APPEAL #

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 06 September 2013 denying the appellant designation as a person with disabilities (PWD). The ministry determined that the appellant did not meet all of the required criteria for PWD designation set out in the *Employment and Assistance for Persons with Disabilities Act*, section 2. Specifically, the ministry determined that the information provided did not establish that the appellant has a severe mental or physical impairment that in the opinion of a prescribed professional

(i) directly and significantly restricts her ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and,

(ii) as a result of those restrictions, she requires help to perform those activities.

The ministry determined that the appellant satisfied the other 2 criteria: she has reached 18 years of age and her impairment in the opinion of a medical practitioner is likely to continue for at least 2 years.

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

At the request of the ministry, and with the consent of the appellant, a ministry trainee attended the teleconference hearing.

The evidence before the ministry at reconsideration consisted of the following:

1. The appellant's PWD Designation Application dated 04 April 2013. The Application contained:
   - A Physician Report (PR) dated 04 April 2011, completed by the appellant's general practitioner (GP) who has known the appellant for 8 years and has seen her seen 2 -10 times in the past 12 months.
   - An Assessor Report (AR) of the same date and completed by the same GP.
   - A Self Report (SR) completed by the appellant.
   - Medical reports: several lab tests, a post-endoscopy physician instructions sheet and a genetic counseling assessment consult report (see below).
   - A newspaper article on iron overload as a common genetic disorder.

2. The appellant's Request for Reconsideration dated 26 August 2013, in which the appellant sets out reasons for her request.

In the PR, the GP diagnoses the appellant's impairments as hepatitis C (onset 2001?), diabetes (onset 1989?), anemia/GI bleeds (onset 2011?), hemochromatosis (onset 2001?), and polycythemia (onset 2001?).

The panel will first summarize the evidence from the PR and AR relating to the appellant's impairments as it relates to the PWD criteria at issue.

Severity/health history

PR:
Under health history, the GP notes "fatigue, nausea, emotional lability."
The GP reports that the appellant has not been prescribed any medication and/or treatments that interfere with her ability to perform DLA.
The GP answers "No" to the question as to whether she requires any prostheses or aids for her impairment.
The GP indicates that the appellant's impairment is likely to continue for two years or more, explaining "permanent, unless miracle can be found."

The GP reports that the appellant can walk unaided less than 1 block, can climb 2 to 5 steps unaided, lift 5 to 15 pounds, has no limitation with respect to remaining seated and has no difficulties with respect to communication.

The GP reports that the appellant has significant deficits with cognitive and emotional function in the areas of emotional disturbance and motivation.

AR:
The GP lists impairments that impact the appellant's ability to manage DLA as fatigue, nausea and emotionally lability.

Ability to perform DLA

PR:
The GP indicates that the appellant lives alone.
Regarding ability to communicate, the GP assesses the appellant's speaking, reading, writing and hearing as good.
With respect to mobility and physical ability, the GP assesses the appellant independent for walking indoors and standing, and requiring periodic assistance from another person for walking outdoors, climbing stairs, lifting and carrying and holding. No explanations or comments are provided.

As the GP has not identified a mental impairment or brain injury, "N/A" is noted for the table in the AR regarding cognitive and emotional functioning and impacts on daily functioning.

As to assistance required for the DLA requiring physical effort, the GP provides the following assessments (with comments in parentheses):

- Personal care: independent in all aspects.
- Basic housekeeping: independent in all aspects (with difficulty).
- Shopping: independent for going to and from stores (with taxi), reading prices and labels making appropriate choices and paying for purchases; periodic assistance from another person required for carrying purchases home.
- Meals: independent in all aspects.
- Paying rent and bills independent in all aspects.
- Medications: independent in all aspects
- Transportation: independent for getting in and out of vehicle and using transit schedules and arranging transportation; periodic assistance from another person required for using public transit (cannot rely on bus since would need to sit & this may not always be possible).
- General comment: "transportation," "help with household chores/cleaning."

Regarding social functioning, the GP assesses the appellant independent of the need for support/ supervision in making appropriate social decisions, ability to develop and maintain relationships, interacting appropriately with others, ability to deal appropriately with unexpected demands (comment: anxiety in some situations), and ability to secure assistance from others.

The GP assesses the appellant with good functioning with her immediate and her extended social networks.

Assistance required/provided

The GP indicates that the appellant needs assistance with transportation and household duties/chores. The GP comments that the appellant receives no assistance from others on a regular basis. The GP indicates that the appellant does not routinely use an assistive device and that none is required. The appellant does not have an assistance animal.

