

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development's (ministry) reconsideration decision dated December 5, 2012 which found that the appellant did not meet four of the five statutory requirements of Section 2 of the Employment and Assistance for Persons with Disabilities Act for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement. However, the ministry was not satisfied that:

- that a medical practitioner has confirmed that the appellant has an impairment that is likely to continue for at least two years;
- the evidence establishes that the appellant has a severe physical or mental impairment;
- the appellant' daily living activities (DLA) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and that
- as a result of those restrictions, in the opinion of a prescribed professional, the appellant requires help, as it is defined in the legislation, 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:

- 1) The appellant's Request for Reconsideration dated November 22, 2012 (RFR);
- 2) Letter from a counselor dated November 22, 2012;
- 3) Neurologist report dated November 20, 2012;
- 4) Letter from a program coordinator dated October 17, 2012;
- 5) A PWD application comprised of a Self-report (SR) signed by the appellant in September 2012; a Physician Report (PR) dated September 26, 2012 completed by the appellant's general practitioner of 16 years; and an Assessor Report (AR) also dated September 26, 2012 and completed by the appellant's general practitioner. On the AR the general practitioner reports that she has seen the appellant 11 or more times in the past year.
- 6) Letter from the appellant to the ministry dated September 20, 2012 (3 pages) with a description of the appellant's functioning (the "Letter");
- 7) A letter from the appellant's sister, undated (2 pages) detailing the appellant's functioning (the "Sister's Letter");
- 8) A letter from the appellant's friend and former roommate (the "Roommate"), undated, regarding his observation of the appellant's functioning;
- 9) An email letter from the appellant's friend dated September 6, 2012 detailing the appellant's functioning (the "Email");
- 10) Ministry of Children and Family Development Referral to Child Care Subsidy June 1, 2012 to July 31, 2012;
- 11) Note from the appellant's physician dated September 6, 2012 (the "Physician's Note") stating that the appellant is being referred to a specialist for further evaluation regarding her chronic pain and intermittent numbness;
- 12) Note from the appellant's physician dated August 2, 2012 (the "Physician's August Note"); and a
- 13) Letter from the Ministry of Social Development to the appellant dated November 9, 2012 advising her that her request for PWD was denied and enclosing a copy of the PWD Decision Summary.

***Diagnoses and Duration***

In the PR, the appellant's general practitioner states that there is no known diagnosis at present and that the appellant's MRI head was normal. The general practitioner also states that she was waiting for the neurological assessment to rule out multiple sclerosis. The general practitioner states that as the diagnosis is unknown the prognosis is unknown.

The neurologist states that the appellant's neurologic exam is normal, that she does not have a neurological diagnosis and her symptoms are not suggestive of multiple sclerosis. The neurologist's impression is that she has a very severe form of fibromyalgia/chronic fatigue syndrome.

**Physical Impairment**

In the SR, the appellant states that she has migraines, random muscle spasms and shakes, slurred speech, blurred vision, muscle weakness, constant back pain, light sensitivity, stomach pains, acid reflux, numbness and radiating pain in her skin, difficulty maintaining healthy weight, joint pain and is always cold.

In the PR, the general practitioner reports that the appellant has bilateral leg pain, back pain, numbness in legs and feet, often generalized whole body pain. She reports that the symptoms come and go but good days become less frequent. The general practitioner states that her symptoms started shortly after the birth of her third child in August 2009, and that the episodes were monthly but are now weekly. The general practitioner states that all investigations to date have been negative.

Where asked to provide height and weight "if relevant", the general practitioner reported a height of 5'1" and weight of 95 lbs.

Functional skills reported in the PR indicate that the appellant can walk less than 1 block, cannot climb any stairs without aid, is limited to 2 kg or less for lifting and can remain seated for less than 1 hour.

In the AR, the general practitioner reports that the appellant's ability to communicate in all four listed areas of speaking, reading, writing and hearing is good. The general practitioner reports that the appellant requires continuous assistance with lifting, carrying and holding.

The neurologist states that the appellant reported her main problem as "hurts everywhere all the time", particularly disabling in the last one and a half to two years. The neurologist states that the appellant told him that she has a burning and over sensitive sensation everywhere in her body with diffuse numbness; that sometimes the pain isn't too bad and she can get things done but at times she is bedridden because of the pain. The neurologist also states that the appellant described blurred vision, shallow breathing, poor sleep and is exhausted and frustrated. The neurologist notes that the appellant tried various medications, one which was of no help, another that caused body convulsions and another that caused paralysis from the waist down. The neurologist states that perhaps a trial of a tricyclic medication could be considered. The neurologist states that on examination the appellant looked healthy but was slow moving and appeared to be in considerable pain and was diffusely tender.

