

## PART C – Decision under Appeal

The decision under appeal is the Ministry's reconsideration decision dated July 23, 2013 which held that the appellant was not eligible for the Persons with Disabilities (PWD) designation. The appellant's application for PWD designation was denied because the ministry determined that the appellant did not meet all five of the criteria set out in section 2, EAPWDA.

In the Reconsideration Decision, the ministry accepted two of the 5 criteria and states:

**Age** – The appellant is at least 18 years of age and meets the requirement of EAPWD, section 2(2).

**Duration** – The appellant's impairment is likely to continue for two years or more and meets the requirement of EAPWD, section 2(2)(a).

The ministry determined that the appellant did not meet the remaining three criteria, specifically that:

- She had a severe physical or mental impairment;
- The severe impairment directly and significantly, in the opinion of a prescribed professional, restricts her ability to perform daily living activities either continuously or for extended periods; and
- As a result of those restrictions, she requires help to perform those activities

## 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:

- A Persons with Disabilities Designation Application dated April 4, 2013, including the Introduction, Section 1 – Applicant Information and Section 2 – Physician Report
- A Persons with Disabilities Designation Decision Summary dated June 18, 2013
- A Request for Reconsideration dated July 18 2013, in which the ministry states that it cannot be determined by the evidence provided that there is a severe impairment that significantly restricts the appellant's daily living activities and as a result requires help of a significant nature and the appellant states that her "physical impairments significantly restrict my daily living activities" and refers to documents from her advocate and doctor. The Request for Reconsideration was accompanied by:
  - A letter from the appellant's medical practitioner dated July 18, 2013
  - A letter from the appellant's advocate at the Canadian Mental Health Association dated July 18, 2013
  - A Disabilities Designation Application dated July 18, 2013 including Section 3 – Assessor Report which includes page 13 and pages 15 to 22, completed by the appellant's advocate

The following evidence was part of the appellant's appeal package:

- A Reconsideration Decision dated July 23, 2013
- A Notice of Appeal dated July 31, 2013
- A revised Notice of Appeal dated August 1, 2013
- A handwritten letter from the appellant's advocate at the Canadian Mental Health Association dated August 8, 2013, indicating that the appellant was unable to pick up her mail because she was out of town, that she brought the paperwork to the Canadian Mental Health Association office for assistance in the appeal process, and requesting that questions be directed to the advocate;
- A Release of Information dated August 13, 2013 naming an advocate

The relevant evidence relating to the three criteria is as follows:

### **Severity of the Impairment**

#### **Physical Impairment**

In the Application for PWD, dated April 4, 2013, the appellant states that severe scoliosis of her spine which is at a 45 degree angle causes her a lot of pain with walking, sitting or any kind of activities. She takes pain medication three to four times a day. She has bladder dysfunction, having to self-catheterize which is painful and causes sleeplessness due to cramping. There have been 5 surgeries to rebuild her bladder in 24 years subjecting her to repeated infections and stopping her from walking and sitting for too long. The catheter is painful to insert causing blood in her urine, requiring her to have emergency treatment at the hospital.

In the same application, the appellant's physician states that she has seen the appellant 2-10 times over a period of 10 months, and has diagnosed scoliosis stating that it may limit the appellant's mobility and extent to which DLA may be done and bladder retention requiring self catheterization, which takes an extended time as well as possible limiting locations she can attend. The physician

states that the appellant has chronic back pain causing inability to stand or sit extended periods of time as well as lifting and bending. The physician also assessed that the appellant is able to walk 4+ blocks and to climb 5 steps unassisted and to sit for approximately 1 hour but did not assess the ability to lift.

In relation to physical limitations, the social worker indicates that the appellant can carry and hold loads up to 5 lbs for short periods of time and continuous help is reported to be required to climb stairs, stand and lift loads over 5 lbs.

