

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision of March 27, 2013, which found that the appellant did not meet three of 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 in the opinion of a medical practitioner the appellant's impairment is likely to continue for at least two years. However, the ministry was not satisfied that:

- the evidence establishes that the appellant has a severe physical or mental impairment;
- the appellant's daily living activities (DLA) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; or 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.

## 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 information before the ministry at the time of reconsideration included the following:

- A PWD application form consisting of a physician's report (PR) signed by the appellant's general practitioner (GP) on November 23, 2012; an assessor's report (AR) signed by a social worker on November 30, 2012; and the appellant's undated self-report.
- A physician's consultation report dated July 20, 1982, reporting on a head injury the appellant sustained while playing baseball.
- A letter from the social worker evidently provided to the ministry on March 19, 2013 as supplementary information for purposes of the reconsideration decision.

### *Admissibility of New Information*

The appellant and her advocate provided oral evidence on appeal. This oral evidence included additional detail regarding the appellant's impairments, the effects they have on the appellant's ability to manage DLA, and the nature of the assistance she receives. The ministry stated no position on admissibility of the new information. The panel has admitted this oral evidence as being in support of information and records that were before the ministry at the time of reconsideration, in accordance with s. 22(4) of the *Employment and Assistance Act*.

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

### *Physical Impairment*

- In the Diagnoses section of the PR, the appellant's GP of approximately 5 years diagnosed chronic back pain, multi-joint pain, and hypertension.
- In the Health History portion of the PR, the GP described the back pain as being mechanical, intermittent and continuous, not resolving, and of no treatable cause. The GP also referred to left knee pain.
- With respect to functional skills the GP indicated the appellant can walk 4+ blocks unaided on a flat surface, can climb 2-5 steps unaided, can lift 15 to 35 pounds, and has no limitations with respect to being able to remain seated. The GP indicated the appellant does not require any prostheses or aids for her impairment.
- In the AR the social worker – who had known the appellant for approximately a year at the time the AR was completed - identified the appellant's physical impairments as being a history of head trauma (the 1982 baseball incident), carbon monoxide poisoning (1963), and knee and back pain.
- The social worker indicated the appellant requires periodic assistance from another person for walking indoors and outdoors, climbing stairs, and standing, and that she needs continuous assistance lifting and carrying/holding.
- In her self-report the appellant wrote that she has suffered a lot of back and left knee pain since being injured in a motor vehicle accident. She wrote that it is painful for her to walk any distance or to use stairs, and stated that sometimes her knee buckles under her.
- In her oral testimony, the appellant said that the only treatment she is receiving for her back and knee pain is a prescription for pain killers from her GP. She said that the GP advised her that the pain is caused by arthritis and that no other treatment is available for it.

- In her letter of March 19, 2013 the social worker wrote that the appellant has chronic pain in her back, knees and legs, and that she is on medication to control her high blood pressure.

#### *Mental Impairment*

- In the Diagnoses section of the PR, where the GP is asked to specify diagnoses related to the impairment, the GP diagnosed the appellant with depression.
- The GP indicated the appellant has no difficulties with communication. She noted significant deficits with 2 of 12 areas of cognitive and emotional function – *emotional disturbance* (e.g. depression, anxiety) and *impulse control*.
- In the Additional Comments section of the PR, the GP commented that the appellant may be difficult to retrain due to “slight intellectual deficit. Only completed Grade 4 schooling. Unable to write and reading poor at best. Thus administrative work not possible.”
- In the AR the social worker referred to mental impairments being learning disability, a history of emotional trauma (followed by a question mark), and anxiety/anger management.
- With respect to her ability to communicate, the social worker indicated the appellant’s hearing is good, her speaking is satisfactory, her reading is poor, and she is unable to write. The social worker commented that the difficulties with reading and writing are due to “cognitive/learning disability.”
- The social worker reported major impacts in 3 of 14 categories of cognitive and emotional functioning: *emotion, neuropsychological* (e.g. *learning disability*), and *other* e.g. *hostility*).
- In her self-report the appellant stated that she’d had a learning disability since she was very young and had difficulty in school. In oral testimony the appellant said that she only completed grade 3 and that in later years in school she was just sent to the library to pass time since she could not do the school work.
- In her oral testimony the appellant said that she can’t write except for her name. Under prompting from her advocate, she said that she could read and understand most of the written material she got from the ministry but not all of it.
- In her letter of March 19, 2013 the social worker wrote that the appellant was in a special needs class as a child, has ongoing depression and mood disorders, and has poor impulse control.

