

### PART C – Decision under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development (the Ministry) dated June 30, 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 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. The Ministry found that, as 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****The following evidence was before the Ministry at the time of Reconsideration:**

- An undated note from the Appellant's spouse (since deceased), stating that he helps her with laundry, sweeping, vacuuming, shoveling snow, lifting, moving things and taking her shopping and to appointments.
- A diagnostic imaging report, dated October 13, 2011, in which Dr D opined: "This patient has mild bone demineralization and osteopenia based on WHO criteria. There is also a major risk factor of a low trauma fracture in this individual over age 40. Basal 10-year risk of fracture is not reliable in patients under 50 years of age, but certainly follow-up is recommended and a repeat examination may be considered in 2-3 years for ongoing evaluation. If a clinical decision is made to treat this patient, then repeat bone mineral densitometry may be useful in one year."
- A diagnostic imaging report, dated October 23, 2011, in which Dr C reported: "Indication: ?L4-5 disk herniation. Technique: A non-enhanced study extends from L3 to S1. At L3-L4, there is mild annulus bulging. The canal and foramina are patent. At L4-L5, there is disk degeneration with mild spondylosis and mild retrolisthesis of L4 on L5. There is annulus bulging and possibly a small central protrusion superimposed, but there is no evidence of gross root compromise. At L5-S1, the canal and foramina are patent. L5 appears transitional exhibiting a pseudoarthrosis with the sacrum, bilaterally.
- A request for physiotherapy from Dr S, GP, dated October 26, 2011, stating a diagnosis of "Lumbar spine degeneration with L sided radiculopathy."
- A note from Dr S dated November 1, 2011, in which he opines that due to extensive damage in her back and the fact that she is attending physiotherapy renders her unable to perform physical work for three months. Dr S completed a Ministry form indicating the same information.
- A diagnostic imaging report, dated March 2, 2012, in which Dr C reported: "Joint spacing is well maintained. No bony abnormality or soft tissue calcification is seen."
- A prescription dated March 9, 2012 for the Appellant from Dr S for Morphine and Naproxen.
- A PWD application form with the following information:
  - o The Appellant describes her disability as fibromyalgia, irritable bowel syndrome, memory loss, blurred vision, depression, lumbar and hip degeneration and osteoporosis.
  - o She states that her fibromyalgia causes paralysis-type symptoms from pain which immobilize her for 2-3 days at a time. Her pain, stiffness, numbness, fatigue and loss of energy affect her ability to stand, walk, climb stairs, sit, lift, carry, attend to personal self-care, meal preparation, basic housework, shopping and socializing. She is in constant fear of falling because of weakness and loss of balance. She had fallen several months ago and broke several ribs, requiring hospitalization. She requires support from another person when walking outside the home.
  - o The Appellant reported the following limitations:

- 3-5 times longer to get out of bed due to pain and stiffness and the same length of time to get dressed. It requires her 1 ½ to 2 hours to prepare for an appointment and she must rest 20-30 minutes after minimal exertion.
- Difficulties with memory loss and recall.
- Her friend assists her with shopping, laundry, basic housework, banking and appointments. (Questioning on this point revealed that she is referring to her since-deceased spouse, who did not live with her.)
- Her irritable bowel syndrome (IBS) isolates her due to her need to be near a bathroom. She has 10-12 loose bowel movements per day. Combined with her other medical problems she often can't make plans with friends and must cancel appointments. Her loss of mobility, consciousness, loss of concentration and loss of motor activity. She is depressed, lethargic with no motivation and basic daily activities require effort.
- The Appellant's physician, Dr S, completed the section two of the PWD application. He has had her as a patient for 1 ½ years and seen her 11 or more times. He diagnosed fibromyalgia, lumbar spine (degenerative disc disease), depression and IBS. Dr D, who imaged the Appellant on October 13, 2011, diagnosed osteopenia. Dr S noted that her chronic lower back pain is not responding to analgesics or physical rehabilitation. Her physical ailments have affected her mood, resulting in a diagnosis of depression. No medications interfere with her ability to perform daily living activities (DLAs), nor does she require a prosthesis or aid for her impairment. Dr S opined that the Appellant's condition was chronic and that she was not a candidate for surgery.
- In terms of functional skills, Dr S noted the following:
  - Able to walk 4+ blocks unaided, climb 2-5 steps, lift less than 2kg/5 lbs, and sit less than 1 hour.
  - She has no difficulty with communication, but has difficulty with memory, emotional disturbance, motivation and attention or sustained concentration.
- With regard to DLAs, Dr S reported:
  - Continuous restriction with personal self-care, basic housework, daily shopping, mobility within the home and outside and the use of transportation. No restrictions were found for meal preparation, management of medications and finances. He noted that her partner had to help her with basic activities.
- A registered nurse (RN), completed section three as an assessor. She found:
  - The Appellant lives alone but has friends who help her when her fibromyalgia acts up.
  - She described the impairments that impact the Appellant's ability to manage DLA. Her fibromyalgia acts up in cold wet weather making it difficult to walk, stand or move. Her osteoporosis and hip/lumbar disc disease make it difficult to grasp things. She has tremors and disturbed balance. She has a poor memory and irritable bowel syndrome with frequent loose stools and uncontrolled bowel movements.
  - She can speak and hear well, read satisfactorily but has poor writing. Her vision blurs with increased pain and she has difficulty grasping a pen or pencil and has hand tremors. She can't sit at a computer due to back pain and finds it difficult to type sometimes due to the pain in her fingers.
  - In terms of Mobility and Physical Ability, she is independent with walking indoors (although she takes significantly longer than typical), climbing stairs (with an assistive device - rails), standing and lifting. She requires periodic assistance with walking outdoors and carrying and holding. Outdoors she can walk four blocks unassisted (not

