

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “Ministry”) reconsideration decision dated March 6, 2014 which held that the Appellant was denied the Persons with Disabilities Designation (“PWD”) as the Appellant did not meet the legislative criteria as set out in section 2 of the Employment and Assistance for Persons with Disabilities Act (“EAPWDA”).

The Ministry held that the Appellant did not have a severe mental or physical impairment that significantly restricted her ability to perform daily living activities either continuously or periodically for extended periods and did not require significant help or supervision of another person, an assistive device or an assistance animal to perform daily living activities resulting from the impairment as required by section 2(2) and (3) EAWPDA.

## PART D – Relevant Legislation

Section 2(2) and (3) of the EAPWDA

Section 2 of the Employment and Assistance for Persons with Disabilities Regulation (“EAPWDR”)

## PART E – Summary of Facts

The evidence before the Ministry at reconsideration included the following documents:

For its reconsideration decision, the Ministry had the following evidence:

1. Appellant's PWD application consisting of:

- A physician's report ("PR") completed on September 12, 2013 by a doctor who noted that the Appellant has been seen in their walk-in clinic since November 12, 2012 after a move from another province.
- An assessor's report ("AR") completed on the same day by the same doctor who indicated she has known the Appellant since November 2012 and has seen the Appellant between 2-10 times in the year preceding the completion of the report.

2. Appellant's request for reconsideration, dated February 20, 2014, with a written statement and the following additional documents:

- January 17, 2013 report from a consulting doctor.
- January 17, 2013 diagnostic imaging report.
- January 25, 2013 lab results.
- April 10, 2013 consultation request letter to a pain clinic specialist.
- May 15, 2013 pain clinic specialist's response to the April 10, 2013 request and a June 13, 2013 injection report from that specialist.
- May 20, 2010 decision by a social benefits tribunal in another province and medical reports from 1999-2010 from another province.

### **Evidentiary Findings**

The Panel has reviewed the medical reports from 1999-2010, as well as the information in the PR, the AR and the medical test results/reports dating January 2013 and June 2013. Because the various medical test results/reports completed in 2013 provide the most recent information about the Appellant's medical conditions and impairments, the Panel gives those more weight than the ones from 1999-2010.

Also for that reason, the Panel will summarize the relevant information from only those more recent reports. As for the tribunal decision from another province, the Panel notes that this appeal tribunal must base its decision on the criteria in the EAPWDA and the EAPWDR, and not legislation from another province. The panel also notes that the information within the tribunal decision reflects the appellant's functioning in 2010. Therefore, the Panel gives the information in that other tribunal decision little weight.

### *Diagnoses*

In the PR, the doctor diagnosed the Appellant with degenerative disc disease – cervical and lumbar spine.

### *Physical Impairment*

The January 2013 consulting report had the following information about the Appellant's conditions:

- No significant bone or joint abnormality identified in bilateral feet.
- Hip joint spaces are maintained bilaterally with no evidence of osteoarthritis; no sacroiliac joint space narrowing is seen.
- Moderate intervertebral disc space narrowing at C5-C6 and C6-C7 with milder disc space narrowing at C4-C5 with endplate osteophytes at these levels; mild anterolisthesis of C3 on C4 at present along with moderate multilevel facet arthropathy; oblique view demonstrates mild to moderate bilateral osteophytic encroachment of the neural foramina from C3-C4 down to C5-C6.
- Minimal convex right lumbar scoliosis; vertebral body heights are maintained; facet arthropathy at L4-L5 and L5-S1 with 7mm of anterolisthesis of L4 on L5; moderate disc space narrowing is present at these levels.