The counselor indicates that she has meet with the appellant on 12 occasions and that the appellant presented with mobility issues (difficulty walking, ascending and descending stairs, getting in her vehicle), pain and stiffness in her limbs evidenced by her continual need to adjust her position and occasional stretching. The counselor states that the appellant also told her that she experiences muscle spasms, sensitivity to light, extreme headaches and fatigue.

The letter from the program coordinator indicates that they were unable to accept the appellant into their program due to her medical condition.

In the Letter the appellant states that she is not able to walk 5 stairs without rail or cane in hand, lift a jug of milk, sit for more than 40-50 minutes, stand for 20 minutes and she cannot go a block without her cane or it "takes me forever to get where I'm going". She states that she has suffered from migraines since she was 15 years old, triggered by sound and light, that last up to 2 weeks with severe numbness of the skin. The back of her head, neck and shoulders are always stiff and sore to touch which makes lifting and folding laundry and other basic cleaning difficult and takes longer. She also reports weakness, making it difficult to hold cups or utensils and the pain affects her hips and legs too. She states that on most days she wakes up feeling like she has been beaten up, stiff and sore to the point that it takes her almost an hour to get out of bed after 8 hours of sleep. She reports that she tries to relieve her pain with stretching, mild yoga, hot bathes and massages but she cannot afford the massages or chiropractic treatment. She reports difficulty sleeping.

In the Sister's Letter, the appellant's reported limitations are: unable to exert herself for more than 15 to 20 minutes, she can't climb more than one small flight of stairs at a time without assistance or taking a break, and resting in one position for longer periods causes her body to become stiff and sore.

The appellant's Roommate reports that he witnessed the appellant's physical state deteriorate to where she was not capable of performing the most basic household tasks and she required assistance with these most basic functions. The Roommate states that the appellant was incapable of walking normally on most days, and it was evident that she was in extreme pain which restricted her movement.

In the Email, the appellant's friend reports that when he first met the appellant at their church, she could not walk without support and was observed "hobbling" to the center, hanging onto the window ledge. When offered assistance, the appellant advised that her legs would give out on her and she often had headaches.

### ***Mental Impairment***

In the SR, the appellant states that she has poor memory.

In the PR, significant deficits of 6 of 11 listed aspects of cognitive and emotional function are reported – language, memory, emotional disturbance, motivation, attention and other (mobility). The general practitioner also notes that the appellant states that she often has slurred speech.

In the AR, for section 4, cognitive and emotional functioning, where asked to complete for an applicant with an identified mental impairment or brain injury, the general practitioner reports that 6 of 14 items are moderately impacted (emotion, attention/concentration, executive, motivation, motor activity and other neuropsychological problems); that there is minimal impact to bodily functions and memory, and no impact to 6 of 14 listed items of consciousness, impulse control, insight and judgment, language, psychotic symptoms and other emotional or mental problems.

The counselor indicates that the appellant reported memory impairment. The neurologist states that the appellant did not present with any obvious cognitive dysfunction.

In the Letter, the appellant states that she tries to keep on top of her mental and emotional health to reduce the stress of her condition, but her ongoing pain brings her to tears and scares her and she experiences random anxiety and panic attacks.

### ***DLA***

In the PR, the general practitioner states that the appellant's impairment directly restricts the appellant's ability to perform DLA. The general practitioner reports that the appellant has periodic restrictions with 6 of the 10 listed tasks of the DLA including personal care, meal preparation, basic housework, daily shopping, and mobility inside and outside the home. The general practitioner explains that the appellant has varying degree of pain and numbness and weakness, episodes are now occurring weekly.

In the AR, the general practitioner reports that the appellant takes significantly longer than typical with the following DLA's: dressing (up to ½ hr); grooming (up to 15 minutes to brush teeth); transfers in and out of bed (1-1/12 hours and sometimes collapses), laundry (2 hours per load), basic housekeeping (all day long), going to and from stores (getting in/out of car), food preparation (hand gets sore) and getting in and out of a vehicle (takes 25 minutes to get out of car). The general practitioner reports that she requires continuous assistance with carrying purchases home and periodic assistance with cooking.

