



### 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 07 October 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, while a severe physical, though not mental, impairment had been established, the information provided did not establish that the appellant's impairment 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

With the consent of the parties, the hearing was conducted in writing pursuant to section 22(3)(b) of the *Employment and Assistance Act*.

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

1. The appellant's PWD Designation Application dated 06 May 2013. The Application contained:
  - A Physician Report (PR) dated 07 May 2013 completed by the appellant's general practitioner (GP) who has known the appellant since November 2012 and has seen her 10 times in the past year.
  - An Assessor Report (AR) of the same date, completed by the same GP.
  - A Self Report (SR) completed by the appellant.
2. The appellant's Request for Reconsideration, dated 01 October 2013. Attached is a letter, prepared by her advocate, from the appellant (reconsideration letter, or "RL") dated 30 September 2013, also signed by her GP on the same date, setting out more information to explain how her severe impairment significantly restricts her ability to perform DLA. Also attached were:
  - A lab report on the appellant's peripheral blood.
  - A cardiology consult report dated 26 August 2013. The cardiologist comments that the appellant has a history of paroxysmal atrial fibrillation/flutter. She doubts that her recent increased frequency in episodes in AP/flutter could be related to worsening mitral regurgitation.

The appellant filed her Notice of Appeal on 14 October 2013. On 06 November 2013 the appellant's advocate provided a Submission, to which was attached:

- A letter from the GP dated 31 October 2013 regarding his agreement with the contents of the RL.
- A note from the appellant regarding the need for heart surgery in 2 – 3 years, possibly sooner.
- A health authority emergency/outpatient record of an ER stay by the appellant on 01 November 2013 for monitoring for atrial fibrillation.

In an e-mail dated 18 November 2013, the ministry stated that there will be no submission on this appeal provided by the Reconsideration Branch, as it is relying on the reconsideration decision.

In the PR, the GP diagnoses the appellant's impairment as mitral valve prolapse – surgical repair, left total hip replacement, L2 compression fracture and left ilio-tibial fasciitis.

### Summary of the evidence

#### *Mental impairment*

In the PR, the GP assesses the appellant with significant deficits with cognitive and emotional function in the area of emotional disturbance, commenting: "Early disturbance in mood due to chronic pain & disability but no formal diagnosis yet." With no mental health condition diagnosed, in the AR the GP makes no assessment as to the degree which a mental impairment restricts or impacts the appellant's daily functioning or indicate any difficulties with, or support/supervision required for, social functioning.

*Restrictions in the ability to perform DLA and help required*

As the ministry has determined that a severe physical impairment has been established, the panel will only summarize the information provided that relates to the criteria at issue in this appeal – the evidence relating to restrictions in the appellant's ability to perform DLA and the need for help as a result of these restrictions. The panel has reviewed the consult, lab and ER reports noted above and finds that, while they confirm the seriousness of the appellant's medical conditions and the severity of impairment, they are not relevant to the criteria at issue.

The panel has drawn upon the summary of the evidence in the PR, AR, SR and RL provided by the appellant's advocate in her Submission, as set out below with changes in format.

*Moving about indoors:*

AR – Uses cane and takes significantly longer than typical. Routinely uses cane to compensate for her impairment.

SR – Unable to walk without a cane. Must use a cane around the house. Has no warning when her legs will give way requiring her to sit immediately.

RL – Not unusual for leg to give way multiple times a day accompanied by excruciating pain. Unable to walk further when this happens. Must sit or lie down for a couple of hours after this happens.

Mobility including climbing stairs depletes her stamina quickly due to the condition of her heart. Moves slowly because of this and must stop to recuperate shortly after starting. At the end of the day, often sleeps on the couch because she does not have the stamina to climb the stairs. Difficult to lift, carry and hold because she must use her cane but also because of her limited strength and condition of her heart. Items over 5 pounds trigger her back pain.

*Moving about outdoors:*

PR – Does not walk without a cane and is limited to climbing 2 to 5 steps.

AR – Uses cane and takes significantly longer than typical. Routinely uses cane to compensate for her impairment.

SR – unable to walk without a cane. Must use a cane anywhere she goes. Has no warning when her legs will give way requiring her to sit immediately.

RL – not unusual for leg to give way multiple times a day accompanied by excruciating pain. Unable to walk further when this happens. Must sit or lie down for a couple of hours after this happens.

Unable to walk to her home one block uphill at all. Must be driven or drive herself.

*Prepare own meals:*

AR – Periodic assistance required for preparing food and cooking.

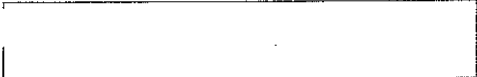
RL – Gets help in the kitchen due to her limited ability to stand.

*Shopping:*

PR – Limited to lifting 5 pounds or less.

AR – Needs continuous assistance from another person for lifting, carrying and holding. Needs continuous assistance with carrying purchases home. Needs periodic assistance with getting to and from stores. Receives assistance from friends.