#### *DLA*

- The GP indicated that the appellant has not been prescribed any medications or treatments that interfere with her ability to perform DLA.
- The GP reported the appellant as not being directly restricted with the DLA of *personal self-care, meal preparation, management of medications, and management of finances*. She also reported the appellant as not being restricted with mobility inside the home.
- The GP described the appellant as being directly and periodically restricted with respect to the DLA of *basic housework, daily shopping, use of transportation, and social functioning*. She also described the appellant as being directly and periodically restricted with mobility outside the home. The GP commented that periodicity is dependent on pain level, that carrying washing/vacuuming is difficult, and “mood low.” Asked to explain the impact on *social functioning*, the GP commented “mood/irritability increases with increased pain.”
- The social worker provided evidence that the appellant lives alone, and described the appellant as requiring either periodic or continuous help with at least some aspects of every

## DLA.

- For aspects of *personal care*, and for the “carrying purchases home” aspect of *daily shopping*, the need for assistance is linked to leg/mobility pain, with the comment associated with *personal care* “some days are worse than others + she needs continuous help on those days.”
- Difficulties with other DLA are either linked to poor literacy and math skills, or have no explanatory narrative. Difficulties with *social functioning* are explained as “Has difficulty resolving issues with individuals...” The social worker described the appellant as being marginal in her functioning with respect to her immediate and extended social networks.
- In her oral testimony the appellant said that she is often misunderstood by other people, which causes her to react with anger and frustration. In response to a question she said that she has no friends and no family nearby other than her mother, who lives in a seniors’ home.
- The appellant said that she needs support with mobility – in the form of rides – every day, since the cost of bus fare is too high.
- In response to a question, the appellant said that she walks to the store for shopping but has to stop every three blocks to rest, and that she can only carry 2 bags, or sometimes only 1 bag. Walking back from the store takes her about 45 minutes.
- The appellant said that she always has to get someone to help her to carry her laundry up and down stairs.
- In her March 19, 2013 letter the social worker wrote that the appellant has great difficulty understanding how to take her blood pressure medications properly, and that the appellant has limited ability to successfully engage with others or to have meaningful supportive relationships other than with her mother.

*Help*

- Asked in the PR to be specific regarding the nature and extent of assistance required by the appellant to perform DLA, the GP wrote “rest and analgesic.”
- Asked in the AR to describe the assistance provided by other people, the social worker indicated “community service agencies.”
- In the AR the social worker indicated that the appellant does not have an assistance animal.
- In response to a question during her oral testimony, the appellant said that she gets no help with her DLA, other than emotional support from her mother. No one helps her with housework.
- In her March 19, 2013 letter the social worker wrote that the appellant relies on her mother for emotional support and support with her DLA.

## PART F – Reasons for Panel Decision

The issue on this 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 enactment 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, and that in the opinion of a prescribed professional the appellant's impairments do not directly and significantly restrict her from performing DLA either continuously or periodically for extended periods, and that as a result of those restrictions the appellant does not require help to perform DLA?

The relevant legislation is as follows:

### EAPWDA:

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.

**EAPWDR section 2(1):**

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.

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**Severe Physical Impairment**

The appellant's position is that her back, knee and leg pain constitute severe physical impairments that significantly impact her functioning. The appellant argued that the ministry focused too much on perceived differences in the opinions of the GP and the social worker.

