

Part C – Decision Under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Poverty Reduction (“ministry”) dated January 5, 2023 , in which the ministry denied the appellant designation as a person with disabilities (“PWD”) under the Employment and Assistance for Persons with Disabilities Act (“EAPWDA”). The ministry found that the appellant met the requirements for age (over 18) and duration (impairment to continue for at least 2 years) but was not satisfied that:

1. the appellant had a severe mental or physical impairment;
2. the appellant’s impairment significantly restricted his ability to perform daily living activities continuously or periodically for extended periods; and
3. the appellant required significant help or supervision of another person to perform daily living activities restricted by his impairment.

The ministry also found that the appellant is not in one of the prescribed classes of people 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

EAPWDA, section 2
EAPWDR, section 2

Full text of the legislation is provided in the Schedule of Legislation after the reasons.

Part E – Summary of Facts

The hearing took place by teleconference. The appellant attended with his parent, who joined the hearing from another location, as a witness and as a support person.

Evidence Before the Ministry at Reconsideration:

The appellant is over 18 years of age. In support of his application, he submitted a medical report dated August 16, 2022 and an assessor report dated October 6, 2022, both completed by a neurologist, and a self-report dated April 30, 2022.

For the reconsideration, the appellant provided a letter from a medical practitioner, Doctor A, dated November 30, 2022.

Medical Report, August 16, 2022:

The neurologist does not state how long the appellant has been their patient (assessor report indicates the appellant has been their patient since June 2021) and indicates that they have seen the appellant between 2 and 10 times in the last 12 months.

Diagnoses:

The appellant is diagnosed with epilepsy (focal and generalized tonic-clonic seizures), onset “unknown.”

Health History:

The neurologist indicates that the appellant has generalized tonic-clonic seizures, including on the following dates: February 11, 2021, March 14, 2021 (as a result of which the appellant had to attend a local hospital emergency department), three convulsions in May 2021 and three convulsions in June 2021. The appellant has been referred to a tertiary care epilepsy clinic in another city.

The neurologist also notes “panic attacks + focal seizures (April 2022).”

The neurologist indicates that the appellant has been prescribed medications that cause dizziness and sedation and can interfere with his ability to perform daily living activities. The neurologist expects that the use of this medication will be “chronic.”

Functional Skills:

The neurologist writes “not applicable” in the section of the form that lists functional skills and has left the questions about physical function blank. However, the neurologist indicates that there are significant deficits with cognitive and emotional function in the areas of memory (ability to learn and recall information) and emotional disturbance (e.g. depression, anxiety).

Daily Living Activities:

The neurologist indicates that the impairment directly restricts the appellant’s ability to perform daily living activities. They indicate periodic restrictions in all daily living activities listed on the form – personal self care, meal preparation, management of medications, basic housework, daily shopping, mobility inside and outside the home, use of transportation and management of finances – except they do not indicate any restriction in social functioning. They add the explanation: “Patient is not able to function [with daily living activities] when having seizures & when post-ictal.” [*emphasis in original*]

*Assessor Report, October 6, 2022:**Living Environment:*

The neurologist indicates “unknown” for the appellant’s living environment.

Mental or Physical Impairment:

The neurologist repeats that the appellant suffers from panic attacks, anxiety, and epilepsy.

Under “Mobility and Physical Ability”, the neurologist indicates that the appellant is independent in all aspects of mobility and physical ability “except when having seizures.”

Under “Cognitive and Emotional Functioning”, the neurologist indicates that the appellant’s impairment restricts or impacts the appellant’s functioning and has a moderate impact on:

- consciousness (e.g., orientation; alert/drowsy; confusion)
- emotion (e.g., excessive or inappropriate anxiety; depression; etc.)

- attention/concentration (e.g., distractible; unable to maintain concentration; poor short term memory)
- memory (e.g. can learn new information, names, etc. and then recall that information; forgets over-learned facts).

Daily Living Activities:

The neurologist writes "N/A" beside daily living activities listed on the form for personal care, basic housekeeping and shopping. They write "unknown" for daily living activities listed for meals, pay rent and bills, medications, and social functioning, and they cross out the sections of the form that ask how mental impairment impacts relationships with immediate and extended social networks.

Assistance Provided for Appellant:

The neurologist writes "N/A" for help required for daily living activities, and leaves blank the section for describing help required.

Additional Information:

The neurologist writes: "This gentleman has epilepsy, panic attacks, anxiety. Episodically he cannot function because of seizures."