Self Report

In her SR, the appellant describes her disabilities as:

- Hepatitis C – cause unknown; interferon – rib[ivarin] treatment failed – 2001.

- Diabetes – insulin dependent – not well controlled.
- Hypertension
- Polyeythemia – low RBC-WC-platelets-ferritin.
- Hemocromatosis – genetic
- Liver damage – caused by above conditions.
- Anemia & stomach bleeds caused by liver damage.
- Porphyria – caused by Hemocromatosis.
- Vertigo – ongoing since interferon – rib[ivarin] treatment in 2001 – can be very severe at times (" Shake your head & walk into oncoming traffic")

The appellant writes:

> "Most times I cannot walk more than 1 block. I take taxis everywhere & I have trouble performing basic household tasks due to fatigue and lack of breath caused by the lack of iron and red cells not being able to circulate oxygen through my body.
> I am very tired, I have had 3 blood transfusions and 3 iron transfusions in the last 12 months – they help but they do not last.
> My diabetes is not well controlled. I can go from 18.00 all day to under 2.00 in an hour – it can play havoc with your body and emotions.
> The iron pills (fera max) that I need for my anemia (the only ones I have found that do not make me violently ill) and the sunscreen I need for my porphyria are both $20:00 per month. Neither is covered by [MSP].
> [Her G.I. specialist] says that I will go on the UNIS list but I will never get the transplant (OK with me) and no doctor will perform surgery on me.
> I have been PPMB for 15 years +++. My conditions are not only ongoing they are growing.
> Fibromyalgia+ carpal tunnel syndrome – caused by above conditions."

Medical Reports

The genetic consult report is dated 14 March 2011 and was prepared by a Health Authority genetic counsellor. The report was regarding the appellant's personal diagnosis of hereditary hemochromatosis (HHC) and prophyria cutanae tarda (PCT). The counsellor explains that HHC is a hereditary disorder of iron regulation in which increased absorption can eventually lead to iron overload. High absorption of iron can occur with excessive storage, particularly in the liver, skin, pancreas, heart, joints and testes. Abdominal pain, weakness, lethargy and weight loss are common early symptoms. PCT is the most common and also the most readily treated form of prophyria. PCT is caused by a deficiency of the enzyme UROD in the liver. Iron has a central role in causing PCT. High iron levels are known to inhibit the activity of UROD. Liver iron is often increased in PCT. Marked increases in ferritin suggest that the patient has HHC, an iron overload condition, in addition to PCT. Because iron overload contributes to PCT and HHC is one of the most common genetic diseases, it is not surprising that some patients have both conditions. The most common symptoms of PCT are fragility and blistering of light-exposed areas of the skin, excessive growth of facial hair and pseudosclerodama. PCT is accompanied by some degree of liver damage which is often mild or moderate, but over time there is a risk of developing cirrhosis and even liver cancer.

The counsellor writes that the appellant's health history could have influenced the course of her HHC and PCT: having a hysterectomy at 29 years and having hepatitis C can influence the course of both

diseases and how they can affect the course of each other.

The balance of the report addresses the possibility of the two diseases appearing in her children, an issue not relevant to this appeal.

The medical reports also include 6 blood work lab reports from 17 January 2012 to 16 January 2013.

The post endoscopy physician instructions sheet, dated 21 January 2013, notes that biopsies were obtained during her colonoscopy and gastroscopy. The surgeon notes that there were "small colon polyps," and "mild stomach bleeding →iron deficiency."

In her Request for Reconsideration, the appellant writes:

> "Given the number and severity of my medical conditions and the added expense in dealing with them, i.e. taxi trips to [another city], four times in six weeks for blood and iron transfusions, iron pills, and the fact that these conditions can and often do interfere with my ability to perform normal daily tasks, I think I should be considered to have a permanent medical disability."

