

## 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 November 7, 2013 denying the appellant designation as a person with disabilities (PWD). The Ministry determined that the appellant did not meet three of the five criteria required for PWD designation as set out in the *Employment and Assistance for Persons with Disabilities Act*, section 2 (the appellant meets the criteria of being 18 years of age or older and, that in the opinion of a medical practitioner, her impairment is likely to continue for two or more years). Specifically, the Ministry determined that, based on the information provided, the following criteria were **not** met:

- That the appellant has a severe mental or physical impairment;
- That, in the opinion of a prescribed professional, the appellant's impairment significantly restricts her ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and
- That as a result of the restrictions, the appellant requires the significant help or supervision of another person to perform the DLA restricted by her impairment.

## 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 reconsideration consisted of the following:

1. The appellant's PWD Designation Application, containing the following three parts:
  - The appellant's Self Report completed February 3, 2013;
  - The Physician Report (PR) dated March 28, 2013 completed by the appellant's family physician who has known the appellant for 15 months and indicated he had seen her 2-10 times in the previous year, and
  - The Assessor Report (AR) dated March 28, 2013 completed by the appellant's family physician.
2. The appellant's submissions on reconsideration (3 pages, handwritten), date stamped received by the Ministry on August 7, 2013.
3. The Ministry PWD designation decision summary dated July 5, 2013.

The appellant completed her notice of appeal on November 16, 2013, and on it she wrote that she is in constant pain, that she cannot sit or stand or lay down for long periods of time and that "due to injuries and illness my nerve endings are damaged and my right foot is painful 24-7 – it feels like I am standing on hot coals." She attached to her notice of appeal a 2-page handwritten submission in which she reiterated her submissions on reconsideration, but did not include any new information.

In her submissions to the panel, the appellant told the panel that she has moved to a different town and has a new doctor who she is seeing two times per month. The appellant did not have any additional information from her doctor, but told the panel she is going to be tested for MS (multiple sclerosis) sometime in the summer. She told the panel that she was frustrated with her situation and that she is in pain all the time and needs help on a daily basis. She said that she would like to live closer to her family so that she could get help from them to perform her DLA.

The following is a summary of the evidence from the PR and AR regarding the appellant's impairments as they relate to the three PWD criteria at issue. The panel has also included reference to the appellant's self report in the PWD application, as well as her submissions on reconsideration and on appeal, and at the hearing.

### Severity of impairments (criteria set out in subs. 2(2) EAPWDA)

In the PR completed March 28, 2013, the appellant's physician diagnosed the appellant with Fibromyalgia/chronic pain syndrome with date of onset in 2000, as well as anxiety, depression and PTSD (post traumatic stress disorder) onset 2001. In his comment regarding the severity of the appellant's conditions, the appellant's physician wrote that the appellant had ischaemic heart disease requiring stents in 2009, as well as Fibromyalgia and chronic pain, and that she is "disabled by persistent pain "all over" and by poor concentration and forgetfulness. Sleep disturbance is a significant factor. History of anxiety, depression and PTSD." The appellant's physician indicated that the appellant has not been prescribed any medication and/or treatments that interfere with her ability to perform DLA. In response to the specific question in the PR, "is the impairment likely to continue for 2 years or more from today?" the appellant's physician checked yes and wrote "condition is

somewhat alleviated by medication.”

In her submissions on reconsideration, the appellant indicated that, in addition to the conditions noted by her physician on the PWD application, she also has Type 2 diabetes, restless leg syndrome, asthma, sinusitis and diverticulitis. At the hearing, the appellant told the panel that the pain medications she takes, which she described as “heavy narcotics,” interfere with her ability to perform her regular activities. She said that she forgets things all the time.

In the functional skills assessment of the PR, the appellant’s physician has indicated that the appellant can walk 4+ blocks unaided on a flat surface, that she can climb 5+ steps unaided, that she can lift 2-7 kg and can remain seated for less than one hour. He indicated that there were no difficulties with communication. The appellant’s physician indicated that she has significant deficits with cognitive and emotional function in the following areas: consciousness, executive, memory, emotional disturbance and motivation. In the comments section regarding these deficits, the appellant’s physician wrote, “None of these is very severe, but related to fatigue, poor concentration, distractibility, forgetfulness, and occasional anxiety” (emphasis by the physician in the PR). In the AR, the appellant’s physician indicated that the appellant’s conditions had a minimal impact on the executive aspect of her cognitive and emotional functioning and a moderate impact on the following aspects of her cognitive and emotional functioning: consciousness, emotion, attention/concentration, memory, and motivation.

