

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development (“ministry”) reconsideration decision dated October 5, 2012 which found that the appellant’s application for Persons With Disabilities (“PWD”) designation did not meet three of the five statutory requirements of section 2 of the Employment and Assistance for Persons with Disabilities Act. The ministry found that the appellant was at least 18 years of age and that her impairment was likely to continue for two years or more. However, the ministry was not satisfied that the evidence establishes that the appellant has a severe physical or mental impairment and 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 the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

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 evidence before the ministry at the time of the reconsideration decision consisted of copies of the following:

1. Person With Disabilities (PWD) Application: applicant information dated July 11, 2012, physician report dated July 11, 2012 and assessor report dated July 11, 2012;
2. A letter dated August 16, 2012 from the ministry to the appellant denying PWD designation and attaching a PWD Designation Decision Summary dated August 16, 2012;
3. A letter from the appellant dated September 19, 2012 (and date stamped "Received" on September 21, 2012) setting out her submissions in support of her Request for Reconsideration;
4. A letter from the appellant's physician dated September 21, 2012 commenting on the appellant's physical condition, medication that she is taking and her daily living activities; and
5. The appellant's unsigned and undated Request for Reconsideration date stamped "Received" on September 21, 2012;

At the commencement of the hearing, the appellant noted that the September 21, 2012 letter from her physician described above was not included in the appeal package. The appellant brought a copy of the letter to the hearing and it was date stamped as received by the ministry on September 23, 2012. The ministry representative agreed that this document was before the ministry at reconsideration and as such it was not treated by the Panel as new evidence.

The ministry representative prepared written submissions and provided a copy to the Panel at the hearing. Those submissions reflected the findings in the Reconsideration Decision and did not raise new evidence and as such, the Panel accepted it as argument.

In her Notice of Appeal dated October 19 2012, the appellant states that she is going to have to insist on this and that she will await for the ministry's response regarding the date on which she is to appear at the hearing before the tribunal.

Section 1 of the PWD application includes three parts. Section A sets out the appellant's personal information including her name, address, date of birth, personal health number, social insurance number and telephone number. This section was completed by the appellant and in response to the question "Do you need help completing this application?" the appellant has checked the "No" box. Section B asks the appellant to describe her disability and the impact it has had on her life. The appellant has not completed this section. Section C is the declaration and notification section and the appellant has signed and dated this section July 11, 2012 but her signature in this section is not witnessed.

At the hearing, the appellant stated that her main problem with her physical impairment was having to wear two braces and walk with a cane. The appellant disagreed with the ministry's position that she does not demonstrate sufficient physical impairment to qualify for PWD status given that it is not easy for her to walk around her apartment. The appellant stated that over the course of her life, she has had to try and convince people to treat her like everyone else and that now her physical condition has deteriorated. The appellant stated that her back is bent and rotating, her left knee is very painful and that every step she takes is very painful and has to be very calculated. The appellant stated that at that particular time, she was in real pain that she would estimate as a "6" on a scale of 1 – 10. The appellant said that while she does need it, she doesn't have someone to come and clean her apartment because she can't afford it. She would like someone to do her laundry and cooking and shopping but she can't rely on her brother because he has his own family and business. The appellant stated that she can walk for a block and enjoys doing so for fitness but that when she does she is not in very good condition afterward and that when her pain is very bad she can't move for 2 days. The appellant noted that she took narcotics to manage her pain for 10 years but doesn't want to take them anymore. The appellant said that her doctor says she should take pain medication but that she doesn't

want to. The appellant said that she has problems with her arms and shoulders, she is losing muscle and that if she wants to write, she can only do it for 10 minutes due to pain.

In response to a question, the appellant commented that she has had multiple operations since she was five years old with the most recent one in the mid-1980's and that none are scheduled in the future. In response to a question, the appellant answered that she has been taking 10mg of methadone for pain management for about two years and that the dosage has remained consistent over that period. The appellant continued that her physician wants to double her daily dose of methadone but she has refused that. In response to a question, the appellant answered that her brother comes over to assist her with grocery shopping once each week and with cleaning her apartment not very often.

The letter from the appellant's physician dated September 21, 2012 indicates that the appellant's medical problems are primarily related to her chronic pain and poor mobility which are a complication of her childhood polio and subsequent multiple operations. The physician goes on to comment that the appellant's pain is managed with a 10mg dose of methadone once each day and that the appellant reports her pain level as varying from 3 to 9 out of 10 in severity. The physician reports that for the most part the appellant is pretty independent and that she does get some family support with laundry, housekeeping and shopping. The physician concludes by stating that he thinks the appellant is disabled from work and that he hopes her pension application will be re-considered.

