

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of November 19, 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 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

The appellant did not attend the hearing. The appellant's advocate did attend. After confirming that the appellant was notified of the hearing, the hearing proceeded in accordance with section 86(b) of the Employment and Assistance Regulation.

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

- A lab report for the appellant dated October 28, 2010.
- A lab report for the appellant dated October 4, 2011.
- A letter from the appellant's Oncologist dated May 29, 2013.
- A Surgical Pathology report dated June 11, 2013.
- The appellant's application for Persons With Disabilities Designation dated June 11, 2013.
- A physician's report ("PR") and assessor's report ("AR"), both completed by the appellant's physician and dated June 11, 2013.
- The appellant's Medical Summary dated June 11, 2013.
- A letter from the appellant's advocate dated November 10, 2013.
- An advocate prepared letter dated November 7, 2013 signed by the appellant and also signed by her physician on November 12, 2013.
- The appellant's request for reconsideration dated November 13, 2013.

### Diagnosis

- In the PR the physician – who has known the appellant since 1999 - diagnosed the appellant with Breast Cancer (2013), Alcoholism (1986), Hepatitis C (1998), Scoliosis (1982), and Anxiety and Depression (1996).
- The physician noted that; the cancer is life threatening, alcoholism is markedly better since cancer diagnosis, hepatitis C is chronic and active, scoliosis is severe and source of chronic pain and the anxiety and depression are controlled.
- In response to the question; Has the applicant been prescribed any medication and/or treatments that interfere with her ability to perform DLA?, the physician responded yes and adds that she will be receiving chemotherapy and the anticipated duration of the medications/treatments are "lifelong".

### Physical Impairment

- In terms of functional skills, the physician reported that the appellant can walk 4+ blocks unaided on a flat surface, can climb 5+ steps unaided, can lift 15 to 35 pounds, and can remain seated for 1 to 2 hours.
- In the AR, the physician commented that the appellant's impairments that impact her ability to manage DLA are the scoliosis which impairs mobility and causes chronic pain as well as receiving chemotherapy and probably undergoing surgery.
- Also in the AR, the physician noted that the appellant is independent with respect to walking indoors, walking outdoors, climbing stairs and standing. She requires periodic assistance from another person for lifting and carrying/holding.
- In her letter dated November 7, 2013, the appellant wrote that "While my physical ability as it relates to daily functioning is restricted to a degree, it is my mental health condition that requires greater focus." The

appellant also reported that her scoliosis and hepatitis C result in chronic back and joint pain along with overall fatigue. During regular monthly hepatitis C flare-ups, she has days when she needs assistance with any physical task that requires bending or lifting more than 5 pounds.

### **Mental Impairment**

- In the PR, the physician indicated that the appellant has 2 significant deficits with cognitive and emotional function namely; emotional disturbance and impulse control. The physician notes that the appellant is coping remarkably well with the recently diagnosed breast cancer and has also significantly cut back on her alcohol consumption.
- In terms of the appellant's ability to communicate, the physician reported that she has no difficulties with communication.
- In the AR, the physician has noted under cognitive and emotional functioning that the appellant suffers a moderate impact in 6 of 14 aspects - bodily functions, consciousness, emotion, impulse control, attention/concentration and memory. He also noted minimal impacts in 3 aspects – insight and judgment, executive and motivation. The physician noted no impacts in the remaining 4 aspects. The physician noted that the appellant has to deal with multiple medical issues, has minimal social supports and is making a good effort at present.
- In her application for PWD designation, the appellant described her disability as; cancer, depression, anxiety, chronic pain and alcoholism and indicated that depending on the side effects of her disability, her quality of life and fear from the unknown is very stressful and amplifies other existing problems.
- In her letter dated November 7, 2013, the appellant wrote that;
  - she suffers from severe depression and anxiety every day,
  - her emotional state is fragile,
  - when she drinks, she becomes aggressive and verbally lashes out at those around,
  - her immediate and extended social networks are abusive and disruptive, and
  - she is at risk of being taken advantage of by others.

