APPEAL #

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development (the ministry) reconsideration decision of October 18, 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 in decision nistry was also not satisfied that the appellant's daily living activities (DLA) are, prescribed professional, directly and significantly restricted either continuously c xtended periods. As the ministry found that the appellant is not significantly restric uld not be determined that she requires help as defined in section 2(3)(b) of the EA

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 July 27, 2012. The application also included a self-report signed by the appellant on July 27, 2012.

- A letter and decision summary from the ministry to the appellant, dated September 10, 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 10, 2012, with written submission attached.

- An undated one-page form titled The Mood Disorder Questionnaire, apparently completed by the appellant. On the form the appellant indicated that her mood had posed a "moderate problem".

- A one-page form titled Generalized Anxiety Disorder GAD-7 and dated March 23, 2009, giving the appellant a total score of 11 out of a maximum possible 21. There is no indication as to who completed the form – the panel concluded it was the appellant. In answer to the question "If you checked off any problems, how difficult have these problems made it for you to do your work, take care of things at home, or get along with other people?" the "very difficult" box has been ticked.

- A Chart Summary produced by the appellant's physician as a result of an examination on September 10, 2010, providing diagnoses of - among other things – plantar fasciitis. The Chart Summary reported the results of a radiology investigation of the appellant's complaint of burning pain in the left lateral thigh as "appropriate alignment of the lumbar spine...Disc spaces maintained....mild facet osteoarthritis lower lumbar spine...sacroiliac joints are preserved..."

- A discharge note from the appellant's local hospital dated July 6, 2011 indicating a diagnosis of plantar fasciitis, and showing treatment provided to the appellant in the form of stretching/strengthening. The appellant was discharged with a home exercise program, without any improvements having been made in terms of heel pain or function.

- A one page form titled Patient Health Questionnaire – PHQ-9, dated March 30/12, on which the appellant has indicated how often she had been bothered by various mood-related problems over the previous 2 weeks. Examples of the problems include "little interest or pleasure in doing things" and "feeling down, depressed, or hopeless". Her score was noted as 15 (with no indication of the maximum possible score). In answer to the question "If you checked off any problems, how difficult have these problems made it for you to do your work, take care of things at home, or get along with other people?" the "very difficult" box has been ticked.

- A one-page report of the result of an x-ray examination of the appellant's left knee on January

17, 2012. The report indicated "Early medial compartmental osteoarthritis."

- A report prepared by a specialist in physical medicine, rehabilitation, and electrodiagnostic medicine, (the "specialist") providing the results of an examination on May 29, 2012. The appellant had reported having numbness in her legs bilaterally since September of 2011. The specialist wrote that the numbness only occurs when the appellant's knees are flexed, and that it does not occur when she is sitting with her knees extended as when driving a car. He reported the range of motion of the appellant's ankles as normal. He wrote that there was no tenderness over the plantar fascia, that plantar flexion and toe extension did not reproduce her pain, and that she is able to walk on her heels and toes with pain. Regarding the heel pain, he wrote that the appellant "likely has chronic compressive neuropathies of the calcaneus" (heel). Neuromuscular screening examination revealed normal sensation in the lower extremities except for the left lateral femoral cutaneous nerve of the thigh. The specialist concluded that the appellant is intermittently compressing nerves when she is sitting and flexing her knees, and that his examination did not suggest any injury to the motor or sensory nerves below the knees. Regarding the transient leg pain, he recommended that the appellant continue with her aerobic exercise and weight loss programs. Regarding her ankle pain, he suggested a trial of topical pain medications, while acknowledging that the heel pain is going to be chronic and resistant to treatment.

- A report dated June 23, 2012 prepared by a physician at a sleep clinic. It reported the appellant as scoring 8/24 on the Epworth Sleepiness Scale consistent with mild daytime sleepiness, and as having mild Obstructive Sleep Apnea (OSA) with symptoms of significant insomnia. He recommended further examination of her sleep.

