

## PART C – Decision under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Social Innovation (the Ministry) dated May 9, 2013 denying the appellant designation as a person with disabilities (PWD). The Ministry determined that the appellant did not meet four of the five criteria required for PWD designation as set out in the *Employment and Assistance for Persons with Disabilities Act*, section 2 (the appellant meets the criteria of being 18 years of age or older). Specifically, the Ministry determined that, based on the information provided, the following criteria were not met:

- the appellant's impairment is not likely to continue for two or more years;
- the appellant does not have a severe mental or physical impairment;
- the appellant's impairment does not significantly restrict her ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and
- the appellant does not require the significant help or supervision of another person to perform the DLA restricted by her impairment.

## 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 reconsideration consisted of the following:

1. The appellant's PWD Designation Application, containing the following three parts:
  - The appellant's Self Report completed December 20, 2012;
  - The Physician Report (PR) dated December 3, 2012 completed by the resident physician at the clinic of the appellant's family physician; and
  - The Assessor Report (AR) dated December 3, 2012 completed by the same resident physician at the clinic of the appellant's family physician.
2. The appellant's Request for Reconsideration, dated April 25, 2013, with the following attachments:
  - A Medical Report – Employability (MR – Emp) dated March 5, 2013, completed by the appellant's family physician;
  - A photocopy of the appellant's admission wrist band for the emergency room of her local hospital; and
  - A letter from the appellant's landlord dated April 29, 2013.

On the PR and AR form, the resident indicated that the appellant had been a patient at the clinic since 2008 and the resident checked that she had seen the appellant once, but wrote that the appellant's physician had seen her 8 times in the past year. The resident indicated that the clinic has the appellant's records dating back to 2004 and the resident had reviewed them.

The appellant completed her notice of appeal on June 4, 2013, and submitted an additional one-page handwritten submission dated July 8, 2013, as well as a 2-page letter from her family physician dated June 3, 2013 (together, the "Additional Information"). In her submissions on appeal, the appellant indicated that she is being referred to a pain clinic, her physical limitations restrict her normal daily living, and her hospitalization record provided at the reconsideration was for a foot injury she sustained April 2, 2013. In his 2-page letter from June 2013 reviewed below, the appellant's physician clarified the information provided by the resident in the PR and AR that were completed in December 2012.

In the Ministry's written submission on appeal dated July 10, 2013, the Ministry's representative indicates that she had read the Additional Information. The Ministry did not object to the admission of the Additional Information. The panel admits as evidence the Additional Information as written testimony in support of the information and records that were before the minister when the decision being appealed was made pursuant to subs. 22(4)(b) of the *Employment and Assistance Act*.

The following is a summary of the evidence from the PR and AR, together with the evidence provided in the Additional Information, regarding the appellant's impairments as they relate to the four PWD criteria at issue. The panel has also included reference to the appellant's self report in the PWD application.

### Severity and duration of impairments (criteria set out in subs. 2(2) and 2(2)(a) EAPWDA)

In the PR, the resident reports that the appellant has ongoing low back and neck pain, as well as post-concussive syndrome, with an onset in May 2012. The resident also reports that the appellant

[REDACTED]

has anxiety and depression, with an onset in July 2009. In her comments, the resident wrote: "... since suffering a head and neck injury on May 14, 2012 her depression and anxiety have worsened due to chronic daily neck and back pain, poor sleep due to pain, medication side effects, inability to work. ... She ... now has a post-concussive syndrome including headaches, disordered sleep, chronic fatigue and short-term memory difficulties." The resident reports that the appellant has been prescribed medication.

In her self report completed in December 2012, the appellant describes her disability, "due to pain I have been prescribed pain medication daily for night in order to sleep. ... due to accident in May [2012, I] was confined to bed rest for 3 months - as result my muscles experienced atrophy and required aid for just the simple task of walking."

In the PR, the resident checked the box "no" in answer to the question, "is the impairment likely to continue for two years or more from today?" and wrote the following comment: "With post-concussive syndrome, 10-15% of patients have symptoms that persist longer than 1 year and a minority go on to develop persistent post-concussion syndrome. It is difficult to predict the prognosis, and whether the depression/anxiety will improve as well. The back and neck pain may improve slowly with rehabilitation."