In the AR, the appellant’s physician wrote that the appellant’s impairments are “forgetfulness and Fibromyalgia pain.” The appellant’s physician indicated that the appellant’s levels of ability to communicate were good in all aspects. In the AR, the appellant’s physician indicated that the appellant was able to independently perform the following aspects of mobility and physical ability: walking indoors and outdoors, climbing stairs and standing. The appellant’s physician checked that the appellant required periodic assistance from another person for lifting and carrying and holding, writing the comment, “Chronic pain syndrome limits heavy lifting but regular physical activity is BENEFICIAL to Fibromyalgia” (emphasis by the physician in the AR).

The appellant told the hearing panel that she can walk a few blocks, but needs to take rests and that she has a hard time getting around because she’s in constant pain. She said that she can’t get up or sit down for too long because of her pain.

Ability to perform DLA (criteria set out in subs. 2(2)(b) EAPWDA)

As the appellant’s physician completed the AR, he did not address the appellant’s DLA in the PR. In the section of the AR indicating the degree of restriction the appellant’s impairments cause on her DLA, the appellant’s physician indicated that the appellant was independent in all 8 tasks of the DLA of personal care. The appellant’s physician indicated that the appellant was also independent in performing the 2 tasks of the DLA of basic housekeeping. For the 5 listed tasks under the DLA of shopping, the appellant’s physician checked that the appellant was independent for reading prices and labels, making appropriate choices, and paying for purchases. The appellant’s physician indicated that the appellant required periodic assistance to perform the tasks of carrying purchases home (“needs help with heavy lifting”) and going to and from stores (“does not drive now”). For the tasks listed under the DLAs of meals, pay rent and bills, medications and transportation, the appellant’s physician indicated in the AR that the appellant was independent for all of the listed tasks.

The appellant's physician checked that the appellant was independent for 4 of the listed aspects of social functioning in the AR, but that she required periodic support/supervision for the aspect of "able to deal appropriately with unexpected demands." The appellant's physician indicated that she had marginal functioning in her immediate and extended social networks.

In her submissions at the hearing, the appellant told the panel that she lives with chronic pain, and as a result, that it is very difficult for her to perform her DLA. She said that she constantly drops things. She told the panel she forgets things frequently and relies on her dog to remind her when she has left a kettle on the stove, for example. She said that she needs to be reminded to take her medication. She said that she doesn't have energy to cook for herself ("sometimes it is too difficult to do anything more than open a can of soup") or to clean.

Assistance required/provided (criteria set out in subs. 2(2)(b)(ii) EAPWDA)

In the section of the AR describing the assistance provided for the appellant, the appellant's physician wrote that the appellant received help from friends, family and volunteers but noted, "able to perform the activities of daily living." The physician also indicated that the appellant does not have an assistance animal.

At the hearing, the appellant told the panel that she lives by herself with her dog, who is not a qualified assistance animal. She described the degree to which her dog helps her – is in the bathroom with her when she showers so can help if she falls and will support her if she needs help standing or getting up. She told the panel her family lives in another town and is not able to help her. The appellant told the panel that because of her chronic pain, she feels she really needs help performing her DLA.

The Ministry stood by the reconsideration decision, relying upon the information from the appellant's physician in the PWD application available to the Ministry at the time the decision was reached. The Ministry said that at the appeal and at the reconsideration, there was no information from the appellant's former or current physician confirming her other conditions (such as asthma, diabetes, and diverticulitis). The Ministry also said that there was no information from the appellant's former or current physician about the impact of her impairments on her ability to perform her DLA that was different from what was set out in the PWD application on which the Ministry relied in making its decision. The Ministry noted that the appellant's dog is not an assistance animal.

## 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 her physical impairment in the opinion of a prescribed professional directly and significantly restricts her ability to perform daily living activities either continuously or periodically for extended periods; and, as a result of those restrictions she requires help to perform those activities.

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.

### Severity of impairments

The appellant told the panel that she is in constant pain, suffering from Fibromyalgia and chronic pain, particularly in her legs, and as a result she finds it difficult to function normally. She described that she could walk a few blocks, but had to stop to rest and to find her bearings. She also said that she forgets many things – such as leaving a kettle on the stove – and needs to be reminded to take her medications for example. The appellant agreed that she did not have further information from her former physician (who completed the PWD application) or from her current physician describing her impairments.

In the reconsideration decision, the Ministry based its determination that the appellant's impairments were not severe on the information provided by the appellant's physician in the PR completed March 28, 2013. The Ministry noted that the appellant's physician had assessed her physical ability (able to walk 4+ blocks unaided, climb 5+ steps unaided, lift between 5-15 pounds, and remain seated less than an hour) and indicated she was independent in the majority of her mobility and physical abilities (other than requiring periodic assistance with lifting and carrying and holding). The Ministry also noted that the physician had written that "regular activity is beneficial" to the appellant's Fibromyalgia. The reconsideration decision noted that the minister was not satisfied that the information provided was evidence of a severe physical impairment.