The general practitioner reports that the appellant is independent with: toileting, feeding self, regulating diet,

reading prices and labels, making appropriate choices, paying for purchases, meal planning, safe storage of food, banking, budgeting, paying rent and bills, filling/refilling prescriptions, taking prescriptions as directed, safe handling and storage of prescriptions, using transit schedules and arranging transportation, and all aspects of social functioning.

The counselor states that the appellant reported having difficulty accomplishing daily activities such as childcare, housework and errands.

In the Letter the appellant states that she because of the pain in her head, neck, and shoulders, lifting and folding laundry are hard to keep up with as well as other basic cleaning. She states that she cannot walk 5 stairs without rail or cane in hand, lift a jug of milk, sit for more than 40-50 minutes, stand for 20 minutes and cannot go a block without her cane or it takes her forever to get where she is going.

### ***Need for Help***

In the PR, the general practitioner states that the appellant uses a cane and she needs a scooter in larger shops. The general practitioner states that the appellant's family and friends help with house work and child care, that social services has put in a home support worker and increased day care hours for her three children.

In the AR, the general practitioner reports that the appellant lives with family, friends or caregiver. The general practitioner also reports that the appellant has assistance with DLA's from family, friends, volunteers, community service agencies and other (members of her church). The general practitioner reports that the appellant uses assistive devices (cane) for walking indoors and outdoors, climbing stairs and standing.

The general practitioner notes that the appellant states that she requires help that is more consistent and scheduled so that she has fewer "down days" for doing too much when no help available.

The general practitioner reports that the appellant uses a cane, walker, scooter and toileting aids (seat and rails) and that she requires a store provided scooter to shop and uses public transit. The general practitioner also notes that the appellant states that she requires more assistance with medical care and costs (i.e. chiropractor, massage therapy, pain management, assistive devices for home/car/outdoors). She also notes that the appellant states that she is often bed ridden and not able to take her three young children out.

The neurologist states that the appellant uses a cane most of the time and has recently gotten a walker to help her get around.

In the Physician's August Note the general practitioner reports that the appellant requires car parking close to her front door for medical reasons.

The counselor states that the appellant has been utilizing daycare for her children and a walker for her daily mobility issues.

In the Sister's Letter, the appellant's sister reports that the appellant gets weekly help from her church with household chores and that the appellant needs financial assistance for mobility products such as crutch's canes, wheel chair, and bathroom safety products.

The Roommate states that while he no longer lives with the appellant, he communicates with her often and periodically visits her to help her when she has flare-ups and is in too much pain to perform her household chores.

In the Email, the appellant's friend reports that for a period of time before he had to go to a city he would stop

by at least once per week and sometimes twice per week to help the appellant with unpacking and cleaning.

In her Notice of Appeal, the appellant states that she has tried for the last five years to get diagnosed by her physician, she cannot afford to hire help for daily living, that it is hard on her family to help her all the time. She states that her doctor has been stonewalling her progress "*saying it's in my head*". The appellant reports that she has tried to get a new doctor and is finally getting a specialist appointment.

Prior to the hearing the ministry provided written submissions, 8 pages. This was a submission only, did not contain any new evidence and provided a summary of the reconsideration decision.

At the hearing, the appellant stated that she is extremely frustrated because her doctor is not helping her properly and has denied making a diagnosis and refused to send her to a rheumatologist. The appellant stated that she has seen a neurologist who suspected she has fibromyalgia, so he has referred her to a rheumatologist and she is waiting for that appointment. The appellant stated that she suffered horrific things as a young adult and pain from the abuse that never went away. She states that she has migraine headaches, body pain, moved to another province for a period of time to try to seek medical help there without success, lost weight (went from 172 pounds to 96 pounds in less than 6 months) and moved back in or around May 2010.

The appellant states that she has tried medications but they do not alleviate her pain. She reports that when she tried a pain medication it caused her to go numb from the waist down. She tried another medication which sent her into convulsions. She cannot walk and is tired of using her son as a crutch. She reports that a women's shelter gave her a walker but she cannot get it in and out of the trunk of her car by herself as it is too heavy. She reports that when her pain starts, it usually lasts 3 days, but often up to one week. She reports that she cannot take her children swimming, doing dishes takes up to one hour and she doesn't know what to do. She reports that she needs help in her home and relying on family and friends is too much of a stress as she requires help more than once a week or once every other week.

