

Part C – Decision Under Appeal

The decision under appeal is the Ministry of Social Development and Poverty Reduction’s (“ministry”) reconsideration decision dated November 15, 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”). At the Reconsideration, the ministry found the appellant met the requirements for age, severe impairment, restrictions to daily living activities (“DLA”), and need for help, but was not satisfied that a medical practitioner had confirmed the impairment is likely to continue for at least 2 years.

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

The ministry based the reconsideration decision on the following legislation:

Employment and Assistance for Persons with Disabilities Act - EAPWDA - section 2

The full text is available in the Schedule after the decision.

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 September 10, 2021. On October 5, 2021, the ministry denied the application finding that the appellant met only two of the criteria for PWD designation: *age* - the appellant is over 18, and *duration* - the impairment is likely to continue for 2 years or more from today.

On November 1, 2021, the appellant submitted a *Request for Reconsideration* ("RFR") with additional information from her medical practitioner ("Dr. X"), psychiatrist, and social worker. On November 15, 2021, the ministry completed the review of the RFR and found that the appellant met all of the criteria for PWD designation except the *duration* requirement. The ministry was not satisfied that a medical practitioner had confirmed that the impairment will continue for at least 2 years as required under section 2(2)(a) of the EAPWDA.

2. The RFR signed by the appellant on November 1, 2021. The following documents were included with the RFR:

- A typed submission from the appellant in which she described struggling with mental illness for the majority of her life despite ongoing therapy and medication. The appellant said that her doctor and psychiatrist believe it will take a few years to get the appellant's symptoms under control given the severity of the impairment.
- A letter from Dr. X (not dated) stating that the appellant has been treated for symptoms of anxiety and depression at their clinic since 2019. The appellant continues to have symptoms of anxiety (including panic attacks), low mood, very poor sleep, and cognitive problems. Dr. X stated that the appellant will be unable to work "for some time" given the severity of the symptoms. Dr X wrote, "it is hard to give a definitive date as patient's response to medications (including need for possible switches in medication due to side effects) and counselling is variable. This is something that could take many months to possibly 1-2 years depending on her response to medications and therapy."
- A letter from a social worker dated October 22, 2021, describing the appellant's functional limitations and restrictions to DLA due to adverse childhood experiences.
- A letter from a psychiatrist ("Dr. Y") dated October 18, 2021, indicating the appellant has major depressive disorder, generalized anxiety disorder, and possible "cluster B personality traits." The appellant is currently struggling with "extreme depression and anxiety" and is mostly housebound.

3. The appellant's PWD application comprised of:

- the *Applicant Information* (self-report - "SR") dated July 16, 2021,
- a *Medical Report* ("MR") dated July 13, 2021, completed by Dr. X who has known the appellant since August 2019, and has seen her 2-10 times in the past 12 months, and
- an *Assessor Report* ("AR") dated August 7, 2021, completed by a registered social worker who has known the appellant since April 2021 and used an office interview with the appellant to complete the report.

4. The ministry's *PWD Decision Summary* with attached letter dated October 5, 2021, in which the ministry found that the appellant did not meet all the criteria for PWD designation. The appellant met the *age* and *duration* requirements.

Summary of relevant evidence from the application:

SR

The appellant described difficulties with daily function and DLA due to severe anxiety and major depression that have taken over her life. The appellant said she is seeking professional help and hopes to “one day find a resolution or even some relief but for now my issues outweigh everything else.”

MR

In the MR (section A), the appellant was diagnosed with anxiety disorder and depression. The appellant sought help at Dr. X's clinic in September 2019 but may have had the impairment since 2004. In section C, *Degree and course of impairment*, Dr. X indicated the appellant's symptoms are “ongoing”, affecting her quality of life. The doctor wrote that the appellant will likely need medication for her impairment “for months to years” based on the severity of her symptoms and the psychiatrist's recommendations.