The ministry's position, as set out in its reconsideration decision, is that it is not satisfied that the information provided is evidence of a severe physical impairment. The ministry argued that the GP provided little to no medical information or reports with respect to the back pain or hypertension, and that the GP did not diagnose leg or knee pain, though she did reference "knee pain" at one point in the PR.

### Panel Decision

To assess the severity of an impairment one must consider the nature of the impairment and its impact on daily functioning as evidenced by functional skill limitations and the degree of independence in performing DLA. The legislation establishes that the determination of severity is at the discretion of the ministry – the ministry must be “satisfied” that the statutory criteria for granting PWD designation are fulfilled. In making its determination the ministry must act reasonably and consider all the relevant evidence, including that of the appellant. While the legislation establishes that the fundamental basis for the analysis is the evidence from prescribed professionals, the professional evidence has to be weighed and assessed like any other evidence, particularly where there are inconsistencies in the professional evidence.

In the appellant’s case, the GP has diagnosed chronic back pain, multi-joint pain, and hypertension as physical impairments. The panel was provided with no evidence as to how the hypertension impacts the appellant’s ability to function. The GP described the pain as being both intermittent and continuous, and described restrictions of the appellant’s ability to manage some DLA as being “periodic” and “dependent on pain level.” Viewing the appellant’s functional skill levels, however, the only problem identified by the GP appears to be the appellant’s limitations with respect to climbing stairs. The social worker’s evidence, on the other hand, indicates that the appellant needs periodic assistance with walking both indoors and out, with climbing stairs, and standing. The GP indicates the appellant can lift 15 to 35 pounds, but the social worker indicates the appellant requires continuous assistance lifting/carrying/and holding. In the panel’s view the appellant’s evidence with respect to the amount of walking she does tends to support the GP’s assessment of her functional skills. Given the social worker’s dual role as assessor and advocate in this case, and given the longer time period for which the GP has known the appellant, where the GP’s evidence and the social worker’s evidence conflict the panel generally prefers the evidence of the GP.

In the circumstances of this case, where the GP’s assessment shows the appellant’s functional skills are relatively high, and where the evidence indicates that assistive devices are neither used nor required, the panel finds that the ministry was reasonable in determining that the evidence does not establish a severe physical impairment.

### Severe Mental Impairment

The appellant’s position is that her depression and learning disability constitute a severe mental impairment. She argues that the ministry was wrong in concluding that the GP diagnosed only depression as a mental impairment. She points to the GP’s findings of significant deficits regarding emotional disturbances and impulse control as support for her position.

The ministry’s position, as set out in its reconsideration decision, is that since much of the social worker’s information relates to cognitive limitations and learning disability, which doesn’t correlate with the GP’s diagnosis, the ministry is not satisfied that the appellant has a severe mental impairment.

Panel Decision

Section 2 of the EAPWDA requires that an impairment and its expected duration of "at least 2 years" must be confirmed by a medical practitioner. The GP meets the statutory definition of a medical practitioner. The social worker is not a medical practitioner. The Diagnoses section of the PR makes available a number of diagnostic codes that the medical practitioner can use to identify the diagnoses. One such diagnostic code is 5.4 Developmental disability. In the appellant's case, the GP did not identify this diagnosis or provide any other reference to development disability or learning disability. The only diagnosis of a mental impairment provided by the GP is regarding depression.

The GP did indicate in the "Additional Comments" section of the PR that the appellant has an intellectual deficit, indicating to the panel that she viewed it as an ancillary condition, rather than a severe impairment as contemplated by the legislation. This conclusion is supported by the GP's description of the intellectual deficit as being "slight", and by her linking the intellectual deficit to employability (which is not a legislative criterion for PWD designation) rather than to restrictions in the appellant's ability to manage her DLA independently (which is a legislative criterion for PWD designation). The panel notes also that there is no medical evidence of the appellant having been tested or treated for a developmental/learning disability.