In the MR-Emp completed by the appellant's physician in March 2013, the appellant's physician indicated that the appellant's primary medical condition is post-concussion syndrome and her secondary medical condition is depression. The physician indicated that the appellant's overall medical condition is "moderate to severe" and checked that the expected duration of the medical conditions is more than 2 years.

In the PR under functional skills, the resident indicated that the appellant can walk 4+ blocks unaided on a flat surface, can climb 2-5 steps unaided, is not able to lift but "can lift less than 5 lbs if she uses a chair/table for bracing ... only if essential" and can remain seated for less than 1 hour.

In his June 2013 letter, the appellant's physician provided further information regarding the appellant's functional skills, writing that while the appellant "is able to walk up to four blocks, she is unable to do so without greatly increasing her pain. She does it because she must. She requires recovery time after such [an] exertion to bring the pain down to manageable levels. All walking exacerbates her pain and, as she suffers from dizziness, she is in constant danger of falling." The physician writes that the appellant is unable to sit without pain, that "sitting for any length of time exacerbates her pain. After about an hour, the pain becomes intolerable." The physician also wrote that the appellant can stand, but not without exacerbating her existing pain and that the pain increases the longer she stands and that she is at risk of falls due to dizziness.

In the PR, the resident checked "yes" in answer to the question "are there any significant deficits with cognitive and emotional function?" and checked the following areas: executive, memory, emotional disturbance, motivation, and attention or sustained concentration. The resident wrote, "her memory is improving since the accident but she still has to use lists to remember tasks for the day, appointments etc. She gets fatigued with planning and loses concentration. Due to depression her motivation can be low on some days."

In his letter of June 3, 2013, the appellant's physician wrote that the appellant suffers from post-

concussive syndrome and has pre-existing conditions of moderate to severe depression and anxiety, chronic back pain (due to mild acquired central stenosis at C5-6 vertebra as well as multilevel facet joint osteoarthritis, cervical spondylosis and severe degenerative disc disease at L3-4 and L4/5) and hypothyroidism. As a result of her post-concussion syndrome, her family physician indicates that the appellant suffers from "disordered sleep, fatigue, short-term memory problems, confusion, dizziness, difficulty with executive thinking processes, poor concentration, problems with articulating her thoughts, difficulties with reading comprehension, headaches and neck pain." The physician wrote that the post-concussion syndrome has exacerbated the appellant's depression and anxiety, that the "initial injury certainly aggravated her back pain" and that her depression and anxiety are "NOT currently responding well to medications."

In the letter of June 3, 2013, the appellant's physician says that the appellant "presents as being very tearful and in poor control of her emotions. She is obviously agitated." He continues, "because of her depression she frequently has trouble getting out of bed in the morning; this can take a couple of hours. Her pain doesn't help. The rest of her day follows this pattern." He describes that she is prone to long periods of weeping, that she lives "in a constant fog of pain, depression and anxiety" and struggles to get through her days.

In the June 2013 letter, the appellant's physician wrote, "it is my considered opinion that [the appellant's] disabilities are likely to continue for two or more years from today's date and are severe."

Ability to perform DLA (criteria set out in subs. 2(2)(b) EAPWDA)

In the PR, the resident checked "yes" in answer to the question, "does the impairment directly restrict the person's ability to perform [DLA]?" The resident indicated that the appellant was continuously restricted in four of the listed DLA: meal preparation, basic housework, daily shopping, and management of finances. The resident wrote that the appellant can't lift or move larger pots/pans to prepare meals, she can't do any bending to perform housework, she can't carry groceries home without a car, and she needs to write lists and reminder notes to keep track of her finances.

The resident indicated that the appellant was periodically restricted in her use of transportation. The resident wrote, "the [appellant] had her driver's license taken away after the head injury. I have written a letter that she is now fit to drive but she is waiting approval."

In the AR, the resident checked that the appellant uses an assistive device to climb stairs – "can climb 2-5 stairs then is too painful and needs to use railing." The resident indicated that the appellant needs continuous assistance from another person or is unable to perform lifting and carrying and holding, writing that the appellant "cannot bend over to lift due to back pain & immobility, as well cannot carry grocery bags or hold objects [over] 5 lbs for same reason."

