

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development (the ministry) reconsideration decision dated January 8, 2013 which found that the appellant did not meet three 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 and that her impairment is likely to continue for at least two years. However, the ministry was not satisfied that the evidence establishes that:

- the appellant has a severe physical or mental impairment;
- 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; and,
- the appellant 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 included the following:

- 1) Person With Disabilities (PWD) Application comprised of the applicant information dated October 5, 2012, and the physician report and assessor report completed by the appellant's family physician of 15 years, both dated October 12, 2012; and,
- 2) Request for Reconsideration- Reasons.

### *Diagnoses*

The appellant has been diagnosed by her general practitioner with severe osteoarthritis in her hips, spine and shoulder, that "...started bothering her in pregnancy."

### *Physical Impairment*

- In the physician report under health history, the general practitioner indicated that the appellant suffers from severe OA (osteoarthritis) of hips and thoracic and lumbar spine and also OA of both shoulders; that she "limps and hobbles around."
- For additional comments, the physician indicated that the appellant "...is severely disabled and can no longer work."
- Functional skills reported in the physician report indicated that the appellant can walk less than 1 block unaided, she can climb 5 or more steps unaided, she can lift 5 to 15 lbs., and she can remain seated for less than 1 hour.
- The physician reported that the appellant has not been prescribed any medications or treatments that interfere with her ability to perform her daily living activities (DLA) and she does not require any aids for her impairment. In the assessor report, the physician indicated that a cane is required as an assistive device and comments that the appellant "...should use a cane."
- In the assessor report, the appellant is reported as independent with walking indoors and walking outdoors ("is very careful") and with climbing stairs ("needs to use a rail and takes longer) and standing. The appellant is independent with lifting less than 15 lbs. and she requires periodic assistance with carrying and holding, with no further comments added by the general practitioner.
- In her self-report included with the PWD application, the appellant stated that she has suffered with osteoarthritis for approximately 15 years and it has steadily worsened to the point that she has a very prominent limp. The appellant stated that she cannot walk very far without discomfort and walking uphill is almost impossible for her. She can only handle a few stairs, when necessary.
- The appellant stated that she works 2 days a week to a maximum of 4 1/2 hours per day as a cook in a restaurant and that is too much for her to handle. The appellant stated that she stands for the whole shift in the kitchen, she lifts frying pans over her head and she hobbles back and forth from the walk-in fridge.
- In the Request for Reconsideration, the appellant's advocate stated that the physician's responses in the reports filed with the PWD application may have been the result of confusion over how to complete the forms. The advocate stated that the appellant's physical impairment is visibly obvious through her posture, her inability to walk correctly and her limp. The advocate stated that the appellant now has to walk with a cane, has extreme difficulty getting in and out of a vehicle, is unsteady going up stairs even with a railing and requires assistance at her part-time job.
- The advocate stated that, according to a medical journal, osteoarthritis is permanent and progressive and that once the damage has occurred, there is no effective way to repair the cartilage.

### *Mental Impairment*

- The general practitioner reported that the appellant has no difficulties with communication and has a

good ability to communicate in most areas, "at times" having a poor ability to speak.

- In the physician report, a significant deficit is reported in 1 of 11 listed aspects of cognitive and emotional function in the area of emotional disturbance, with the comment "...severely stressful time in patient's life at present- marital break-up and abusive relationship." In the assessor report, this area is identified as having no impact on the appellant's cognitive and emotional functioning; however, minimal impacts are assessed in "other emotional or mental problems" and memory. The general practitioner wrote "...stress and depression and recent mental health discord secondary to marital break-up and ending of marriage."
- The general practitioner indicated that the appellant independently manages all 5 listed aspects of social functioning, including making appropriate social decisions, developing and maintaining relationships, interacting appropriately with others, dealing appropriately with unexpected demands, and securing assistance from others. She has good functioning with both her immediate and extended social networks, with no support or supervision required.
- In the Request for Reconsideration, the appellant's advocate stated that the physician's responses in the reports filed with the PWD application may have been the result of confusion over how to complete the forms.

