

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development's (the ministry) reconsideration decision dated May 21, 2013 which found that the appellant did not meet two of the five statutory requirements of section 2 of the *Employment and Assistance for Persons with Disabilities Act* (EAPWDA) for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement, that the appellant's impairment was likely to continue for at least two or more years, and that the appellant has a severe physical impairment. However, the ministry was not satisfied that:

- the appellant's daily living activities (DLA) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and that
- as a result of those restrictions, the appellant requires the significant help or supervision of another person, an assistive device, or the services of an assistance animal, to perform DLA.

## PART D – Relevant Legislation

*Employment and Assistance for Persons with Disabilities Act* (EAPWDA), section 2  
*Employment and Assistance for Persons with Disabilities Regulation* (EAPWDR), section 2

## PART E – Summary of Facts

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

- 1) The appellant's Request for Reconsideration dated April 19, 2013 (RFR) stating that she needs an extension as she is not yet ready to submit the form for reconsideration;
- 2) Letter from the ministry to the appellant with a PWD Designation Decision Summary dated March 11, 2013 (the "Summary") confirming that the ministry was satisfied that the appellant met the age requirement, that the appellant's impairment was likely to continue for at least two or more years, and that the appellant had a severe physical impairment. In particular, the Summary indicates that the appellant's physician has diagnosed her with COPD, irritable bowel syndrome, osteoarthritis of the cervical spine and GERD/Ulcer.
- 3) A PWD application comprised of a Self-Report dated February 22, 2013 (SR); a Physician Report (PR) dated February 2, 2013 completed by the appellant's physician; and an Assessor Report (AR) also dated February 2, 2013 and completed by the appellant's physician. On the PR the physician indicates that the appellant has COPD, irritable bowel syndrome, osteoarthritis cervical spine, tendinitis in her hands and GERD/Ulcer and is significantly impaired for physical activity. The physician reports that the appellant is 5'3" and 140 pounds. He also reports that her impairment is permanent and worsening. On the PR and AR the general practitioner reports that he has known the appellant since June 2006 and has seen the appellant two to ten times in the last year; and
- 4) Chest X-Ray report dated February 13, 2013.

### *New Information*

In her Notice of Appeal dated May 28, 2013, the appellant states that she needs constant help with DLA, her roommate does all the yard work, chops fire wood and brings it upstairs, carries her laundry, takes the garbage out, and helps with sweeping and shopping. The appellant also states that she only showers when her roommate is at home or when someone else is there due to vertigo and balance issues. The appellant further states that she did not complete the RFR because she is still waiting for her physician to return from a month's holiday and she has an appointment on June 5, 2013. The appellant states that she was going to see her physician to have him amend the disability forms as he was not aware that she had a roommate. The appellant states that she should have explained her situation to her physician more clearly. The appellant asks whether she should still have her physician amend the disability application forms or whether her statement is sufficient.

Following her Notice of Appeal the appellant also provided a letter dated June 18, 2013 advising that she was unable to provide any further information from her physician as he was in a car accident on his way home from holidays and has not yet returned to work. She also provided a letter from her roommate dated June 17, 2013 providing information as to the assistance he provides to the appellant including, chopping and carrying firewood, yard work, shopping, changing light bulbs, vacuuming, meal preparations, taking the garbage out and being present when the appellant showers (the Roommate Letter).

The panel has admitted the appellant's written testimony and the Roommate Letter into evidence as they are support of information and records that were before the ministry at the time of reconsideration, in accordance with section 22(4) of the *Employment and Assistance Act*. In particular, the panel finds that the new evidence relates to the appellant's impairment and the impact on her functioning.

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

### ***Mental Impairment***

In the SR, the appellant reports that she suffers from depression, and that being emotionally stressed or depressed effects her breathing causing her to cough and gasp for air.

In the SR the appellant states that she suffers from depression and because she suffers from physical and financial stressors, these trigger her disabilities. The appellant reports that she feels like she cannot do very much of anything, nothing is very important, and she is losing her ability to care. She reports that she isolates a lot because of her health and because she lacks interest in being with others. She also reports that she does not seem to have much of a sense of humor, and is tired no matter how much she sleeps.

In the PR, there is no report of a mental impairment in Section A - Diagnosis of the PR, but in Section C, the physician reports that the appellant has significant deficits with cognitive and emotional function, namely emotional disturbance. In the comments section, the physician reports that the appellant has depression "on and off".

In the AR, for section 4, cognitive and emotional functioning, the general practitioner reports that the appellant has moderate impact to bodily functions and emotion. Under comments the physician reports that the appellant's sleep is interfered with by chronic mild depression and chronic pain.

