

Part C – Decision Under Appeal

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the Ministry) Reconsideration Decision (RD) dated October 28, 2021, which found that the Appellant did not meet three of the five statutory requirements of Section 2 of the *Employment and Assistance for Persons with Disabilities Act* (EAPWDA) for designation as a person with disabilities (PWD). While the Ministry found that the Appellant met the age requirement and, on reconsideration, that he had an impairment which was likely to continue for at least two years, it was not satisfied that the evidence establishes that:

- The Appellant has a severe physical or mental impairment;
- The Appellant's daily living activities (DLA) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and,
- As a result of these restrictions, the Appellant requires the significant help or supervision of another person, the use of an assistive device, 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) and the Panel notes that he did not appeal the decision on this basis. 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

EAPWDA, Section 2

EAPWDR, Section 2

Employment and Assistance Act (EAA), Section 22(4)

The relevant legislation is provided in the Appendix.

Part E – Summary of Facts

The evidence before the Ministry at the time of the RD included the PWD Application comprised a self report (SR), completed by the Appellant on September 1, 2021, a Medical Report (MR) dated September 4, 2021 and completed by a Rheumatologist (the Rheumatologist) who has known the Appellant since December 2020 and who has seen the Appellant 2 -10 times in the past year, and an Assessor Report (AR) dated July 30, 2021, also completed by the Rheumatologist.

The evidence available to the Ministry at the time of the RD also includes:

- A Request for Reconsideration form (RFR) signed by the Appellant on October 13, 2021, in which the Appellant describes the symptoms he suffers because of his physical disability, the severity of his impairment, and its impact on DLA;
- A one-page letter dated October 9, 2021 from the Rheumatologist (the Rheumatologist's October 9 Letter), addressed to whom it may concern, expressing support for the Appellant's PWD designation application, summarizing the treatment he has received to date, explaining why the Appellant is presently unable to work, and explaining why the Rheumatologist can't say when the Appellant might be able to work again;
- A two-page letter dated December 21, 2020 from the Rheumatologist (the Rheumatologist's December 21 Letter), addressed to the Appellant's Family Physician (FP) providing a history of the Appellant's presenting illness, a review of his symptoms, the results of a limited physical examination of the Appellant, a summary of the results of previous investigations of the Appellant as provided by the FP, the Rheumatologist's impressions based on the Appellant's medical history, the results of the Rheumatologist's examinations and the FP's investigations, and plans for further action and follow-up; and,
- A two-page letter dated July 20, 2021 from the Rheumatologist to the FP (the Rheumatologist's July 20 Letter), acknowledging the Appellant's previous appointment date of December 21, 2020, listing active medications that the Appellant is taking and a history of medication treatments, listing vaccines that the Appellant has had, providing a history of medical treatments the Appellant has received since the Rheumatologist's December 21, 2020 examination, providing the results of a March 2021 investigation and the results of the Rheumatologist's July 20, 2021 examination, and plans for further action and follow-up.

The reasons given by the Appellant for the RFR and relevant information contained in the Rheumatologist's December 21 Letter and the Rheumatologist's July 20 Letter are detailed in the appropriate sections of the discussion below.

Diagnoses

In the MR, the Rheumatologist diagnoses the Appellant with mechanical pain of the spine and lower extremities with a date of onset of 2019.

Severe Physical Impairment***Physical Functioning***

In the MR, under Health History, where asked to indicate the severity of the applicant's medical conditions and how they impair the applicant, the Rheumatologist wrote "*Several year history of progressive lower back and lower extremity pain, limiting strength and mobility. Partially responsive to [non-steroidal anti-inflammatory drugs (NSAIDs)]. Investigations non-revealing, including [magnetic resonance imaging (MRI)]*".

The Rheumatologist has not reported on the Appellant's functional skills in the section of the MR dealing with those skills (which are: the number of blocks that the applicant can walk unaided on a flat surface, the number of stairs that the applicant can climb unaided, the applicant's lifting limitations, and how long the applicant can remain seated). The Rheumatologist has not completed the section of the MR where the prescribed professional is asked to provide any additional information that might be considered relevant in understanding the significance of the applicant's medical condition and the nature of their impairment.