on consecutive days) but needs help in case she slips in the winter. She can stand for 30 minutes before her back and hips seize. Then she requires two hours to recover. She can carry "less than 20 lbs short distance only" as her arms are weak and her back hurts. She requires help with longer distances or heavier items.

- The RN completed the section regarding Cognitive and Emotional Functioning. She noted major impacts on the Appellant's functioning regarding bodily functions (toileting problems and sleep disturbance), consciousness (drowsy) and emotion (depression). Moderate impacts were noted for attention/concentration, executive, memory and motivation. Impulse control, insight and judgement, motor activity, language, psychotic symptoms and other neuropsychological, emotional and mental problems had no impact on functioning. The RN related how the IBS affected her sleep. She has broken sleep and feels "like having flu all the time." She has depression, chronic pain and feels restricted and has a lack of independence.
- In an additional note dated April 5, 2012, the RN noted:
  - Depression – the Appellant has no motivation to do anything; has poor self-esteem and lack of self-worth. She is unable to garden and has lost financial resources. Cooking requires instruction and guidance which is difficult for her as she used to cook very well, from memory. She has poor concentration and can't do simple things like crossword puzzles. She has difficulty reading and can only read for two hours on a good day.
  - She has only two good days per week but they still contain physical/mental restrictions. Her motivation is low and she is often overwhelmed with simple tasks.
  - Regarding executive planning she must make lists as she often forgets things and becomes frustrated. She has poor motivation from her pain, fatigue and weakness. Her memory/retention is poor.
- Regarding personal care, the Appellant is independent in all categories although takes significantly longer than typical dressing, grooming and with transfers in/out of bed and chair. She takes 10 minutes to dress in the morning as her joints are stiff and a similar time to get in/out of bed. Decreased range of motion makes it difficult to do her hair.
- With respect to basic housekeeping she requires periodic assistance with housekeeping and continuous assistance for laundry. Her friends help her carry her laundry bundles and she has difficulty moving and bending from her back pain. She is able to do light housework such as dishes and dusting. Sweeping takes a long time as she can only work short periods and she needs help cleaning the tub.
- Regarding shopping she is independent making appropriate choices and paying for purchases, requires periodic assistance reading prices and labels and continuous assistance going to/from stores and carrying purchases home. Her blurred vision interferes with reading, she can't carry groceries and she requires periodic support with walking.
- With meals she is independent with planning, food preparation and cooking although she takes significantly longer than typical with preparation. She requires recipes as she can't recall how to cook without them.
- She is independent in all aspects of paying rent and bills and medications but relies on friends to take her to and from appointments.
- Regarding social functioning she is independent in all aspects except the ability to deal with unexpected demands: "on bad days she just goes to bed."
- She has good functioning with her immediate social network and marginal functioning

with extended networks. While she appears to function she does not feel well "inside" and has difficulty developing new relationships.

- She withdraws socially as people don't understand her illness and restrictions.
- Assistance is provided by her friends; none is required from an assistance animal.
- In additional notes, The RN reports that the Appellant has had fibromyalgia for 15 years and has learned to accept the pain and restrictions. Her back and hip pain are getting worse and greatly affected by weather, which makes her more dependent on others. She is not yet a surgical candidate.
- The RN saw the Appellant once, for the purpose of this assessment.

