

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation's (the ministry) reconsideration decision dated May 3, 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 reconsideration consisted of:

- 1) The appellant's Request for Reconsideration (RFR) dated April 25, 2013;
- 2) Radiology report dated October 17, 2012;
- 3) Letter from the ministry to the appellant and PWD Designation Decision Summary dated March 5, 2013; and
- 4) A PWD application comprised of a Self-report (SR) signed by the appellant on December 27, 2012; a Physician Report (PR) dated December 16, 2012 completed by the appellant's general practitioner; and an Assessor Report (AR) dated October 25, 2011 completed by the appellant's general practitioner. On the PR and AR the general practitioner reports that he has known the appellant for two years and has seen her 11 or more times in the last year.

In her Notice of Appeal dated May 16, 2013, the appellant stated that she was requesting an extension of 1 ½ months in order to have her medical information transferred from another province.

With respect to the appellant's request for an extension of time, the panel notes that the hearing was initially set for June 7, 2013 and was adjourned once to July 16, 2013 and then again to August 13, 2013 in order to allow the appellant time to obtain the additional medical records. There is no information to indicate that the appellant has made efforts to obtain the other medical records between the time her Notice of Appeal was submitted on May 16, 2013 and the date of the hearing. The panel also notes that the appellant did not attend the hearing to provide any further information with respect to her efforts to obtain the additional medical information or her request for a further extension of time. The panel finds that while the ministry's interests may not be prejudiced by a further delay, one objective of the legislation is to provide a speedy appeal hearing. As the hearing had previously been adjourned on two occasions the panel declines the appellant's request for a further extension of time.

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 EAR section 86(b).

The ministry relied on the reconsideration decision and did not submit any further information.

Physical Impairment

In the RFR, the appellant reports that her illnesses include diabetes, fibromyalgia, inflammation in the soft tissue, mild stenosis, sciatic pain, bowel syndrome and major food allergies. She states that she is not able to do a lot of work and finds it difficult to sit for more than an hour at a time.

The radiology report indicates that the appellant has mild diffused spondylosis.

In the SR, the appellant states that due to spinal deterioration she is in constant pain and she takes a lot of medicine. She reports that there are times when the pain is so intense that she has a hard time moving.

In the PR, the general practitioner reports that the appellant has NIDDM (non insulin dependent diabetes mellitus), date of onset not known, and severe lumbar spondylosis, date of onset 1987. Under the "Health History" section, the appellant's physician reports that the appellant suffers from chronic back pain and that she takes an inordinate amount of time to complete tasks around the house because of pain and stiffness. He also reports that she experiences nocturnal pain, is unable to afford physiotherapy treatments, has been unable to exercise due to back pain, and struggles to control her sugar levels. The physician reports that the appellant is

5'4" tall and weighs 165 pounds. The physician also reports that the appellant has been prescribed pain medication which makes her very drowsy. The anticipated duration of the medications/treatment is reported to be indefinite.

Functional skills reported in the PR indicate that the appellant can walk 1 to 2 blocks unaided, can climb 5+ stairs, can lift between 2 to 7 kg and can remain seated 1 to 2 hours. The physician reports that the appellant does not require any prostheses or aids for her impairment.

In the AR, the physician reports that the appellant's physical impairment is lumbar spondylosis, daily persistent moderate to severe pain limiting exercise and ability to walk. The general practitioner reports that the appellant is independent with walking indoors, walking outdoors, climbing stairs, and carrying and holding but requires periodic assistance with standing and continuous assistance with lifting. The physician comments that the appellant mentions she is unable to lift objects more than 7 kg due to severe exacerbation of her back and she periodically needs someone to help her to the store.

Mental Impairment

In the SR the appellant does not provide any information regarding a mental impairment.

In the PR, the general practitioner reports that the appellant has no difficulties with communication. While the general practitioner did not check off the box indicating that the appellant has significant deficits with cognitive and emotional function, he reports that she has deficits with motivation as she finds that she has lost interest in things she used to enjoy.

In the AR, the physician reports that the appellant's ability to communicate in speaking, reading, writing and hearing is good. For section 4, cognitive and emotional functioning, the appellant's physician reports that there is no impact to the following areas: bodily functions, consciousness, emotion, impulse control, insight and judgment, attention/concentration, executive, memory, motor activity, language, psychotic symptoms, other neuropsychological symptoms or other emotional or mental problems. He reports that there is moderate impact to motivation as the appellant finds it hard to motivate herself to do the things she used to enjoy such as fishing, because of her severe ongoing lower back pain.

