

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development's (the ministry) reconsideration decision dated March 26, 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* (EAPWDA) for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement and that the appellant's impairment was likely to continue for at least two or more 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 that
- as a result of those restrictions, the appellant requires the significant help or supervision of another person, an assistive device, or the services of an assistance animal, to perform DLA.

## PART D – Relevant Legislation

*Employment and Assistance for Persons with Disabilities Act* (EAPWDA), section 2  
*Employment and Assistance for Persons with Disabilities Regulation* (EAPWDR), section 2

## PART E – Summary of Facts

The evidence before the ministry at the time of the reconsideration decision consisted of:

- 1) The appellant's Request for Reconsideration dated March 13, 2013 (RFR);
- 2) PWD Designation Decision Summary dated February 15, 2013;
- 3) A PWD application comprised of a Self-report (SR) signed by the appellant on December 18, 2012; a Physician Report (PR) dated December 18, 2012 completed by the appellant's general practitioner of 3 months; and an Assessor Report (AR) also dated December 18, and completed by the appellant's general practitioner. On the PR and AR the general practitioner reports that he has seen the appellant two to ten times in the past 12 months.

In her Notice of Appeal the appellant states that she is unable to work as she is in pain all the time and cannot live on the amount of income assistance she is currently receiving. The appellant also states that she has been on disability before and as she is in pain all the time and unable to get a job, her PWD application should be accepted.

The appellant did not attend the hearing. Having confirmed that the appellant was notified of the hearing, the panel proceeded with the hearing pursuant to *Employment and Assistance Regulation* section 86(b).

The ministry relied on the reconsideration decision and submitted no new information.

### **Physical Impairment**

In the SR, the appellant states that due to a critical accident requiring major hip surgery, she has a metal plate and several screws and pins in her hip which cause her extreme pain and discomfort. She states that due to chronic pain and severe arthritis she has joint pain and stiffness and is unable to sit, stand, or walk for more than 10-15 minutes. She states that the pain is so bad some mornings that she cannot get out of bed and she has a hard time getting in and out of the bath. She also states that bending, carrying and lifting are very hard, "100% of the time" and that vacuuming, sweeping and mopping cause "double the discomfort". The appellant also states that her hip locks up sometimes and that standing to perform household tasks or walking in stores is very difficult. She also states that she has muscle weakness which causes fatigue.

In the PR, the general practitioner reports that the appellant has had arthritis in her right hip since 1990 and chronic pain in her hip that affects her mobility on a daily basis. He also reports that her hip joint has been damaged and she is not suitable for joint replacement. The general practitioner also reports that she has ongoing discomfort and it is affecting her mobility and ability to find and hold on to a job.

Functional skills reported in the PR indicate that the appellant can walk 1 to 2 blocks, can climb 2 to 5 steps unaided, is limited to lifting 2 to 7 kg (5 to 15 lbs), and can remain seated for less than 1 hour.

In the AR, the general practitioner reports that the appellant has pain in her joint that limits the range of motion in her hip. The appellant's ability to communicate in all four listed areas of speaking, reading, writing and hearing is good. The general practitioner indicates that the appellant takes significantly longer with walking indoors and outdoors, climbing stairs, standing, lifting, and carrying and holding. The general practitioner explains that "[d]ue to her hip pain, the appellant has difficulty performing these tasks 100% of the time".

### **Mental Impairment**

In the SR, the appellant does not include any reports of mental impairment.

In the PR, the general practitioner reports that the appellant does not have any difficulties with communication and that there are no significant deficits with cognitive and emotional function.

In the AR, for section 4, cognitive and emotional functioning, the general practitioner has not checked off any of the boxes to indicate that there is any impact to the appellant's daily functioning.

### **DLA**

In the SR, the appellant states that she has trouble getting out of bed, that bending, carrying and lifting are very hard "100% of the time", that vacuuming, sweeping and mopping cause "double the discomfort" and that she cannot stand to cook, do dishes or laundry. She states that getting in and out of the bath and up off the toilet is difficult.

In the PR, the general practitioner reports that the appellant is 5 feet 1 inches and weighs 180 pounds and has not been prescribed any medication and/or treatment that interfere with her ability to perform all DLA.

In the AR, the general practitioner reports that the appellant is independent with the following tasks: dressing, grooming, bathing, toileting, feeding self, regulating diet, reading prices and labels, making appropriate choices, paying for purchases, meal planning, food preparation, cooking, safe storage of food, banking, budgeting, paying rent and bills, filling/refilling prescriptions, taking prescriptions as directed and safe handling and storage of medications.