In the section of the AR where the assessor is asked to indicate the assistance required related to impairments that directly restrict the applicant's management of mobility and physical abilities (walking outdoors, standing, climbing stairs, lifting, and carrying and holding), the Rheumatologist has not identified any activities that require either periodic or continuous assistance from another person or that the Appellant is unable to perform, but does indicate that the Appellant takes significantly longer than normal with all listed mobility and physical abilities, adding "*All due to ongoing pain despite use of analgesics as well as stiffness and limitation of mobility*". No additional comments are given in the space provided.

In the SR, the Appellant states that he has been suffering from undiagnosed nerve and joint pain for over two years and he has been unable to work. He says that in May 2019 he felt an electric shot in his left wrist and a few weeks later the pain was debilitating and was present in both wrists. As a result, he has not worked since then and has "*consistently felt a pins and needles sensation*" in his wrists "*followed by electric shocks upon further aggravation*". He also says that his joints and surrounding tendons ache and feel stiff, and within a year these symptoms had spread to his ankles and up his arms, forcing him to drop out of college. Now he experiences the same pain in all his extremities and his spine, to the point where "*the pain is so sensitive it hurts to wear certain ... clothing*" and even after taking painkillers he is unable to work.

In the RFR, in addition to the information regarding the severity of his physical impairment as described in the SR, the Appellant says that his progressively worsening health requires "*dosages in (his) pharmacological care*". He also says that he has limited mobility and functioning of the wrists, that "*there are some functions (he) can't do or sustain for prolonged periods of time*" and that as a result he is "*slower than most*".

In the Rheumatologist's October 9 Letter, the Rheumatologist writes "*(The Appellant) has daily pain, stiffness, limitation of mobility, and function that result from (his physical impairment). Investigations to date have been negative, but he has only had a partial response to typical analgesic treatment, as well as regular exercises and mobility exercises ...*".

In the Rheumatologist's December 21 Letter, the Rheumatologist writes "*(The Appellant) noted gradual onset of diffused pain in upper and lower extremities over many years. He eventually had enough pain*

to prompt medical assessment in May 2019 due to sharp shock-like pain in the left wrist while playing (a musical instrument). He has progression of similar shock-like pain in both arms and both legs ... (and) has similar neuropathic pain in the rectum. He also notes pain in the joints, particularly in the wrists. He gets aching pain in both wrists, left more than right, as well as both ankles."

In the Rheumatologists July 21 Letter, the Rheumatologist says that the Appellant reported during the examination that his wrists and ankles exhibit the same degree of stiffness and pain they did when the Rheumatologist conducted the December 21, 2020 examination, without swelling. The Rheumatologist also states that the Appellant's thoracic spine is painful but does not often wake him up at night, and that the Appellant experiences sporadic morning stiffness that lasts for 15 minutes.

Severe Mental Impairment

Mental Functioning

Neither the Appellant nor the Rheumatologist has indicated that the Appellant has any impairments to his mental functioning.

Restrictions in the Ability to Perform DLA

In the MR, the Rheumatologist indicates that the Appellant has not been prescribed any medications or treatments that interfere with his ability to perform DLA. The Appellant has not provided any comments in the section of the MR that asks the prescribe professional to provide any additional information that might be considered relevant in understanding the impact of the Appellant's medical condition on daily functioning.

The instructions provided in the DLA section of the MR ask the prescribed professional to not complete the DLA section if they are also completing the AR. Nevertheless, this section of the form was completed by the Rheumatologist, and in it they have indicated that the Appellant's basic housekeeping, daily shopping, mobility inside and outside the home, and use of transportation are all continuously restricted. Where asked to provide additional comments regarding the degree of restriction, the Rheumatologist has written "*Pain, stiffness, weakness and loss of mobility impact all activities continuously*".

In the AR, the Rheumatologist indicates that the Appellant requires neither periodic nor continuous assistance with any DLA tasks, but takes significantly longer than typical with the personal care tasks of dressing, grooming, bathing, toileting and transferring in and out of bed, adding the comment "*Takes longer than usual due to pain stiffness and limitation of mobility despite appropriate treatment*". No information is provided by the Rheumatologist in the section of the AR that deals with basic housekeeping. Regarding the DLA of shopping, the Rheumatologist indicates that the Appellant is independent with all tasks except going to and from stores and carrying purchases home (indicating that he takes significantly longer than typical with these tasks) but the Rheumatologist doesn't provide any other comments or explanation. The Rheumatologist indicates that the Appellant is independent with all aspects of all other listed DLA except for getting in and out of a vehicle and taking public transit, where they indicate that the Appellant takes significantly longer than normal. No additional comments or explanations are provided.

