legislation in a reasonable way and a *severe* mental impairment under section 2(2) of the EAPWDA was not established on the evidence.

Physical impairment

To assess whether the applicant has a severe physical impairment, the ministry considers information on the degree of restrictions to physical functioning and whether the applicant requires significant help or any assistive devices to manage physical DLA. The panel finds that the assessment of severity based on daily physical functioning is a reasonable interpretation of the legislation.

Arguments - physical impairment

The appellant argues she has physical symptoms including body aches and pains, cramps, and fatigue. The appellant reports feeling drained of energy. The ministry argues the appellant does not have a severe physical impairment because in the AR the doctor indicates the appellant is independent with all physical functions including *walking, climbing stairs, standing, lifting, and carrying and holding*. The ministry acknowledges that the appellant may suffer from pain and fatigue due to fibromyalgia but argues that the appellant's ability to manage mobility and physical activity is not impaired according to information in the application.

Panel's decision - physical impairment

The panel finds that the ministry's decision for physical impairment, (no *severe* impairment), was reasonably supported by the evidence. The appellant is diagnosed with fibromyalgia but the doctor marked section D of the MR, physical functional skills, "N/A." In the AR, the appellant was assessed as independent with all physical functions including walking outdoors and lifting and she does not need any assistive devices. Based on the information provided in the PWD application which does not indicate a severe impairment of physical functioning,

the panel finds that the ministry reasonably determined the requirement for a severe impairment under section 2(2) of the EAPWDA was not met.

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 a psychologist or 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* under the legislation. Continuous means that the activity must generally be restricted all the time. The ministry views a periodic restriction as significant when it occurs frequently or for longer periods of time; for example, the activity is restricted most days of the week, or for the whole day on the days that the person cannot do the activity without help or support.

The panel views the ministry's interpretation of the legislation as reasonable. Accordingly, where the evidence indicates that a restriction arises periodically as with the appellant's ability to manage personal care, medications, and shopping, it is appropriate for the ministry to require information on the duration and frequency of the restriction as well as details about the help or support that is needed. With that information, the ministry can assess whether the legislative requirement 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. **It is important to note that under the legislation, the inability to work or manage job duties is not considered a DLA and the ministry cannot consider financial need/lack of financial resources in determining PWD eligibility.**

Arguments - DLA

The appellant acknowledges she can manage DLA to look after her children's needs but argues that her depression leaves her tired and overwhelmed and her panic attacks are more frequent if she works too much. The ministry accepts that the appellant is restricted with personal care, housekeeping, and shopping on the days she has panic attacks and low mood but argues there was not enough information from the doctor to confirm that DLA are continuously restricted or periodically restricted for extended periods of time as required by the legislation.

Panel's decision - restrictions to Daily Living Activities

The panel has considered the evidence from the doctor in its entirety and finds the ministry's decision that DLA were not significantly restricted either continuously or for extended periods of time was reasonably supported by the evidence. In the MR, the doctor does not indicate any continuous restrictions to DLA but checked that *Personal self care, Meal Preparation, Management of medications, Basic housework, and Social functioning* are periodically restricted on days when the appellant "is having severe anxiety or depression." In the AR, the doctor comments

that *Personal Care, Basic Housekeeping, and Shopping* are restricted on "certain days" due to the appellant's panic attacks and chronic depression.

The doctor does not say how frequently the "bad days" occur. The doctor also says that despite periodic restrictions with personal care, housekeeping, and shopping, the appellant "is able to pull herself through." In addition, the doctor's evidence about restrictions to *Meals, Medications, and Social functioning* shows some inconsistency between the MR and AR. In the AR, the doctor marked the appellant as independent with these DLA but the

appellant appears to have some limitations socially on her “bad days” as the doctor indicates *marginal functioning* with extended social networks.

What constitutes an extended period of time is not defined in the legislation but where DLA are restricted only on “bad days” with the frequency not reported by the doctor, the ministry was reasonable to find there was not enough information to confirm significant restrictions to DLA over a long period of time. The panel therefore finds that the ministry reasonably determined there was not enough evidence to confirm significant restrictions to DLA under subsection 2(2)(b)(i) of the EAPWDA.

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 indicates she does not have family or social support and is tired and drained by her anxiety and depression while looking after her children. The ministry argues that because DLA are not significantly restricted, it cannot be determined that significant help is required.

Panel's decision - help with Daily Living Activities

The doctor indicates the appellant does not have family or social support to help manage DLA, but did not comment on what help is required where none is available (AR). The doctor wrote “N/A” regarding any assistive devices for the appellant’s physical impairment (fibromyalgia).

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 was reasonable because the frequency of periodic restrictions to DLA was not reported. In particular, the doctor did not say how often the appellant has “bad days.” On review of the evidence from the doctor, the panel finds the ministry’s conclusion that the criteria for help under subsection 2(2)(b)(ii) of the EAPWDA were not met was a reasonable application of the legislation.

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 was reasonably supported by the evidence. The legislation requires all of the criteria to be met. The ministry was reasonable in finding that only two criteria (age, and duration of impairment) were met because there was not enough information in the record about how frequently the appellant has “bad days” to confirm a severe impairment that significantly restricts DLA for extended periods. The panel finds that the ministry reasonably applied the legislative requirements to the information that was provided. The panel confirms the reconsideration decision. The appellant is not successful on appeal.

PART G – ORDER

THE PANEL DECISION IS: (Check one) UNANIMOUS BY MAJORITY

THE PANEL CONFIRMS THE MINISTRY DECISION RESCINDS THE MINISTRY DECISION

If the ministry decision is rescinded, is the panel decision referred back to the Minister
for a decision as to amount? Yes No

LEGISLATIVE AUTHORITY FOR THE DECISION:

Employment and Assistance Act

Section 24(1)(a) or Section 24(1)(b)

and

Section 24(2)(a) or Section 24(2)(b)

PART H – SIGNATURES

PRINT NAME

Margaret Koren

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2021-08-04

PRINT NAME

Nancy Eidsvik

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2021-08-04

PRINT NAME

Susanne Dahlin

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2021-08-04