

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of December 9, 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 parties this hearing was conducted in writing in accordance with s. 22(3)(b) of the *Employment and Assistance Act*.

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 April 8, 2013], a physician's report ("PR") signed by the appellant's physician of 6 months [dated June 10, 2013], and assessor's report ("AR") signed by the appellant's social worker [dated April 12, 2013].
- The appellant's written submissions dated October 24, 2013 and November 24, 2013.
- A letter from the appellant's son dated October 24, 2013.
- Supporting medical documents such as hospital admission records, prescription forms, and medical test results (collectively referred to as "the Medical Reports").

Neither party submitted any new evidence for the appeal hearing.

### *Physical Impairment*

- In the PR the appellant's physician diagnosed her with lupus and rheumatoid arthritis. In the Health History section of the PR she noted that the appellant has had previous surgery to her feet.
- In terms of functional skills the physician indicated the appellant can walk 1 to 2 blocks unaided on a flat surface, climb 2 to 5 stairs unaided, lift 5 to 15 pounds, and experiences no limitations in remaining seated.
- The physician noted that "I have not reviewed old notes – they have not been made available to me."
- In the AR the social worker wrote that the appellant's impairments include lupus; rheumatoid arthritis; double surgery to both feet to repair broken bones; Hepatitis C due to blood transfusion; and inflammation to feet, knees, back and organs due to rheumatoid arthritis.
- The social worker noted that the appellant is independent with respect to walking indoors (carefully, uses walls and furniture) and outdoors (2 blocks only), climbing stairs (difficult), and standing (max 20 minutes), though taking significantly longer than typical. She indicated the appellant requires continuous assistance with lifting/carrying/holding and commented "due to surgery is not allowed to lift and carry."
- In her self-report the appellant wrote that she is always in pain, and that her son lifts everything for her over 20 lbs. She wrote that she needs strong sun block because her skin burns easily, and that it is extremely stressful for her to go to a food bank because her immune system is compromised and she is at risk of getting sick.
- In her written submission of October 24, 2013 the appellant wrote that she cannot walk further than 1 block without extreme pain, and that she can't carry anything – even her purse causes pain, and her son has to carry shopping bags for her. The appellant also wrote that her physician and her social worker "did not really fill out the forms – nor was there any health research done on their part, nor did they ask me for medical inform which I had at the time."
- In her letter of November 24, 2013 the appellant described the pain (9 on a scale of 1-10)

caused by her rheumatoid arthritis, and explained that she uses a walker during cold months. She wrote that the physician in her current community took her off her lupus medication after seeing her only once, causing her significant pain. She indicated that she is waiting to see a rheumatologist.

- The appellant also reported being affected by allergies, Hepatitis C, cervical cancer, and a heart condition. She wrote that the Hepatitis C makes her weak most of the time, and that she becomes nauseous for weeks at a time. She indicated that she hasn't seen a specialist yet regarding her cervical cancer, but that her physician has told her that she will be seeing a specialist. The appellant stated that she was expecting a letter from her physician and a specialist regarding her Hepatitis C.

### *Mental Impairment*

- In the Health History section of the PR the appellant's physician noted that the appellant has "psychological issues: Anxiety and depression."
- In terms of functional skills the physician reported that the appellant has no difficulties with communication. She indicated a significant deficit with cognitive and emotional function in 1 of 11 categories of cognitive and emotional function – emotional disturbance.
- In the AR the social worker wrote that the appellant's impairments include anxiety/depression/panic-PTSD. She reported that the appellant's ability to communicate is good in all respects "when fully functional", noting that winter cold affects the appellant's jaw, making it difficult to speak and causing her to "withdraw[] almost completely."
- The social worker indicated the appellant experiences major impacts in 2 areas of cognitive and emotional functioning: emotion (anxiety, depression, panic attacks) and "other" commenting on childhood trauma and PTSD. The social worker also noted moderate impacts with respect to bodily functions (toileting) and attention/concentration (when anxious).
- In her self-report the appellant wrote that the constant pain causes her to experience anxiety.
- In her written submission of November 21, 2013 the appellant reported that she suffers from PTSD and residential school syndrome.