RL – Needs help with most of the shopping. Always needs help carrying purchases home.



*Transportation:*

AR – Needs periodic assistance to get in and out of vehicle

RL – Lack of stamina and grogginess affect her ability to drive. During the 69 km drive, she had to pull over twice to sleep due to exhaustion. Can never drive more than an hour due to her lack of stamina and exhaustion as well as the need to get in and out of vehicle due to the condition of her hip.

*Housekeeping:*

PR – limited to lifting 5 pounds or less.

AR – needs continuous assistance with lifting, carrying and holding. Needs periodic assistance for housework and laundry. Receives assistance from friends.

RL – can no longer vacuum because it's too heavy and therefore gets help with vacuuming. Limited ability to stand requires that she gets help with doing the dishes. Cannot hang laundry and therefore needs assistance with that task.

*Personal self care:*

AR – Dressing, grooming, bathing and toileting all take significantly longer than typical.

SR – requires half an hour to get out of bed and experiences dizziness for first 5 – 10 minutes.

RL – mobility including dressing and going to the washroom depletes her stamina quickly due to the condition of her heart. Moves slowly because of this, stop to recuperate shortly after starting. Difficulty showering because of limitations on length of time she can stand but finds it difficult to bathe because of the challenges getting out of the tub. Must have cane nearby.

*Other factors*

RL – codeine taken for pain makes her groggy and also makes it difficult for her to sleep at night. Also heart medication makes her cold and shaking. Lack of stamina generally is due to the condition of her heart. Her condition has worsened since the submission of the original application in May.

*The GP and the reconsideration letter*

Near the end of the RL, following her description of how physical impairment restricts her ability to perform DLA as summarized above, there is an advocate-prepared statement signed by her GP. After introducing the GP, the statement goes on to read:

“[The appellant] has asked me to read her statement above. I have done so. I find it to be a credible description of the types of limitations she would face in light of her medical condition. I would expect a woman in her condition to face the daily restrictions due to her disabilities that she describes in her statement.”

There follows blank lines on which the GP has written “no alterations.”

The statement then resumes with the following advocate-prepared statement:

“[The appellant] has asked me to make any modifications or additions to the statement that I see fit to make. I have done so. I am now signing this statement and I'm asking the ministry of social development and social innovation to accept it as my own.”

In his letter included with the advocate's Submission on appeal, the GP writes:

“... my comment 'no alterations' was referring to her written account of her symptoms and

disability included within the application and clearly infers that I agreed with this account and did not wish to make any amendments to this account i.e. alterations. It does not mean that I disagreed with her account and does not therefore mean that you should base your decision on the information in the first PWD application and ignore the second application. Furthermore, regarding her symptoms and restrictions in daily living as a result, I feel I adequately completed the tick-box proforma on your application form and that further clarification or detailing was unnecessary.”

Admissibility of evidence

The panel finds that the new information provided by the appellant at appeal is in support of the information before the ministry at the time of the reconsideration. The information concerning her ER visit and her note concerning her need for surgery are further to the GP's diagnosis of her heart condition. The letter from the GP clarifies what he meant by "no alterations" in the RL. The panel therefore admits the appellant's testimony pursuant to Section 22(4)(b) of the *Employment and Assistance Act*. The panel accepts the advocate's Submission as argument.

## 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, while a severe physical impairment had been established, the information provided did not establish that the appellant's impairment 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.

### **Mental impairment**

In the reconsideration decision, the ministry, having determined that a severe physical impairment had been established, did not address severity of mental impairment. As the GP did not diagnose any mental health condition and identified one significant cognitive and emotional deficit in the area of emotional disturbance and did not assess any impacts on daily functioning or difficulties with social functioning, the panel finds that the ministry reasonably determined that a severe mental impairment had not been established.

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

In the reconsideration decision, the ministry quoted from the last page of the RL wherein the GP indicates that he finds its contents to be a credible description of the types of limitations the appellant would face in the light of her medical condition, with the notation "no alterations." The ministry stated that as the GP has indicated that there are no alterations on the appellant's PWD designation application, the ministry will base this Request for Reconsideration on the original PWD application and other medical reports.

The ministry refers to the AR and lists the 11 tasks of the DLA applicable to a person with a severe mental or physical impairment that the GP has indicated the appellant can manage independently. The ministry then lists the 7 tasks that the GP indicates takes significantly longer than typical, noting that the GP does not report how much longer it takes for the appellant to manage these tasks. The ministry goes on to list the 6 tasks for which the GP has indicated that the appellant requires periodic assistance, noting that the GP does not provide any explanation or description of the type and amount of assistance required and does not identify any safety issues.

The ministry stated that in the additional medical information provided in the RL, the GP has another opportunity to assess the appellant's ability to manage DLA and the GP indicated that there are "no adjustments" (sic).