Letters from the appellant's physician and social worker, both dated July 18, 2013, state the appellant is not able to function in daily living activities without continuous support. Chronic back pain limits standing or sitting longer than one hour. Ability to lift and bend is limited as is ability to walk prolonged distances. The appellant is able to walk four blocks but no further due to pain; although DLAs are not restricted, it takes 2-3 times longer than someone who does not suffer from scoliosis related pain. If available, support would be needed to help with meal preparation, housework and home maintenance. The appellant must self-catheterize daily which takes time and limits the locations she is able to attend and stay.

Physician prescribed treatments include regular physiotherapy and massage therapy and regular use of muscle relaxants and analgesics for symptom control.

#### **Mental Impairment**

The physician does not provide a mental health diagnosis and reports no deficits to cognitive functioning and emotional functioning and no restrictions to social functioning. Communication is good with no difficulties. Daily functional impacts are mostly in the no impacts column. There are two moderate impacts on emotion and motor activity and one major impact on bodily functions.

In the Assessor Report, the social worker with the Canadian Mental Health Association, dated July 18, 2013, reports 5 major impacts, 2 moderate impacts and 1 minimal impact on daily, cognitive and emotional functioning. The social worker states that she held an office interview with the appellant and spoke to the physician. The social worker reports Post Traumatic Stress Disorder (PTSD) due to an assault in October 2012 that in her opinion causes anxiety, depression, attention and concentration issues, difficulties in planning and organizing, and problem solving. In the report, the social worker indicates that PTSD is not diagnosed by the medical practitioner.

#### **Daily Living Activities**

In the application for PWD designation, the physician indicated that all DLAs are performed independently and no assistance is required. In the additional letters, both the physician and the social worker state that help may be required for heavier lifting and for distances more than four blocks. Further, all listed aspects of the appellant's ability to communicate were rated as good, all aspects of the appellant's mobility and physical ability were rated as independent.

#### **Help Required with Daily Living Activities**

In the PWD application, the physician states that because the appellant is able to perform all DLAs independently and that DLAs are not restricted, the appellant does not require help with DLAs. The social worker confirms that the appellant is able to perform all DLAs. In the letters, both the physician and social worker indicate that although the appellant is able to perform all DLAs, she is not able to

function in daily living activities without continuous support for walking distances longer than four blocks, carrying loads heavier than five pounds, and if available, help with meal preparation, housework and home maintenance.

#### Oral testimony at hearing

The appellant provided additional oral evidence which the panel determined was in support of the information and records before the ministry when the decision was made and admitted the oral evidence under EAA, section 22 (4) as it directly related to the appellant's physical impairment and her ability to perform DLAs.

The appellant described the catheterization process, indicating that she wakes up three or four times each night needing to self-catheterized, and describing the pain this causes, particularly if she can't get the catheter in fast enough. She takes Tylenol and a muscle relaxant for pain. Her previous doctor prescribed Demerol but took her off due to dependency on the drug. Her current physician has not prescribed any narcotics or stronger pain medication. Prescribed treatment includes hot compresses and elevating her legs. Her friends help her with laundry, cleaning, and household chores.

The appellant states that the scoliosis impacts her ability to walk very far, makes it hard to get out of bed, bend over or climb stairs. She states that although she can climb stairs independently, it takes longer than when she has someone helping her. She stated that she has had several surgeries, pins are holding up her bladder and intestines, and there is lots of scar tissue. The appellant/advocate argue that she is in a great deal of pain due to her scoliosis and bladder retention; that her conditions restrict her in DLAs and she needs the support and help of another person to perform many of the DLAs.

Her previous doctor who treated her for several years is retired. She has been seeing the current doctor for about 10 months.

The ministry reviewed the reconsideration decision but did not provide any new evidence, acknowledged that the appellant has a serious condition but re-iterated that the evidence did not satisfy all five of the required criteria for a PWD designation under EAPWDA, section 2.

## PART F – Reasons for Panel Decision

The issue under appeal is the reasonableness of the Ministry's decision to find that the Appellant was ineligible for the Persons with Disabilities (PWD) designation because the appellant did not meet all of the five criteria for designation under Section 2 (2) and (3) of the *Employment and Assistance for Persons with Disabilities Act*.