### *DLA*

- In the PR the physician indicated that the appellant's ability to manage 8 of the 10 prescribed DLA (*personal self-care, management of medications, daily shopping, mobility indoors and outdoors, use of transportation, management of finances, decision-making, and social functioning*) is not directly restricted by her impairment.
- The physician indicated that the remaining 2 DLA (*meal preparation and housework*) are periodically restricted. By way of explaining her use of the term "periodic", the physician wrote that regarding meal preparation "her son has to open can[s] for her". Regarding basic housekeeping she wrote "her son needs to help her lift things > 20 lbs".
- In the AR the social worker noted that "all movement is painful, so her DLA's are affected according to her physical/mental condition that day."
- The social worker indicated the appellant independently manages her *personal self-care* (taking 4 to 6 times longer than typical), *medications* (takes significantly longer), most aspects of *use of transportation* (she is able to drive) and all aspects of *social functioning* (withdraws when she feels overwhelmed). The social worker noted that the appellant has good functioning with respect to both her extended (when she is able to function) and immediate social networks.
- The social worker indicated the appellant requires help with all aspects of the DLA of *basic*

*housekeeping, daily shopping, meal preparation, and management of personal finances (pay rent and bills – using direct deposit and online banking).* The social worker commented that the appellant's son helps her with these DLA.

#### *Help*

- In the PR, in response to the question "What help does your patient need with [DLA]?" the physician responded "Home help". The physician noted that the appellant does not require any prostheses or aids for her impairment.
- In the AR, in response to questions asking her to describe the support/supervision/help required by the appellant, she responded "Home Help" and "Community support worker". The social worker indicated that the appellant receives help from family and friends, that she uses a walker, and that she does not have an assistance animal.
- In her written submission of November 24, 2013 the appellant wrote that "I require daily care and assistance, and my son helps me with my household needs."
- In his letter of October 24, 2013 the appellant's son wrote that the appellant "cannot open a jar or can, nor can she lift anything heavy because of rh[e]umatoid arthritis." He noted that "She is legally disabled and has medical documents to prove it. I help her."

The Medical Reports, viewed as a whole, support the diagnoses of lupus, seasonal allergies, rheumatoid arthritis, foot pain due to a bunion, fatigue, vaginal bleeding, and Hepatitis C.

## 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 impairments cause constant severe pain, which limits her mobility and constitutes a severe physical impairment. She argued that neither of the professionals (the physician and the social worker) accurately conveyed the severity of her impairments.

The ministry's position - as set out in its reconsideration decision - is that it acknowledges that the appellant's medical conditions cause her to experience some limitations, but that these limitations are more moderate than severe.

### Panel Decision

A diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a severe impairment. An "impairment" is a medical condition that results in restrictions to a person's ability to function independently or effectively.

To assess the severity of an impairment one must consider the nature of the impairment and the extent of its impact on daily functioning as evidenced by functional skill limitations and the degree to which performing DLA is restricted. A medical barrier to the appellant's ability to engage in paid employment is not a legislated criterion for severity. 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.

The onus of proving that she satisfies the legislative criteria rests with the appellant. Unfortunately, her two professionals appear to have formed very different opinions as to the severity of the appellant's impairment. Both the physician and the social worker substantively based their assessments on interviews with the appellant. The physician noted that she had not been provided with the appellant's previous medical records. Given the respective dates on which the PR and AR were completed by the professionals, the social worker did not have the benefit of reviewing the physician's opinion at the time she completed the AR.

The evidence is reasonably consistent among the physician, the social worker, and the appellant that she can walk 1 to 2 blocks unaided on a flat surface before experiencing pain. The social worker's evidence indicates that the appellant manages to walk and climb stairs independently though she takes significantly longer than typical. The social worker and the appellant indicate that the appellant uses a walker during cold winter weather, while the physician indicated that the appellant requires no prostheses for her impairments. The appellant's evidence in her October 24, 2013 submission is in conflict with the evidence from her self-report and the physician, which indicated that the appellant can lift up to 20 pounds. Her ability to lift up to 20 pounds is indirectly supported by the appellant's son who noted that his mother cannot lift anything "heavy". Considering the physical functional skills evidence as a whole, the panel finds the ministry reasonably considered it to be indicative of moderate impairment rather than severe impairment.

The panel notes that the appellant is still undergoing medical tests for other potential problems, but the panel must base its decision on the evidence that it currently has before it.

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 the appellant's impairments do not appear to have translated into significant restrictions in her ability to manage her DLA independently.