In her Notice of Appeal, dated 20 September 2013, the appellant writes:

> "Daily living activities
> "Chores: Take significantly longer. I do a little bit, rest, do a bit more, rest again..... On days that are particularly bad, things just do not get done. Until January of this year, my mother, who lived with me, had care workers twice a week and they helped with several of the household chores.
>
> "Walking and shopping: Since I live about 3 km from town, shopping, being able to walk a block on bad days, (which happens often), [....] is not much use, and as stated by my doctor, public transportation is not a good option for me. I take taxis to the store, stop and rest a few times while in the store, have had store personnel ask for more than one occasion if they could call an ambulance for me because of semi-fainting spells. Return taxi drivers always carry my purchases to the door.
>
> "Additional information from doctor: [The GP] did not fill out the original forms in great detail because he believed that the limitations caused by my conditions would be self-evident, especially to a person with medical training. I was unable to get additional information from my doctor because I live in [hometown] and all my doctors are in [another city]. Round-trip transportation is about $100 per trip. This is significantly affecting my ability to get medical advice and treatment.
> Between June 26 and August 16 I have had two blood transfusions and three iron transfusions. I was to have a fourth iron transfusions but could not go because I could not afford transportation. If I had a PWD [designation] I would be eligible for cheaper transportation. Case in point – after the August 16th transfusions I had a bad reaction, intense pain, fever, flushing and vomiting for over 12 hours. I should have and would have called an ambulance and gone to the hospital in [a nearby city], except that once I was treated and released I had no way to get home. A PWD [designation] would have given me options.
> *I believe that a PWD [designation] is essential to my healthcare and my ability to remain

as independent as possible, for as long as possible. In short, a certain security and dignity of life."

At the hearing, the appellant provided oral testimony that included additional detail with respect to her diagnosed impairments and the impacts they have on her ability to perform DLA. She referred to her written reasons in he Notice of Appeal, and spoke to the three items listed;

- The length of time required in completing household chores – sometimes these do not get done, or she takes long breaks in order to complete her chores.
- Her ability to walk and shop is impacted; there are times she cannot walk more than one block and is therefore unable to even walk to her mailbox.
- Her physician does not like filling out forms, and in any event, she could not get additional information in support of this appeal as her physician is in another city and the appellant could not afford the transportation expenses to see her physician about providing more information.

The appellant stressed that her biggest issue is obtaining transportation assistance to enable her to receive adequate medical care. She indicated that she is on waiting lists for a local physician and a closer specialist, having only moved to her current location from another city in June, 2013.

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

The ministry did not object to the admissibility of the new information provided by the appellant in her Notice of Appeal and at the hearing. The panel finds that this information is in support of the information before the ministry at the time of the reconsideration, clarifying points mentioned in the PWD Application and in the appellant's Request for Reconsideration. The panel therefore admits the appellant's submissions pursuant to Section 22(4)(b) of the *Employment and Assistance Act*.

APPEAL #

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 has a severe mental or physical impairment that in the opinion of a prescribed professional

(i) directly and significantly restricts her ability to perform daily living activities either continuously or periodically for extended periods; and,

(ii) as a result of those restrictions she requires help to perform those activities.

The ministry determined that she met the 2 other criteria in *EAPWDA* section 2(2) set out below.

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.

The panel will consider each party's position regarding the reasonableness of the ministry's decision under the applicable PWD criteria at issue in this appeal.

Severity of impairment

For PWD designation, the legislation 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 (in this case, the appellant's GP) identify the impairment and confirm that impairment 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 or shortness of breath). A severe impairment requires the identified cause to have a significant impact on daily functioning.

Mental impairment

The position of the ministry is that, based on the evidence provided by the GP, there is not enough evidence to establish a severe mental impairment. At the hearing, the appellant stated that her application for PWD designation was not based on a mental deficit, but rather on her disabling physical conditions, explaining that her emotional lability was occasioned by these conditions, particularly as a result of sudden drops in blood sugar due to her uncontrolled diabetes.

The panel notes that the GP has not diagnosed a mental health condition as an impairment. While the GP reported that the appellant had significant deficits with cognitive and emotional function in the areas of emotional disturbance and motivation and that emotional lability was a factor, no cognitive and emotional impacts on daily functioning were identified and, apart from "anxiety in some situations," no difficulties with social functioning were noted. On this basis, and taking into account the appellant's statement at the hearing, the panel finds that the ministry was reasonable in determining that a severe mental impairment had not been established.

Physical impairment

In the reconsideration decision, the ministry noted that the GP indicates that the appellant is able to walk less than 1 block unaided, climb 2 – 5 steps unaided and can lift between 5 – 15 pounds. The

ministry also noted that the GP indicates that the appellant requires periodic assistance with walking outdoors, climbing stairs, lifting, and carrying and holding; however no information is provided on how often she requires assistance. The position of the ministry is that the functional skill limitations described by the GP are more in keeping with a moderate degree of physical impairment and is therefore not satisfied that the information provided is evidence of a severe physical impairment.