Self-Report:

The appellant states that he has seizures and panic attacks that can cause seizures "most all the time." He says that random seizures happen throughout the day, and he says he cannot be left alone without being checked on regularly. Seizures leave him feeling disoriented and cause memory loss. He has been hospitalized "many times" and seizures have caused him to be incontinent. He says he has atonic seizures, which involve sudden loss of muscle control and often result in falling and injuring himself. He says he has clonic seizures much less frequently. He is unable to drive and says he cannot walk down the street alone without emergency medication or someone with him in case he has a seizure.

Letter from Doctor A, November 30, 2022:

The doctor states that the appellant has "epilepsy focal and generalized tonic clonic seizures", generalized anxiety disorder and attention deficit disorder. The doctor states "The

following medical conditions is [sic] a severe impairment which is not [expected] to change and significantly restricts patients [sic] daily living activities.”

Letter from Ministry to Doctor B, January 3, 2023:

The ministry sent a letter by fax to Doctor B, who was covering for Doctor A that week, asking for additional information about the appellant’s medical condition. The ministry refers to the November 30, 2022 letter from Doctor A, saying that the letter did not “include enough detail about the medical condition to enable the ministry to make an informed decision.” The ministry goes on to say:

[Doctor A] reports this patient has Epilepsy with focal and generalized tonic-clonic seizures, GAD, and ADD and reports it is a severe impairment, not expected to change, and significantly restricts DLA's. However, it is unclear from the PWD application and letter how often this patient is experiencing seizures and panic attacks; as such, makes it difficult to establish the level of impairment this patient experiences on a day-to-day and episodic basis, its impact on their ability to perform and manage DLA's on a day-to-day basis and episodic basis, and the level assistance [sic] or help they require because of their medical conditions.

The reconsideration decision indicates there was no response to this letter by the date of the decision.

Additional Evidence:

In the Notice of Appeal, the appellant writes that he still suffers seizures several days a week, which leave him extremely confused and disoriented afterwards for several hours.

Letter from Neurologist, February 16, 2023:

The appellant provided a letter from the neurologist to Doctor A, stating that the appellant:

- continues to have focal and generalized seizures
- is on three antiseizure medications
- has a history of panic attacks
- is unable to work
- is being referred to an epilepsy clinic in City A
- has “events consistent with seizure activity (and/or panic attacks and/or PNES [psychogenic nonepileptic seizures]).”

Evidence at the Hearing:

Appellant's Parent:

At the hearing, the appellant's parent stated:

- the appellant has been having seizures since November 2019
- the seizures have been ongoing and happen almost daily
- they speak to the appellant on the phone once or twice a day, and see him once a week
- often, they speak to the appellant in the afternoon and 90% of the time the appellant is not able to say what they did that morning
- mornings seem to be worse for the appellant because he will have had a focal seizure within an hour of waking, and then he cannot remember anything for the next 2 or 3 hours
- they have witnessed the appellant's seizures, once where the appellant was incontinent
- they cannot see the appellant being able to hold a job, and his driver's licence has been taken away

The parent also stated that the neurologist has not seen the appellant in person, all appointments have been by telephone. The parent sat in on some appointments with the appellant and gave further explanations to the neurologist, and the parent is not confident that the appellant is "coherent enough" to give accurate information to the doctors on his own.

In response to questions from the panel, the parent said that, when the appellant has a seizure, he will be sitting next to the parent, talking, and then suddenly go blank and stare into space. The parent will grab the appellant's arm and ask if he is okay, and the appellant will say no, I don't think so. Then the appellant "gaps out" for an hour or two. He may not remember having had lunch five minutes ago.

The parent went on to say that, when the appellant has a focal seizure, he does not fall to the ground, he "gaps out", and these seizures usually happen in the morning. They visit the appellant in person once a week "to help with things," spending time with the appellant, driving him to the store and doing his shopping for him.

The parent also said that, in September 2022, they moved the appellant's younger brother in to live with the appellant because they do not think the appellant should be alone due to the seizures.

Appellant:

The appellant said that, when he wakes up in the morning and has a seizure, he loses an hour, and forgets things – for example, he might think one of his brothers is in another province, when he actually knows his brother lives in another municipality in this province. He also gave an example of apparently having changed the PIN on his bank card but having no memory of doing that.

In answer to questions from the panel, the appellant stated that, when he has a seizure, he feels “strained mentally” for the rest of the day, and sometimes hallucinates. While the appellant said that he is on his own during the day, the appellant’s parent clarified that the appellant’s brother is present in the residence, and the appellant confirmed that he meant his brother is not always in the same room with him. His girlfriend works fulltime but helps with preparing meals. He confirmed that his last tonic-clonic seizure was, as the neurologist stated, in June 2021.

