

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated April 9, 2014 which found that the appellant did not meet three of the five statutory requirements of Section 2 of the *Employment and Assistance for Persons with Disabilities Act* for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement and that her 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,
- as a result of these restrictions, the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

## 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 the time of the reconsideration decision included the Person With Disabilities (PWD) Application comprised of the applicant information and self-report dated November 12, 2013, a physician report (PR) dated October 27, 2013 and an assessor report (AR) dated November 7, 2013, both completed by a general practitioner who has known the appellant for 2 years.

The evidence also included the following:

- 1) Letter dated March 24, 2014 from the appellant's physician 'To whom it may concern'; and,
- 2) Request for Reconsideration dated March 17, 2014.

### ***Diagnoses***

In the PR, the appellant was diagnosed by the medical practitioner with osteoarthritis (OA) of hands and knees (onset 1990), rotator cuff syndrome with frozen shoulder (1992), fibromyalgia (2009), bilateral cataracts (2011), degenerative disc disease (1994) and depression (2006).

### ***Physical Impairment***

In the PR, the appellant's physician reported that:

- In terms of health history, the appellant has fibromyalgia which causes chronic pain, OA of her knees decreases mobility and causes pain climbing up and down stairs, OA in hands and rotator cuff causes impairment using hands and shoulder with normal ADL's.
- The appellant requires an aid for her impairment, namely a walking cane.
- In terms of functional skills, the appellant is able to walk less than 1 block unaided on a flat surface, climb 2 to 5 steps unaided, lift under 2 kg. (5 lbs.), and remain seated for 1 to 2 hours.

In the AR, the appellant's physician indicated that:

- The appellant is assessed as independent with walking indoors and outdoors, uses an assistive device and takes significantly longer than typical with climbing stairs (note: "climbs stairs one at a time, needs handrail"), is both independent and requires periodic assistance with standing (no explanation provided), and requires periodic assistance with lifting (note: "depends on day- some days able to do on own") and no assessment provided for carrying and holding.
- In the section of the AR relating to assistance provided through the use of assistive devices, none of the listed items have been indicated by the physician.

In her self-report, the appellant wrote that:

- On a daily basis she has pain from injuries from "MVA's" [motor vehicle accidents] and fibromyalgia and has to take pain medication every 6 hours. She does not sleep well at night.
- She cannot sit, stand or lie down for very long. It is also difficult to do much exercise. If she does a little too much when the pain level is lower, she ends up being in extreme pain for several days after.
- She cannot plan ahead because she may have extreme pain on any particular day.
- She also gets extreme "TMJ headaches" that make concentrating difficult and her hearing sensitive.
- Sometimes the pain is on the whole right side of her body, and sometimes it is the left.
- She has developed many allergies/sensitivities, which include many medications that could help her with the pain (anti-inflammatory).

- Sometimes the arthritis in her hands makes it pretty much impossible to open jars or grip.
- The arthritis in her knees makes stairs a bit of an issue. She definitely needs to use a handrail and/or take it a step at a time, and she uses an elevator when available.
- She has had issues with the rotator cuff in both shoulders and had to have cortisone shots in both (several years ago). There are many times that her shoulders ache.
- She gets migraines from stress and from allergies which can last for 2 to 3 days.

In her Request for Reconsideration, the appellant added that:

- She has likely overstated how far she can walk. She lives in a court and she can cut through the middle of the island and walk back to her place and that is the extent of her walk, and that is not done on a daily basis.

In the letter dated March 24, 2014 from the appellant's physician, the physician wrote:

- The appellant was not realistic about her true impairments on the initial assessment. Some of the tasks she is able to do but only on very occasional good days.
- The appellant is known with chronic pain which affects her mobility and mental mind set. The pain is generalized due to fibromyalgia but worse in her back, legs/hips and shoulder.
- Vision has improved since cataract surgery but still needs to wear corrective lenses.
- Walking indoors and outdoors, short distances the appellant is independent but anything more than 50 meters, she gets tired quickly and it has been suggested that she needs a walker.
- Standing for short periods is OK but longer than 10 minutes she has to take a break due to pain.
- Lifting, carrying and holding- the appellant is not able to carry more than 5 lbs.