In response to a question the appellant stated that she does not see a psychiatrist, but does see a counselor on a regular basis as she tries to take care of her mental health because her body is driving her crazy. She has been prescribed another medication but does not feel that is helping either.

The ministry representative stated that although the ministry sympathizes with the appellant's situation, their position is heavily weighted on the doctor's information and relied on the reconsideration decision.

## PART F – Reasons for Panel Decision

The issue on the appeal is whether the ministry reasonably concluded that the appellant is not eligible for designation as a person with disabilities (PWD) as she has not met all the criteria in Section 2(2) of the EAPWDA.

In particular, was the ministry reasonable in determining that the appellant's medical practitioner has not confirmed that the appellant has a medical condition that is likely to continue for at least two years, that the appellant does not have a severe physical or mental impairment that, in the opinion of a prescribed professional, directly and significantly restricts her from performing DLA either continuously or periodically for extended periods thus necessitating the need for help with 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;

(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.

#### *Duration*

The appellant's position is that she has had migraine headaches and ongoing pain in her body for many years and that it is not getting better. Her position is that her doctor has refused to diagnose her, is stonewalling her and she does not know what else she do to demonstrate to the ministry that she is disabled.

The ministry's position is that Section 2(2)(a) of the EAPWDR requires a medical practitioner to opine that the appellant has a severe mental or physical impairment that is likely to continue for at least two years and as the general practitioner, in the PR reports that the prognosis is unknown because the diagnosis is unknown, the legislative criteria has not been met.

As the legislation requires that a medical practitioner provided a diagnosis that the impairment will continue for at least two years, and the appellant's general practitioner has not provided that diagnosis, the ministry's decision that the criteria of Section 2(2)(a) of the EAPWDR was not met was reasonable.

#### *Severity of physical impairment:*

The ministry argues that the evidence does not establish that the appellant has a severe impairment. The ministry's position is that the general practitioner does not provide a diagnosis and that the general practitioner's evidence indicates that the appellant can perform most aspects of mobility and physical abilities using a cane to mobilize. The ministry argues that the evidence demonstrates that while the appellant's functional skills are limited by pain, remedial measures are available in the form of analgesics to treat and ameliorate her symptoms.

The ministry also notes that the appellant's MRI head was normal, multiple sclerosis was ruled out and that although the neurologist is of the impression that the appellant may have severe fibromyalgia/chronic fatigue syndrome, he is not an expert in that area so his opinion in that regard is not a definitive diagnosis.

The appellant agreed that fibromyalgia/chronic fatigue syndrome is not the neurologist's area of specialty but that the neurologist helped her by referring her to a rheumatologist. However, the appellant argues that her symptoms, severe headaches, body pain and limitations demonstrate that she has a severe physical impairment and that the Email, the letter from the Roommate and the Sister's Letter, in combination with the general practitioner's evidence and her evidence, support a finding of severe physical impairment.

The panel finds that while the evidence of the general practitioner does not contain a diagnosis or prognosis the PR confirms that the appellant has bilateral leg pain, back pain, numbness in legs and feet, often generalized whole body pain with symptoms that come and go with good days becoming less frequent. The PR and AR confirm that the appellant's functional skills are limited and that the appellant can hardly walk, is in significant pain, requires aids to climb stairs and requires continuous assistance with lifting, carrying and holding.



The appellant's evidence is that she can barely walk and the neurologist reports that the pain can be so severe that the appellant is virtually bedridden. The panel finds that the PR, AR, neurologist's report, appellant's evidence and the evidence of the Roommate, and in the Email and Sister's Letter all confirm that the appellant can hardly walk, is in constant pain and has significant functional limitations.

The panel also finds that the supportive narrative from the general practitioner and the neurologist describes how the appellant's physical impairment significantly limits the appellant's ability to function either continuously or periodically for extended periods. For the above reasons, the panel concludes that the ministry's decision that the appellant has not established that she has a severe physical impairment was not reasonable.

*Severity of mental impairment:*

The ministry argues that the evidence does not show that the appellant has a severe mental impairment. The ministry's position is that although the general practitioner reported five deficits to cognitive and emotional functioning, the appellant does not have any difficulties with communication and the general practitioner did not provide a mental health diagnosis. The ministry also notes that while the general practitioner notes that impacts on daily functioning are minimal to moderate, this category of the PR is meant to be completed for applicants with an identified mental impairment and the general practitioner has not diagnosed the appellant with a mental impairment. In addition, the general practitioner reports that there is no restriction to social functioning. The ministry's position is that without a mental health diagnosis or any supportive narrative describing a severe mental impairment that significantly limits the appellant's ability to function either continuously or periodically for extended periods, the requirements of EAPWDR section 2(2) have not been met.

