

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of October 25, 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; 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.

## 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 appellant, the ministry had an observer attend the hearing.

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

- The appellant's PWD application form consisting of the appellant's self-report [dated May 29, 2013], a physician's report ("PR") [dated June 12, 2013], and an assessor's report ("AR") [dated June 12, 2013].
- The appellant's Request for Reconsideration dated October 23, 2013.
- A "To whom it may concern" letter dated October 23, 2013 and signed by the appellant's nephrologist and her renal social worker (the "October 23 Letter").

### *Admissibility of New Information*

In her oral testimony the appellant provided new information regarding her impairments and the nature and frequency of the assistance she receives with her DLA. This information provides additional detail with respect to issues addressed in the original PWD application. 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*

- The PR was completed by an individual "for" the appellant's regular physician. It is not clear from the Certification portion of the PR whether the individual who completed the PR is a medical practitioner or whether she has merely filled in the form on behalf of a medical practitioner. In her oral testimony the appellant said that her regular physician had been away and that someone at the hospital, whom the appellant had never met before, completed the PR without asking the appellant any questions about her medical condition or her ability to manage DLA.
- In the PR the appellant's diagnoses are identified as end stage kidney disease, diabetes, and anemia. According to the PR, despite undergoing nightly peritoneal dialysis the appellant still has chronic fatigue and decreased endurance.
- In terms of physical functional skills, the PR describes the appellant's ability to walk unaided on a flat surface and her ability to climb stairs unaided as "unknown". It states that the appellant's lifting capacity is limited to 2 to 7 kilograms, and that there is no limitation to her ability to remain seated.
- The AR was completed by a registered nurse (a prescribed professional) who wrote that he'd known the appellant for 1 year and that he'd seen her 2-10 times over the preceding year, commenting "regular clinics 1 to 3 months". In her oral testimony the appellant said that the renal social worker wasn't available to fill out the AR form. She said that she'd never seen the registered nurse before he filled out the form in June 2013 and that he filled out the form without asking the appellant any questions about her ability to perform DLA or anything else. In response to a question from the panel, the appellant acknowledged that she had been

seeing the registered nurse about once a month starting in February as he had been training her to perform her own dialysis. However, she said, he only knows about dialysis and he doesn't know anything else about her.

- In the AR the registered nurse noted the appellant has a peritoneal dialysis catheter inserted into her abdomen "that needs special attention." He described her as being independent in terms of walking indoors and outdoors, climbing stairs and standing. He wrote that she needs periodic assistance lifting and carrying/holding heavy objects because of her catheter.
- In the October 23 Letter the appellant's nephrologist and renal social worker described the appellant as being "...known to the [hospital] peritoneal dialysis program." They provided a diagnosis of chronic kidney disease due to diabetic nephropathy, with co-morbid conditions of diabetes complicated by nephropathy, long standing anemia, hyperlipidemia (high cholesterol) and past hysterectomy. They wrote that "...[the appellant] has a severe and permanent physical disability." They indicated that the appellant has to repeat the peritoneal dialysis cycle four times nightly, and that she experiences light headedness, dizziness, headaches and fatigue as a direct result of her renal disease and therapy.
- In her Request for Reconsideration, the appellant wrote that her physicians have told her not to lift more than 10 pounds.
- In her oral evidence the appellant said she gets frequent headaches. She said that her daughter is a match for being a kidney donor, and that more testing is being done with respect to diabetes before a date for kidney transplant surgery can be set.

#### *Mental Impairment*

- The PR provides no diagnosis of a mental medical condition.
- In terms of functional skills the PR indicates the appellant has no difficulty with communication other than a lack of fluency in English, and that the appellant has no significant deficits with cognitive and emotional function.
- In the AR the registered nurse described the appellant's communications ability as being good in all respects, and reported the appellant's impairment as having minimal or no impact on all aspects of her emotional and cognitive functioning.