In the PR the appellant's physician, who has known her for 6 years, diagnosed the appellant with bilateral plantar fasciitis, osteoarthritis of the left knee, chronic fatigue syndrome, and OSA. In the Health History portion of the PR the physician said that the appellant has difficulty walking more than 2 – 3 hours after which she needs to sit down due to sore heels, and that sitting is fine with her left leg straight. He described the osteoarthritis of the left knee as being "mild". He referred to the appellant's PHQ-9 and GAD-7 scores when referring to her depression and anxiety as being "mild/moderate". He also described her OSA as being "mild". The physician wrote that the appellant has not been prescribed any medication that interferes with her ability to perform DLA, and that she does not require any prostheses or aids. In terms of functional skills the physician reported the appellant as being able to walk less than 1 block unaided, being able to climb 2 to 5 stairs unaided, as being able to remain seated for 1 to 2 hours, as having no limitations in lifting, and as having no difficulty with communication. He reported significant deficits in 3 out of 11 categories of cognitive and emotional function: emotional disturbance (e.g. depression, anxiety), motivation and attention/sustained concentration. In the DLA portion of the PR, the physician indicated that the appellant's ability to perform DLA is unrestricted with respect to personal self-care, meal preparation, management of medications, use of transportation, management of finances, and social functioning. He indicated that she has periodic restrictions in basic housework, and daily shopping, and mobility inside the home "depending on amount to do/duration." He also indicated that the appellant's mobility outside the home is restricted but did not say whether the restriction is continuous or periodic. In response to the request for additional comments regarding the degree of restriction the physician wrote "needs help – distance/duration." Asked to describe what assistance the appellant needs with DLA, the physician indicated by pen stroke "none" and added "as long as can do things in stages."

In the AR the physician reported the appellant as living alone. He described "the applicant's mental or physical impairments that impact his/her ability to manage [DLA]" as "low energy, low motivation". Part B.4 of the AR is to be completed "for Applicant with an identified mental impairment or brain injury." The physician completed Part B.4 indicating that the appellant's mental impairment has no impact on 4 of 14 categories of cognitive and emotional functioning, minimal impact on 3 categories, moderate impact on 5 categories, and major impact on 1 category –"motivation". He indicated the appellant's ability to communicate is good in all respects, and described the appellant as "independent" in 6 of 6 categories of mobility and physical ability, but noted "limited distance". The physician reported the appellant as being independent in personal care, basic housekeeping ("limited"), shopping, meals, pay rent and bills (with the comment "limited finances stress bills), medications, and transportation. He also reported the appellant as being independent in 4 out of 5 aspects of social function, and requiring periodic support/supervision with respect to making appropriate social decisions. The appellant's functioning is "good" with respect to her immediate and extended social networks. Asked to indicate the assistance provided by other people the physician indicated "family". In response to the question "If help is required but there is none available, please describe what assistance would be necessary" the physician wrote "help son/grandparents". The physician made no indication that the appellant requires any assistive devices and reported that the appellant does not have an assistance animal.

In her self-report the appellant wrote that her heel pain affects everything that she does, that it takes her 3 days to mow her lawn and her housework is done in 10 minute intervals. She has had 4 jobs all ending because of the pain in her heels. She has orthotics but they don't help much. Even when asleep in bed the pain in her heels wakes her up. Standing in line at the food bank or the grocery store is too painful. The appellant tries not to stand or walk at all and she can't enjoy many of the things she used to do. Recently the left leg goes numb from knees to toe when she sits. The specialist told her to keep her knee straight, so she can no longer sit at her computer which is the only entertainment she has. The appellant wrote that her visits to doctors have not helped her heels at all. When she asks when her heels will be better the doctors tell her it won't be long, but they are as bad as ever after 4 years.

In the appellant's written submission to the reconsideration officer, she explained how much she enjoyed her work and leisure activities prior to having a heart attack. After she recuperated from the heart attack she got work as a cashier but then her heels started hurting and her left leg felt like it was on fire. She wrote that the leg problem was from a pinched nerve and the pain in her heels was diagnosed as plantar fasciitis. She was shown exercises for her ankles and was told to stand on a padded surface at work. After 9 months she had to go to emergency because the pain was so great and she ended up on medical unemployment. Since then she has gotten orthotics and has tried 3 other jobs, the longest lasting 2 days. She cannot work the minimum required 4 hours a day, so was laid off in January 2012. Her heels aren't as bad when she stays off them, so she doesn't do anything that requires standing. Recent cortisone injections were painful and did not help. The appellant wrote that she needs help, but the only help she gets is from a neighbour who weeds her flower bed, mows the lawn and removes snow from the driveway. The appellant tries to make quick meals, does laundry once a week, and tends to let most housework go. She wrote that heel pain seems like a small thing to most people because there are no visible signs of the pain, but it has had more impact on her life than childbirth or even her heart attack.