### **Evidence at the Hearing**

- The Appellant provided the following evidence at the Hearing:
  - She has fibromyalgia, lower back pain, IBS and depression and her symptoms are progressively debilitating. She sees her doctor once per month.
  - She stated her fibromyalgia is like MS. It is similar to having the flu all of the time. Her pain debilitates her for three days at a time, particularly in bad weather. She drops things often and has numbness in her hands. She can't lift or twist.
  - Because of her IBS she can't be far from the toilet, which has ramifications in her social and working life.
  - She has osteoporosis and has broken bones in the past.
  - When the weather changes for the worse she cannot do any activities.
  - Her daily pain is moderate to severe. She can't walk outdoors without help.
  - She relies on her neighbours to do laundry, transportation and yard work.
  - Under questioning regarding her daily routine, the Appellant stated that it takes 20-30 minutes to get out of bed, five minutes to get to the kitchen, she takes her meds then a couple of hours to dress and apply makeup. She watches TV and takes more meds. If there's bad weather she gets very seized up. If she goes shopping she must have assistance with anything heavy. She frequently drops things while shopping or around the house.
  - The Appellant also disputed her physician's assertion that she could walk four blocks as she states she is unable to.

Under section 22(4)(b) of the Act, the Panel admitted the new evidence as it is in support of information and records which were before the Ministry at the time of its decision. The Ministry did not submit a challenge to the Appellant's introduction nor the content of this evidence.

## PART F – Reasons for Panel Decision

This is an appeal of the Ministry's reconsideration decision dated June 30, 2012, which held that the Appellant did not meet 3 of the 5 statutory requirements of section 2 of the Employment and Assistance for Persons with Disabilities Act for designation as a person with disabilities (PWD). The Panel must determine whether this decision is reasonably supported by the evidence or a reasonable application of the applicable enactment in the circumstances of the person appealing the decision.

The Ministry found that the Appellant met the age requirement and that her impairment is likely to continue for at least 2 years. However, the Ministry was not satisfied that the Appellant has a severe physical or mental impairment nor that her daily living activities (DLA) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods. The Ministry also found that as the Appellant is not significantly restricted from DLA, it could not be determined that she requires the significant help or supervision of another person and that no assistive devices are required.

The criteria for being designated as a person with disabilities (PWD) are set out in section 2 of the EAPWDA:

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

Section 2(1) of the EAPWDR defines DLA for a person who has a severe physical or mental impairment as:

- (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.

An "assistive device" is defined in the EAPWDA as "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."

The Appellant argued that her GP, Dr S, found her continuously restricted from performing:

- Personal Self care
- Basic Housework
- Daily Shopping
- Mobility Inside the House
- Mobility Outside the House, and
- Use of Transportation

She also referenced the extensive comments made the RN who acted as her assessor, which discussed her DLA restrictions.

She disagrees with the Ministry's application of the relevant legislation, arguing that the Ministry improperly added criteria regarding degree and duration of support required and disregarded the Appellant's self-report in section B of the PWD application. She referenced the *Hudson* decision regarding the number of DLA restrictions necessary to establish a claim as well as the requirement to heed the Appellant's evidence unless there is a reason not to.

The Ministry did not advance new arguments or evidence beyond what was contained in the reconsideration decision.

There is no dispute that the Appellant is over 18 years old nor that her impairment is likely to last for at least two years.

The Act requires the physical or mental impairment to be severe. Evidence of severity can be drawn from the Appellant's ability to perform DLA as well as medical evidence of the impairment itself.

The Ministry found that the Appellant had neither a severe physical nor mental impairment. With respect to the latter, the Panel notes that she was diagnosed with depression which has resulted from her physical impairments. The symptoms are social withdrawal, poor concentration, a loss of memory, poor motivation and executive planning. She becomes overwhelmed with simple tasks and often gives up trying.

Despite this evidence, the Panel agrees with the Ministry that a severe mental impairment has not been established. There is no evidence of treatment for severe depression and despite her cognitive and emotional limitations the Ministry's conclusion was reasonable.