In the AR, the general practitioner indicates that the appellant takes significantly longer than typical with transfers (in/out of bed) and transfers (on/off of chair) as her pain and stiffness is worse in the mornings. He reports that the appellant takes significantly longer with laundry, basic housekeeping, going to and from stores, carrying purchases home, getting in and out of a vehicle, using public transit and using transit schedules and arranging transportation, as her joint pain significantly impacts her mobility and affects these activities.

With respect to social functioning, the general practitioner reports that the appellant is independent with making appropriate social decisions, developing and maintaining relationships, interacting appropriately with others and securing assistance from others. However, the general practitioner reports that the appellant requires periodic supervision to deal appropriately with unexpected demands as she requires periodic assistance with increased physical demands. The general practitioner reports that the appellant has good functioning with respect to her relationships with her immediate social network and extended social networks.

### **Need for Help**

In the SR, the appellant states that she is in great need of help to do her housework, getting groceries and transportation. She also states that she cannot afford the cost of pain medications including Advil or muscle creams.

In the PR, the general practitioner reports that the appellant does not require any prostheses or aids for her impairment.

In the AR, the general practitioner reports that the appellant would benefit from personal transport. The general practitioner does not provide any indication of the amount of assistance and does not indicate that the appellant requires the help of an assistance animal.

## PART F – Reasons for Panel Decision

The issue on the 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 legislation 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;
- that the appellant's DLA's 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, the appellant does not require the significant help or supervision of another person, 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.

**Severe physical impairment:**

In the SR, the appellant states that she has chronic, severe hip pain which causes severe physical limitations including muscle weakness, fatigue, sleep difficulties and difficulties with household chores and mobility. In the SR and NOA, the appellant states that she is eligible for PWD because she has chronic pain which makes her unable to retain or hold a job and she cannot afford the cost of paying for housecleaning, transportation, someone to get her groceries, pain medications or muscle creams.

The ministry argues that the functional skills limitations described by the general practitioner are more in keeping with a moderate degree of impairment and that the evidence does not establish that the appellant has a severe physical 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 panel finds that a medical practitioner, the appellant's general practitioner, has diagnosed the appellant with arthritis in her right hip arising from trauma in 1990 which causes her pain, stiffness, and mobility limitations. Although the appellant reports that her physical impairment causes her great pain, that some tasks are always very hard (getting out of bed, bending, carrying and lifting) and that some household chores (vacuuming, sweeping and mopping) cause double the discomfort, the panel finds that the functional limitations noted by the general practitioner in the PR and AR are consistent with each other and indicate that the appellant's functional limitations were in the moderate range rather than severe.

In addition, although the AR indicates that the appellant takes significantly longer to perform all listed tasks of mobility and physical ability (walking indoors, outdoors, climbing stairs, standing, lifting, and carrying and holding), and although the general practitioner reports that due to her hip pain the appellant has difficulty performing these tasks "100% of the time", the general practitioner does not provide any further information to indicate how much longer any of the DLA's take.

Furthermore, although the appellant, in the SR indicates that she has difficulty getting in and out of the bath and on and off the toilet, the AR indicates that the appellant is independent with bathing and toileting and the general practitioner has not indicated that these tasks take significantly longer than typical. Although the appellant states that she cannot afford pain medications and muscle creams, the general practitioner, in the PR reports that the appellant has not been prescribed any medications and that she does not require any aids

for her impairment.

Although the appellant and her general practitioner, in the SR and PR, indicate that the appellant is unable to obtain and hold a job, the panel notes that employability is not a criterion for designation as PWD.

The panel concludes that the ministry reasonably determined that the appellant's level of independent physical functioning does not establish that the appellant has a severe physical impairment under section 2(2) of the EAPWDA.

Therefore, the panel finds that the ministry's decision, which concluded that the evidence does not establish a severe physical impairment under section 2(2) of the EAPWDA, was reasonable.

#### **Severity of mental impairment:**

The ministry's position is that as there is no mental health diagnosis there is no mental impairment.

The appellant did not submit that she has a severe mental impairment.

#### *Panel Decision*

There is no evidence of any mental health diagnosis or any limitations with respect to the appellant's cognitive or emotional functioning, ability to communicate, or her relationships with her immediate and extended social networks. Therefore, the panel finds that the ministry's decision, which concluded that the evidence does not establish a severe mental impairment under section 2(2) of the EAPWDA, was reasonable.