#### *DLA*

- In the assessor report, the general practitioner reported that all listed tasks of the DLA personal care are performed independently without any noted restriction, with an added comment that she has "...difficulty getting socks on and tying shoes."
- While the appellant independently does her laundry, she requires periodic assistance from another person with basic housework, with the comment "...difficulty with cleaning."
- For shopping, she is independent with 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, with the comment "...needs assistance."
- In her self-report, the appellant stated that when she goes shopping she finds herself "...hunching over the shopping cart resting on it in order to get through the store." The appellant stated that it takes her more time to do household chores, that she has a hard time bending down or reaching up.
- For transportation, the appellant is assessed as requiring periodic assistance with getting in and out of a vehicle, described as "occasional" need for assistance, and is independent with using public transit and using transit schedules and arranging transportation.
- All listed tasks for the DLA meals, paying rent and bills, and medications are managed independently with no noted restrictions.
- In the Request for Reconsideration, the appellant's advocate stated that the physician's responses in the reports filed with the PWD application may have been the result of confusion over how to complete the forms.
- The advocate stated that the appellant lives on her own and the physician intended to identify her as 'independent', as not living in a facility, but that does not mean to say that she can manage every task.

#### *Need for Help*

- The general practitioner reported that the appellant lives with her teen-aged daughter and "should use a cane" as an assistive device.
- The general practitioner indicated that the help required for DLA is provided by the appellant's family and friends.

In her Notice of Appeal, the appellant expressed her intention to dispute the reconsideration decision.

Prior to the hearing, the appellant provided a letter dated January 21, 2013 from her family physician which

included the following :

- The appellant was examined due to her severe osteoarthritis and she is more disabled and her condition is getting worse each day.
- The physician reported that the appellant needs to use a cane 90% of the time.
- The physician stated that the appellant needs assistance with DLA, including shopping, housecleaning, especially anything requiring bending over and getting down on her knees, she must hang on to a door knob, chair or another person in order to get up. Grocery shopping is extremely difficult since she has to lean on the cart 90% of the time and take frequent rests. The appellant has back spasms while sitting on the toilet about 40% of the time and has difficulty getting up again.
- The physician reported that there are days, plus or minus 50% of the time, when the appellant is barely able to move at all and on these days she is unable to do any of her DLA at all.

The appellant also provided a letter dated January 23, 2013 from her sister which included the following :

- She has observed the appellant having difficulty with many activities. She is unsteady on stairs and takes them slowly even if there is a hand rail. She limps all the time and has to use a cane now. She can see the pain that she is experiencing from the look on her face. She winces and groans at times.
- The appellant cannot get down low enough to tie or untie her shoes. She always has her hands on the wall or something else to keep her balance. She has to get help from someone to get up in order to steady herself or grab onto a cupboard, chair, or something solid.
- The appellant gets up slowly from a chair and getting out of a low chair is nearly impossible. When she gets into her car, she "hangs" on the door and lowers herself into the seat. She has to grasp the door in order to get in.
- She has observed the appellant shopping on several occasions and she needs to use the cart to lean on and walk with. She needed assistance with collecting items and placing them in the cart. She was relieved to be picked up at the entrance to the store rather than having to walk to the vehicle.

The ministry did not object to the admissibility of the letters. The panel admitted both letters, pursuant to Section 22(4) of the Employment and Assistance Act, as providing further detail relating to the appellant's diagnosed conditions and in support of information that was before the ministry on reconsideration. The appellant's advocate provided a written submission which contained no new evidence and the panel accepted it as argument.

At the hearing, the appellant provided the following oral evidence:

- The appellant stated that she is using her cane virtually all of the time now. The appellant stated that she does not use it indoors much, but she leans on the furniture or supports herself on a wall or cupboard.
- The appellant stated that she cannot take anti-inflammatory medications because she has bleeding from the stomach and all she can take is Tylenol for the pain, as needed.
- The appellant stated that she has been referred to an orthopedic surgeon regarding a hip replacement. The problem is that the osteoarthritis is throughout her body and the surgeon told her that the hip replacement will not get rid of all the pain, but that it should help. The appellant stated that she first had osteoarthritis in one hip but now it is in both hips.
- The appellant stated that the pain has become much worse in the last few months and that the osteoarthritis is now moving into her ankles.
- The appellant stated that she agrees with her sister's account of her functioning, as set out in her letter.
- The appellant stated that she is still working 2 days per week but that it is only because she needs the money since this is her only source of income. When she is at work, she hangs on to something and she puts her hands on the counter to support herself and to pull herself up. The appellant stated that

she needs a few days to recover from her time at work. About half of the time she is not able to do any DLA since she is unable to move. The appellant stated that she is in pain every day but there are some days when it is much worse than the other days.

