

### PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development (the ministry) reconsideration decision of September 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

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

- The appellant's application for designation as a PWD. The application included a physician report (PR) and assessor's report (AR) both completed and signed by the appellant's physician on August 23, 2012. The self-report section of the application form was signed by the appellant on August 24, 2012 but the appellant left the self-report blank.
- A letter and decision summary from the ministry to the appellant, dated August 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 September 12, 2012, with written submission attached.
- A written report from a medical geneticist dated October 21, 2011.

In the PR the physician diagnosed the appellant as having muscular dystrophy, with onset in 2006. He noted weakness especially in the area of hip, thigh, pelvic and spine. In the health history part of the PR the physician reported that the appellant's movements are slow, weak and "less steady", but wrote that "she is independent for vital functions and most mobility" while noting that "everything takes more time. Speech, swallowing and fine coordination of hands – is good." He indicated that the appellant needs help ascending a high step – such as climbing into an elevated vehicle – and that she is unable to use public transport. The appellant has not been prescribed any medication that interferes with her ability to perform DLA and does not require any prostheses or aids but may need them within the next few years as muscular dystrophy is a progressive disease with no treatment available to halt or cure the disease. Functionally the physician reported the appellant as being able to walk less than 1 block on a flat surface unaided, to climb 2 to 5 steps unaided, to lift 5 to 15 pounds, and as having no limitations on being able to remain seated. The appellant has no significant deficits in cognitive and emotional functioning.

In the AR the physician wrote that the appellant was living with family, but noted she was intending to move out on her own for purposes of post-secondary education. He identified the same areas of muscle weakness as he did in the PR with the additional observation "also shoulders, legs." The appellant's ability to communicate was noted as "good" in all respects. The physician indicated the appellant was independent in 4 of 6 tasks related to mobility and physical ability – walking indoors, climbing stairs, standing and carrying holding (light objects only) – but needed periodic assistance with walking outdoors and lifting. He indicated she also needed periodic assistance with laundry and basic housekeeping (if the loads or chores were more than light) and with 1 of 5 tasks related to shopping – carrying purchases home (if heavy). With respect to transportation the physician noted the appellant was independent with respect to using transit schedules and arranging transportation, but needed periodic assistance getting in and out of a vehicle (if a high vehicle) and continuous assistance using public transit (unable to move quickly/safely). He wrote that the appellant was able to use her own car. In all other aspects of DLA – personal care, shopping, meals, pay rent and bills, medications – the physician indicated the appellant was independent, but noted that everything she does for personal care takes much longer to do. In section B.4 of the AR – which is to be completed for an applicant with an identified mental impairment or brain injury - the physician noted the appellant's impairment has no impact on 11 categories of cognitive and functioning, and minimal

impact on emotion (depression) and motor activity (weakness causing instability). He described the appellant as independent in terms of social functioning. The physician noted that the appellant used no assistive devices or assistance animals, but that she will need assistive devices and personal assistance at some stage in the future.

In her report of October 21, 2011 the medical geneticist indicated the appellant has a genetic profile consistent with limb girdle muscular dystrophy, with a clear predominance of involvement in the pelvic girdle. At the time the appellant reported that she did not have significant weakness of the shoulder girdle, and that she did not have any limitations of daily activities that refer to use of her arms. The medical geneticist described the appellant as having a very unsteady gait, a noticeable great effort to walk, and more significant hyperlordosis (excessive curvature of the spine). She used a boot with a high heel for increased steadiness, and had significant difficulty in going from a sitting to a standing position and standing without support. The appellant was noted as getting only limited physical exercise, and the medical geneticist suggested more exercise (specifically swimming or other physical activity) and physical therapy.

In the written submission attached to her Request for Reconsideration the appellant reported that she is unable to climb stairs without an elevator or assistance. She said that she now lives away from home and has difficulty with housekeeping and groceries without help from her roommate. The appellant is only able to sit for an hour without getting sore and uncomfortable. She is unable to follow the medical geneticist's recommendations with respect to swimming and other physical activities because of insecurity about her "overly thin" body, and fear of crowded areas due to poor balance. The appellant indicated she is unable to walk on slippery surfaces without guidance and indoors tends to hold on to objects for balance. Her muscles often cramp when walking and she is unable to get up without help from others after a fall. The appellant also described the depression she feels as a result of not being able to lead a normal life.

At the appeal hearing the appellant stated that she is unable to get up unaided, to carry heavy objects, or to walk for long periods. When carrying objects any distance she has to use a backpack because of her balance. If she sits too long her hips and back hurt, and if she sits in a low chair she needs help to stand. The appellant reported that she cannot clean the house by herself – she has difficulty leaning over and it is hard to reach above her head to clean mirrors or windows. She has to take breaks during shopping and needs help from others to carry groceries and to push the cart. The appellant did try leg braces at one point but they weren't really helping so she stopped using them about 2 years ago. On questioning from the panel the appellant confirmed that she moved away from home after the physician completed the PR and AR and is attending classes on line. Now that she is not living with her family she is discovering how difficult it is to do such DLA as cleaning and meal preparation – it is more difficult and takes longer than she had realized.