The appellant's position is that she tries to take care of her mental health as her body drives her crazy. The appellant is frustrated and does not know what to do because of her condition.

The panel finds that the evidence of a medical practitioner does not confirm a diagnosis of a mental disorder and the PR and AR confirm that any impacts to the appellant's mental status are minimal to moderate. The general practitioner assessed the appellant as independent in all areas of social functioning, and that the appellant's ability to communicate is good in all areas. Therefore, the panel finds that the ministry's decision, which concluded that the evidence does not establish a severe mental impairment, was reasonable.

*Whether ability to perform DLA is directly and significantly restricted:*

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 a severe impairment has not been established and that the general practitioner reports periodic restriction to personal self care, meal preparation, basic housework, daily shopping and mobility inside and outside the home and no description of duration to extreme symptoms or outcomes of remedial measures such as analgesics. The ministry also argues that the general practitioner reports that almost all daily activities are performed independently albeit some tasks take longer to perform, with periodic help with cooking and continuous help to carry purchases home. The ministry's position is that as the majority of DLA's are performed independently or require little help from others, the information from the prescribed professional does not establish that the impairment significantly restricts DLA's either continuously or periodically for extended periods of time.

The appellant argues that she can barely walk due to body pain, that she can't climb stairs and that she needs significant help from family and friends on a regular basis with housework, but that even with the help she has it is not enough.

The evidence of the prescribed professional, the appellant's general practitioner, indicates that the appellant

has periodic restrictions in six of 10 DLA's and requires continuous assistance with lifting, carrying and holding. In the AR, the general practitioner reports that the appellant takes significantly longer with dressing (up to ½ hr) and grooming (up to 15 minutes to brush teeth), transfers in and out of bed (1-1/2 hrs and sometimes collapses), two hours per load for laundry and that it takes her all day long to complete her basic housekeeping. The general practitioner also reports that the appellant's family and friends help with housework and child care and that social services has put in a home support worker and increased day care hours for her three children.

The panel finds that given the evidence of the prescribed professional, it is difficult to conclude that the appellant's impairment does not significantly restrict her DLA's continuously and periodically for extended periods as required by section 2(2)(b)(i) of the EAPWDA and that the ministry's decision that this criteria was not met was not reasonable.

In addition, although there is no outcome of the trial of the medication suggested by the neurologist, the panel finds that the ministry's position that there is no description of the outcome of remedial measures such as analgesics is not accurate as the neurologist reports that the appellant tried one medication which she stated made her "paralyzed from the waist down" and another medication which the appellant stated made her body go into "convulsions".

*Whether help to perform DLA is required:*

The ministry notes that the appellant uses a cane but the ministry's position is that as it has not been established that the appellant's DLA's are significantly restricted, it cannot be determined that significant help is required from other persons.

The appellant argues that she cannot perform her housework alone, that she needs more than the assistance she is getting from her family and friends and current level of childcare. The appellant argues that she uses a cane, can hardly walk, requires a scooter and the Email, Roommate and the Sister's Letter all confirm that the appellant has been and continues to receive assistance from them when possible and help with mobility.

The panel finds that the evidence of the general practitioner confirms that the appellant requires significant help from family, friends, child care, cane and store scooter as required by section 2(2)(b)(ii) of the EAPWDA so the panel finds that the ministry's decision that it cannot be determined that significant help is required from other persons was not reasonable.

*Conclusion:*

The panel finds that the ministry's decision that the evidence of the medical practitioner has not established that the appellant has a severe physical impairment was not reasonable. The panel also finds that the ministry's decision that the appellant's DLA's are not significantly restricted and that she does not require assistance with DLA's was not reasonable.

However, the panel finds that the ministry's decision that the medical practitioner has not opined that the appellant has a severe mental or physical impairment that is likely to continue for at least 2 years as required by section 2(2)(a) of the EAPWDA was not met was reasonable. The panel also finds that the ministry's decision that a severe mental impairment has not been established was reasonable.

In conclusion, as the panel finds that the ministry's decision that the medical practitioner has not provided an opinion to establish that the severe physical impairment is likely to continue for at least 2 years as required by section 2(2)(a) of the EAPWDA was not met, the panel confirms the ministry's decision.