- The appellant stated that her sister helps her with the cleaning at home or it does not get done.

The panel admitted the appellant's evidence, pursuant to Section 22(4) of the Employment and Assistance Act, as providing further detail of her diagnosed conditions and being in support of information that was before the ministry on reconsideration.

At the hearing, the ministry relied on its reconsideration decision. The ministry also added that the PWD application contains instructions for the physician and assessor reports and that there is ample space provided for elaboration or qualifiers to any assessments made.

## PART F – Reasons for Panel Decision

The issue on the appeal is whether the ministry's decision, that the appellant is not eligible for designation as a person with disabilities (PWD) as she does not meet all the criteria in Section 2 of the EAPWDA, was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. The ministry found that the appellant does not have a severe mental or physical impairment and that her daily living activities (DLA) are not, 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, it could not be determined that the appellant 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;

(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 panel will consider each party's position regarding the reasonableness of the ministry's decision under the applicable PWD criteria at issue in this appeal.

### **Evidentiary Considerations**

The panel finds that the evidence of the appellant's physician contained in the letter dated January 21, 2013 is markedly different than that set out in the physician and assessor reports prepared approximately 3 months previously, on October 12, 2012. For example, the appellant was previously assessed as independent with her mobility and a majority of the tasks of DLA and, in the new assessment, the physician reported that the appellant now requires the use of a cane 90% of the time and is unable to perform any DLA approximately 50% of the time. The physician referred to having examined the appellant on January 21, 2013 and reported that she is "more disabled" and that her condition is getting worse each day. The panel notes that the letter is from the appellant's family physician of 15 years, that he is familiar with the appellant's medical history and the progress of her condition, and it consists of narrative in the physician's own words rather than check marks to indicate agreement to formulaic statements. For these reasons, the panel places more weight on the evidence contained in the letter dated January 21, 2013 where it is inconsistent with that set out in the original physician and assessor reports included in the PWD application.

### **Severe Physical Impairment**

The appellant's position is that a severe physical impairment is established by the evidence of her pain due to osteoarthritis in her hips, back, shoulders and ankles. The advocate argues that the evidence of the medical practitioner in the PWD application and the letter dated January 21, 2013, together with the appellant's evidence, establishes that the appellant has a severe physical impairment. The advocate also argues that the format of the reports for the PWD application is flawed and it leads to confusion for the physician.

The ministry's position is that the information provided by the general practitioner in the PWD application indicates that the appellant is able to walk less than 1 block unaided, to climb 5 or more steps unaided, to lift 5 to 15 lbs. and to remain seated for less than 1 hour. The ministry argues that the duties of the appellant at her work indicate a satisfactory level of mobility and an ability to function with similar activities of lifting and bending at home. The ministry points out that the determination on the criteria is at the time of application and not some time in the future when the condition may progress. Although the ministry acknowledges that the appellant has some functional skill limitations as a result of her physical condition, the ministry argues that the limitations described are more in keeping with a moderate degree of impairment.

### **Panel Decision**

The legislation clearly provides that the determination of severity of impairment is at the discretion of the minister, taking into account all of the evidence including that of the appellant. However, the legislation is also clear that the fundamental basis for the analysis is the evidence from a prescribed professional respecting the nature of the impairment and its impact on daily functioning.