In the PR, the doctor provided the following information about the Appellant's impairment:

- Has degeneration of her cervical and lumbar spine with spinal stenosis.
- Has chronic pain, stiffness and less mobility due to this – referred to reports from another province – no new scans have been recently done.
- Is seeing another doctor for injections and there has been improvement of her symptoms.
- Also, referred to an orthopedic doctor for problems with her feet – bilateral metatarsalgia with pain on mobilizing.
- Uses orthotics in her shoes.
- For functional skills – can walk unaided on a flat surface for less than 1 block – “need to take breaks”; can climb 5+ steps unaided – “takes time and rest periods”; can lift under 5 lbs.; can remain seated for less than 1 hour.
- Has no difficulties with communication.

In the AR, the doctor provided the following information about the Appellant:

- Her impairments are chronic neck and lower back pain with restrictions of mobility and activity.
- Her ability to communicate is good in the following areas: speaking, reading, writing and hearing.

The doctor who wrote the April 10, 2013 consulting request letter described the Appellant as having chronic foot pain, congenital high arches and noted she has now developed some clicking sensation in her 4<sup>th</sup> MT head area. She has custom orthotics made in another province.

The pain clinic specialist who completed the May 15, 2013 consultation reported the following about the Appellant:

- Has a long history of pain in her C-spine and L-spine area, and describes getting an injection in her C-spine on a fairly regular basis.
- She slipped and fell at the local swimming pool in the past 2 weeks, struck the back of her head and was diagnosed with a concussion, which flared up her symptoms, particularly in her lower back on the left side.
- Typically does not get any real radicular symptoms; usually has pain down the posterolateral aspect of her left leg to her knee.
- Medications include Tylenol #3 taken up to 4 times daily; denies having any other chronic medical problems.
- Had a recent CT scan of her head, because of the fall – head scan was unremarkable.

- CT of her C-spine shows spondylosis throughout, as well as some facet joint arthropathy throughout; x-rays from January 2013 of L-spine show facet arthropathy from L4-5, L5-S1, with some anterolisthesis at L4 on L5.
- She is alert and appropriate; indicating pain in the left lower area on her L-spine.
- Has good forward flexion and extension; has pain with left lateral flexion; has no radicular type signs in the lower extremity; tone, power and deep tendon reflexes are normal bilaterally.
- In prone position with axial loading, she has pain over her L4-5 and L5-S1 facet joints, consistent with her pain; C-spine shows decreased range of motion, particularly with rotation and lateral flexion towards the left side; has palpable pain over the mid and lower facets on the left side.
- Signed informed consent for lumbar facet injections as well as medial branch nerve blocks and had procedures performed that day; she tolerated the procedure well and will be followed up again in 1 month.

A June 13, 2013 pain clinic injection report indicating some improvement with recent facet injections; now with myofascial neck and shoulder pain.

#### *Mental Impairment*

The doctor provided no diagnoses of any mental health condition. In the PR, the doctor indicated "unknown" as to whether there are any significant deficits with cognitive and emotional function.

In the AR, the doctor reported the following impacts to cognitive and emotional functioning:

- Minimal impact to emotion and motivation.
- No impact to the other 12 listed areas.

#### *Daily Living Activities*

In the PR, the doctor provided the following information about how the Appellant's impairment restricts her ability to manage daily living activities:

- Has not been prescribed any medication and/or treatments that interfere with her ability to perform daily living activities.
- Basic housekeeping, daily shopping and mobility outside the home – continuously restricted.
- Personal self-care – periodically restricted.
- Meal preparation, management of medications, mobility inside the home, use of transportation, management of finances and social functioning – no restrictions.

The doctor added the following comments: "personal self-care is no problem if pain is controlled with medication"; "she cannot stay sitting or standing for > 15 min. at a time. Mobility becomes painful if walk > 15 min.

In the AR, the doctor reported the following about the Appellant's ability to manage daily living activities:

- Is independent walking indoors and outdoors, climbing stairs and standing. Walking outdoors and climbing stairs – takes longer, frequent stops.
- Needs periodic assistance with lifting and with carrying and holding.
- Independently manages all areas of personal care, paying rent and bills, medications and transportation.
- Needs periodic assistance with food preparation, cooking and safe storage of food;

independently manages meal planning.