### **DLA**

- In the PR, the physician did not indicate whether or not the appellant suffered any restrictions to DLA as he was not required to complete this section if he was completing the AR, which he did complete.
- In the AR, the physician indicated that the appellant independently manages all aspects of Personal Care, Basic Housekeeping, Shopping, (except carrying purchases home where it is indicated that she requires periodic support from another person), Meals, Pay Rent and Bills, Medication and Transportation.
- Under social functioning, the appellant was described as requiring periodic support with appropriate social decisions, able to develop and maintain relationships, interacts appropriately with others, being able to deal appropriately with unexpected demands and able to secure assistance from others. The appellant is described as having marginal functioning with both her immediate social and extended social networks.
- In her letter dated November 7, 2013, the appellant wrote that she struggles with alcoholism and typically makes poor choices both personally and socially which impacts her daily living. The appellant stated that while her physician indicated that she is independent in a number of DLA, he did so with the knowledge that she manages alone, has no choice but to complete many tasks as best she can since there is no one immediately available to help her and that she would benefit greatly from daily supervision to ensure she makes appropriate choices and social decisions. The appellant noted that she is currently living in a homeless shelter and once in her own home will need help to organize her day and prompt her to perform basic hygiene,

grooming, laundry, housekeeping duties, cook healthy meals, manage her finances and remind her about appointments.

- The appellant's physician, after reviewing the information in the appellant's letter dated November 7, 2013, noted that he agrees that it provides an accurate assessment of the appellant's overall physical condition and that he can confirm that the appellant's disabling conditions will continue to persist and are severe enough to restrict her daily living activities to the point where she requires significant assistance and supervision from others.

#### **Help**

- In both the PR and the AR, the physician indicated that the appellant requires no aids or prostheses for her impairment, and that she does not have an assistance animal. The physician indicated that the appellant is provided with help from friends and community services agencies and that she requires assistance with transportation at the moment and has significant financial difficulties.

- In her letter dated November 7, 2013, the appellant wrote that she would benefit from regular, ongoing counseling and daily supervision to ensure she makes appropriate choices and social decisions.

#### **At the Hearing**

The appellant's advocate reiterated the arguments contained in the appeal record and stressed the need for the appellant to receive PWD benefits, in order to move forward with her life.

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

## PART F – Reasons for Panel Decision

The issue under 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 authorized under an enactment to practice the profession of

(a) medical practitioner,

(b) registered psychologist,

(c) registered nurse or registered psychiatric nurse,

(d) occupational therapist,

- (e) physical therapist,
- (f) social worker,
- (g) chiropractor, or
- (h) nurse practitioner.

### **Severe Physical Impairment**

The appellant's position is that her scoliosis and hepatitis C result in chronic back and joint pain along with overall fatigue and that during regular monthly hepatitis C flare-ups, she has days when she needs assistance with any physical task that requires bending or lifting more than 5 pounds.

The ministry's position, as set out in its reconsideration decision, is that the evidence does not establish that the appellant has a severe physical impairment.

### **Panel Decision**

The determination of severity of impairment 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 act reasonably and 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, the professional evidence has to be weighed and assessed like any other evidence.

The evidence of the medical practitioner is that the appellant's main disabilities that impact her ability to manage DLA are the scoliosis which impairs mobility and causes chronic pain as well as receiving chemotherapy and probably undergoing surgery. In the panel's view, the appellant's functional skills, as described by the physician are more in keeping with a moderate impairment rather than a severe impairment. This is consistent with the information provided by the appellant in her letter where she indicated that while her physical ability as it relates to daily functioning is restricted to a degree, it is her mental health condition that requires greater focus. The panel concludes that the ministry was reasonable in finding that the appellant does not have a severe physical impairment.

### **Severe Mental Impairment**

The appellant's position is that her mental health condition requires greater focus as she suffers from severe depression and anxiety every day. She argues that her emotional state is fragile; when she drinks, she becomes aggressive and verbally lashes out at those around, that her immediate and extended social networks are abusive and disruptive, and that she is at risk of being taken advantage of by others. The appellant also indicated that depending on the side effects of her disability, her quality of life and fear from the unknown is very stressful and amplifies other existing problems.

The ministry's position, as set out in its reconsideration decision, is that the evidence does not establish that the appellant has a severe mental impairment.

### **Panel Decision**

The physician has diagnosed the appellant with anxiety and depression which he reported is controlled. The physician indicated that the appellant has significant deficits in 2 categories of cognitive and emotional function namely; emotional disturbance and impulse control. In the AR, the physician has noted under cognitive and emotional functioning that the appellant suffers a moderate impact in 6 of 14 aspects - bodily functions, consciousness, emotion, impulse control, attention/concentration and memory. He also noted minimal impacts in 3 aspects – insight and judgment, executive and motivation.