At the appeal hearing the appellant said that she has been trying to work but cannot. She said that the doctors don't look at her feet. They've diagnosed plantar fasciitis but now she has a burning sensation in her thigh. In response to questioning from the panel the appellant said that she might benefit from a wheel chair or a cane, and that she needs help cleaning house. When asked whether she gets significant help from anyone else she responded "no" and that she lives alone with her dog. One friend helped with yard work but she has moved away. The appellant does her own shopping. She drives herself into town and has no money for the bus. In response to a question, the appellant said that her doctor keeps saying that the heel pain will clear up, but she insisted that the doctor is wrong about it being plantar fasciitis. She thinks it is something else – she has looked it up on the internet and the symptoms don't fit. When asked if she has had a test for fibromyalgia, she said that the physicians don't want to investigate to see if her pain is caused by anything other than plantar fasciitis. Regarding the pain in her left thigh, the appellant said she was told that the nerve passes over her hipbone, which could perhaps be addressed by surgery but she would never have feeling in that nerve again. When asked whether she has depression, the appellant replied that that "could be", but she knows she doesn't enjoy life. In response to questioning about her insomnia, the appellant said that she often only gets 3 hours sleep a night, and perhaps 2 hours during the day, but that she is too claustrophobic to use the medical device that was recommended for her OSA. She is learning to sleep on her side. When asked about functional limitations she confirmed that she can walk less than a block, but indicated that she can climb up to 15-20 stairs when she has to access a ministry office, but that she would not be able to do so at work. When asked whether she is following up on the recommendations of the specialist, she said that she is doing the aerobic exercise and working on weight loss, but the topical pain relievers suggested by the specialist are too expensive so she hasn't tried them. She tried an oral version of one of the suggested pain medications but it did not help. In response to her question about orthotics, she said that the doctors did not recommend them but they were provided by a clinic. She wears the orthotics faithfully but they do not help. When asked whether her physician has referred her to a neurologist, the appellant said that he has not. She said that she has no faith in her physician and that she'd like to change doctors. She's tried to change doctors a couple of times but many aren't accepting new patients, so she has "kind of given up" looking for a new physician.

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 stated that the appellant is a recipient of income assistance as a person with persistent multiple barriers to employment. The panel considered this information as having been before the ministry at the time of reconsideration. Otherwise, the ministry relied on its reconsideration decision and provided no new evidence.

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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 him 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.

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Severe Physical Impairment

The appellant's position is that her heel pain constitutes a severe physical impairment which limits her ability to perform DLA, to work, and to engage in her previous recreational pursuits.

The ministry's position, as expressed in its reconsideration decision, is that the functional skill limitations described 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.

In terms of physical impairment, there are a number of sources of medical evidence. In the PR the appellant's physician described the appellant's functional capabilities as being limited in terms of

distance (less than 1 block), but not so much in terms of time (difficulty walking more than 2-3 hours). He indicated the appellant can climb 2 to 5 steps unaided but the appellant's evidence at the hearing was that she can climb significantly more steps if she is sufficiently motivated to do so. She has no limitations in lifting, and the 1 or 2 hour limitation in seating doesn't evidence a "severe" impairment.

The appellant's physician diagnosed plantar fasciitis in both feet, osteoarthritis in the left knee, chronic fatigue syndrome and OSA. He described the osteoarthritis and the OSA as being "mild". His findings with respect to the severity of osteoarthritis and OSA are supported by the x-ray report and the sleep clinic report respectively. The panel was provided with no evidence of the severity or impact of the appellant's chronic fatigue syndrome, except perhaps indirectly through the report from the sleep clinic which identified "mild" daytime sleepiness and the physician's comment in the AR with respect to "low energy, low motivation." The specialist determined that the appellant intermittently compresses nerves in her legs when she is sitting and flexing her knees, which causes the periodic burning feeling in her thighs. The recommended treatment was weight loss and exercise.