The pertinent legislation is:

### Section 2 – *Employment and Assistance for Persons with Disabilities Act*

#### 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 – *Employment and Assistance for Persons with Disabilities Regulation*

#### 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.
- (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.
- (3) The definition of "parent" in section 1 (1) applies for the purposes of the definition of "dependent child" in section 1 (1) of the Act.

The ministry's position is that the evidence contained in the applications and letters does not establish either a severe physical or mental impairment or significant restriction on the appellant's ability to perform daily living activities and therefore the appellant does not meet all five of the required criteria set out in EAPWDA section 2, for a PWD designation, specifically the following three criteria:

**Severity of the Impairment** – The ministry states that it is not satisfied that the evidence provided establishes a severe impairment, either physical or mental which result in a significant restriction in the appellant's ability to perform DLAs. Both the social worker and the physician agree that the majority of DLAs are performed independently, the functional skill limitations are not significantly restricted and all five aspects of social functioning are independent.

In terms of mental impairment, the ministry pointed out that this section of the application is intended to be completed "for an applicant with identified mental impairment or brain injury", and the physician did not provide a diagnosis of any mental impairment. The physician did indicate that social functioning is performed independently in all 5 aspects.

**Daily Living Activities** – The ministry states that the evidence from the prescribed professional does not indicate that DLAs are significantly restricted, either continuously or periodically for extended periods or that significant help is required from other persons. A urological appliance is used for self-catheterization.

**Help Required with Daily Living Activities** - the ministry states that since the evidence provided does not establish that DLAs are significantly restricted; it cannot be determined that significant help is required from other persons. It notes that a urological appliance is used for self-catheterization.

With regard to support for home maintenance, the ministry states that this is not included under the EAPWD legislation. Regarding the social worker's indication that there is a need for help with meal preparation, the ministry states that there is no evidence to explain why this is needed and further, this category is meant to reflect issues related to eating disorders characterized by major disturbances in eating behavior. The physician did not diagnose any eating disorder.

The appellant's position is that the restrictions caused by scoliosis and bladder retention are a severe impairment, significantly limiting her ability to function and that she requires help in performing DLAs.

The panel finds that the ministry reasonably determined that the appellant does not have a severe physical or mental impairment. Based on the evidence provided by her physician, she is able to independently perform all daily living activities and her functional skill limitations are not significantly restricted, although doing those activities may involve more time than a person without her conditions. Further the panel finds that the medical evidence is that the appellant is able to manage her pain and other symptoms with non-prescription drugs, physiotherapy, massage, and hot compresses.

The panel finds that since the physician did not provide a mental health diagnosis and reports no deficits to cognitive functioning and emotional functioning, the ministry reasonably determined that the appellant does not have a severe mental impairment.

The panel finds that the ministry reasonably determined that the appellant's conditions do not directly and significantly restrict her ability to perform DLAs either continuously or periodically for extended periods of time. In the opinion of both the physician and the social worker, although the appellant suffers from chronic pain, she performs all DLAs independently, although more slowly on her own. She can self-catheterize, walk short distances, lift small weights up to 5 lb, climb stairs, shop, stand for short periods; she has no restrictions on her communication skills, social functioning and independently performs personal care activities, basic housekeeping and shopping.

The panel finds that although the appellant finds it helpful when someone can assist with carrying groceries, climbing stairs, and housekeeping, she is able to self-catheterize and perform DLAs independently and without significant help or supervision of another person.

The panel finds that although the appellant meets two of the criteria for a PWD designation, she has not satisfied all five criteria set out in the EAPWDA section 2 and EAPWDR, section 2 and therefore does not qualify for the PWD designation.

In conclusion, the panel finds that the ministry's reconsideration decision to deny the appellant's application for PWD designation, pursuant to Section 2, EAPWDA and section 2 EAPWDR was a reasonable application of the enactment in the circumstances of the appellant and the ministry's decision was reasonably supported by the evidence and confirms the decision.