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 independently manages all aspects of Personal Care, Basic Housekeeping, Shopping, (except carrying purchases home where it is indicated that she requires periodic support from another person), Meals, Pay Rent and Bills, Medication and Transportation; under Social Functioning, the appellant was described as requiring periodic support with appropriate social decisions, able to develop and maintain relationships, interacts appropriately with others, being able to deal appropriately with unexpected demands and able to secure assistance from others. The appellant is also described as having marginal functioning with both her immediate social network extended social networks. The panel agrees with the appellant that her mental health condition requires greater focus however; the panel finds that as described by the physician, the appellant's disabilities are more in keeping with a moderate impairment rather than a severe mental impairment. 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 she struggles with alcoholism and typically makes poor choices both personally and socially which impacts her daily living. The appellant states that while her physician indicated that she is independent in a number of DLA, he did so with the knowledge that she manages alone, has no choice but to complete many tasks as best she can since there is no one immediately available to help her. The appellant argues that she would benefit greatly from daily supervision to ensure she makes appropriate choices and social decisions. The appellant noted that she is currently living in a homeless shelter and once in her own home will need help to organize her day and prompt her to perform basic hygiene, grooming, laundry, housekeeping duties, cook healthy meals, manage her finances and remind her about appointments.

The ministry's position, as set out in its reconsideration decision, is that the appellant is able to independently, manage 27/28 DLA. The ministry noted that the appellant requires periodic assistance with all 5 aspects of social functioning, although no explanation or description of such help is provided. The ministry does recognize that the physician reported that once chemotherapy starts and the appellant has surgery that the need for assistance will increase and that it is likely that this help will be time-limiting for the duration of treatment and recovery from breast cancer.

### **Panel Decision**

The legislation – section 2(2)(b)(i) of the EAPWDA – requires the minister to substantially assess direct and significant restrictions of DLA in consideration of the opinion of a prescribed professional, in this case the appellant's physician. This doesn't mean that other evidence – such as that from the appellant - shouldn't be factored in as required to provide clarification of the professional evidence, but the legislative language makes it clear that the prescribed professional's opinion is fundamental to the ministry's determination as to whether it is "satisfied". In the appellant's case, the prescribed professional has supplied little in the way of narrative to provide detail to the degree of restriction to DLA.

The legislation requires that a severe impairment 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. There is also 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, any analysis of periodicity must also include consideration of the frequency. In circumstances where the evidence indicates that a restriction arises periodically, it is entirely appropriate for the ministry to require evidence of the duration and frequency of the restriction in order to be

"satisfied" that this legislative criterion is met.

The panel notes that in the AR, the physician reports that the appellant independently manages the majority of her DLA, with the exception that she requires periodic assistance with all aspects of social functioning, although, no description of help required is provided. In the advocate prepared letter, the panel also notes that the physician agrees with the assessment of the appellant's overall physical condition and her current circumstances however; provides no detail as to what her restrictions are, how they impact the appellant's DLA, and what type of assistance and supervision from others would be required and of what duration. As well the panel finds that by the appellant's own admission, it is her mental impairment rather than her physical impairment that requires focus. The appellant has confirmed that she struggles with alcoholism and that she makes poor choices both personally and socially and this significantly impacts her daily living. The appellant argues that she would benefit greatly from daily supervision to ensure she makes appropriate choices and social decisions.

The onus is on the appellant to prove on the balance of probabilities that she satisfies the legislative criteria with restrict to direct and severe restrictions to her ability to manage her DLA independently. In the panel's view, while the evidence indicates that the appellant has difficulty with her DLA, specifically social functioning, it does not establish impairments directly and significantly restrict her ability to manage her DLA either continuously or periodically for extended periods. Accordingly, the panel finds that the ministry reasonably found that this legislative criterion is not satisfied.

#### **Help with DLA**

The appellant's position is that she would benefit from regular, ongoing counseling and daily supervision to ensure she makes appropriate choices and social decisions.

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**

Findings that a severe impairment directly and significantly restricts a person's ability to manage her DLA either continuously or periodically for an extended period are a precondition to a person requiring "help" as defined by section 2(3)(b) of the EAPWDA.

In both the PR and the AR, the physician indicated that the appellant requires no aids or prostheses for her impairment, and that she does not have an assistance animal. The physician indicated that the appellant is provided with help from friends and community services agencies and that she requires assistance with transportation at the moment and has significant financial difficulties. For the reasons provided above, the panel finds that the ministry reasonably concluded it could not be determined that the appellant requires help with DLA as defined by the legislation.

#### **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 finding 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.