#### **DLA**

In the SR, the appellant reports that due to her breathing difficulties it is difficult to clean, shop, walking very far (i.e. farther than 80 feet), getting the garbage out or carrying more than 10 pounds. The appellant reports that she cannot do anything in a hurry and must move slow and steady because if she rushes she gets in a panic and cannot breathe.

The appellant also reports that when she has flare-ups of abdominal pain and diarrhea she cannot be away from the toilet and cannot leave home until it passes, often being unable to do anything but rest. She reports that due to the tendonitis in her thumbs and wrist and right shoulder she cannot perform repetitive movements such as opening cans (no more than 2), sweeping, scrubbing, vacuuming, writing, knitting or crocheting. The appellant reports that she can only do a little at a time and if she does too much her thumbs and wrists swell up, she has extreme pain and she loses all strength in her hands and she is unable to pick up a cup of coffee or use her right arm at all. She reports that as she is right-handed this affects everything she does and it will take 2 to 5 days for the function to come back if she rests and takes pain killers.

In the SR, the appellant also states that the arthritis in her neck causes stabbing and aching pain in her neck and shoulders which radiates to her back and hips. As a result, she reports that she cannot work very long with her head bent down which impacts activities such as paperwork, reading, knitting and sewing.

In the Notice of Appeal the appellant states she requires constant help with DLA and that her roommate does all the yard work, chops the fire wood and brings it upstairs, carries her laundry up and down the stairs, take the garbage out on garbage day, helps with vacuuming and sweeping, brings things upstairs from the freezer and does the major shopping once a month. She also states that she only showers when her roommate or someone else is home due to vertigo and dizziness. If no one else is there she will only sponge bath as she is afraid of falling.

In the Roommate Letter, the roommate states that as the appellant has great difficulty lifting and carrying things up and down the stairs he does that for her. He chops and brings her firewood for her, carries her laundry up and down the stairs, does the yard work, goes shopping once a month, changes light bulbs, and helps with vacuuming and meal preparations where chopping is involved. He also takes the garbage out on garbage day.

In the PR, the appellant's physician reports that the appellant can walk less than 1 block, can climb 2-5 stairs,

can lift under 5 pounds and can remain seated 1-2 hours. The physician also reports that the appellant requires continuous assistance with carrying and holding and periodic assistance with laundry and basic housekeeping due to physical limitation. The physician also reports that the appellant has emotional disturbance with depression, on and off.

In the AR the appellant's physician reports that the appellant is independent with walking indoors, requires periodic assistance with climbing stairs, standing and lifting. The physician reports that the appellant requires continuous assistance with walking outdoors, carrying and holding. The physician also reports that the appellant's lifting and carrying abilities are markedly restricted.

In the AR, the general practitioner reports that the appellant is independent with the following tasks: dressing, grooming, bathing, toileting, feeding self, regulating diet, transfers (in/out of bed), transfers (on/off of chair), going to and from stores, reading prices and labels, making appropriate choices, paying for purchases, meal planning, food preparation, cooking, safe storage of food, banking, budgeting, paying rent and bills, filling/refilling prescriptions, taking medications as directed, safe handling and storage of medications, and getting in and out of a vehicle.

The physician reports that the appellant requires periodic assistance with laundry and basic housekeeping and continuous assistance with carrying purchases home. Under additional comments, the physician reports that the appellant's physical limitations restrict carrying, walking and housework.

With respect to social functioning, the physician reports that the appellant is independent with making appropriate social decisions, developing and maintaining relationships, interacting appropriately with others, dealing appropriately with unexpected demands and securing assistance from others. The physician reports that the appellant has good functioning with respect to her relationships with her immediate social network and extended social networks.

### ***Need for Help***

In the SR, the appellant states that her neighbor comes to clear the snow in the driveway in the winter and helps with cutting the grass. She reports that she has to rely on others to help her with shopping, cleaning, carrying and reaching and it makes her feel bad and adds to her depression.

In the Notice of Appeal the appellant states that she requires constant help with DLA and that her roommate does all the yard work, chops the fire wood and brings it upstairs, carries her laundry up and down the stairs, take the garbage out on garbage day, helps with vacuuming and sweeping, brings things upstairs from the freezer and does the major shopping once a month. She also states that she only showers when her roommate or someone else is home due to vertigo and dizziness. If no one else is there she will only sponge bath as she is afraid of falling.

In the Roommate Letter, the appellant's roommate states that as the appellant has great difficulty lifting and carrying things up and down the stairs he does that for her. He chops and brings her firewood for her, carries her laundry up and down the stairs, does the yard work, goes shopping once a month, changes light bulbs, and helps with vacuuming and meal preparations where chopping is involved. He also takes the garbage out on garbage day.

In the PR, the physician reports that the appellant requires a nebulizer/spacer for metered dose inhalers.