The position of the appellant is that her GP did not fill out the application forms (i.e. the PR and AR) in great detail because he believed that the limitations caused by her conditions would be self-evident, especially to a person with medical training. She argues that her chronic, progressive and debilitating medical conditions, the resulting fatigue and nausea, her difficulties with mobility, household chores and transportation, and the need for frequent visits to the hospital for transfusions, all point to a severe physical impairment.

The panel notes that the legislation requires that the minister be "satisfied" that the applicant has a severe impairment. The panel takes this to mean that the minister must be persuaded by the evidence, starting with the diagnoses provided a medical practitioner and the unbiased and expert assessments of the impacts on daily functioning given by a medical practitioner/prescribed professional, including sufficient details, descriptions or explanations to convey a clear picture of these impacts. The panel does not view as consistent with the legislation the proposition, attributed to her GP by the appellant, that the minister should be able to deduce from a list of diagnoses and side effects the severity of the applicant's impairment. This proposition also does not take into account that, for different people a medical condition will frequently cause varying degrees of impact on daily functioning, an argument made by the ministry at the hearing.

The panel notes that the GP diagnoses the appellant with several chronic medical conditions: hepatitis C, diabetes, anemia/GI bleeds, hemochromatosis, and polycythemia). Under health history in the PR, the space provided for the medical practitioner to describe the severity of the applicant's medical condition, the GP noted fatigue, nausea and emotional lability, without describing the frequency, degree or duration of these side effects or the circumstances under which they occur. The GP has assessed some limitations to the appellant's mobility, reporting in the PR that she is able to walk less than one block ("at times" according to the appellant), climb 2 – 5 steps. In the AR, the GP assesses the appellant requiring periodic assistance for walking outdoors, climbing stairs, lifting and carrying and holding, without providing any information as to the nature and frequency of such periodic assistance. No assistive devices are routinely used or required. As to the other DLA requiring physical effort, the GP assesses the appellant independent in almost all aspects (see below), while the appellant has described her difficulties with doing household chores as taking significantly longer than typical and her risk of fainting while shopping (not confirmed by the GP), her reliance on taxis, and has emphasized her financial difficulties with transportation to and from hospitals and doctors' offices. The panel finds that, without further information that would present a clearer picture of how and to what extent her medical conditions restrict her daily functioning, the ministry was reasonable in determining that a severe physical impairment had not been established

Significant restrictions in the ability to perform DLA.

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

The appellant's position is that her medical conditions significantly restrict her ability to perform many DLA, particularly moving about indoors and outdoors, shopping for personal needs, using public transport and performing housework.

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, a criteria is not established in this appeal. This DLA criterion must also be considered in the broader context of the legislation, which provides that the minister may designate a person as a person with disabilities "if the minister is satisfied that" the criteria are met, including this one. In exercising the discretion conferred by the legislation, it is reasonable that the minister would expect that the opinion of a prescribed professional be substantiated by information that would satisfy the minister that the direct and significant restrictions in the ability to perform DLA, either continuously or periodically for an extended period, are validated.

As noted above, the appellant's prescribed professional – her GP – has reported some limitations in the appellant's ability to move about indoors and outdoors. For all aspects of the other DLA requiring physical effort, the GP has assessed the appellant independent, with the exception of carrying purchases home from shopping and using public transit, where periodic assistance from another person is noted, though the frequency or type of help is not described. The GP has also commented that, while the appellant is assessed as independent for basic housekeeping, this is done "with difficulty," but without further explanation, and that she needs "help with household chores/cleaning," without describing the frequency or type of help needed.

In the panel's view, considering that a severe mental or physical impairment has not been established and assessing the appellant's overall ability to function as reported in the PR and AR, it is difficult to assess the GP's opinion as confirming that the restrictions to her ability to manage her DLA are "significant." The panel therefore finds that the ministry reasonably determined that this legislative criterion had not been met.

Help with DLA

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 appellant's position is simply that she requires ongoing help from others, particularly for household chores, shopping and transportation to and from her doctors' offices and hospital.

The panel notes that the legislation requires that in the opinion of a prescribed professional the need for help must arise from direct and significant restrictions in the ability to perform DLA that are either continuous or periodic for extended periods. The panel finds that the ministry reasonably determined that since 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.

Conclusion

Having reviewed and considered all of the evidence and the relevant legislation, the panel finds that the ministry's decision that the appellant was not eligible for PWD designation was reasonably supported by the evidence and therefore confirms the ministry's decision.