The appellant's most significant physical impairment is the pain in her heels, which her physician has diagnosed as plantar fasciitis. The appellant was insistent that plantar fasciitis was not the correct diagnosis for her heel pain, and the specialist's report seems to lend some support to her point of view since his examination found that there was no tenderness over the plantar fascia and that plantar flexion did not reproduce the pain she described. He appeared to provide an alternative diagnosis of "chronic compressive neuropathies of the [heel]." However, the appellant's physician subsequently in the PR still described the diagnosis as plantar fasciitis. The appellant has not made a serious effort to obtain an opinion from another physician with respect to whether plantar fasciitis is indeed the cause of the heel pain. Similarly, while the specialist suggested a trial treatment with topical pain medication for the pain in her heels, the appellant advised the panel that she has not tried the suggested treatment.

Considering the medical evidence that the diagnosed osteoarthritis and OSA are "mild", the appellant's evidence that she has not pursued all the diagnostic or treatment options available for her heel pain, and the physician's and the appellant's evidence that the appellant is independent in performing virtually all of her DLA, the panel concludes that the ministry reasonably determined that the evidence does not support a finding of a severe physical impairment.

Severe Mental Impairment

The appellant did not advance an argument with respect to having a severe mental impairment.

The ministry's position, as expressed in its reconsideration decision, is that the medical evidence is more in keeping with a moderate degree of impairment, and that there is not enough evidence to establish a severe mental impairment.

The physician did not diagnose a mental impairment in the Diagnosis section of the PR, but he did describe "mild/moderate depression/anxiety" in the Health History section of the PR and identified some significant deficits with 3 out of 11 categories of cognitive and emotional function. The panel notes, however, that at least one of these three categories (emotional disturbance – e.g. depression/anxiety) is expressly described as "mild/moderate" in the Diagnosis section of the PR as

stated above. In the AR the physician described 1 "major" impact to cognitive and emotional functioning, 5 "moderate" impacts, and 7 "minimal" or "no" impacts.

Section 2(1)(b) of the EAPWDR prescribes two DLA as being related solely to severe mental impairment – "make personal decisions about personal activities, care or finances" and "relate to, communicate or interact with others effectively." The evidence provided by the physician in the PR and the AR is that the appellant is unrestricted and independent with respect to personal self-care and management of finances, that she is "good functioning" in terms of immediate and extended social networks, and that she is independent in terms of 4 out of 5 aspects of social functioning. While the physician indicated that the appellant requires periodic supervision or support in making appropriate social decisions, he provided no explanation or description of the degree or duration of support or supervision required.

In light of the medical evidence that the appellant's depression and anxiety are mild to moderate, that their impacts are overwhelmingly "moderate" or less, and that the appellant is independent in terms of decision making and social functioning, the panel finds that the ministry reasonably determined that the evidence does not demonstrate a severe mental 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 either continuously or periodically for extended periods.

In the PR the appellant's physician indicated that she is periodically restricted in 3 DLA – housework, shopping, and mobility inside the home. He also indicated she is restricted in mobility outside the home but did not indicate whether the restriction is continuous or periodic. With respect to the periodicity the physician wrote that it is dependent on the amount the appellant has to do and its duration. In the AR the physician wrote that the appellant is independent in terms of walking indoors and out (though limited in distance), housekeeping (with undescribed limitations), shopping, and all other DLA.

The appellant's evidence was mainly about restrictions of her ability to work, rather than restrictions of DLA. While she experiences difficulty performing some DLA such as shopping, housework and mobility, she still manages to perform them without assistance.

On balance, the panel finds that the evidence supports the ministry's determination that the appellant's ability to perform DLA is not directly and significantly restricted either continuously or periodically for extended periods.

Help with DLA

The appellant's position is that she has required assistance to perform yard work. She also implied that she needs help with meal preparation, laundry, and other housework.

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.

On the evidence, the appellant is managing virtually all of her DLA without assistance from other persons. It would be difficult to describe her as needing the "significant help or supervision of another person" as required by EAPWDA s. 2(3)(b)(ii). The appellant does use orthotics that were not prescribed by a prescribed professional, but confirmed that the orthotics do not improve her mobility. 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.