In the AR, the physician reports that the appellant requires help from neighbors for activities outside her home such as "...garbage, gardening, snow clearance, etc".

## PART F – Reasons for Panel Decision

The issue on the 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 legislation in the circumstances of the appellant. In particular, was the ministry reasonable in determining:

- that the appellant's DLA's are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and that
- as a result of those restrictions, the appellant does not require the significant help or supervision of another person, an assistive device, or the services of an assistance animal, to perform DLA?

The criteria for being designated as a person with disabilities (PWD) are set out in Section 2 of the EAPWDA as follows:

### Persons with disabilities

2 (1) In this section:

"**assistive device**" means a device designed to enable a person to perform a daily living activity that, because of a severe mental or physical impairment, the person is unable to perform;

"**daily living activity**" has the prescribed meaning;

"**prescribed professional**" has the prescribed meaning.

(2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act if the minister is satisfied that the person has a severe mental or physical impairment that

(a) in the opinion of a medical practitioner is likely to continue for at least 2 years, and

(b) in the opinion of a prescribed professional

(i) directly and significantly restricts the person's ability to perform daily living activities either

(A) continuously, or

(B) periodically for extended periods, and

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

(3) For the purposes of subsection (2),

(a) a person who has a severe mental impairment includes a person with a mental disorder, and

(b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires

(i) an assistive device,

(ii) the significant help or supervision of another person, or

(iii) the services of an assistance animal.

(4) The minister may rescind a designation under subsection (2).

Section 2(1)(a) of the EAPWDR defines DLA for a person who has a severe physical or mental impairment as follows:

### Definitions for Act

2 (1) For the purposes of the Act and this regulation, "**daily living activities**",

(a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following activities:

(i) prepare own meals;

(ii) manage personal finances;

- (iii) shop for personal needs;
  - (iv) use public or personal transportation facilities;
  - (v) perform housework to maintain the person's place of residence in acceptable sanitary condition;
  - (vi) move about indoors and outdoors;
  - (vii) perform personal hygiene and self care;
  - (viii) manage personal medication, and
- (b) in relation to a person who has a severe mental impairment, includes the following activities:
- (i) make decisions about personal activities, care or finances;
  - (ii) relate to, communicate or interact with others effectively.

### **Severity of mental impairment:**

The panel notes that the reconsideration decision indicates that the ministry found that the evidence established that the appellant had a severe physical impairment but does not contain the ministry's determination as to whether the evidence established that the appellant has a severe mental impairment. As the ministry had found that a severe physical impairment had been established and as the physician had not diagnosed a mental health condition as an impairment, the panel finds that the ministry was reasonable in not making a determination regarding a severe mental impairment.

### **Restrictions in the ability to perform DLA**

The appellant's position is that her physical impairments directly and significantly restrict her ability to perform DLA. In particular, the appellant states that she is unable to shower unless her roommate or another person is there and that she requires constant help with DLA. The appellant states that her roommate does all the yard work, chops and brings in fire wood, carries her laundry up and down the stairs, takes the garbage out, helps with vacuuming and sweeping, brings items upstairs from the freezer and pantry, does the major shopping once a month, changes light bulbs, carries heavy items, moves heavy items around the house, and cleans her driveway in the winter.

The ministry's position is that the evidence of the prescribed professional establishes that because the appellant has a severe physical impairment it would be reasonable to find that her impairments impact her ability to manage DLA but there is no information on how often she requires assistance. The ministry states that as the appellant's physician reports that the appellant is able to manage the majority of DLA independently and is independent in all aspects of social functioning, there is not enough evidence to establish that the appellant's severe impairment, in the opinion of a prescribed professional, significantly restricts the appellant's DLA either continuously or periodically for extended periods.

### *Panel Decision*

The legislation requires that a severe impairment, in the opinion of a prescribed professional, directly and significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods. The term "directly" means that there must be a causal link between the severe impairment and the restriction. The direct restriction must also be significant – it must be more than trifling and more than merely an inconvenience. Finally, there is a component related to time or duration. The direct and significant restriction may be either continuous or periodic. If it is periodic it must be for an extended time. Inherently, an analysis of periodicity must also include consideration of the frequency. All other things being equal, a restriction that only arises once a year is less likely to be significant than one which occurs several times a week. While the legislation must be interpreted in a large and liberal manner, there still must be sufficient evidence on each of the legislative criteria to reasonably satisfy the ministry that they have been met.

In the AR, the physician reports that the appellant's physical impairment directly restricts 3 of the 8 prescribed DLA set out in EAPWDA section 2(1)(a) in relation to a person who has a severe physical impairment (*shop for personal needs, perform housework and move about indoors/outdoors*). The physician reports that the appellant is independent with walking indoors but requires continuous assistance with walking outdoors. The physician indicated that the appellant is unrestricted in 5 of the 8 prescribed DLA (*prepare own meals, manage personal finances, use public or personal transportation facilities, perform personal hygiene and self care, and manage personal medication*), although the physician notes that public transit is not available.