The Panel came to a different conclusion with respect to her physical impairment, however. Examining the evidence of her different conditions as a whole, the Panel finds it was not reasonable to find a lack of severity. The Appellant has multiple conditions: IBS, fibromyalgia, depression,

osteopenia and spinal degeneration. (Note: the Appellant describes her condition as osteoporosis, whereas Dr D diagnosed osteopenia.) Dr S opined: "Lumbar spine degeneration with L sided radiculopathy," and that "due to extensive damage in her back and the fact that she is attending physiotherapy renders her unable to perform physical work for three months." While this decision is not related to her ability to work outside the home his comments are instructive with respect to her PWD application.

There is contradictory evidence regarding her ability to walk 4+ blocks unaided. Dr S checked the box indicating she could do so, whereas the RN noted she has difficulty moving due to stiffness and pain in her back/legs. She could walk "unassisted in summer weather for about 4 blocks, unable to walk 2 consecutive days." In winter however, she requires support from another person when going out due to slippery conditions. The Panel finds this relevant given her osteopenia, particularly as she has suffered broken bones in the past from this condition. Dr D opined that "[t]here is also a major risk factor of a low trauma fracture."

Taking her three physical conditions into account (fibromyalgia, spinal degeneration and osteopenia) the evidence shows that her outdoor mobility achieves 4+ blocks only in the best conditions, which do not prevail throughout the year where she lives.

Dr S noted that she can climb only 2-5 steps, lift less than 2 kg/5 lbs and sit for less than an hour. The RN noted she could carry "less than 20 lbs short distance only." The Panel concludes from this that the Appellant can carry the lower weight (less than 5 lbs) consistently and the higher weight (less than 20 lbs) for short periods.

The assessor and the Appellant noted the debilitating pain which renders the Appellant unable to function periodically, particularly during poor weather. Even in good weather she is unable to lift heavy items required for laundry and shopping, she drops items and must rely on friends to transport her to appointments.

Based on these diagnoses and consequent restrictions the Panel finds the Ministry unreasonably determined that a severe physical impairment was not established.

With respect to her DLA, Dr S found her continuously restricted with:

- Personal Self care
- Basic Housework
- Daily Shopping
- Mobility Inside the House
- Mobility Outside the House, and
- Use of Transportation

As her assessor, The RN provided greater detail. She found her requiring periodic assistance from another person for walking outdoors. She can't walk more than 4 blocks unassisted (in good weather) and must rest a day in-between walks. Indoors she takes significantly longer than typical to move about. Similarly with personal care, she takes significantly longer than typical to dress, groom, and transfer in/out of bed and chairs. She requires continuous assistance with laundry and periodic assistance with housekeeping. Specifically she can only do light housekeeping: others must do the rest for her. With shopping she requires periodic assistance reading prices (due to blurred vision) and continuous assistance going to/from stores and carrying purchases home due to her inability to



mobilize and carry items. Regarding the extent of the requirement for periodic assistance, poor weather renders her incapable of functioning for days at a time.

The RN found her independent with meal planning (apart from requiring recipe cards to assist her poor memory) paying rent and bills and taking medications. She is unable to transport herself although she can get in and out of vehicles. The Appellant's evidence to the Panel is consistent with these findings.

Referencing the EAPWDR the evidence shows that the Appellant's impairment directly and significantly restricts her ability to perform daily living activities (DLA) either continuously or periodically for extended periods in the following areas:

- **Shopping for Personal Needs.** She can carry less than five pounds consistently and drops items regularly. She relies on friends to transport her shopping, occasionally to read labels that appear blurry and to carry items home.
- **Performing Housework to Keep One's Residence in Acceptable Sanitary Condition.** The same difficulties with lifting heavy items and often dropping things prevent her from performing this DLA and friends must do the heavier work and her laundry. Add to this debilitation from bad weather which precludes her from functioning for multiple days.
- **Moving About Indoors and Outdoors.** The Appellant's main difficulty in mobilizing in weather where she runs the risk of breaking a bone if she slips and falls. Even in good weather she can walk only approximately four blocks but must take a day to recover.

The Panel finds the Ministry unreasonably found a lack of restrictions as contemplated in the EAPWDR in these areas.

The Ministry's findings were not reasonable in this regard as the evidence shows the existence of restrictions which meet the statutory requirements.

The evidence also shows that she requires help to perform these DLA, which she receives from her friends and neighbours. Note: while the RN discussed the use of railings as an assistive device, this does not meet the definition in the EAPWDA, namely:

"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;

However, as she requires the "significant help or supervision of another person" the test in EAPWDA 2 (3) is met.

In summary, the Panel finds that the Ministry's decision was not reasonably supported by the evidence and rescinds the decision.