

### PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development (the ministry) reconsideration decision of April 25, 2012, which found that the appellant did not meet three of 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). The ministry found that the appellant met the age requirement and that in the opinion of a medical practitioner her impairment is likely to continue for at least two years. However, the ministry was not satisfied that the evidence establishes that she has a severe physical or mental impairment. The ministry was also not satisfied that 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. As the ministry found that the appellant is not significantly restricted with DLA, it could not be determined that she requires help as defined in section 2(3)(b) of the EAPWDA.

### 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

With the written consent of both parties, this hearing was conducted as a written hearing in accordance with s. 22(3)(b) of the *Employment and Assistance Act* (EAA).

The information before the ministry at the time of reconsideration included the following:

- The appellant's application for designation as a PWD, signed by the appellant on January 19, 2012. The application included a self-assessment prepared by the appellant, as well as a physician's report signed by the appellant's physician (a general practitioner) and dated January 16, 2012 and an assessor's report signed by a social worker, dated December 8, 2011. Both the physician and the social worker are prescribed professionals.
- A letter from the ministry to the appellant, dated February 28, 2012 advising the appellant that she had been found ineligible for designation as a PWD.
- The appellant's Request for Reconsideration form signed by the appellant on April 12, 2012.
- A three page brochure or form produced by the organization by which the social worker is employed, which explains the "lens" or assessment model through which the social worker analyzed the appellant's impairment (the Assessment Model). The Assessment Model "responds to the complexity of disability by incorporating a number of approaches, including the Biophysical Model, Identity Theory, Strengths Perspective, and Post-modernism." It includes a brief description of each of these "approaches", describing post-modernism as "a major challenge to universalism of social and political theories by pointing out that there a (sic) 'myriad of different subjectivities and different realities' (p. 63), and emphasizing both the relativity and constructedness of knowledge or so-called 'truth' (p. 63)." On the third page of the document the social worker indicated that she provided the appellant with information and a referral for a disability parking permit.
- A ministry file record of a telephone conversation between the reconsideration officer and the appellant on April 25, 2012, specifying that the physician confirmed that the appellant had been the physician's patient since January 13, 2010 and that the physician had seen the appellant 5 times between January 13, 2010 and April 5, 2012.

In the physician's report, the physician diagnosed the appellant with epilepsy and degenerative disc disease. She indicated that the seizure disorder is controlled by medication – the last seizure having occurred approximately 14 years ago – but the seizure medications worsen the appellant's memory loss. The physician added an additional comment that the appellant has "chronic back pain that affects her daily living". There is no indication in the PR that the appellant is undergoing any medical treatment with respect to her back pain. In section C of the physician's report the question is asked "Is the impairment likely to continue for two years or more from today?" The physician answered "Epilepsy – will be permanent disorder". In terms of physical functional skills the physician reported that the appellant can walk more than 4 blocks and climb more than 5 stairs unaided, can lift 15 to 35 pounds, and can remain seated for 1 to 2 hours. The appellant has no difficulties with communication. The physician indicated a significant deficit with respect to 1 out of 11 categories of cognitive and emotional function, that is, memory (*ability to learn and recall information*). Part E of the physician's report form is titled Daily Living Activities and identifies the 10 DLAs prescribed in s.

2(1) of the EAPWDR. The physician indicated that the only DLA in which the appellant is restricted is daily shopping, with the extent of the restriction being "unknown", and the restriction being described as "periodic" because of chronic back pain. Regarding the 2 DLA which are related only to mental impairment or brain injury (i.e. decision making and social functioning), the physician did not indicate whether or not there is any restriction, but did comment with respect to social functioning "Do socialize". In terms of assistance the physician noted that the appellant does not use any prostheses or aids for her impairment, but that her husband assists her with DLA.