DLA

In the RFR and SR, the appellant states that she is not able to do a lot of work, cannot sit for more than one hour and has a hard time moving.

In the PR, the general practitioner reports that the appellant's impairment directly restricts her ability to perform the DLA of mobility outside the home on a continuous basis. Under additional comments, the physician reports that the appellant has difficulty walking more than 2 blocks. The physician reports that the appellant is not restricted with all other listed DLA: personal self care, meal preparation, management of medications, basic housework, daily shopping, mobility inside the home, use of transportation, management of finances and social functioning) are not restricted.

In the AR, the physician reports that the appellant is independent with all tasks: dressing, grooming, bathing, toileting, feeding self, regulating diet, transfers (in/out of bed), transfers (on/off of chair), laundry, basic housekeeping, going to and from stores, reading prices and labels, making appropriate choices, paying for purchases, carrying purchases home, meal planning, food preparation, cooking, safe storage of food, banking, budgeting, paying rent and bills, filling/refilling prescriptions, taking prescriptions as directed, safe handling and storage of prescriptions, getting in and out of a vehicle, using public transit, using transit schedules, making appropriate social decisions, developing and maintaining relationships, interacting appropriately with others and dealing appropriately with unexpected demands. The physician has not indicated whether the appellant is

independent with securing assistance from others or whether she requires any assistance with that task. The physician reports that the appellant has good functioning with her immediate and extended social networks.

Under Section E – Additional Information, the physician reports that because of the appellant's severe and debilitating ongoing back pain she is unable to exercise adequately and this is affecting her glycemic control. He reports that she is unable to walk more than 2 blocks without severe pain and she often wakes up at night with pain. The physician states "[s]he is able to perform most of her "ADL" though".

Need for Help

In the SR, the appellant states that she is unable to do a lot of work around the house because of severe, constant back pain.

In the PR, in response to the question as to what assistance the appellant needs with DLA, the physician reports "n/a" or not applicable. Under additional comments he states "no additional comments at this time".

In the AR, the physician reports that the appellant requires help with DLA from family and friends but that no further assistance is needed at this time. The physician reports that the appellant periodically uses a cane but does not require an assistance animal.

PART F – Reasons for Panel Decision

The issue on the appeal is whether the ministry's reconsideration decision denying 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 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:

The appellant's position is that she has severe and debilitating back pain, spondylosis, fibromyalgia, diabetes, and severe allergies that limit the amount of work she can do. The appellant states that the doctor did not understand how to complete the PWD application forms.

The ministry's position is that while they acknowledge that the appellant's physical impairments may impact her functional abilities, 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. In particular, the ministry notes that while the appellant's physician reports that she suffers from chronic back pain and she takes an inordinate amount of time completing tasks, no information is provided on how much longer any those tasks take, and the physician reports that the appellant is independent in her DLA. The ministry also states that although the appellant reports that she has fibromyalgia, bowel syndrome and major food allergies, these conditions have not been corroborated by her physician.

Panel Decision

The panel finds that a medical practitioner, the appellant's general practitioner, has diagnosed the appellant with NIDDM and severe lumbar spondylosis that cause the appellant constant pain and some functional limitations. Although the appellant reports that she has fibromyalgia, bowel syndrome and major food allergies, these conditions have not been corroborated by her physician.

Functional skills reported in the PR indicate that the appellant can walk 1 to 2 blocks unaided, can climb 5+stairs, can lift between 2 to 7 kg, and can remain seated 1 to 2 hours. The physician reports that the appellant does not require any prostheses or aids for her impairment although on the AR, the same physician reports that the appellant requires periodic use of a cane.

The panel notes that in her letter submitted with her Notice of Appeal, the appellant states that her physician "does not know how to fill out a form". While it may be that the physician does not understand the appellant's daily struggles and functional limitations, and while the legislation provides that the minister may take all the information into account, including that of the appellant, 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.

While the physician reports that the appellant takes an inordinate amount of time completing tasks, and that she requires periodic assistance with standing and continuous assistance with lifting, the physician does not provide any further information to indicate which tasks take longer or how much longer those tasks take. In

addition, the physician reports that the appellant is independent with "ADL".