In section C, the doctor is asked to answer the question: *Is the impairment likely to continue for 2 years or more from today?* The form has *yes* or *no* boxes for the doctor to check as well as a space for comments. Dr. X checked *no*, and wrote, “maybe”... This is based on patient's response to medications and counselling. She may likely continue to experience some symptoms of anxiety/depression but the goal with treatment is to reduce severity so she is more functional.”

In section F - *Additional Comments*, Dr. X stated that the appellant will require ongoing follow up with her psychiatrist and counsellor as well as medication management for “ongoing benefit, and it may take many months to see any significant improvements.”

AR

In Section D - *Assistance Provided for Applicant*, the social worker stated that the appellant will require mental health services (psychiatrist and possible group therapy) for “1-2 years.” to treat her anxiety and depression and support her in managing DLA.

Additional submissions

Subsequent to the reconsideration decision the appellant submitted new evidence to the Tribunal requiring an admissibility determination under section 22(4) of the *Employment and Assistance Act*. The appellant filed a *Notice of Appeal* with a letter from Dr. X, received by the Tribunal on November 24, 2021. The letter, dated November 19, 2021, contained the following information as a follow up to Dr. X's previous letter and PWD medical report:

- Dr. X spoke with the appellant about her “ongoing depression and anxiety symptoms” which continue to impact her daily functioning, combined with the challenges she has in managing her symptoms with medications.
- Due to side effects related to medication, the appellant requires medication management including changes in dose “to be done over a much longer timeline compared to other patients.” It will therefore take the appellant longer to have significant improvement in symptoms.
- On review of the appellant's history and current challenges, “it is very likely that she will continue to suffer from impairment related to depression/anxiety symptoms at 2 years or longer.”
- The appellant will “likely need to continue medications, see psychiatry, and access counselling resources for at least the next 2 years, and likely medications even longer.”

Admissibility of letter from Dr. X

The ministry did not raise any objections to the letter. The panel admits the letter as evidence under section 22(4) of the *Employment and Assistance Act*. The panel finds that the letter contains additional clarification and elaboration on the duration of the appellant's impairment. The letter is therefore admissible because it is reasonably required for a full and fair disclosure of all matters related to the decision under appeal.

Oral testimony

The appellant attended the hearing with a family member for support. The appellant consented to the ministry's request to present their argument first. Neither party submitted new evidence that requires an admissibility determination by the panel. The panel accepts the oral submissions of both parties as argument for the appeal. The arguments will be addressed in Part F - *Reasons*.

Part F – Reasons for Panel Decision

The issue on appeal is whether the ministry's decision that found the appellant ineligible for PWD designation because not all the criteria under section 2 of the EAPWDA were met, was reasonably supported by the evidence or was a reasonable application of the legislation in the circumstances of the appellant. Specifically, was the ministry reasonable to find that the requirement for the impairment to continue for at least 2 more years was not established on the evidence?

Impairment likely to continue for at least 2 years***Arguments***

The appellant's position is that her impairment is ongoing despite treatment and her doctor has confirmed that her impairment will continue for at least 2 more years.

Ministry argument at the Reconsideration

The ministry's position was that a medical practitioner had not confirmed that the 2-year duration requirement was met as required by the legislation. The ministry noted that Dr. X checked *no* in the MR when asked if the impairment is likely to continue for 2 more years or more, but also wrote "maybe" and explained that it depends on the appellant's response to treatment. The ministry argued that the doctor's comment that "it may take many months to see any significant improvement" does not confirm that the impairment will continue for 2 or more years.

The ministry argued that the additional letter from Dr. X and the letter from the psychiatrist (submitted with the RFR) also did not confirm the *duration* requirement. The ministry noted that Dr. X indicated it was difficult to give a definitive date due to variable responses to medications and counselling.

Ministry position at the hearing

The ministry maintained that the reconsideration decision was reasonably supported by the evidence they had at the time because Dr. X checked *no* when asked if the impairment will continue for at least 2 more years but then stated "maybe." The ministry argued that the reconsideration decision was reasonable because Dr. X did not provide definitive comments in the MR or their letter but only said that 1-2 years was a possibility.