- Needs periodic assistance with laundry and basic housekeeping.
- Needs periodic assistance with going to/from stores and carrying purchases home; independently manages reading prices/labels, making appropriate choices and paying for purchases.
- For social functioning – independently manages to make appropriate social decision, develop and maintain relationships and interacting appropriately with others; needs periodic assistance with dealing appropriately with unexpected demands and with securing assistance from others.
- Has good functioning with her immediate and with her extended social networks.

#### *Help with Daily Living Activities*

In the PR, the doctor wrote that the Appellant gets help from her grandson with chores in the house and shopping. The Appellant uses a cane if it gets worse.

In the AR, the doctor reported that family helps the Appellant, that she uses assistive devices – a cane and a scooter in stores when available. The Appellant does not have an assistance animal.

The Panel finds the information in the notice of appeal and the Appellant's statements at the hearing provide details about her conditions related to the information that the Ministry had at reconsideration. Therefore, pursuant to section 22(4) of the Employment and Assistance Act, the Panel admits the written information and the testimony as being in support of the evidence that was before the Ministry at reconsideration.

At the hearing, the Appellant provided the following additional oral evidence:

1. the Appellant takes Tylenol-3's three times a day to help control her pain and is not able to take other forms of pain medication because she looks after her grandson;
2. the Appellant was diagnosed with her condition in 1986;
3. the Appellant was on disability in a different province until her father passed away and she moved to British Columbia to be with her family;
4. the Appellant cannot work and her muscles are not working which caused her to fall on her face on at least one occasion;
5. the Appellant takes care of her grandson;
6. the Appellant's grandson helps her with her daily living activities;
7. the Appellant has never used a cane but she does have orthotics;
8. the Appellant receives cortisone injections in her neck, hip and lumbar spine every three months;
9. the Appellant does not have a doctor currently - the doctor that filled out the application is not her doctor and she saw her between 2 – 10 times; and
10. the doctor filled the form out incorrectly noting that she is not able to climb many stairs or able to lift or carry anything at all;

The Ministry did not submit additional or new evidence on appeal and relied exclusively on the Reconsideration Decision.

The panel finds that the additional evidence provided by the Appellant clarified her situation and was admissible under section 22(4) of the *Employment and Assistance Act* as it was in support of the

records before the Ministry at reconsideration.

## PART F – Reasons for Panel Decision

The issue under appeal is whether the Ministry reconsideration which held that the Appellant the Appellant did not meet the legislative criteria as set out in section 2(2) and (3) of the EAPWDA for designation as PWD was reasonably supported by the evidence or a reasonable application of the legislation.

### Legislation

Section 2 of the EAPWDA is the section that gives the Ministry the authority to designate a person as a person with disabilities. Specifically section 2(2) gives the Ministry the discretionary power to designate persons as PWD who has reached 18 years of age if the Ministry is satisfied that the person has a severe mental or physical impairment.

Section 2(2)(a)(b)(i)(ii) of the EAPWDA further requires that in the opinion of the medical practitioner the impairment is likely to continue for at least 2 years and in the opinion of a prescribed professional directly and significantly restricts the person's ability to perform daily living activities either continuously or periodically for extended periods and that as a result of the restrictions the person requires help to perform those activities.

For the purposes of section 2 of the EAPWDA, section 3(a) defines "severe mental impairment" to include a person with a mental disorder and section 3(b) defines "help" in relation to help with daily living activity to include a person who requires an assistive device, the significant help or the supervision of another person or the services of an assistive animal to perform daily activities.

Section 2 of the EAPWDA reads as follows:

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;

"health professional" repealed

"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**

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.

### **Ministry's Position**

In determining that the Appellant did not qualify as a PWD pursuant to section 2(2)(3) of the EAPWDA, the Ministry concluded that only two of the five criteria listed had not been established and the Appellant did not verify that she suffered 1) a severe impairment that 2) directly and significantly restricted her daily activities and that she 3) required assistance with daily activities as a result of the



significant restrictions.