The panel finds that the functional limitations described by the general practitioner indicate that the appellant's functional limitations are in the moderate rather than severe range. In addition, although the physician describes the appellant's back pain as severe, that does not appear to be supported by the functional limitations described or by the radiology report which indicates that the appellant has mild diffused spondylosis as opposed to moderate or severe spondylosis.

The panel finds 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 appellant's position is that due to her severe back pain and medical conditions she has lost interest in activities she previously enjoyed such as fishing, and has difficulty motivating herself.

The ministry states that although the appellant's physician identifies significant deficits in the areas of cognitive and emotional functions regarding motivation with the explanation that the appellant has lost interest in things she used to enjoy and has difficulty motivating herself, the ministry's position is that the prescribed professional, the appellant's physician, has not provided enough evidence to establish a severe mental impairment.

Panel Decision

The panel notes that the physician identifies significant deficits in the areas of cognitive and emotional functions regarding motivation with the explanation that the appellant has lost interest in things she used to enjoy and has difficulty motivating herself. However, the panel also notes that the physician has not actually diagnosed the appellant with a mental impairment. In addition, other than the loss of interest and motivation the physician reports that the appellant's communication and interaction with her immediate and social networks is good.

In the AR, for section 4, cognitive and emotional functioning, the physician reports that there is no impact to any listed areas except the appellant's motivation. As there is moderate impact to only one of the 14 listed areas, the panel finds that the ministry's decision, which found that there is not enough evidence to 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 prevent her from doing a lot of work and that she has difficulty sitting for more than one hour at a time. The appellant's position is that she is limited from walking and lifting anything more than 7 kg.

The ministry's position is that based on the information provided by the appellant's physician, there is not enough evidence to establish that the appellant's impairments directly and significantly restrict her DLA continuously or periodically for extended periods. The ministry notes that although the physician indicates that the appellant's impairment continuously restricts her DLA regarding mobility outside the home with the explanation that she has difficulty walking more than 2 blocks, the remainder of the DLA are not restricted. The ministry also states that as the physician on the AR, indicates that the appellant is independent with all DLA and has not provided any information to indicate that it takes the appellant significantly longer to perform her DLA, the ministry is not satisfied that the information demonstrates a severe mental or physical impairment

that in the opinion of the prescribed professional significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods.

Panel Decision

The legislation requires that in the opinion of a prescribed professional 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 a few times 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.

Based on the evidence in the PR, the prescribed professional indicates that the appellant's impairment directly restricts 1 of the 8 prescribed DLA in relation to a person who has a severe physical impairment as per EAPWDA section 2(1)(a) (*move about indoors and outdoors*). However, the panel notes that while the physician reports a continuous restriction with respect to mobility outside the home, the appellant's mobility inside the home is not restricted.

The general practitioner indicated that the appellant is unrestricted in all 7 of the other 8 prescribed DLA (*prepare own meals, manage personal finances, shop for personal needs, use public or personal transportation facilities, perform housework, perform personal hygiene and self care, and manage personal medication*).

With respect to determining whether a person has a severe mental impairment, the evidence regarding the additional two prescribed DLA, making decisions about personal activities, care or finances; and relating to, communicating or interacting with others effectively, is that the appellant's DLA's are not restricted. In the AR, the physician reports that the appellant has good functioning with respect to her immediate and extended social networks.

As the appellant is only restricted in one DLA, the panel finds that the ministry reasonably determined that, based on the evidence provided by the prescribed professional, 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 thereby not satisfying the legislative criteria of section 2(2)(b)(i) of the EAPWDA.

Help with DLA

The appellant's position is that she has continuous pain and is not able to do a lot of work.

The ministry's position is that as it has not been established that the appellant's DLA 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, as the significant help or supervision of another person, or the services of an assistance animal in order to perform a DLA.

The panel notes that in the AR, the physician reports that the appellant receives assistance from family and

friends and periodically uses a cane but there is no additional information provided as to the amount, frequency or duration of help or supervision provided by the family or friends. In addition, the physician reports that the appellant is independent with all DLA and does not require any further assistance at this time. The panel also notes that while the appellant states she is not able to do a lot of work, she has not provided any further information to indicate what help is needed, the amount of help needed or information as to who provides her with help.

Based on the evidence, 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 significant help to perform DLA as a result of those restrictions as required by EAPWDA section 2(2)(b)(ii).

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.

Therefore, the panel confirms the ministry's reconsideration decision.