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

The appellant's position is that her physical impairments directly and significantly restrict her ability to perform DLA including getting in and out of bed, in and out of the bath and off the toilet, performing household chores including cooking, dishes, vacuuming, sweeping, mopping, doing laundry, and obtaining groceries.

The ministry's position is that the evidence of the prescribed professional establishes that although the appellant takes significantly longer with some DLA (transfers in/out of bed, transfers on/off of chair, laundry and basic housekeeping, going to and from stores, carrying purchases home, getting in and out of a vehicle, using public transit, and using transit schedules and arranging transportation), there is no information provided on how much longer these tasks take. The ministry states that the general practitioner has not indicated that the appellant requires either continuous or periodic assistance with any DLA and while the general practitioner reports that the appellant requires periodic assistance with increased physical demands, it is not clear how often assistance is required or what is meant by "*increased physical demands*". The ministry's position is that although the appellant's functional limitations directly restrict her ability to perform some aspects of DLA, with many tasks taking longer than normal, no severe impairment has been established and all aspects of DLA are still performed independently.

The ministry's position is that the evidence does not establish that the appellant's impairments significantly restrict her ability to manage DLA's, continuously or periodically for extended periods.

#### *Panel Decision*

The legislation requires that a severe impairment directly and significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods. The term "directly" means that there must be a causal link between the severe impairment and the restriction. The direct restriction must also be significant – it must be more than trifling and more than merely an inconvenience. Finally, there is a

component related to time or duration. The direct and significant restriction may be either continuous or periodic. If it is periodic it must be for an extended time. Inherently, an analysis of periodicity must also include consideration of the frequency. All other things being equal, a restriction that only arises once a year is less likely to be significant than one which occurs several times a week. While the legislation must be interpreted in a large and liberal manner, there still must be sufficient evidence on each of the legislative criteria to reasonably satisfy the ministry that they have been met.

In the AR, the general practitioner indicated that the appellant's impairment directly restricts 5 of the 8 prescribed DLA in relation to a person who has a severe physical impairment (*shop for personal needs, use public transportation, perform housework, move about indoors and outdoors, and perform self care*).

The general practitioner indicated that the appellant is unrestricted in the remaining 3 of the 8 prescribed DLA (*preparing own meals, managing personal finances and managing personal medication*).

The panel finds that while there are restrictions to some aspects of 5 of the 8 prescribed DLA, the DLA are all managed independently and there is no information to indicate that the appellant requires either periodic or continuous assistance with any of the DLA. In addition, even within each prescribed DLA, there are many aspects of the DLA which the appellant is independent and does not take significantly longer to perform. For example, with respect to personal care, the general practitioner reports that she takes significantly longer with transfers in/out of bed and transfers on/off of chair but that the appellant is independent with dressing, grooming, bathing, toileting, feeding self and regulating diet.

The panel notes that the general practitioner indicates that some of the DLA take significantly longer than typical due to joint pain and stiffness but the general practitioner has not provided any information on how much longer these tasks take. In addition, while the general practitioner reports that the appellant requires periodic supervision to deal appropriately with increased physical demands, it is not clear how often assistance is required or what is meant by "*increased physical demands*". The general practitioner noted regarding the supervision required that the appellant would benefit from personal transport, but no further explanation is provided.

The panel concludes that the ministry was reasonable in finding that the appellant's impairment does not significantly restrict her ability to perform DLA, either continuously or periodically for extended periods.

Therefore, the panel finds that the ministry's decision that the noted restrictions in the appellant's ability to perform some aspects of some DLA did not constitute a direct and significant restriction of the appellant's ability to perform DLA in the opinion of a prescribed professional thereby not satisfying the legislative criteria of section 2(2)(b)(i) of the EAPWDA, was reasonable.

### **Help with DLA**

The appellant's position is that she requires help with DLA including housecleaning, transportation, getting groceries and the cost of her pain medications and muscle creams.

The ministry's position is that as it has not been established that DLA's are significantly restricted, it cannot be determined that significant help is required from other persons, and no assistive devices are required.

Section 2(2)(b)(ii) of the EAPWDA requires that, in the opinion of a prescribed professional, 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) of the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform a DLA.

While the panel finds that the evidence of a prescribed professional establishes that the appellant would benefit from some personal transport, there is no evidence of how much help with personal transport is required, and there is no other assistance required. The panel finds that the ministry reasonably determined that, as direct and significant restrictions in the appellant's ability to perform DLA have not been established, it cannot be determined that the appellant requires help to perform DLA as a result of those restrictions.

### **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 reasonably supported by the evidence and a reasonable application of the applicable legislation in the circumstances of the appellant, and therefore confirms the decision.