The Ministry found that there was insufficient information provided in the medical report to support that the Appellant suffers with a "severe impairment." The Ministry did acknowledge that the reports suggest the Appellant suffers with severe physical limitations but these limitations do not restrict the Appellant's ability to independently function. The Ministry stated the following:

The ministry is not clear from the information provided by [the physician] that your physician has provided enough evidence to confirm a severe physical impairment. Although your physician indicates in the functional assessment that that [sic] you have significant physical limitations, as your assessor, your physician indicates you can independently manage the majority of your physical and mobility functions. Further, as you are able to manage the majority of your physical activities independently or with periodic assistance, evidence of a severe physical impairment has not been provided by you physician.

The Ministry acknowledged that the Appellant did have an "impairment" and suffered from a degenerative disc disease of the cervical and lumbar spine, but held that the documentation did not substantiate that the impairment was a "severe" impairment as required by section 2 of the EAPWDA.

The Ministry noted that the report supported that the Appellant is able to complete independently the majority of her mobility and physical abilities although it was noted that she takes longer than the average person to complete the tasks and that she requires only periodic assistance lifting, carrying and holding.

The Ministry held that the report did not provide sufficient details to determine whether or not the Appellant's impairment was "severe." The Ministry also noted that there was no mention in the physician and assessor reports that the Appellant had any significant deficits in her cognitive and emotional functioning that would otherwise require another person to manage her social functioning.

In terms of whether the Appellant provided the Ministry with sufficient information to establish that the impairment directly and significantly restricted her daily living activities, the Ministry noted in the medical report that the Appellant was able to prepare her own meals, manage her own medication, get around inside and outside of her the home, use or access transportation, manage finances and social functioning.

The Ministry did note that the medical report confirmed the Appellant required periodic assistance with basic housekeeping, carrying purchases home and most aspects of food preparation, but that she could also independently manage her personal care, the majority of the shopping tasks, meal planning, payment of rent and bills, medication and transportation.

The Ministry held the report fell short and did not provide information regarding the "type" and "amount" of assistance required and failed to identify safety issues and while they acknowledge that the impairment may impact the ability to manage her daily activities her impairment does not directly and significantly restrict her daily activities as required by the legislation.

As far as the Appellant requiring help with her daily living activities, the Ministry noted that her practitioner noted that she uses a cane and scooter in stores that offer them to their patrons. The Ministry found, however, that as they already determined the Appellant's daily living activities were not to be significantly restricted that "it cannot be determined that significant help is required from

other people.”

### **Appellant's Position**

The Appellant argued she did suffer a severe impairment and she was restricted in her daily living activities which she required assistance with in order to perform her activities. The Appellant submitted a number of documents to support that she was suffering from severe degenerative disc disease that affects her cervical and lumbar spine, including self-reports, reports from her medical practitioner, diagnostic imaging, lab results and various medical reports and consults that spanned between 1999 to 2010.

The Appellant additionally submitted a 2010 tribunal decision from another jurisdiction that determined the Appellant was a person with a disability and that she suffered with a substantial physical impairment that is continuous and recurrent and expected to last one year or more. The panel in that decision found that the Appellant suffered a degenerative disc disease of the lumbar and cervical spine and spinal stenosis.

The Appellant further argued that she is severely restricted in her daily activities and although she is independent as it relates to her personal care, that she requires “extra time” as a result of her continuous pain for many other daily activities, including walking and lifting to eating her meals.

The Appellant also gave evidence that house chores and shopping for groceries is very painful and is done with the assistance of her grandson. When an electric cart is available, the Appellant also uses this when she is shopping. The Appellant additionally stated that she continues to drive her automobile, but not great distances as this creates pain in her neck and shoulders and sometimes results in severe headaches and back pain.

### **Panel's Reasons**

The legislation clearly stipulates that in order for the Appellant to be a PWD all the requirements of section 2 of the EAPWDA must be satisfied.