In the section of the AR describing the appellant's cognitive and emotional functioning, the resident indicated that the appellant's impairment had a moderate impact on her memory and motivation, and a minimal impact on her attention/concentration and executive functions, writing "poor memory from post-concussive syndrome makes executive planning difficult. [The appellant] has to use multiple lists/reminders. Depression/anxiety cause poor motivation and concentration."

In her self report of December 2012 with the PWD application, the appellant wrote that she is unable

to vacuum and wash floors, that "general housekeeping is taxing" for her. She wrote that she stopped driving due to her medication and that she has no social outlets. She stated that due to her physical restraints, she was unable to be physically active. She wrote that she is still experiencing memory loss and recall in communicating, that she cannot sit for extended amount of time and it's necessary for her to be in a "horizontal position". She wrote that every appointment and medication must be noted "so I may have immediate recall" of it.

In his June 2013 letter, the appellant's physician provided elaboration of the effect of the appellant's post-concussive syndrome on her cognitive and emotional functioning as set out above.

Assistance required/provided (criteria set out in subs. 2(2)(b)(ii) EAPWDA)

In the section of the PR describing the assistance the appellant needs with DLA, the resident wrote that the appellant "requires someone to do her house cleaning. With meals she has someone help once per week to make meals for the whole week so she doesn't have to lift pots/pans. She needs help carrying groceries."

In the AR, the resident indicated that the appellant needs continuous assistance from another person for laundry, basic housekeeping and carrying purchases home, writing that the appellant "cannot do any activities that include bending over, lifting or carrying. Also cannot sit for more than 1 hr, due to back pain." The resident also indicated in the AR that the appellant requires periodic assistance from another person for food preparation, cooking and safe storage of food, writing "with cooking again [appellant] cannot lift any pots or pans (too heavy) and cannot bend to get supplies. Currently gets help twice per week to cook all meals for the week so they can be warmed up." In the AR, the resident indicated that the appellants' friends help her, but "has been relying too much on friends. Needs assistance with grocery shopping, house cleaning and cooking."

In the letter from the appellant's landlord dated April 29, 2013 and provided with the reconsideration submission, the landlord wrote that he assists her in her daily chores (shopping, walking her dogs, cooking).

In the June 2013 letter, the appellant's physician wrote that the appellant requires a friend explain paperwork to her. The physician also wrote, "I understand her landlord assists with shopping, cooking and other household tasks as she is mostly unable to do them."

## PART F – Reasons for Panel Decision

The issue in this appeal is whether the Ministry reasonably determined that the appellant is ineligible for PWD designation because she did not meet all the requirements in section 2 of the EAPWDA. Specifically, the Ministry determined that the information provided did not establish that the appellant's impairment is likely to continue for two years or more, that she has a severe mental or physical impairment that in the opinion of a prescribed professional directly and significantly restricts her ability to perform daily living activities either continuously or periodically for extended periods; and, as a result of those restrictions she requires help to perform those activities.

The following section of the *EAPWDA* applies to this appeal:

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.

The following section of the *EAPWDR* applies to this appeal:

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.

In its submission on this appeal, the Ministry wrote the following:

The original reconsideration decision was based on the information presented at the time of adjudication. After reading the appellant's submission combined with the new letter from her medical practitioner, the ministry would have approved PWD designation.

The panel notes that there is no provision in the *Employment and Assistance Act* allowing an appeal by consent – this panel cannot automatically rescind the reconsideration decision even though the Ministry's submission on appeal is that given the Additional Information, it would have approved PWD designation. Accordingly, this panel must assess the Ministry's reconsideration decision and determine whether it was reasonable based on the evidence (which will include the Additional Information provided since the reconsideration decision) or a reasonable application of the legislation in the appellant's circumstances.

Regarding the evidence of the appellant's physician provided in the Additional Information, the panel notes that the appellant's physician has known the appellant since 2008, and as of December 2012, had seen the appellant 8 times in the previous year, and continues to treat the appellant regularly. The panel notes that the resident who completed the PR and AR had seen the appellant once or twice in December 2012 and had reviewed the appellant's file with the clinic. Accordingly, where there is discrepancy between the evidence of the appellant's physician and the resident, the panel places more weight on the evidence of the appellant's physician than on the evidence provided by the resident in the PR and AR.

#### Duration of impairment

In the reconsideration decision, the Ministry based its determination that the appellant's impairments were not likely to continue for 2 years or more on the information provided by the resident in the PR completed in December 2012.