#### *DLA*

- The PR indicates the appellant's impairment does not directly restrict her ability to perform DLA. In the "Additional Comments" portion of the PR it is noted "While [the appellant's impairment] does not impact on her ability to perform [DLA] she may have a decreased capacity to work for prolonged hours due to chronic fatigue and poor endurance."
- In the AR the registered nurse indicated the appellant is independent in all aspects of all DLA, including the decision-making aspects of *daily shopping, meal preparation, managing personal finances, managing medications, and social functioning*. He described the appellant as having "good functioning" with respect to her immediate and extended social networks.
- In the October 23 Letter the nephrologist and renal social worker wrote that the appellant's kidney failure "significantly restricts her activities of daily living". They stated that the appellant relies heavily on her daughter to do the shopping since the appellant cannot lift heavy items. They also stated that the daughter does the cooking, the laundry, reminds the appellant to take medications, and sets up the appellant's 5 kg dialysis bags each night. They indicated that the appellant does her own dialysis connections, showering and grooming but that it takes her significantly longer than typical to do these tasks.
- In her self-report the appellant wrote that if she works her blood pressure goes up and if she

sits in an office her blood sugar goes up. She wrote that "My diabetic request me to do exercise a lot..." and that the dialysis catheter "...doesn't let me do certain sport like I use to do before."

- In her Request for Reconsideration the appellant wrote that she can walk, but at a slower, safer pace to prevent falling. She also wrote that her daughter helps her to cook, clean, shop for groceries, and pick up her medications.
- In response to a question from the panel, the appellant disagreed that she could lift the 2-7 kilograms indicated in the PR. She said all she can lift is a trash bag. She also disagreed with respect to her ability to remain seated, saying that she can only sit for 5 minutes.
- Also in response to questions from the panel, the appellant said that she can only do ½ the self-care that she used to be able to do, and that she has to cook for herself when her daughter is at work.

#### *Help*

- In the AR, the registered nurse responded "N/A" (not applicable) to questions about assistance provided by other people, assistive devices used by the appellant, and assistance provided by assistance animals.
- In her oral evidence the appellant said that she relies on help from her daughter with respect to housework, shopping, and cooking. She also said she relies on financial assistance from her son.

## 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

(a) authorized under an enactment to practise the profession of

- (i) medical practitioner,
- (ii) registered psychologist,
- (iii) registered nurse or registered psychiatric nurse,
- (iv) occupational therapist,
- (v) physical therapist,
- (vi) social worker,
- (vii) chiropractor, or
- (viii) nurse practitioner, or

(b) acting in the course of the person's employment as a school psychologist by

- (i) an authority, as that term is defined in section 1 (1) of the *Independent School Act*, or
- (ii) a board or a francophone education authority, as those terms are defined in section 1 (1) of the *School Act*,

if qualifications in psychology are a condition of such employment.

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**Severe Physical Impairment**

The appellant's position is that her kidney disease and diabetes, along with dizziness and headache, constitute a severe physical impairment.

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

insufficient evidence of a severe physical impairment.

Panel Decision

The diagnosis of a medical condition is not itself determinative of a severe impairment. One person with, say, diabetes may be significantly restricted from being able to manage DLA independently, while another person with diabetes may be entirely unrestricted. Accordingly, 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 ministry 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 legislation makes it clear that the determination of severity is at the discretion of the ministry – the ministry must be "satisfied" that the statutory criteria for granting PWD designation are fulfilled. In making its determination the ministry must 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, in exercising its decision-making power the ministry cannot merely 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. The professional evidence has to be weighed and assessed like any other evidence. Accordingly, the nephrologist's and renal social worker's declaration that the appellant's impairment is "severe" is not determinative that this statutory criterion is satisfied.

The panel has given the evidence in the PR little weight because it is not clear whether it was completed by a medical practitioner. However, the AR was completed by a registered nurse who has known the appellant for several months to a year. His evidence indicates that the appellant's physical functional skills, other than lifting/carrying/holding, are at the higher end of the ability scale. The appellant indicated that she has had to slow down with her walking, and said that her ability to lift is more limited than the AR would indicate, but otherwise provided little evidence to refute the registered nurse's assessment of her functional skills.