In the SR, the Appellant writes "*Chores and housekeeping can often be painful for extended periods of time. For instance doing the dishes, folding laundry, ... cleaning ... (and) grocery shopping. Although*

capable, carrying baskets and grocery bags can cause me pain ... If I drive long enough that becomes a problem as well.

In the RFR, the Appellant writes that the DLA that he unable to do or sustain for a long period of time include folding laundry, washing dishes, shopping, use of transportation and housework generally, and that the degree of restriction in performing these DLA "*(varies) on a day-to-day basis*".

There are no references to the Appellant's inability to perform DLA in the Rheumatologist's December 20 Letter, the Rheumatologist's October 9 Letter, or the Rheumatologist's July 21 Letter.

Need for Help

In the MR the Rheumatologist indicates that the Appellant does not require any prostheses or aids for his impairment.

Where asked in the AR what assistance the prescribed professional's patient needs with DLA, the Rheumatologist has written "*Unknown*". In the section of the AR where the prescribed professional is asked what assistance is provided through the use of a list of assistive devices the Rheumatologist has written "*n/a*". The Rheumatologist also indicates that the Appellant does not have an assistance animal. Where asked in the AR who provides help with the applicant's DLA, the Rheumatologist has ticked "Family" but has not provided any comments or explanation in the space provided.

In the SR, the Appellant states that he is "*still fully dependent on my dad for shelter, transportation and other needs*".

The Appellant does not provide any information in the RFR about his need for help with DLA or who assists him with those activities.

There are no references to the Appellant's need for help in performing DLA in the Rheumatologist's December 20 Letter, the Rheumatologist's October 9 Letter, or the Rheumatologist's July 21 Letter.

Additional Information Submitted after Reconsideration

Section 22(4) of the EAA says that a panel may consider evidence that is not part of the record that the panel considers to be reasonably required for a full and fair disclosure of all matters related to the decision under appeal. Once a panel has determined which additional evidence, if any, is admitted under EAA Section 22(4), instead of asking whether the decision under appeal was reasonable at the time it was made, a panel must determine whether the decision under appeal was reasonable based the requirements set out in the legislation and on all admissible evidence.

In the section of the Notice of Appeal (NOA) that asks the applicant why they disagree with the Ministry's RD, the Appellant has indicated that the Ministry is using his lack of a diagnosis as a means of denying him the PWD designation, which he feels is "*ignorant and wrong*".

Neither the Appellant nor the Ministry provided any additional evidence after the RD was made.

Admissibility of New Evidence

No new evidence was presented in the NOA.

Part F – Reasons for Panel Decision

The issue under appeal is whether the Ministry's RD, which found that the Appellant is not eligible for designation as a PWD, was reasonably supported by the evidence or was a reasonable application of the legislation in the circumstances of the Appellant. Was it reasonable for the Ministry to determine that the evidence does not establish that the Appellant has a severe mental or physical impairment, and that the Appellant's DLA are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods? Was it reasonable for the Ministry to determine that because of any direct and significant restrictions it could not be determined that the Appellant requires the help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA?

ANALYSIS**Severity of Impairment**

The term "*impairment*" is not defined in the EAPWDA. The Cambridge Dictionary defines "*impairment*" in the medical context to be "*a medical condition which results in restrictions to a person's ability to function independently or effectively*". "*Impairment*" is defined in the MR and the AR sections of the PWD application form to be "*a loss or abnormality of psychological, anatomical, or physiological structure or function causing a restriction in the ability to function independently, appropriately or for a reasonable duration*". While the term is not defined in the legislation, the Panel finds that the Ministry's definition of "*impairment*" as set out in the MR and the AR is a reasonable definition of the term for the purpose of partially assessing an applicant's eligibility for the PWD designation.

In addition, a diagnosis of a severe impairment does not in itself determine PWD eligibility. Section 2(2) of the EAPWDA requires that in determining whether a person may be designated as a PWD, the Ministry must be satisfied that the individual has a severe physical or mental impairment with two additional characteristics: in the opinion of a prescribed professional, it must both be likely to continue for at least two years [EAPWDA 2(2)(a)] and it must *directly* and *significantly restrict* a person's ability to perform DLA continuously or periodically for extended periods, resulting in the need for the person to require an assistive device, or significant help or supervision from another person or an assistance animal in performing those activities [EAPWDA 2(2)(b)]. Therefore, in determining PWD eligibility, after assessing the severity of an impairment, the Ministry must consider how long the severe impairment is likely to last and the degree to which the ability to perform DLA is restricted and assistance in performing DLA is required. In making its determination the Ministry must consider all the relevant evidence, including that of the Appellant. However, the legislation is clear that the fundamental basis for the analysis is the evidence from a prescribed professional – in this case the Rheumatologist.