Although the resident checked "no" in answer to the question of whether the impairment was likely to continue for 2 years or more, the comment provides only general information about post-concussion syndrome, with the resident stating "it is difficult to predict the prognosis and whether the depression/anxiety will improve as well." In his June 2013 letter, the appellant's physician reviewed the appellant's impairments, confirming that the appellant suffers from ongoing post-concussive syndrome in addition to her earlier impairments, and wrote that it was his considered opinion that the appellant's disabilities are likely to continue for two or more years from that date [June 3, 2013].

Accordingly, based on the evidence of the appellant's physician to which this panel attributes more weight than the evidence of the resident in the PR as the appellant's physician directly addressed the appellant's impairments (as opposed to general remarks about post-concussion syndrome), the panel finds that the Ministry's determination that the appellant did not meet the first criteria required by subs 2(2)(a) of the EAPWDA (impairments continuing for two or more years) is not reasonably supported by the evidence.

### Severity of impairment

For PWD designation, section 2(2) of the EAPWDA requires that a severe mental or physical impairment be established. The determination of the severity of impairment is at the discretion of the minister, taking into account all the evidence, including that of the applicant. However, the starting point must be medical evidence, with the legislation requiring that a medical practitioner identify the impairment and confirm that the impairment will continue for at least two years. The panel notes that the appellant's family physician has confirmed that her impairments will continue for at least two years.

In the discussion below concerning the information provided regarding the severity of the appellant's impairments, the panel has drawn upon the ministry's definition of "impairment." This definition consists of "cause" and "impact" components: "impairment is a loss or abnormality of psychological, anatomical or physiological structure or function [the cause] causing a restriction in the ability to function independently, effectively, appropriately or for a reasonable duration [impact]." This definition is not set out in legislation and is not binding on the panel, but in the panel's view it appropriately describes the legislative intent. The cause is usually set out as a disease, condition, syndrome or even a symptom (e.g. pain). A severe impairment requires the identified cause to have a significant impact on daily functioning.

### *Mental impairment*

The reconsideration decision states that the minister is not satisfied that the appellant has a severe mental impairment based on the evidence provided by the resident in the PR and AR in December 2012, as well as the MR-Emp completed by the appellant's physician in March 2013. In the decision, the Ministry writes, "several deficits to cognitive and emotional functioning are indicated [by the resident in the PR] ... However, when assessing your cognitive and emotional functioning, [the resident] indicates all areas of daily functioning to be either not impacted, minimally or moderately impacted; no major impacts were identified." The Ministry also notes that, in the words of the resident, "only 10-15% of people with post-concussive syndrome have symptoms beyond a year and only a minority go on to develop persistent post-concussion syndrome." Although the reconsideration decision refers to the MR-Emp form completed by the appellant's physician in March 2013, the decision does not note in considering the severity of the appellant's impairment or the evidence of the resident in the PR that the appellant's physician indicated on the MR-Emp form that her primary medical condition is post-concussion syndrome.

The reconsideration decision notes that the resident diagnosed the appellant with depression in the PR, and her family physician indicated depression was her secondary medical condition in the MR-Emp form, but that the appellant did not mention issues with depression in her self report. The reconsideration decision states that the resident "assesses that your depression has no impact on your daily functioning according to your application." The reconsideration decision notes that the resident diagnosed the appellant with anxiety in the PR, but that "your anxiety has no impact on your daily functioning according to your application" and that the appellant's physician had not listed anxiety as a symptom in the MR-Emp form of March 2013.

The panel notes that information provided by the appellant's physician in the June 2013 letter indicates that the appellant's post-concussion syndrome has continued and has exacerbated her



anxiety and depression, which the physician states are not responding well to medications. The appellant's physician describes the appellant as "living in a constant fog of pain, depression and anxiety" and that her depression causes her to have trouble getting out of bed in the morning and struggle to get through her days.

The evidence of the appellant's physician from March and June 2013, to which the panel gives more weight than the evidence of the resident in December 2012, illustrates that the appellant's mental impairments are limiting her day-to-day functioning. The panel finds that, based on the information provided, the Ministry's determination that a severe mental impairment had not been established was not reasonably supported by the evidence.