The panel notes that there are some inconsistencies between the physician's evidence and that of the appellant and her roommate. For example, on the AR, the physician reports that the appellant is independent with food preparation but the appellant and her roommate both indicate that the appellant has difficulty with chopping foods and that the roommate helps the appellant with chopping.

While section B, question four of the AR, indicates that the appellant's mental impairment restricts or impacts her functioning with respect to bodily functions and emotion, the evidence of the prescribed professional does not indicate that the appellant has a severe mental impairment that directly and significantly restricts the appellant's ability to perform the two prescribed DLA set out in EAPWDA section 2(1)(b), being i) making decisions about personal activities, care or finances or ii) relating to, communicating or interacting with others effectively.

The panel notes that there is an inconsistency between the appellant's evidence of the impact of her depression in that she states that her depression causes her to isolate whereas her physician reports that her social functioning is independent and that she has good functioning with her immediate and extended social networks.

The panel also notes that on the AR, the physician reports that the appellant lives alone whereas the appellant indicates that she rents the basement to her roommate. In her Notice of Appeal, the appellant states that she was going to have her physician amend the disability forms as he was not aware that she has a roommate. The appellant also states that she should have explained things more clearly to her physician. While it may be that the appellant's physician does not have a full understanding of the appellant's situation and all of the impacts that the appellant's impairments have on her DLA, the information provided by the prescribed professional does not establish that the appellant's severe impairment directly and significantly restricts her ability to perform DLA either continuously or periodically for extended periods. For example, the prescribed practitioner does not provide any information on how often or how frequently the periodic assistance is required and his information indicates that most of the appellant's activities are managed independently.

Therefore, the panel finds that the ministry's reconsideration decision, which determined that the noted restrictions in the appellant's ability to perform some aspects of some DLA did not constitute a direct and significant restriction of the appellant's ability to perform DLA either continuously or periodically for extended periods, thereby not satisfying the legislative criteria of section 2(2)(b)(i) of the EAPWDA, was reasonable.

### **Help with DLA**

The appellant's position is that she requires help with DLA including lifting heavy items, yard work, garbage removal, clearing her driveway, vacuuming, sweeping and someone to be in her home when she showers.

The ministry's position is that as it has not been established that DLA's are significantly restricted, it cannot be determined that significant help is required from other persons, and no assistive devices are required.

Section 2(2)(b)(ii) of the EAPWDA requires that, in the opinion of a prescribed professional, as a result of direct and significant restrictions in the ability to perform DLA, a person requires help to perform those activities.

Help is defined in subsection (3) of the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform a DLA.

In the PR, the physician reports that the appellant requires a nebulizer/spacer for metered dose inhalers. The panel does not consider a nebulizer to be an assistive device as defined in the legislation: rather, such an item is a means to deliver medication.

In the AR, the physician reports that the appellant requires help from neighbors for activities outside her home such as "...garbage, gardening, snow clearance, etc".

The Roommate Letter provides some detail of the tasks that he assists the appellant with but there is no indication of how often or how much assistance is provided in terms of how many days per week or how many hours per week.

The panel finds that the evidence demonstrates that the appellant requires some intermittent help with basic housework and laundry and outdoor mobility but the evidence of the prescribed professional does not support the appellant's evidence as to the extent of help she requires. For example, the appellant and her roommate report that the appellant requires assistance with chopping food but on the AR, the physician reports that the appellant is independent with meal planning and food preparation. While the appellant and the roommate report that the appellant requires someone to be in her home while she showers due to her fear of falling because of her dizziness and vertigo, the physician, on the AR, reports that the appellant is independent with bathing.

As previously noted, in her Notice of Appeal, the appellant states that she was going to have her physician amend the disability forms as she had not explained her situation fully to her physician, including advising him that she had a roommate. While it may be that the appellant's physician does not have a full understanding of the appellant's situation and the extent of the help that she requires, the panel finds that at the time of reconsideration, the ministry's determination that the evidence did not establish that in the opinion of a prescribed professional the appellant requires significant help or supervision of another person perform DLA as a result of a direct and significant restriction of her DLA as required by EAPWDA section 2(3)(b).

### **Conclusion**

Having reviewed and considered all of the evidence and relevant legislation, the panel finds that the ministry's reconsideration decision which determined that the appellant was not eligible for PWD designation was reasonably supported by the evidence and was a reasonable application of the applicable legislation in the circumstances of the appellant. Therefore, the panel confirms the ministry's reconsideration decision.