In the reconsideration decision, the Ministry noted that the comment of the appellant's physician that although he had indicated she has deficits with some areas of cognitive and emotional functions, "none of these is very severe, but related to fatigue, poor concentration, distractibility, forgetfulness and occasional anxiety." The Ministry also noted that the physician in the AR indicated that the appellant's impairments had a moderate impact on five of the aspects of cognitive and emotional functioning, a minimal impact on one aspect, and no impact on the other aspects. The Ministry determined that the impacts described by the appellant's physician were more in keeping with a moderate degree of mental impairment.

The legislation provides that the minister may designate a person as a PWD if the minister is satisfied that the person has a severe mental or physical practitioner that in the opinion of a medical practitioner is likely to continue for at least 2 years (subs. 2(2)(a) of the EAPWDA). The appellant's physician confirmed in the PWD application that her condition is likely to continue for at least 2 years – the issue is whether the information provided confirms the severity of the impairment. At the hearing, the appellant said that she also suffers from Type 2 diabetes, restless leg syndrome, asthma, sinusitis and diverticulitis (submissions she also made on reconsideration). However, this panel can only consider medical conditions which have been confirmed by a medical practitioner and this information was not set out in the PWD application by the appellant's physician and there was no further information confirming these conditions from the appellant's current or former physician. Based on the evidence of the appellant's physician set out in the PWD application (noted above with reference to the Ministry's reconsideration decision) and confirmed by the appellant at the hearing that she is able to walk a few blocks, climb stairs unaided, carry lighter items, and although she is forgetful, she is capable of looking after herself, the panel finds that the Ministry's determination that the appellant does not have a severe physical or mental impairment (meeting the criteria required by

subs 2(2) of the EAPWDA) is reasonably supported by the evidence.

Significant restrictions in the ability to perform DLA.

The appellant told the panel that because of her chronic pain, she finds it difficult to perform her DLA. She said that she doesn't have the energy to function normally. She said that frequently drops things, that she has difficulty standing up and occasionally falls over. She says she forgets things and needs reminders to do things like take her medication or attend to things on the stove.

In the reconsideration decision, it is noted that the Ministry relies on the medical opinion and expertise from the appellant's physician to determine whether her impairments significantly restrict her ability to perform her DLA either continuously or periodically for extended periods. In the PWD application, the appellant's physician indicated that she required periodic assistance going to and from stores and carrying purchases home, but didn't provide information on how often she requires assistance. The reconsideration decision noted that the appellant's physician indicated in the AR that the appellant could perform the remainder of all of the DLA independently. The reconsideration decision found that based on the information provided by the appellant's physician, the ministry does not have enough evidence to confirm that the appellant's impairments significantly restrict her ability to perform her DLA continuously or periodically for extended periods.

The legislation requires in subs. 2(2)(b) that a prescribed professional confirm that the appellant's impairments restrict her ability to perform her DLA continuously or periodically for extended periods. The panel notes the evidence of the appellant's physician in the AR that she can perform all but 2 tasks of all DLA independently – it is only the tasks of going to and from stores and carrying purchases home for which her physician has indicated she requires periodic assistance, but without indicating the amount of time this would be. Accordingly, the panel finds the Ministry's determination that the appellant was not significantly restricted in her ability to perform DLA as required under subs. 2(2)(b) was reasonable based on the evidence.

Help with DLA

The appellant told the panel that she needs help from other perform to perform her DLA – that because of her chronic pain and low energy, she needs help. The appellant described that she relies on her dog to help her a great deal – that the dog will go into the bathroom with her when she showers as she has fallen before and the dog can help her get back up, that the dog will help pull her upright in the morning or when she is standing up from sitting, and that her dog will remind her that she has left something on the stove.

In its reconsideration, the Ministry determined that as it "had not been established that [DLA] are significantly restricted ... it cannot be determined that significant help is required from other persons."

The legislation requires in subs. 2(b)(iii) that in the opinion of a prescribed professional, as a result of the appellant's restrictions, the appellant requires help to perform DLA. The panel notes the evidence before the Ministry at the reconsideration as set out by the appellant's physician in the AR was that the appellant needs periodic assistance with carrying purchases home and going to and from stores, but that he had written the comment, "able to perform the activities of daily living" in the area where the PWD application form asks about the assistance provided to the appellant from other people.

The panel finds that the Ministry's determination that because 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, is reasonable.

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 is reasonably supported by the evidence. The panel therefore confirms the Ministry's decision.