For the foregoing reasons, the panel has concluded that while the appellant does have some serious physical health issues, the ministry reasonably determined that the evidence falls short of establishing that the appellant has a severe physical impairment as contemplated by the legislation.

### **Severe Mental Impairment**

The appellant did not expressly advance an argument with respect to severe mental impairment, but she stated that her PTSD and anxiety are with her constantly, often keeping her confined to her home for days at a time.

The ministry's position, as set out in its reconsideration decision, is that the evidence provided is insufficient to confirm a severe mental impairment.

### **Panel Decision**

The physician's and social worker's evidence is consistent in indicating that the appellant has good communication skills, though the social worker indicates there are times when the appellant is not "fully functional". The physician noted one significant deficit with cognitive and emotional function – emotional disturbance. This is consistent with the social worker's evidence noting a major impact in this area. The social worker also noted PTSD as a separate major impact. Otherwise the social worker indicated moderate, minimal or no impacts to the appellant's cognitive and emotional functioning. There is no professional evidence indicating that the appellant is house-bound for days at a time with PTSD or anxiety.

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 the decision making aspects of *manage personal medication* (filling/refilling/taking as directed), and *social functioning* (appropriate social decisions). The social worker indicated that the appellant requires continuous assistance with making appropriate choices during the DLA of *daily shopping*, and that she needs continuous assistance with meal planning during the DLA of *meal preparation*. On balance the panel concludes that the evidence indicates the appellant manages her own *decision making*.

With respect to *social functioning*, the evidence is that the appellant functions well, though she periodically has a tendency to withdraw.

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. She relies primarily on the social worker's evidence to show that the combination of physical impairment and PTSD/anxiety continuously restrict her management of DLA .



The ministry's position, as set out in its reconsideration decision, is that the professional evidence does not demonstrate that the appellant's impairments directly and significantly restrict her ability to perform DLA either continuously or periodically for extended periods. The ministry emphasized the physician's evidence that the appellant independently manages most of her DLA and stated that the degree of assistance provided by the appellant's son was unclear. The ministry also concluded that although the social worker indicated that the appellant withdraws when she feels overwhelmed, there was no evidence provided that the appellant requires support/supervision with social functioning.

### Panel Decision

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. The direct restriction must also be significant. Finally, there is a component related to time or duration. The direct and significant restriction may be either continuous or periodic. If it is periodic it must be for an extended time. Inherently, any analysis of periodicity must also include consideration of the frequency. All other things being equal, a restriction that only arises once a year is less likely to be significant than one which occurs several times a week. Accordingly, in circumstances where the evidence indicates that a restriction arises periodically, it is 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.

Section 2(1) of the EAPWDA prescribes ten DLA. Of those ten, the physician's evidence indicates that the appellant is not directly restricted with respect to eight: *personal-self care; management of medications, daily shopping, move about indoors and outdoors, use of transportation, management of finances, social functioning and decision-making*. The physician indicated that the appellant is periodically restricted with respect to *meal preparation and basic housekeeping*.

The social worker's evidence is at odds with the physician's assessment, indicating that the appellant only independently manages three DLA: *management of medications, use of transportation, and social functioning*. The social worker indicates that the appellant requires continuous assistance with virtually all other DLA.

The physician's evidence and the social workers evidence on DLA vary significantly, though both are based substantially on interviews of the appellant. The Medical Reports confirm the diagnoses of various medical conditions (lupus, rheumatoid arthritis, Hepatitis C) but does not provide evidence of the degree to which DLA are restricted or of the frequency or duration of these restrictions. The appellant has indicated that she would provide additional letters from her physician and another specialist but has not done so. There is evidence that some of the restrictions to DLA are variable, being weather-dependent or mood-dependent.

Viewing the evidence as a whole, given the inconsistencies between the evidence of the two professionals, and the internal inconsistencies in the appellant's evidence, the panel concludes the evidence falls short of showing on the balance of probabilities that the appellant's ability to manage her DLA is directly and significantly restricted either continuously or periodically for extended periods. The panel finds that the ministry reasonably determined that this legislative criterion was not satisfied.

**Help with DLA**

The appellant's position is that she requires continuous help to manage her DLA.

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**

The panel finds that the ministry reasonably concluded that as it has not been established that DLA are significantly restricted, 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 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.