

### PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision of June 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 physician's report (PR) and assessor's report (AR) both completed by the appellant's physician on February 21, 2013.
- The appellant's hand-written self-report dated February 12, 2013.
- A letter from the appellant's physician dated June 25, 2013.

### *Admissibility of New Information*

In her oral testimony the appellant provided new information regarding the nature, frequency and duration of the assistance she receives with her DLA. This information provides additional detail with respect to issues addressed in the original PWD application forms. Accordingly, the panel has admitted this new information 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 PR the physician, the appellant's medical practitioner of about 8 months, provided diagnoses of degenerative disc disease and degenerative arthritic joint changes in knees and feet. These conditions cause painful flare-ups.
- In commenting on the severity of the impairment the physician wrote that while a June 2012 X-Ray indicated mild degenerative disc disease in the lower back, the patient's pain and impairment are "considerable". She also commented that an April 2008 bone scan showed degenerative changes in shoulders, knees and feet.
- In terms of functional skills the physician described the appellant as being able to walk unaided on a flat surface for 1 to 2 blocks, to climb 5+ steps (using hand rails), to lift 5 to 15 pounds, and to remain seated for 1 to 2 hours. In the AR the physician indicated the appellant requires periodic assistance with all aspects of mobility. The physician also indicated the appellant takes significantly longer than typical walking outdoors and climbing stairs.
- In her self-report the appellant wrote that she has trouble standing on her own for more than 10 minutes, and that she takes pain medications every day. She stated that she has had this condition for 6 years, and that it "...is really causing my mental anguish."
- In her letter of June 25, 2013 the physician described persistent, chronic degenerative joint disease and depression.
- In her oral testimony on appeal, the appellant said that impairment of her mobility is the most important factor.

### *Mental Impairment*

- The physician diagnosed the appellant with depression, describing mood fluctuations and frustration with physical impairments contributing to psychological distress.
- In the PR the physician noted a significant deficit with cognitive and emotional function with

respect to emotional disturbance. In the AR the physician noted major impacts in 2 of the 14 aspects of cognitive and emotional functioning (sleep disturbance and depression), moderate impacts in 2 other aspects (attention/concentration and motivation), and minimal or no impacts in the other 10 aspects.

- The physician reported the appellant's ability to communicate as good in all respects.
- In her self-report the appellant wrote that she is unable to hold a job which impacts her mental state and makes her very depressed. Not receiving enough money to live on makes her very upset and leaves her with feelings of uselessness and helplessness.

#### DLA

- The physician reported the appellant as needing periodic assistance with aspects of 7 of the prescribed DLA: *personal care, basic housekeeping, shopping, meal preparation, use of transportation, mobility indoors and outdoors, and social functioning*. She described the appellant as functioning marginally with both immediate and extended social networks. The physician explained that "Flare ups of pain & variations in intensity will dictate whether assistance is required."
- The physician described the appellant as being independent with respect to *managing finances* (pay rent and bills) and *managing medications*. There is no indication that the appellant requires any assistance with respect to *decision making*.
- In her June 25, 2013 letter the physician wrote that the appellant's symptoms significantly restrict her ability to perform DLA for extended periods, and that she requires help with DLA "when her own functioning is reduced."
- In her self-report the appellant wrote that her body hurts when doing the simplest tasks; there are some days she is so sore she can't complete anything.
- The appellant wrote that her partner, with whom she lives, requires constant care himself. She wrote "It takes me all day just to do the basics of care not only for myself but also my partners needs too... And because my partner can't help I have to do everything."
- The appellant also wrote that "Housework is only done when I can't handle the mess anymore... I also have to take care of my partner... With all of these problems and stress I myself am getting really depressed – Because I have to do all of the things in keeping the house, cooking, shopping etc."
- In her oral testimony on appeal the appellant stated that her impairment is continuous "24/7".
- In response to a question the appellant said that flare-ups of pain occur about 2 to 3 times in a 24 hour period and she has to take a time out of about ½ hour. Otherwise she feels constant, nagging pain.

#### Help

- In response to a question about the help that is provided with DLA, the physician indicated in the AR "family". The physician referred to "occasional" use of a cane, and confirmed that the appellant does not have an assistance animal. Asked to describe the support/supervision the appellant could use which would maintain her in the community, the physician wrote "Partner... at times is not supportive in these circumstances would benefit from access to physical + psychological support from another agency."
- In response to a question at the appeal hearing the appellant said that her partner helps her with her personal care – he helps her to get dressed, to get out of bed, and to wash her hair. He does most of the laundry, though the appellant organizes it. The appellant washes the dishes; her partner puts them away.

- Asked to describe the periodic help she gets using public transportation, the appellant said that on days when she feels she can't drive their car, her partner walks the 100 m or so with her to the closest bus stop.

## 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 stated that mobility is her most important impairment. She argues that the legislation requires "the opinion of a medical practitioner", and her physician has confirmed that her impairment is severe, chronic and irreversible. The appellant said that the ministry placed too much weight on the fact that she takes analgesics to control pain. She pointed to the physician's statement that the degeneration of her body is chronic and irreversible.

The ministry's position, as set out in the reconsideration decision, is that the appellant's functional skills are in keeping with a moderate degree of impairment. The ministry said that it is not satisfied that the information provided is evidence of a severe physical impairment.

### Panel Decision

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 is clear 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. The ministry cannot simply defer to the opinion of the professionals with respect to whether the statutory requirements are met as that approach would amount to an improper fettering of discretion.