There are seemingly conflicting reports in which make it uncertain the severity of the Appellant's condition. The consulting report barely acknowledges the existence of a condition whereas the PR, for example, is clear that the Appellant suffers from a degenerative disc condition and consequently lives in chronic pain and stiffness.

In the consulting report dated January 2013, for example, the practitioner states that there is “no significant bone or joint abnormality” or “no evidence of osteoarthritis or sacroiliac joint space.” The practitioner describes her intervertebral disc space as “moderate” to “milder” narrowing which similarly describes her osteophytic encroachment. The consulting report uses mild or minimizing words to describe the Appellant's condition which suggests that the Appellant's condition while present is not a severe impairment.

The PR, however, confirms that the Appellant has degeneration of her cervical and lumbar spine with spinal stenosis. The condition results in the Appellant living with chronic pain and stiffness which restricts her mobility and makes her daily activities challenging. The PR notes that the Appellant has injections given by another doctor and wears orthotics to help minimize the pain.

The AR likewise suggests the Appellant suffers chronic neck and back pain that restrict her mobility and the pain clinic specialist also notes that the Appellant suffers in pain but little more is offered to support the severity of her condition.

Based on the myriad of medical documentation submitted by the Appellant, however, it seems reasonable to conclude that the Appellant does have a chronic degenerative disc condition and that the Appellant has been seeking treatment as evidenced in the medical reports since at least 1999. In view of the level of independence with the DLA reported by the physician who completed the PWD application (discussed in greater detail by the panel under "DLA Restrictions") and the information in the diagnostic reports, the Panel finds that the Ministry reasonably determined that a severe physical impairment has not been established.

The Panel also finds that as the Appellant has not been diagnosed with a mental impairment or brain injury and as no significantly deficits with cognitive and emotional functioning are reported in the PR, the Ministry reasonably concluded that a severe mental impairment was not established.

#### **Restrictions with DLA and the need for help**

The legislation requires that the Ministry be satisfied that in the opinion of a prescribed professional a person is directly and significantly restricted in his or her ability to perform DLA either continuously or periodically for extended periods and that a result of those restrictions, the person requires help, as defined in the legislation, to perform DLA.

The Panel finds that the Ministry reasonably concluded that there is not sufficient evidence to support that the Appellant has a severe impairment that directly and significantly restricts her ability to perform daily living activities either continuously or periodically for extended periods.

The Appellant and the medical reports confirm the Appellant uses orthotics and the aid of a scooter while shopping. The Appellant gave oral evidence, however, stating that contrary to the report she does not use a cane to get around. While the use of a scooter when shopping can be classified as the use of an assistive device, the legislation requires that in order to perform the task the person is "required" to use the assistive device. The infrequent use of the scooter coupled with the fact that Appellant is not required to use a scooter for shopping but only when it is provided makes the use of the scooter optional and not a requirement.

While the Appellant says she additionally relies on her grandson to assist her in the house chores and shopping this also cannot be said to be "significant help" as required by the legislation. The Appellant's physician identifies the need for periodic assistance with some tasks of DLA but has not provided information to establish that the assistance is required for extended periods. Further the physician reports the Appellant as independently managing the majority of DLA tasks with no assistance.

The Panel finds that the physician's description of the restrictions and need for assistance and the Appellant's reported need of assistance around the house doing chores or helping with the shopping, however, cannot be characterized as "significant help" for the purposes of the section 2(3)(b)(ii) and that the Ministry reasonably concluded that the requisite degree of restriction with the DLA and resulting need for help was not established.

**Conclusion**

The legislation is clear that in order to be eligible for a PWD the recipient must have a severe mental or physical impairment that directly and significantly restricts her ability to perform her daily activities and does not require significant help of another person. The Appellant did not provide sufficient evidence to support these legislative requirements. For the above reasons, the Panel finds the Ministry's determination that the Appellant be denied PWD for failing to meet the legislative requirements was reasonably supported by the evidence and confirms the decision.