The physician who completed the physician report confirms that the appellant has been his patient for 1 year and that he has seen the appellant between 2 and 10 times in the past 12 months. In the physician report, the physician notes a diagnosis of polio with persistent scoliosis, leg weakness and joint pain with the date of onset as 1960. The physician notes under Health History that the appellant has had polio since she was one year of age resulting in scoliosis and partial paralysis in both legs. The physician goes on to comment that the appellant requires a right knee brace and a left leg brace from foot to thigh. Lastly, the physician notes that the appellant has chronic pain in her right knee, back and hands which is treated with small doses of methadone. The physician indicates that the appellant has not been prescribed medication that may interfere with her ability to perform DLA. In response to the question whether the impairment is likely to continue for two years or more, the physician indicates "yes" and notes "Permanent impairment." The physician indicates that the appellant can walk 1-2 blocks unaided on a flat surface, that she can climb 5 or more stairs unaided, that she can lift under 2 kgs and she can remain seated less than 1 hour. The physician does not comment whether the appellant has any difficulties with communication and he notes that the appellant has no significant deficits with cognitive and emotional function.

The appellant's physician also completed the assessor report and indicates that the appellant lives alone. The physician further notes that the appellant has a good ability to communicate in speaking, reading, writing and hearing. The physician indicates that the appellant is independent in all areas of mobility and physical ability other than lifting and carrying for which she requires periodic assistance from another person. Specifically, the physician comments "...gets help from her brother with shopping, vacuuming." The physician notes that there is no impact on any aspect of the appellant's cognitive or emotional functioning. The physician indicates that the appellant is independent with all tasks of personal care including dressing, grooming, bathing, toileting, feeding self, regulating diet and transfers on/off chair. The physician reports that the appellant requires periodic assistance with doing laundry and basic housekeeping and that she receives assistance from her brother with housework and shopping. The physician indicates that the appellant is independent with most of the tasks of shopping including going to and from stores, reading prices and labels, making appropriate choices and paying for purchases while requiring periodic assistance from another person with carrying purchases home. The physician reports that the appellant is independent with all tasks of managing meals, including meal planning, food preparation, cooking and safe storage of food. The physician indicates that the appellant is independent with all tasks of paying rent and bills (including banking and budgeting), with managing medications (filling/refilling prescriptions, taking as directed and safe handling and storage) and with

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transportation (getting in and out of a vehicle, using public transit and using transit schedules and arranging transportation). The physician reports that the appellant is independent in all aspects of social functioning and that she has good functioning in respect of her immediate social and extended social networks. The physician notes again that the appellant relies on family for help with DLA and uses a cane and braces but no assistance animal to compensate for her impairment.

PART F – Reasons for Panel Decision

The issue on the appeal is whether the ministry reasonably concluded that the appellant did not meet three of the five statutory requirements of Section 2 of the EAPWDA for designation as a person with disabilities (PWD). The Ministry found that the appellant was at least 18 years of age and that her impairment was likely to continue for two years or more. However, the ministry was not satisfied that the evidence establishes that the appellant has a severe physical or mental impairment and 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 the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

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

Persons with disabilities

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.

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

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

Definitions for Act

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;

ATTACH EXTRA PAGES IF NECESSARY

- (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.

The ministry referred to the Reconsideration Decision and submitted that to be eligible for PWD designation, the appellant must satisfy all five criteria as set out in section 2 of the EAPWDA and that in the present case, the appellant has failed to do so. The ministry argues that the evidence does not demonstrate that the appellant has a severe physical impairment but that her functioning is more in line with a moderate degree of impairment. The ministry specifically points to the physician report which indicates that the appellant is able walk 1-2 blocks, lift under 2 kgs and remain seated for less than one hour. The ministry refers to the assessor report which indicates that while the appellant wears a knee and leg brace as assistive devices, she is independent in all aspects of mobility and physical ability other than lifting, carrying and holding for which she requires periodic assistance but the ministry argues that the assessor report does not indicate how often such assistance is needed. The appellant disagrees with the ministry's contention that she does not have a severe physical impairment. She argues that her physical condition is deteriorating, that her back is bent and rotating and her left knee is very painful which makes walking around very difficult. The appellant states that she walks with a cane and wears two braces to assist her in walking and that she currently takes medication daily to manage her pain.