To assess the severity of an impairment one must consider the nature of the impairment and its impact on the appellant’s ability to manage her DLA as evidenced by functional skill limitations, the restrictions to DLA, and the degree of independence in performing DLA. The PR form describes this approach well when it defines the word “impairment” as being “*a loss or abnormality of psychological, anatomical or physiological structure or function causing a restriction in the ability to function independently, effectively, appropriately or for a reasonable duration.*” Of course, this definition is not set out in legislation and is not binding on the panel, but in the panel’s view it quite appropriately describes the legislative intent.

The physician has diagnosed the appellant with 2 physical impairments – degenerative disc disease and arthritic degeneration of other joints. The physician noted that though the June 2012 X-Ray report indicated mild degenerative disc disease, the appellant’s pain and impairment are “considerable.” The panel acknowledges that the appellant’s impairments are, by definition, degenerative. However, the appellant’s functional skills as currently described by the physician appear generally to be in the mid-range, indicating a moderate degree of impairment. In the AR the physician indicated the appellant requires periodic assistance from another person with respect to her functional skills related to mobility and physical ability, but neither she nor the appellant has provided an explanation as to the type of assistance required, its frequency, or duration. Similarly, where the physician has indicated the appellant takes significantly longer than typical for walking outdoors and climbing stairs, she has provided no information as to how much longer these activities require.

As discussed in more detail in the subsequent section of this decision under the heading Significant Restrictions to DLA, the functional skills limitations resulting from her impairment do not appear to have translated into significant restrictions in the appellant’s ability to manage her DLA independently. For these reasons, the panel has concluded that the ministry reasonably determined that there is insufficient evidence to establish that the appellant has a severe physical impairment.

### Severe Mental Impairment

The appellant did not expressly advance an argument with respect to severe mental impairment. She indicated that her physical condition exacerbates her depression and frustration.

The ministry’s position, as set out in its reconsideration decision, is that the information provided is

not sufficient evidence of a severe mental impairment.

### Panel Decision

The evidence appears to indicate that the mental impairment is secondary to the physical impairment. Neither the physician nor the appellant has provided any information as to how the appellant's mental impairment restricts her ability to perform DLA.

Section 2(1)(b) of the EAPWDR prescribes two DLA that are specific to mental impairment – make decisions about personal activities, care or finances (*decision making*), and relate to, communicate or interact with others effectively (*social functioning*). The evidence indicates that the appellant is not significantly restricted with respect to *decision making* in that she independently manages her finances (pay rent and bills) and her medications, and she makes appropriate social decisions.

With respect to *social functioning*, the physician indicated the appellant is independent in all respects except that she requires periodic support or supervision in dealing appropriately with unexpected demands. The physician concluded the appellant functions marginally with both immediate and extended social networks.

The secondary nature of the appellant's mental impairment, coupled with the evidence of limited impacts on the appellant's ability to manage the DLA specific to mental impairment and virtually no information about the impact of her depression on other DLA, lead the panel to conclude that the ministry reasonably found that the evidence falls short of establishing a severe mental impairment.

### Restrictions to DLA

The appellant's position is that her impairment is continuous and therefore her restrictions to DLA are continuous. She is able to manage DLA at times but has to take breaks that last for about ½ hour.

The ministry's position is that as the majority of DLA are performed independently or require some help during unspecified flare-ups of pain, the information from the prescribed professional does not establish that impairment significantly restricts the appellant's DLA either 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 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 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 physician has indicated that the appellant is substantially independent with all or most aspects of most DLA, but that she is periodically restricted with some aspects of 7 of 10 DLA. In her June 25, 2013 letter the physician referred to these restrictions as being "significant". The physician has, however, provided no information with respect to the frequency or duration of the periodic restrictions. The appellant has sought to fill that gap with her oral evidence that she requires a ½ hour time-out 2 or 3 times a day when the pain flares up. She has also provided inconsistent evidence with respect to whether she can perform DLA independently. In her self-report the appellant indicated that she performs all aspects of such DLA as housekeeping, cooking and shopping because her "partner can't help..." In her oral evidence the appellant said that she does receive help from her partner with laundry, cooking, dish-washing, and personal care. Because of these unexplained inconsistencies, the panel cannot give significant weight to the appellant's evidence of restrictions on DLA, or the duration or frequency of those restrictions.

On balance, the evidence indicates that the appellant is substantially independent with respect to most aspects of virtually all DLA. The physician has provided no evidence as to how often the periodic flare-ups of pain - which restrict the appellant's ability to perform DLA independently - occur, or how long they last when they do occur.

On balance, and viewing the evidence as a whole, the panel finds that the ministry reasonably concluded that the evidence is insufficient to prove that the appellant is significantly restricted in her ability to perform DLA either continuously, or periodically for extended periods.

### **Help with DLA**

The appellant argues that she requires help with DLA. She states that if she were on her own, she doesn't know that she would be able to do anything at all.

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. The ministry acknowledges that a cane is used occasionally for mobility.

### **Panel Decision**

As noted above, the evidence is inconsistent with respect to the degree of help the appellant receives with DLA from her partner. However, even if the appellant receives the help from her partner that she indicated in her oral evidence, it would be difficult to conclude that it constitutes "the significant help or supervision of another person" that is required by s. 2(3)(b)(ii) of the EAPWDA. The appellant's occasional use of a cane for walking is not sufficient to fulfill this legislative criterion.

The appellant does not use an assistance animal.

For these reasons, 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's medical conditions 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 a reasonable application of the legislation in the circumstances of the appellant. The panel therefore confirms the ministry's decision.