The panel admitted the appellant's testimony as evidence as it provides more detail regarding the impacts of her impairment, and constitutes oral testimony in support of information and records that were before the ministry at the time of reconsideration, in accordance with s. 22(4) of the *Employment and Assistance Act*.

The ministry proffered a 2-page written summary of the reconsideration decision, which the panel accepted as being written argument. Otherwise the ministry relied on its reconsideration decision and submitted no new evidence.

## 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 periodically 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.

\*\*\*\*\*

*Severe Mental Impairment*

The appellant did not expressly state a position with respect to severe mental impairment.

The ministry's position, as set out in the reconsideration decision, is that there is not enough evidence to establish that the appellant has a severe mental impairment.

In the PR the appellant's physician reported that the appellant has no significant deficits in cognitive and emotional functioning. There is evidence of some depression resulting from the appellant's frustration with the physical limitations she faces, but functional impacts do not appear to be significant. In the AR the appellant's physician reported minimal impact to 2 out of 14 categories of

cognitive and emotional functioning, and noted that the appellant is independent with respect to all aspects of social functioning (including relationships with her immediate and extended social networks) and decision-making. Based on this evidence, the panel concludes the ministry reasonably determined that the appellant does not suffer from a severe mental impairment.

### *Severe Physical Impairment*

The appellant's position is that the ministry's reconsideration decision was not based on a detailed analysis of her medical condition and that considering her difficulties with mobility and other DLA, she does have a severe physical impairment.

The ministry's position, as set out in the reconsideration decision, is that the functional skill limitations identified by the appellant's physician are more in keeping with a *moderate* degree of impairment, and that there is not enough evidence to establish a *severe* physical impairment.

To assess the severity of an impairment one must consider the impact on daily functioning in terms of one or more of functional skill limitations, cognitive and emotional deficits, restrictions on the ability to perform DLA, and assistance required. On assessing the evidence, the panel notes that while the appellant does have limitations to functional skills of walking, climbing stairs and lifting, the physician indicates that most of the appellant's impairment is with respect to her hips, thighs, pelvis and back, and that she is "independent for vital functions and most mobility". He also notes that "fine coordination of hands is good." There is an inconsistency in the evidence with respect to the appellant's ability to remain sitting, with the physician noting no limitation and the appellant saying that she starts to get sore after an hour of sitting, but in the panel's view it would be difficult to conclude that even a 1 hour limitation would indicate a "severe" impairment. The panel notes also that the medical geneticist has expressed the view that the appellant is capable of swimming or other physical activity as a form of therapy, and noted that the appellant did not report any limitations to daily activities that refer to the use of her arms. The panel acknowledges that the appellant suffers from a progressive disease, and that her impairment may have advanced during the year since she saw the medical geneticist. The panel also understands that the appellant has had a change in her living arrangements since her physician completed the PR and AR, and that the appellant may be experiencing more limitations now that she is living away from her family. However, given the current medical information which identifies relatively limited impacts to the appellant's functioning, the panel finds that the ministry reasonably concluded that there is not enough evidence to establish that the appellant presently has a severe physical impairment.

### *Restrictions to DLA*

The appellant's position is that her ability to perform DLA is directly and significantly restricted by her physical impairments, in some respects continuously and in other respects periodically.

The ministry's position, as set out in its reconsideration decision, is simply that there is not enough evidence from the appellant's physician to confirm that the appellant's impairments significantly restrict her ability to manage her DLA.

On the evidence, the most significant restrictions to DLA appear to be with respect to mobility, with the appellant's physician noting that the appellant requires periodic assistance from others to walk outdoors, and the appellant saying that she holds onto objects for stability when moving about indoors. However, as noted by the appellant's physician in the PR, the appellant is "independent [with] most mobility." While she is limited in her ability to use public transportation because of unsteadiness, she is capable of driving her own vehicle to get around. The appellant requires periodic assistance with basic housekeeping and carrying objects home from shopping, but the physician has provided no information on how frequently the periodic assistance is required or for what duration. While the physician has noted that the appellant takes longer than normal with respect to personal care, there is no indication of how much longer these activities take. All other DLA are indicated by the physician as being performed independently by the appellant. Based on the foregoing information, the panel concludes that the ministry reasonably determined that the legislative criterion regarding direct and significant restrictions to DLA has not been satisfied.

#### *Help with DLA*

The appellant's position is that she requires assistance from her roommate and family in order to manage her DLA.

The ministry's position, as set out in its reconsideration decision, is that as it has not been established that DLA are significantly restricted it cannot be determined that significant help is required from other persons. The ministry also referred to the evidence of the appellant's physician that the appellant does not require the use of an assistive device, but that that would change at some point in the future.

On the evidence, the appellant requires periodic assistance from others with respect to some DLA. Without evidence of the extent, frequency or duration of these periods, it is difficult to describe this as being the "significant help or supervision of another person" as required by EAPWDA s. 2(3)(b)(ii). Neither the appellant's physician nor the appellant herself identified her as using assistive devices, though the medical geneticist indicated that the appellant uses a boot with a high heel for steadiness, and the physician indicated that the appellant will require assistive devices at some stage in the future. There is no evidence to indicate that the appellant requires or would benefit from an assistance animal.

The panel finds that based on the evidence the ministry reasonably determined that the appellant does not require help to perform DLA as defined by the legislation.

#### *Conclusion*

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