The medical practitioner, the appellant's general practitioner of 15 years, has diagnosed the appellant with osteoarthritis of her hips, thoracic and lumbar spine and both shoulders. The general practitioner described the appellant's condition as severe and commented that the appellant is severely disabled and can no longer work. The appellant explained that she continues to work 2 days per week as this is her only source of income and that she has to put her hands on the counter to support herself and to pull herself up while she is there. The appellant stated that she needs a few days to recover from her time at work. The physician reported in the January 21, 2013 letter that there are days, plus or minus 50% of the time, when the appellant is barely able to move at all and on these days she is unable to do any of her DLA at all. In the PWD application, the general practitioner assessed the appellant as able to walk less than 1 block unaided and to climb 5 or more steps unaided and to lift 5 to 15 lbs., and stated that she should use a cane as an assistive device. In the assessor report, the general practitioner indicated that the appellant is independent with lifting less than 15 lbs. and she requires periodic assistance with carrying and holding, with no further comments added. The appellant was also assessed as being independent in walking indoors and outdoors and climbing stairs. In the letter dated January 21, 2013, however, the general practitioner reported that the appellant is "more disabled", that her condition is getting worse each day and that she needs to use a cane 90% of the time. The appellant stated that she has suffered with osteoarthritis for approximately 15 years and it has steadily worsened to the point that she has a very prominent limp and she cannot walk very far without discomfort and walking uphill is almost impossible for her. She can only handle a few stairs, when necessary. The appellant explained that she cannot take anti-inflammatory medications because she has bleeding in her stomach. The appellant stated that she is in pain every day but there are some days that are much worse than others. The appellant's sister stated in her letter that the appellant is unsteady on stairs and takes them slowly even if there is a hand rail, that she limps all the time and has to use a cane now. The panel finds that the evidence demonstrates that the appellant's limitations with mobility and physical ability have increased beyond a moderate degree of impairment and that the ministry's determination that the evidence does not establish that the appellant has a severe physical impairment as required under section 2(2) of the EAPWDA was not reasonable.

### **Severe Mental Impairment**

The appellant's position is that a severe mental impairment is established by the general practitioner's assessment of a significant deficit with cognitive and emotional function in the area of emotional disturbance.

The ministry's position is that a severe mental impairment has not been established as the physician does not identify a mental impairment. The ministry relies on the evidence that the general practitioner reports a significant deficit in cognitive and emotional functioning in the area of emotional disturbance and indicates that it is a severely stressful time in the appellant's life. The ministry argues that the general practitioner indicates a minimal impact on daily functioning for memory and other emotional or mental problems, with no impact to any other cognitive and emotional functioning.

### ***Panel Decision***

The panel finds that that medical practitioner did not diagnose a mental disorder and although a significant deficit is identified in the area of emotional disturbance, which is assessed as having no/minimal impact on the appellant's daily functioning, the only other minimal impact identified is in the area of memory. All other areas of cognitive and emotional functioning are assessed as having no impact from a mental impairment and the general practitioner commented that "...stress and depression and recent mental health discord secondary to marital break-up and ending of marriage." The general practitioner indicated that the appellant independently manages all 5 listed aspects of social functioning, including making appropriate social decisions, developing and maintaining relationships, interacting appropriately with others, dealing appropriately with unexpected demands, and securing assistance from others. She has good functioning with both her immediate and extended social networks, with no support or supervision required. While the appellant's advocate argued that the physician's responses in the reports filed with the PWD application may have been the result of confusion over how to complete the forms, the general practitioner did not refer to any impacts from a mental impairment



in his letter dated January 21, 2013. For these reasons, the panel finds that the ministry reasonably determined that a severe mental impairment was not established under section 2(2) of the EAPWDA.

### **Restrictions in the ability to perform DLA**

The appellant's position is that her physical and mental impairments directly and significantly restrict her ability to perform DLA and she requires both the use of an assistive device and the assistance of another person to perform many DLA. The appellant's advocate argues that the evidence of the appellant's physician seen together with that of the appellant and her sister shows that the appellant's DLA are directly and significantly restricted either continuously or periodically for extended periods. The advocate argues that the physician indicated that the appellant is restricted in DLA in the areas of mobility, personal self-care, basic housework, and daily shopping and that she is not able to perform any DLA at least 50% of the time.

The ministry's position is that the evidence of the prescribed professionals establishes that although some aspects of some DLA are assessed as requiring periodic assistance, namely basic housekeeping, carrying purchases home and getting in and out of a vehicle, all of the other aspects of DLA are still performed independently. The ministry argues that the physician does not indicate that any tasks take significantly longer than typical although he does note, in regards to dressing, that while independent the appellant has difficulty with getting socks on and tying shoes. The ministry argues that the information provided does not establish that an impairment significantly restricts DLA continuously or periodically for extended periods.