Both the duration of the impairment criterion and the Appellant's age criterion have been determined by the Ministry to have been met and are not at issue in this appeal.

Physical Functioning

The Ministry's position is that the Appellant's functional skill limitations as described by the Rheumatologist do not describe a severe degree of physical impairment. As a result, the Ministry is not satisfied that the information provided is evidence of a severe physical impairment.

The Appellant's position is that he has been suffering from undiagnosed nerve and joint pain for over two years. As a result he continuously feels a pins and needles sensation in his wrists followed by electric shocks. In addition, his wrist, ankle, spine and upper arm joints and surrounding tendons ache and feel stiff, and the pain is so sensitive that it even hurts to wear certain types of clothing.

Panel Decision

The Panel notes that the Rheumatologist did not complete some sections of the MR and the AR that the Ministry relied on in determining that the Appellant does not have a severe physical impairment, but the Panel also notes that there is additional evidence of the degree of severity of in the Rheumatologist's December 20 Letter, the Rheumatologist's October 9 Letter, or the Rheumatologist's July 21 Letter.

In determining the reasonableness of the Ministry's decision on the severity of the Appellant's impairment, the Panel has considered all of the evidence, even the evidence submitted but not included in the MR or AR. The Panel also notes that the additional criteria that must be met under EAPWDA Section 2(2) are separate and distinct from whether the applicant has a severe physical impairment.

The term "severe" is not defined in the EAPWDA. The Cambridge Dictionary defines "severe" as "causing very great pain, difficulty, worry, damage, etc.; very serious". In the MR, the Rheumatologist said that the Appellant has a history of progressive lower back and lower extremity pain over several years, which limit his strength and mobility. In the Rheumatologist's October 9 Letter, the Rheumatologist says that the Appellant has daily pain, stiffness, limitation of mobility and function resulting from his physical impairment. In the Rheumatologist's December 21 Letter, the Rheumatologist says that the Appellant has had diffused pain in his upper and lower extremities for many years, and that in May 2019 his pain was severe enough to prompt a medical assessment due to a "sharp shock-like pain" in his wrist, which progressed to both arms and both legs. He also notes the Appellant suffers from pain in the joints, particularly in the wrists and both ankles.

Based on *all* of the available evidence, which includes the information provided in the Rheumatologist's December 20 Letter, the Rheumatologist's October 9 Letter, and the Rheumatologist's July 21 Letter, the Panel finds that the Ministry was not reasonable in finding that the Appellant does not have a severe physical impairment.

Mental Functioning

As no evidence to suggest that the Appellant has any limitations to his mental functioning, and because the Appellant has not appealed the RD on that basis, the Panel finds that the Ministry reasonably determined that the Appellant does not have a severe mental impairment.

Restrictions in the Ability to Perform DLA

The Ministry's position is that, as a majority of the Appellant's DLA are performed independently or require little help from others, and because the additional time he requires to manage DLA remains unclear, the information from the Rheumatologist does not establish that the Appellant's physical impairments significantly restrict his DLA either continuously or periodically for extended periods.

The Appellant's position is that some DLA, specifically doing dishes, folding laundry, basic housekeeping grocery shopping, are often painful, and that the degree of restriction in performing these DLA varies on a day-to-day basis.

Panel Decision

Section 2(2)(b) of the EAPWDA requires that the Ministry be satisfied that a prescribed professional has provided an opinion that an applicant's severe impairment *directly* and *significantly* restrict their DLA, continuously or periodically for extended periods.

DLA are defined in Section 2(1) of the EAPWDR and are also listed, in an expanded form and using different language, in the MR and in the AR. For example, the DLA of "*prepare own meals*" in EAPWDR Section 2(1) appears in the AR as "*meal planning*", "*food preparation*", "*cooking*" and "*safe storage of food*". The term DLA appears in EAPWDA Section 2(2)(b) in the plural ("*daily living activities*"), which means that at least two of the activities listed in Section 2(1) must be significantly restricted for this legislative criterion to be met.