The panel finds that the evidence of a medical practitioner in the physician report confirms a diagnosis of polio with persistent scoliosis, leg weakness and joint pain. While the physician report does not indicate that the appellant has been prescribed any medication that interferes with her ability to perform DLA, the appellant noted in her submissions that she takes 10mg of Methadone for pain relief daily and the physician notes that the appellant uses a right leg and left knee brace for her impairment. The appellant added that she also uses a cane. The physician indicates that the appellant can walk 1-2 blocks unaided on a flat surface, that she can climb 5 or more stairs unaided, that she can lift under 2kg and remain seated less than 1 hour. The physician assesses the appellant as independent with walking indoors, walking outdoors, climbing stairs and standing and that she requires periodic assistance with lifting and carrying noting that she gets help from her brother with shopping and vacuuming. In the September 21, 2012 letter prepared by the appellant's physician, he notes that the appellant's medical problems are a complication of her childhood polio and multiple operations and that her pain is managed with daily medication.

While the appellant does require the use of a leg and knee brace as well as a cane, the evidence demonstrates that she is able to independently carry out all activities of mobility and physical ability with the exception of lifting, carrying and holding for which she requires only periodic assistance. Based on all of the circumstances as set out above, the panel finds that the ministry reasonably determined that the evidence does not establish that the appellant suffers from a severe physical impairment.

With respect to mental functioning, the ministry argues that the evidence does not show that the appellant has a severe mental impairment. The ministry argues that the physician reports that the appellant does not have any significant deficits to cognitive and emotional functioning and that the assessor report demonstrates that

the appellant can independently manage all of her social functioning and that she has good functioning with her immediate and extended social networks. The appellant argues that stress makes her physical condition worse.

The panel notes that the appellant's physician identifies in the physician report that she has no significant deficits with cognitive or emotional functioning and similarly, in the assessor report the appellant's physician indicates that there is no impact on the appellant's cognitive, emotional or social functioning. Based on this evidence, the panel finds that the ministry's decision that the evidence does not establish a severe mental impairment was reasonable.

The ministry argues that the evidence does not establish that the appellant's DLA are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods. The ministry argues that while the appellant requires periodic assistance with laundry, housekeeping and carrying purchases home, the nature and extent of the assistance cannot be established and as such the ministry cannot determine that the appellant is significantly restricted for extended periods of time. The ministry further submits that appellant manages a significant majority of her DLA independently. The appellant argues that while she doesn't have someone helping her with laundry, cooking and shopping, it's because she can't afford it. The appellant argues that her brother helps her with grocery shopping once each week and with cleaning her apartment, specifically vacuuming and the bathroom, not very often but that this is due in part to his own family and business obligations.

The panel finds that the legislation requires that the ministry be satisfied that the appellant has a severe mental or physical impairment that in the opinion of a prescribed professional directly and significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods. In the assessor report, the physician indicates that the appellant is independent in all aspects of personal care and that she requires periodic assistance with laundry and basic housekeeping. For shopping, the physician notes that the appellant is independent going to and from stores, reading prices and labels, making appropriate choices and paying for purchases and that she requires periodic assistance carrying purchases home. The physician adds the comment that the appellant "Gets assistance from brother with housework and shopping." The physician notes that the appellant is independent with all aspects of meals, paying rent and bills, medications and transportation. The physician notes that the appellant is independent with all aspects of social functioning. In the September 21, 2012 letter from her physician, the physician notes that the appellant is "for the most part pretty independent" and comments further that she receives some family support with laundry, housekeeping and shopping. Based on the afore-mentioned, the panel finds that the ministry's determination that the evidence of a prescribed professional does not establish a direct and significant restriction on the appellant's ability to perform DLA either continuously or periodically for extended periods, as required by Section 2(2)(b)(i) of the EAPWDA, was reasonable.

In determining whether the ministry reasonably concluded that the appellant does not require the significant help or supervision of another person or the use of an assistive device, the panel relies on the information from the physician and the appellant that she lives alone and that she relies on her brother for periodic assistance with laundry, housekeeping and shopping. The appellant wears a right leg brace, a left knee brace and she uses a cane. As it has not been established that the appellant's DLA are directly and significantly restricted as set out above, the panel finds that the ministry's conclusion that the requirement for significant help or supervision of another person, an assistive device, or the services of an assistance animal to perform DLA, under Section 2(2)(b)(ii) of the EAPWDA, has not been met was reasonable.

Overall the panel finds that the ministry's reconsideration decision was reasonably supported by the evidence and confirms the decision pursuant to Section 24(2)(a) of the Employment and Assistance Act.