### ***Panel Decision***

The evidence of a prescribed professional, the appellant's general practitioner, is that the appellant requires a cane as an assistive device 90% of the time and can walk less than 1 block unaided. The appellant stated that she is using her cane virtually all of the time now, that while she does not use it indoors, she leans on the furniture or supports herself on a wall or cupboard. In the assessor report, the general practitioner reported that all listed tasks of the DLA personal care are performed independently, with an added comment that she has "...difficulty getting socks on and tying shoes." In the January 21, 2013 letter, the physician reported that the appellant has back spasms while sitting on the toilet about 40% of the time and has difficulty getting up. While the appellant independently does her laundry, she requires periodic assistance from another person with basic housework, with the comment "...difficulty with cleaning." In her self-report, the appellant stated that it takes her more time to do household chores, that she has a hard time bending down or reaching up. At the hearing, the appellant stated that her sister helps her with the cleaning at home or it does not get done. In the January 21, 2013 letter, the physician stated that the appellant needs assistance with DLA, including shopping, housecleaning, especially anything requiring bending over and getting down on her knees, and that she must hang on to a door knob, chair or another person in order to get up. In her self-report, the appellant stated that when she goes shopping she finds herself "...hunching over the shopping cart resting on it in order to get through the store." The appellant's sister observed in her letter that the appellant needs to use the cart to lean on and walk with, she needs assistance with collecting items and placing them in the cart, and it is difficult for her to walk from the store to the vehicle. In the physician's January 21, 2013 letter, he reported that grocery shopping is extremely difficult for the appellant since she has to lean on the cart 90% of the time and take frequent rests. In the assessor report, all listed tasks for the DLA meals, paying rent and bills, and medications are managed independently with no noted restrictions. However, in the January 21, 2013 letter the general practitioner reported that there are days, plus or minus 50% of the time, when the appellant is barely able to move at all and on these days she is unable to do any of her DLA at all. The panel finds that the evidence, especially the more recent report from the appellant's physician of 15 years, shows that the appellant is continuously restricted with moving about indoors and outdoors, and with the physical aspects of the DLA of personal care, shopping and basic housekeeping for half of the time and continuously restricted with all DLA the other half of the time. The panel finds that the ministry's conclusion that the evidence of the prescribed professional does not establish direct and significant restriction of the appellant's ability to perform DLA, thereby not satisfying the legislative criterion of s. 2(2)(b)(i) of the EAPWDA, was not reasonable.

**Help to perform DLA**

The appellant's position is that she requires both the significant assistance of another person and the use of a cane as an assistive device to perform DLA, although the advocate argues that only one of these is required according to wording in the legislation.

The ministry's position is that because it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required from other persons, although the ministry notes that the physician indicated that the appellant should use a cane.

***Panel Decision***

Section 2(2)(b)(ii) of the EAPWDA requires that, as a result of direct and significant restrictions in the ability to perform DLA, a person requires help to perform those activities. Help is defined in subsection (3) as the requirement for an assistive device or the significant help or supervision of another person or the services of an assistance animal in order to perform a DLA. The panel finds that only one of these types of help is required by the use of the word "or" in the list of options.

The panel finds that the evidence of the prescribed professional establishes that the appellant requires the use of a cane as an assistive device 90% of the time, for any aspects of DLA which require mobility, and that she also requires continuous assistance from another person, being her sister and friends, with all of her DLA approximately 50% of the time. The prescribed professional also reported in the January 21, 2013 letter that the appellant needs continuous assistance with the physical tasks of personal care, shopping and housekeeping. Based on the foregoing evidence, the panel finds that the ministry's determination that the evidence does not show that the appellant requires the significant help of another person or the use of an assistive device to perform DLA was not reasonable.

**Conclusion**

Having reviewed and considered all of the evidence and relevant legislation, the panel finds that the ministry's reconsideration decision which determined that the appellant was not eligible for PWD designation was not reasonably supported by the evidence, and therefore rescinds the decision. Therefore, the decision is overturned in favour of the appellant.