Based on the foregoing analysis, and in the context of the limited restrictions her mental condition poses for her ability to manage DLA, which is discussed in more detail below, the panel finds that the ministry reasonably concluded that the evidence falls short of showing that the appellant has a severe mental impairment.

Restrictions in DLA

The appellant's position is that the appellant's physical and mental impairments directly and significantly restrict virtually all of her DLA, either continuously or periodically for extended periods.

The ministry's position is that as the evidence does not establish whether DLA are restricted for extended periods, and since a number of the restrictions identified by the appellant are based on an undiagnosed learning disability, the evidence does not establish that this legislative criterion has been met.

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, or substantial. 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, any 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. Accordingly, in circumstances where the evidence indicates that a restriction arises periodically, it is entirely appropriate for the ministry to require evidence of the duration and frequency of the restriction in order to be "satisfied" that this



legislative criterion is met.

The GP's evidence indicates that the appellant is unrestricted with respect to 5 of the 10 prescribed DLA: *personal self-care, meal preparation, management of medications, management of finances, and decision making.*

The GP indicates the remaining 5 DLA – *basic housework, daily shopping, moving about indoors and outdoors, use of transportation, and social functioning* – are directly and periodically restricted. There is nothing to indicate whether these restrictions are significant, since there is no information provided by the GP or the social worker with respect to how frequently, or for how long, the periodic restrictions arise. The social worker has indicated that the appellant requires continuous help with aspects of *personal self-care* on days where her leg pain is worse, but has provided no information with respect to how often that occurs.

The GP has identified the appellant's mood and irritability with restrictions to one DLA - *social functioning* – of the two DLA which s. 2(1)(b) of the EAPWDR identifies as being specific to severe mental impairment. The other DLA – *decision making* – does not appear to be significantly restricted as the GP's evidence indicates that the appellant manages her own finances, medications, and other activities. The social worker has linked restrictions in 7 DLA – *daily shopping, meal preparation, management of finances (pay rent and bills), management of medications, use of transportation, decision-making and social functioning* to the appellant's learning disability ("poor literacy and math skills"), which has not been confirmed as an impairment.

Based on the evidence as a whole, and considering the appellant's evidence that she lives alone and does not get any help with DLA, the panel finds the ministry was reasonable in determining that the evidence does not establish that the appellant is directly and significantly restricted from managing her DLA either continuously or periodically for extended periods.

### **Help with DLA**

The appellant argues that she needs the help of her mother and community agencies to perform her DLA. She said that a person may need help, even though she is not receiving it.

The ministry's position is that as it has not been established that DLA are significantly restricted it cannot be determined that significant help is required from other persons.

### **Panel Decision**

The evidence indicates that the appellant receives emotional support from her mother. There is insufficient evidence to show that the appellant receives other help to perform her DLA from anyone.

The panel notes that there may be situations in which a person may "require" help but not be receiving it. In the panel's view the word "require" indicates a degree of necessity so that it is something that a person cannot reasonably do without. If the person does not get the help she requires, the DLA goes undone either continuously or periodically for extended periods. In the panel's view there is simply insufficient evidence to show that the appellant relies upon "the significant help or supervision of another person."

There is no evidence that the appellant requires assistive devices or an assistance animal.

Accordingly, the panel finds that the ministry reasonably concluded that as it has not been established that DLA are significantly restricted, it could not be determined that the appellant requires help with DLA as defined by s. 2(3)(b) of the EAPWDA.

### **Conclusion**

The panel acknowledges that the appellant suffers from medical conditions that affect her ability to function. However, having reviewed and considered all of the evidence and the relevant legislation, the panel finds that the ministry's decision declaring the appellant ineligible for PWD designation is reasonably supported by the evidence. The panel therefore confirms the ministry's decision.