#### *Physical impairment*

In the reconsideration decision, the ministry determined that the information provided did not establish that the appellant has a severe physical impairment, noting the resident's comments about the appellant's functional mobility. In the June 2013 letter, the appellant's physician clarified the information provided by the resident, providing detailed information as to the extent her medical conditions restrict the appellant's ability to function. The appellant's physician writes that while the appellant can walk up to 4 blocks, she does it only because she has to and that this walking causes her increased pain, she requires recovery time, walking exacerbates her pain and she is in constant danger of falling. The appellant's physician states that the appellant cannot sit without pain and after an hour of sitting, the pain "becomes intolerable"; the physician also reports the appellant can stand but not without exacerbating her pain, which increases the longer she stands. The panel also notes that the appellant's physician expressly stated in his June 2013 letter that he considers the appellant's impairments to be severe.

Again, the panel gives more weight to the evidence of the appellant's family physician as he has known the appellant longer than the resident who completed the PR and AR and provides a more detailed narrative about her impairment. The panel therefore finds that, based on the evidence from the appellant's family physician, the Ministry was not reasonable in determining that a severe physical impairment had not been established as required by subs. 2(2) of the EAPWDA.

#### *Significant restrictions in the ability to perform DLA.*

The panel notes that, according to the legislation, the direct and significant restriction in the ability to perform DLA must be a result of a severe impairment. As stated above, this panel has found that based on the information provided by the appellant's family physician, the Ministry's determination that the appellant's mental and physical impairments are not severe is not reasonably based on the evidence.

In the reconsideration decision, it is noted that the resident indicated in the PR that the appellant was continuously restricted in meal preparation, basic housework, daily shopping and management of finances and periodically restricted in her use of transportation. The reconsideration decision then goes on to state, "However, the narrative is less compelling: you are now fit to drive, you are managing your own finances albeit you use a list to keep track, with meals your ability to lift/move larger pots & pans is restricted, with housework you are unable to bend, and with shopping you are unable to carry groceries home without a car (it is noteworthy that you live in a rural area)."

The panel notes that although the resident indicated in the PR that she had written a letter for the appellant that she was fit to drive, there was no other evidence before the Ministry at the reconsideration (or on the appeal) that the appellant is in fact able to drive and does drive herself. The panel relies on the evidence from the PR, as well as of the appellant's landlord and physician, that the appellant is periodically restricted in her DLA of use of transportation. The panel notes that in 2-3 places in the PR and AR prepared in December 2012, the resident indicated that the appellant relies on the continuous assistance of others for meal preparation – that friends help prepare meals for the week as the appellant cannot cook for herself and she cannot lift any pots or pans. The resident noted in the PR and AR that the appellant must rely on lists to remind herself of her finances, as also stated by the appellant in her self report, and that this is continuous. The information set out by the appellant's physician in his June 2013 letter reiterates the appellant's restrictions and reinforces that the appellant's impairments continuously restrict her daily living activities, in particular, housekeeping, shopping and cooking.

Accordingly, the panel finds that based on the information provided (which includes the information before the Ministry at reconsideration), the Ministry's determination that the appellant was not significantly restricted in her ability to perform DLA as required under subs. 2(2)(b) was not reasonable.

#### Help with DLA

In its reconsideration, the Ministry determined that as it "had not been established that [DLA] are significantly restricted ... it cannot be determined that significant help is required from other persons."

The panel notes the evidence before the Ministry at the reconsideration regarding the appellant's need for continuous assistance in 4 of the DLA, as well as periodic assistance in 1 DLA. The panel also notes the information provided by the appellant's landlord in his letter of April 2013 indicating that he assists her with her DLA.

Given this panel's finding that information has been provided showing the appellant's impairments significantly restrict her DLA continuously (meal preparation, basic housework, daily shopping and management of finances) and periodically for extended periods (use of transportation), the panel finds that based on the information provided from the appellant's landlord, by the resident in the PR and AR, and by the appellant's family physician, the Ministry's determination that because it has not been established that DLA are directly and significantly restricted, it cannot be determined that help is required as provided under section 2(2)(b)(ii) of the EAPWDA, is not reasonable.

#### Conclusion

Having reviewed and considered all of the evidence, including the Additional Information, and the relevant legislation, the panel finds that the Ministry's decision that the appellant was not eligible for PWD designation is not reasonably supported by the evidence. The panel therefore rescinds the Ministry's decision.