Admissibility of Additional Evidence:

The ministry did not object to the additional letter from the neurologist, and the additional oral evidence provided by the appellant and his parent at the hearing.

The additional evidence provides further details about the appellant’s medical condition, its impact on his ability to perform daily living activities, and the assistance provided by others. The panel finds that the additional evidence is reasonably necessary for the full and fair disclosure of all matters relating to the decision under appeal, and therefore it is admissible under section 22(4) of the Employment and Assistance Act.

Part F – Reasons for Panel Decision

The issue on appeal is whether the ministry's reconsideration decision, in which the ministry found the appellant to be ineligible for PWD designation under the EAPWDA, was reasonably supported by the evidence or was a reasonable application of the legislation in the appellant's circumstances. The ministry found that the appellant met the requirements for age (over 18) and duration (impairment to continue at least two years) but was not satisfied that:

- the appellant has a severe mental or physical disability;
- the appellant's impairment, in the opinion of a prescribed professional, directly and significantly restricts his ability to perform daily living activities 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 daily living activities.

Appellant's Position:

The appellant maintains that epileptic seizures, occurring almost every day, lasting 1 to 3 hours, and subsequent postictal recovery, are a severe mental and physical impairment. The seizures affect his memory, leaving him with no memory of significant periods of his day. When he has a seizure he is not able to perform any daily living activities, and he needs the help and supervision of family members during that time. He cannot work or drive a car.

Ministry Position:

The ministry accepts that the appellant has epileptic seizures, and that they are ongoing, as indicated in the November 30, 2022 letter from Doctor A. However, the ministry says that there is not enough detail provided about the frequency and duration of seizures, to determine that the appellant has a severe physical impairment.

Similarly, the ministry says that, while the neurologist has indicated significant deficits in memory and emotion, they have not provided details to show the severity of those deficits. The ministry notes that, while there are moderate impacts on 4 areas of cognitive functioning, there are no major impacts noted. Therefore, the ministry maintains that a severe mental restriction has not been established.

Although the ministry acknowledges that all daily living activities are periodically restricted during a seizure and post-seizure recovery, the ministry says that the frequency and duration of those events has not been established, and therefore the ministry cannot determine that the appellant is significantly restricted in performing daily living activities for extended periods.

The ministry maintains that, because the information provided does not establish that daily living activities are significantly restricted, it cannot be determined that the appellant needs significant help from other people to perform daily living activities.

Panel Decision:

To find a person eligible for PWD designation under the EAPWDA, the ministry must be satisfied that the appellant has met all the requirements in section 2 of the legislation. In this case, the ministry was not satisfied that:

- the appellant had a severe mental or physical impairment;
- in the opinion of a prescribed professional, the impairment directly and significantly restricted the appellant's ability to perform daily living activities;
- as a result of those restrictions, the appellant requires help to perform those activities.

Severe Mental or Physical Impairment:

The panel finds that the appellant's epilepsy, almost daily seizures and related recovery time, are a severe mental and physical impairment. (As epilepsy is an impairment of brain function, it is difficult, and beyond the expertise of the panel, to separate the physical and mental effects of epileptic seizures. The panel notes both physical and mental impairments arising from the same medical condition, and addresses the severity of the impairment globally.)

As the appellant is entirely unable to function, mentally or physically, during a seizure, his impairment during that time is severe. The ministry's concern is that the neurologist has not stated how often the seizures occur, or how long they last.

The panel notes that the ministry tried to get additional details about the level of the appellant's impairment, by writing to Doctor B on January 3, 2023. It appears that Doctor B did not respond that day, or the following day, and on January 5, 2023 the ministry then

delivered the reconsideration decision, denying PWD designation. It is unclear to the panel why the ministry followed this timeline.

The neurologist and Doctor A have confirmed that the appellant suffers epileptic seizures that are ongoing. The appellant is not able to function at all during the seizures and in the postictal period as he recovers. The appellant and his parent have provided additional detail about the frequency and duration of the seizures, which occur almost every day and last between one and three hours. It may take the appellant the rest of the day to recover. The neurologist confirms significant deficits with memory and emotional disturbance. The appellant's parent has described frequent conversations with the appellant where he cannot remember what he has done for hours of the day "almost 90% of the time." The appellant's brother has moved in with him because of the family's concern that the appellant cannot be left alone when he has seizures.

Therefore, the panel finds that the ministry's determination was not reasonable. In the panel's view, the appellant has a severe mental and physical impairment.