Section 2(2)(a) of the EAPWDR defines "*prescribed professional*" to include a "*medical practitioner*". Therefore, the Rheumatologist is considered a prescribed professional for the purpose of providing opinions regarding the nature of the Appellant's impairment and its impact on the performance of DLA. The term "*directly*" means that there must be a causal link between the severe impairment and the restriction. The direct restriction must also be significant. There is also a component related to time or duration - the direct and significant restriction must be either continuous or periodic. If periodic, it must be for extended periods.

In the MR and the AR, prescribed professionals are instructed to check marked boxes and to provide additional explanations; for example, a description of the type and amount of assistance required and the frequency and duration of periodic restrictions.

The Panel notes that the Rheumatologist has indicated in the MR that the Appellant's basic housekeeping, daily shopping, mobility inside and outside the home, and use of transportation are all *continuously* restricted. It is also clear from the Rheumatologist's reporting that the Appellant's restrictions are a *direct* result of his physical impairments.

In the RD, the Ministry determined that because no information is provided to describe how much longer he takes in completing some of the DLA, the Ministry is unable to determine that he is *significantly* restricted. The Panel finds that it is reasonable for the Ministry to require additional detail about how much longer it takes an applicant to perform DLA and the degree to which DLA are impacted to assess the significance of a restriction.

In the MR, the Ministry asks the prescribed professional to "*Provide additional comments regarding the degree of restriction*" and in the AR, to describe how much longer than typical DLA tasks take. The Panel notes that in response to the degree of restriction question in the AR, the Rheumatologist has written "*Pain, stiffness, weakness and loss of mobility impact all activities continuously*", which addresses the *frequency* of the restriction rather than the *degree* of the restriction. In response to the question in the AR, the Rheumatologist indicates that specified DLA tasks take longer than usual but they don't say how much longer.

The Panel also notes a contradiction in the evidence provided by the Rheumatologist and the Appellant: while the Rheumatologist says that the Appellant is continuously restricted in some DLA, the Appellant says that the degree of his restrictions in performing those DLA varies on a day-to-day basis

Because information is not provided in the Appellant's PWD application that would allow the Ministry to assess the significance of the Appellant's restrictions, and because some of the evidence is inconsistent,

the Panel finds that the Ministry reasonably determined that the information from the Rheumatologist does not establish that the Appellant's impairments *significantly* restrict his DLA.

Help with DLA

The Ministry's position is that it cannot be determined that significant help is required from others as it has not been established that DLA are significantly restricted either continuously or periodically for extended periods.

The Appellant's position is that DLA take considerably longer than typical but has not identified any DLA that require help from another person or the use of an assistive device.

Panel Decision

The Panel notes that DLA can be *continuously restricted* and still not require *periodic or continuous assistance* from another person or an assistive device. In this case, both the Rheumatologist and the Appellant have indicated that DLA take the Appellant significantly longer to complete (though not how much longer), but neither the Rheumatologist nor the Appellant have indicated that the Appellant requires periodic or continuous assistance from another person or an assistive device, or indeed who would provide that assistance if it were required.

The Panel finds that the Ministry reasonably determined that the Appellant does not require help to perform DLA.

Conclusion

Having reviewed and considered all the admissible evidence and relevant legislation, the Panel finds that the Ministry's RD, which determined that the Appellant was not eligible for the PWD designation under Section 2 of the EAPWDA, was reasonably supported by the available evidence and was a reasonable application of the EAPWDA in the circumstances of the Appellant, and therefore confirms the decision. The Appellant's appeal, therefore, is not successful.

Appendix – Relevant Legislation

The criteria for being designated as a PWD are set out in Section 2 of the EAPWDA as follows:

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 EAPWDR provides as follows:

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 ...

The EAA provides as follows:

Panels of the tribunal to conduct appeals

22(4) A panel may consider evidence that is not part of the record as the panel considers is reasonably required for a full and fair disclosure of all matters related to the decision under appeal.

APPEAL NUMBER 2021-0214

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)

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

Part H – Signatures

Print Name

Simon Clews

Signature of Chair

Date (Year/Month/Day)

2021/12/11

Print Name

Joan Cotie

Signature of Member

Date (Year/Month/Day)

2021/12/14

Print Name

Cherri Fitzsimmons

Signature of Member

Date (Year/Month/Day)

2021/12/11