Based on the information provided by the GP, the ministry found that there is not enough evidence to establish that the appellant's impairments directly and significantly restrict her DLA either continuously or periodically for extended periods and that therefore this legislative criterion had not been met.

The position of the appellant, as set out in her advocate's Submission, is that, because of the phrase used by the GP ("no alterations") in the RL, the ministry completely ignored the materials submitted with her Request for Reconsideration. The advocate cites section 8 of the *Interpretation Act* and the *Hudson* decision, arguing that the requirement that any enactment be construed in a fair, large and

liberal way must also extend to the interpretation of an applicant's application.

The Submission argues that had the RL been considered, and had the GP support of her statement been considered along with it, the additional details about the restrictions the appellant faces because of her disabilities would have been apparent. The advocate then reviewed the evidence in the PR, AR, SR and RL as set out in Part E above.

The advocate also argued that the ministry failed to take into account information provided in the cardiologist's consult report and the lab report confirming that the appellant's stamina is limited and as a result her ability to perform DLA is restricted.

#### *Panel findings*

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 criterion which has been established in this appeal. This DLA criterion must also be considered in terms of the preceding legislative language of section 2 of the *Act*, 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 from the prescribed professional that would satisfy the minister that there are direct and significant restrictions in the ability to perform DLA, either continuously or periodically for an extended periods, by presenting a clear and complete picture of the nature and extent of these restrictions.

Given the GP's letter included with the advocate's Submission, the panel accepts that the GP agreed with the description given in the RL respecting the appellant's symptoms and restrictions in daily living. However, the panel notes that this criterion refers to the requirement that the restrictions described be "in the opinion of a prescribed professional." The panel takes this to mean that the information relating to this criterion be in the prescribed professional's own words, not second-hand through an advocate. The panel thus takes the view that an advocate prepared letter signed by the appellant and endorsed by a prescribed professional cannot be considered a substitute for an AR personally completed with due diligence by a prescribed professional.

The panel notes that in the section of the AR relating to the DLA (other than that of moving about indoors and outdoors) applicable to a person with a severe mental or physical impairment, the GP has offered no narrative or comments in the spaces provided.

The evidence from the PR and AR is that, with respect to the DLA of moving about indoors and outdoors, the appellant is unable to walk without a cane, taking significantly longer than typical. The panel finds that there is sufficient evidence to establish that the appellant is significantly restricted in her ability to manage this DLA.

With respect to the other DLA, the GP has indicated in the AR that the appellant takes significantly longer than typical to manage the following tasks: dressing, grooming, bathing, toileting, transfers in/out of bed, transfers on/off chair and carrying purchases home. The RL, while describing symptoms of limited stamina, particularly in the DLA of personal self care, does not provide any additional information as to how much longer, or how much time it takes, for the appellant to do these



tasks. The panel notes that in the RL the appellant states she always needs help carrying purchases home, a change from that reported in the AR.

In the AR, the GP assessed the appellant as requiring periodic assistance with basic housekeeping, laundry, going to and from stores, food preparation, cooking, and getting in and out of vehicle. As noted above, the RL indicates that the appellant always needs help for carrying purchases home. However, neither in the AR nor in the RL is there any description as to in what way, how often, for how long, to what extent and under what circumstances this help is provided. The panel considers it reasonable to read paragraphs (i) and (ii) of subsection 2(b) of the EAPWDA together:

2(2)The minister may designate a person ... as a person with disabilities...if the minister is satisfied that the person has a severe mental or physical impairment that

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.

Taking this approach, it is reasonable that the ministry would rely on the information of help provided as an indicator of how significantly the person's ability to perform DLA is restricted. Without a description of the nature, frequency and extent of help provided, it is difficult to obtain a clear picture of the restrictions in the appellant's ability to perform these tasks.

The panel notes that in the PR and AR the GP makes no reference to the appellant's stamina or lack thereof. The cardiologist's consult report confirms the seriousness of the appellant's heart condition, but makes no direct reference to her stamina. The RL states that mobility including climbing stairs depletes her stamina quickly due to the condition of her heart, and refers to stamina issues elsewhere. The panel considers these references as relating to the linkage (how "directly") her heart condition and her resulting impairment restricts her ability to perform DLA, but does not describe the degree or extent (how "significantly") her ability to perform DLA are restricted.

For the above reasons, and without more information on how much time it takes for those tasks that take significantly longer than typical and without an adequate description of the help provided, the panel finds that, while the DLA of moving about indoors and outdoors is significantly restricted, the ministry was reasonable in determining that the information provided did not establish that overall the appellants severe physical impairment significantly restricts the appellant ability to perform her DLA, either continuously or periodically for extended periods.

### **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 the evidence clearly shows that she requires the use of a cane for mobility and help from friends for numerous daily tasks.

### ***Panel findings***

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. The panel therefore confirms the ministry's decision.