Restrictions to Daily Living Activities

Under section 2(2)(b)(i) of the EAPWDR, if the ministry is satisfied that a person has a severe mental or physical impairment, the ministry must also be satisfied that, in the opinion of a prescribed professional, the appellant's ability to perform daily living activities is directly and significantly restricted by the severe impairment, either continuously or periodically for extended periods. Not all daily living activities must be directly and significantly restricted. However, in *Hudson*, the court stated that "there must be evidence from a prescribed professional indicating a direct and significant restriction on at least two daily living activities."

Under section 2(1)(b) of the EAPWDR, for a person who has a severe physical or mental impairment, "daily living activities" means:

- prepare own meals;
- manage personal finances;
- shop for personal needs;
- use public or personal transportation facilities;
- perform housework to maintain the person's place of residence in acceptable sanitary conditions;
- move about indoors and outdoors;
- perform personal hygiene and self-care;
- manage personal medication.

For a person with a severe mental impairment, the definition of “daily living activities” includes:

- make decisions about personal activities, care or finances; and
- relate to, communicate or interact with others effectively.

While people often think of “disability” in terms of being able to work at employment, employability is not one of the daily living activities considered for PWD designation under the legislation.

The ministry has pointed out deficiencies in the completion of the form by the neurologist. Certainly the assessment of the appellant’s condition would be made more readily if the doctors had provided the detail requested in the forms. However, the panel must determine whether the reconsideration decision is reasonable based on all the evidence.

Both the neurologist and Doctor A confirm that the appellant has severe, ongoing epileptic seizures, during which he cannot perform any daily living activities. The neurologist confirms that the inability to perform daily living activities continues during the postictal recovery phase. The appellant and his parent provide additional detail about the frequency and duration of seizures and recovery, which restrict the appellant’s ability to perform all daily living activities, usually for several hours, almost every day.

The appellant is not restricted in daily living activities when he is not having or recovering from a seizure. However, given the evidence of the frequency and duration of the appellant’s seizures, affecting him for hours almost every day, the panel finds that the appellant’s ability to perform daily living activities is directly and significantly restricted periodically for extended periods.

Help with Daily Living Activities

Under section 2(2) of the EAPWDA, confirmation of direct and significant restrictions to daily living activities is a precondition for the determination that, because of those restrictions, the person requires help to perform those activities. In its reconsideration decision, the ministry stated that, as it had not been established that the appellant’s daily living activities were significantly restricted, it could not be determined that the appellant needed help to perform daily living activities.

The panel has found that the appellant’s ability to perform daily living activities is significantly restricted by severe mental and physical impairment, and therefore goes on

to consider whether, in the opinion of a prescribed professional, the appellant requires help to perform those activities as a result.

Under section 2(3) of the EAPWDA, a person requires help to perform a daily living activity if they need an assistive device or significant help from another person to perform it. It is not clear why the neurologist wrote "N/A" in the section of the Assessor Report that asks for information about help required for daily living activities, or why they left blank the section that asks for a description of necessary assistance. If the appellant is unable to perform any daily living activities during an epileptic seizure, and during the postictal phase, the only reasonable inference is that he would require help from another person to perform any daily living activity during that time. If he is not able to perform the activity at all, then the help required would be significant. The panel also notes that the appellant's family provides continuous supervision because of the risks arising from the appellant's seizures, and the appellant's parent helps with transportation and shopping because the appellant cannot operate a motor vehicle.

Therefore, the panel finds that the appellant requires significant help or supervision of another person to perform daily living activities during a seizure and postictal recovery.

Conclusion:

The panel finds that the ministry's reconsideration decision, which determined that the appellant did not meet the criteria for PWD designation, is not reasonably supported by the evidence. The panel finds that, viewing the evidence as a whole, including the additional evidence of the appellant and the appellant's parent at the hearing, the appellant:

- has a severe mental or physical impairment due to epilepsy;
- in the opinion of a prescribed professional, the impairment directly and significantly restricts the appellant's ability to perform daily living activities periodically for extended periods;
- as a result of those restrictions, the appellant requires help to perform those activities.

Therefore, the panel rescinds the reconsideration decision. The appellant is successful in the appeal.

Schedule – Relevant Legislation
Employment and Assistance for Persons with Disabilities Act

Persons with disabilities

s. 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).

Employment and Assistance for Persons with Disabilities Regulation

Definitions for Act

s.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.

(3) The definition of "parent" in section 1 (1) applies for the purposes of the definition of "dependent child" in section 1 (1) of the Act.

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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

Susan Ferguson

Signature of Chair

Date (Year/Month/Day)

2023/02/28

Print Name

Kenneth Smith

Signature of Member

Date (Year/Month/Day)

2023/02/28

Print Name

Peter Mennie

Signature of Member

Date (Year/Month/Day)

2023/02/28