The evidence in the appellant's self-report focused on the impacts of her medical condition on her ability to work and to pursue former recreational activity, rather than on her ability to manage DLA. This evidence indicates that at least one of her health professionals has suggested she continue to "exercise a lot."

Considered as a whole, the evidence indicates that the appellant's impairment negatively affects her employability; however employability is not a criterion with respect to PWD designation.

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 impairments do not appear to have translated into significant restrictions in the appellant's ability to manage her DLA independently. Based on the foregoing analysis, 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 advanced no argument with respect to severe mental impairment.

The ministry's position, as set out in its reconsideration decision, is simply that there is not enough evidence to establish a severe mental impairment.

### **Panel Decision**

There is no evidence to indicate that the appellant has been diagnosed with a mental impairment. In terms of mental functional skills, the evidence indicates that the appellant's communications skills are good in all respects. There is no evidence of any significant impacts to the appellant's cognitive and emotional functioning.

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. Based on the registered nurse's evidence in the AR, she also independently manages the decision-making components of the DLA of *daily shopping*, and *meal preparation* (meal planning and food storage). The undisputed evidence of the registered nurse in the AR is that the appellant has good *social functioning*.

Considering the evidence as a whole, the panel concludes that the ministry reasonably determined that it does not demonstrate a severe mental impairment.

### **Significant Restrictions to DLA**

The appellant's position is that her DLA are significantly restricted. The appellant argues that the individuals who completed the PR and the AR do not know her well, and that substantial weight should be put on the October 23 Letter. The appellant indicates she is significantly restricted with respect to *daily shopping*, *basic housekeeping*, *meal preparation*, and that she can only do half the *personal self-care* that she used to do.

The ministry's position, as expressed in its reconsideration decision, is that the information provided does not demonstrate that the appellant has a severe impairment that significantly restricts her ability to perform DLA either continuously or periodically for extended periods.

### **Panel Decision**

The evidence with respect to restrictions to DLA is inconsistent. As noted above in the discussion of severe physical impairment, the panel has given little weight to the PR. The AR indicates that the appellant has no significant restrictions to any aspects of her DLA. The October 23 Letter indicates that the nephrologist and the renal social worker believe that the appellant's DLA are "significantly"



restricted, but in the same paragraph they discuss the impact on her employability. The only DLA which are specifically mentioned are *basic housekeeping*, *meal preparation*, and *daily shopping*.

With respect to *meal preparation*, the appellant acknowledged that she does her own cooking when her daughter is not home. With respect to *basic housekeeping*, the evidence indicates that the appellant is restricted from lifting heavy weights. However, this doesn't clarify how the appellant's impairment impacts her ability to do the lighter aspects of *basic housekeeping*, particularly in light of the appellant's acknowledgment that she can lift a trash bag. Regarding *daily shopping*, the evidence indicates the appellant relies on her daughter to lift the heavier purchases. Regarding *mobility indoors and outdoors*, the registered nurse indicated the appellant is entirely independent. This observation is supported by the appellant's evidence that she has to take it slower while walking, but otherwise didn't refer to any other restrictions with mobility.

Considering the evidence as a whole, it does not present a convincing picture of an individual whose ability to manage her DLA is significantly restricted. Accordingly, the panel concludes that the ministry reasonably determined that the appellant's ability to manage her DLA independently is not significantly restricted either continuously or periodically for extended periods.

### **Help with DLA**

The appellant's position is that she relies on help from her daughter to perform the DLA of *daily shopping*, *basic housework*, and *meal preparation*.

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

### **Panel Decision**

In the panel's view, it would be difficult to conclude that the help provided to the appellant by her daughter with respect to aspects of housework, shopping and cooking constitutes "the significant help or supervision of another person" that is required by s. 2(3)(b)(ii) of the EAPWDA.

The appellant does not use an assistive device or an assistance animal to perform DLA.

For these reasons, the panel finds that the ministry reasonably concluded 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.