In the assessor's report the social worker described the appellant's impairment as "chronic lower back ache and pain will shoot up her back 1-2 days per week, epilepsy". She described the appellant's ability to communicate as "satisfactory". Regarding mobility and physical ability the social worker reported the appellant as requiring "continuous assistance from another person or unable" with respect to walking indoors and outdoors, climbing stairs, standing, lifting, and carrying/holding, commenting that "constant back ache makes it difficult to do all activities" and "cannot stay seated more than 10 minutes." The social worker describes the appellant as requiring continuous assistance with most aspects of personal care, basic housekeeping, shopping, meals and transportation reporting that her husband generally helps with most DLA and that most DLA take up to 4 times longer to perform because of constant back ache. With respect to DLA that relate to mental functioning – decision making regarding payment of rent and bills, taking medications, and social functioning – the social worker reports that the appellant is independent, with the exception that her husband has to go to pick up her medications and she needs periodic support or supervision to deal appropriately with the stress of unexpected demands. The appellant has good functioning in terms of her immediate and extended social networks. With respect to cognitive and emotional functioning, the social worker reports a major impact on motor activity (with the words extreme tension underlined), a moderate impact on attention/concentration, minimal impacts on emotion (anxiety) and bodily functions (sleep disturbance) and no impact on the remaining 9 categories. In terms of assistance provided by other people the social worker says the appellant lives too far from town and getting all the help she needs is difficult. Her husband and step-mother do help. The appellant requires no assistance provided by assistance animals but a walker would be useful for support. In the assessor's report the social worker indicated that her information source was an office interview with the appellant, and wrote that "During the interview, the daily living of [the appellant] was looked at through the [Assessment Model] to determine how it is affected by her disabilities." She indicated that her first contact with the appellant had been within the previous 2 weeks.

In her self-assessment the appellant referred to her chronic back pain and poor memory. She wrote that her back hurts all the time but some days are worse where she cannot do anything, that sometimes her husband has to help her in and out of the tub, or car, or from sitting to standing, and that she sometimes can't do household chores so has to leave them for her husband to do after work. She takes Tylenol for the pain. She cannot work because she needs to be able to take a bath or to lie down or to take pain killers as needed. Staying in one spot for long is not possible. She reported that about half the time she cannot remember things from day to day or hour to hour.

In her Request for Reconsideration the appellant wrote that her physician had only seen her twice and had only been her physician for a year. She explained that she did not feel the physician fully understands the impacts of her disability on her DLA, and that the social worker took the time to really investigate. The appellant wrote that even though her last epileptic seizure was 14 years ago she must take medication daily to control it and the medication causes her memory to worsen. If she

doesn't take the medication she becomes groggy and cannot focus or concentrate. She stated that she requires someone with her at all times because of the chance of her back going out which causes severe pain and could result in her not being able to move.

The appellant provided an additional brief submission in her Notice of Appeal (NOA). In it she stated that she did not believe the reconsideration officer did a thorough review of the evidence. She wrote that even though she has seen her physician 5 times, none of those visits was longer than 5 minutes except perhaps for her initial appointment which lasted about 10 minutes. On the first appointment (Jan. 13, 2010) there was no examination, the second appointment (Oct. 6, 2011) was for a prescription renewal, the third (November 18, 2011) was with respect to her back, and the last two (Jan. 12, 2012 and Apr. 5, 2012) were brief visits to fill in forms.

The panel finds that the appellant's written submission in her NOA provides further detail with respect to the information and records that were before the minister at the time of reconsideration, and accepts it as evidence in accordance with section 22(4) of the *Employment and Assistance Act*.

The ministry relied on its reconsideration decision.

## PART F – Reasons for Panel Decision

The issue on this appeal is whether the ministry's decision to deny the appellant designation as a PWD was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. In particular, was the ministry reasonable in determining that the appellant does not have a severe physical or mental impairment, and that in the opinion of a prescribed professional the appellant's impairments do not directly and significantly restrict her from performing DLA either continuously or for extended periods, and that as a result of those restrictions the appellant does not require help to perform DLA?

The relevant legislation is as follows:

### 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 has a severe mental or physical impairment that

(a) in the opinion of a medical 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.

**EAPWDR section 2(1):**

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 authorized under an enactment to practice the profession of

- (a) medical practitioner,
- (b) registered psychologist,
- (c) registered nurse or registered psychiatric nurse,
- (d) occupational therapist,
- (e) physical therapist,
- (f) social worker,
- (g) chiropractor, or
- (h) nurse practitioner.

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***Severe Mental Impairment***

The appellant has not expressly stated a position on whether she has a severe mental impairment, though she has provided evidence of impacts on memory which are confirmed by her physician.

The ministry's position as expressed in its reconsideration decision is that there is no evidence to establish a severe mental impairment.