However, based on the recent letter from Dr. X, submitted on appeal, the ministry said there is now compelling evidence to confirm the impairment will continue for at least 2 more years. The ministry said that the letter of November 19, 2021 supports approving the PWD application.

The panel asked the ministry why they addressed the *duration* criterion at the Reconsideration when in the original decision the requirement for the impairment to continue for at least 2 more years was checked and stated as being met. The ministry said they were not the adjudicator but would attribute the original decision to ministry error. The ministry suggested the adjudicator "would have picked up on what the doctor actually said" in finding that the *duration* requirement was not met at the Reconsideration.

Legislative requirement

The legislation requires all the criteria in section 2 of the EAPWDA to be met, to be eligible for designation as a PWD. Section 2(2)(a) requires a medical practitioner or nurse practitioner to confirm that the applicant's impairment is likely to continue for at least 2 more years. In this case, the confirmation of *duration* would need to come from the appellant's doctor or psychiatrist as the social worker who filled out the AR would not meet the legislative requirement.

The legislation does not specify the starting point for the assessment of the 2-year period but in section C-1 of the MR, the medical practitioner is asked to indicate whether the impairment is likely to continue for 2 years or more "from today." Dr. X signed the MR on July 13, 2021. The legislative test is forward-looking and in the circumstances of the appellant, the appellant's impairment should persist until July 2023 or beyond to meet the legislative requirement.

Analysis and Panel's decision - duration of impairment

In the reconsideration decision, the ministry did not explain why they were reconsidering the *duration* criterion when the original decision of October 5, 2021 clearly stated in both the check mark and narrative that *duration* was met. At the hearing, the ministry suggested that the most likely explanation was ministry error based on the evidence from the doctor which the ministry said did not give a clear indication of the 2-year requirement.

The panel finds that the reconsideration decision was reasonably supported by the evidence because there was no confirmation from Dr. X on how long the impairment is expected to last and the letter from the psychiatrist addressed the appellant's immediate functioning only. In section C-1 of the MR, the doctor checked *no* when asked if the impairment is likely to continue for 2 years or more. The doctor also stated "maybe" and indicated in comments that the duration is uncertain based on the appellant's response to treatment including the need to trial different medications in case of side effects. In the letter for the reconsideration, Dr. X affirmed that the impairment could possibly continue for 1-2 years but did not give a definitive opinion.

The panel has considered the information in its entirety beyond the check mark and narrative for question C-1 of the MR. The doctor indicated that the appellant's mental impairment is longstanding, for "many years, maybe since age 10" which suggests it will likely continue long term. However, the duration of medication was uncertain ("I suspect she will need medication for months to years") and it "may take many months and possibly 1-2 years" to achieve symptom reduction depending on the appellant's response to medications and therapy. Dr. X stated in the letter for the RFR that "it is hard to give a definitive date as patient's response to medications...and counselling is variable."

The recent letter from Dr. X, sated November 19, 2021, provided an update on the appellant's condition and unequivocally states that the appellant's impairment will continue for 2 years or more given the appellant's history and current challenges with trying to find the right medication and access counselling resources. The letter states that it is "very likely" the appellant will suffer from anxiety symptoms and depression "at 2 years or longer" and will need medications, psychiatry and counselling "for at least the next 2 years" with medication required for longer than that. With the new information submitted on appeal, the panel finds that the reconsideration decision is no longer reasonably supported by the evidence.

Conclusion

The EAPWDA states that 5 criteria need to met including a severe impairment that will last for at least 2 more years. The evidence indicates the appellant has met all 5 criteria under section 2 of the EAPWDA. The panel rescinds the ministry's decision and refers the decision back to the minister for determination on amount of disability assistance. The appellant is successful with her appeal.

Schedule – Relevant 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).

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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)

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

Part H – Signatures

Print Name

Margaret Koren

Signature of Chair

Date (Year/Month/Day)

2021/12/15

Print Name

Daniel Chow

Signature of Member

Date (Year/Month/Day)

2021/12/15

Print Name

Ken Smith

Signature of Member

Date (Year/Month/Day)

2021/12/15