As noted in the Summary of Facts above, the physician noted a significant deficit in 1 of 11 categories (i.e. memory) of cognitive and emotional function. She hasn't given any indication that this deficit affects the appellant's ability to perform DLA. The social worker reports a major impact on 1

category of cognitive and emotional functioning (motor activity), a moderate impact on 1 other category, and minimal or no impact on the remaining 11 categories. She reports the appellant as being independent with respect to decision-making related to financial matters and medication management. The appellant is "good functioning" with respect to immediate and extended social networks, and independent with respect to almost all other aspects of social functioning including appropriate social decisions, developing and maintaining relationships, appropriate interactions with others, and ability to secure assistance from others. On balance, the panel finds that the evidence strongly supports the ministry's conclusion that the appellant does not have a severe mental impairment.

### *Severe Physical Impairment*

The appellant's position is that the ministry did not fully consider all the evidence in concluding that she does not have a severe physical impairment. She says that the social worker spent more time on investigating the impacts of her physical impairment on her ability to perform DLA than the physician did, with the implication being that where the physician's evidence is inconsistent with that of the social worker, the social worker's evidence should carry more weight.

The ministry's position is that despite the physician reporting that the appellant has few limitations in terms of physical functioning, the social worker indicates that the appellant requires continuous assistance and is unable to manage any of her mobility and physical functions. The ministry says that the social worker reports a wide range of limitations that are for the most part not congruent with the functional skills limitations from the physician's report. The ministry acknowledges that the appellant experiences limitations as a result of her medical conditions, but maintains that the information provided does not establish a severe physical impairment.

It's apparent that there is significant inconsistency between the evidence of the physician and the social worker with respect to the degree of physical impairment. In the physician's report, she indicates that the appellant has no limitations with respect to physical functioning except that she can't lift more than 35 pounds and she can't remain seated for more than 1 to 2 hours. The physician indicates that the only impacts on the appellant's ability to perform DLA are with respect to memory and periodically with daily shopping due to chronic back pain.

In contrast, the social worker says that "constant back ache makes it difficult to do all activities". Her observation is that the appellant cannot sit for more than 10 minutes. She reports that the appellant requires continuous assistance with virtually all physical DLA, and says that most physical DLA take up to 4 times longer than normal to perform.

The panel notes that there is no evidence that the social worker conducted an objective physical assessment of the appellant's ability to function. However, on the appellant's evidence, her back problem was the subject of at least one prior appointment with the physician, in addition to the appointment with respect to completing the physician's report form. When asked in the physician's report form to give an opinion on the expected duration of the impairment the physician referred only to the duration of the appellant's epilepsy. She provided no opinion on the duration of the back pain, indicating to the panel that the physician did not consider the back pain to be a severe impairment – this would be consistent with the functional skills assessment reported by the physician. In the

panel's view it is significant that there is no evidence that the appellant is undergoing any kind of medical treatment for her back other than taking Tylenol. Based on the totality of the evidence, the panel finds that the ministry reasonably determined that the appellant does not have a severe physical impairment.

#### *Direct and Significant Restrictions*

The only restriction on DLA reported by the physician is a periodic restriction on daily shopping. She did not provide any information on the frequency or duration of that periodic restriction. The social worker and the appellant report that virtually every physical DLA is continuously restricted by the appellant's back pain. The appellant's position is that the social worker spent more time assessing her, implying that the social worker's assessment should carry more weight. The ministry's position is that it did not have enough corroborative information to determine if the appellant was significantly restricted.

In the panel's view it is more likely than not that if the appellant's DLA are as significantly restricted by back pain as the social worker and appellant indicate they are, the appellant would have seen her physician on more than one occasion to obtain treatment, and would likely be seeking the opinion of a specialist. Given the physician's evidence of the appellant's functional skills and the almost non-existent evidence of any medical treatment for the appellant's back condition, it doesn't seem credible that the appellant would be as restricted in her DLA as the social worker reports. Accordingly, the panel tends to place more weight on the evidence of the physician than the social worker. Based on the evidence, and on the legislative requirement that direct and significant restrictions must be the result of a severe mental or physical impairment, the panel finds the ministry was reasonable in concluding that the appellant has not satisfied this legislative criterion.

#### *Help in Relation to DLA*

Regarding the need for help with DLA, the legislation requires that the need for assistance must arise from direct and significant restrictions in the ability to perform DLA that are either continuous or periodic for extended periods in the opinion of a prescribed professional. The panel finds that the ministry reasonably determined that since it has not been established that DLA are directly and significantly restricted, it cannot be determined that help is required under section 2(2)(b)(ii) of the EAPWDA.

#### *Conclusion*

Having reviewed and considered all of the evidence, the panel finds that the ministry's decision declaring the appellant ineligible for PWD designation was reasonably supported by the evidence and therefore confirms the ministry's decision.