### ***Mental Impairment***

In the PR, the appellant's physician reported that:

- The appellant has no difficulties with communication.
- There are significant deficits with the appellant's cognitive and emotional function in the areas of emotional disturbance, motivation and attention or sustained concentration.

In the AR, the physician indicated that:

- The appellant has a good ability to communicate in speaking and hearing and poor ability with reading and writing.
- There are no major impacts to the appellant's cognitive and emotional functioning, moderate impacts in the areas of bodily functions, emotion, attention/concentration, memory and motivation.
- There are minimal impacts to executive and no impacts in the remaining 7 areas of functioning.
- The appellant is assessed as independent with all aspects of social functioning: making appropriate social decisions, developing and maintaining relationships, interacting appropriately with others, dealing appropriately with unexpected demands, and securing assistance from others.
- The appellant has marginal functioning in both her immediate and extended social networks.

In her self-report, the appellant wrote that:

- With the help of family, friends, and professional help she is trying to keep a positive outlook.

In her Request for Reconsideration, the appellant added that:

- She gets frustrated with her limitations at times but her faith and a great group of friends has kept her spirits uplifted.

In the letter dated March 24, 2014 from the appellant's physician, the physician wrote:

- Depression affected executive functioning.
- Communication- reading has improved since eye surgery and is satisfactory. Writing is poor, she is right-handed and when her shoulder is painful she has difficulty.
- For bodily functions, there is a major impact: poor sleep.
- Executive planning, there is a moderate impact: difficulty with abstract thinking and organizing, not able to plan ahead.
- Motivation, there is a major impact: when she is depressed and in a lot of pain, she does not want to get out of bed and even says no to things that she usually would enjoy doing, like looking after grandchildren.
- Her cognitive functioning is impacted by her physical inability to do things, financial stress, pain, stress from loss of independence, and grief from losing a family member.

### ***Daily Living Activities (DLA)***

In the PR, the physician indicated that:

- The appellant has not been prescribed any medication and/or treatment that interfere with her daily living activities.

In the AR, the physician reported that:

- The appellant is independent with moving about indoors and outdoors.
- The appellant is independent in 4 out of 8 tasks of the DLA personal care, including dressing, grooming, feeding self and regulating diet. She uses an assistive device for bathing (showering) and toileting as she needs railing, and takes significantly longer than typical with transfers in/out of bed. There is no assessment provided for her ability to transfer on/off of chair.
- The appellant is independent with doing her laundry and requires periodic assistance from another person with basic housekeeping, and takes significantly longer than typical.
- The appellant is independent in performing 4 of 5 tasks of the DLA shopping, including going to and from stores, reading prices and labels, making appropriate choices, and paying for purchases. The appellant requires continuous assistance from another person with carrying purchases home. For going to and from stores, the physician noted: "does not drive at night, vision issue. Pain getting in and out of vehicle- some days not able to drive due to this."
- The appellant is independent with 2 out of 4 tasks of the DLA meals: meal planning and safe storage of food. She takes significantly longer than typical with food preparation and cooking, and physician noted "pain."
- The appellant is independent with 3 of 3 tasks of the DLA paying rent and bills: banking, budgeting and paying rent and bills.
- The appellant is independent in performing all 3 tasks of managing her medications: filling/refilling prescriptions, taking as directed and safe handling and storage.
- The appellant is independent in performing 2 of 3 tasks of managing her transportation: using public transit (marked "N/A"), and using transit schedules and arranging transportation. The appellant takes significantly longer than typical with getting in and out of a vehicle.

In her self-report, the appellant wrote that:

- She can only do small amounts of house cleaning at a time; sweeping and vacuuming are the hardest on her back and bending down or kneeling is not something she can really do because when she has done so, she ends up paying for it.
- Sometimes her arthritis in her hands make it pretty much impossible to open jars, use a can opener, hold/grip pens and use a mouse or type on a keyboard.
- Driving or being a passenger can sometimes be an issue due to low back and hip pain, therefore making travel difficult when she feels this way. She has far more pain issues when she has to sit/ride in a car as opposed to a truck/SUV type of vehicle. It is easier to get down from a vehicle than to get up out of a car.

In her Request for Reconsideration, the appellant added that:

- Over the last few years she has struggled to maintain her independence and, in doing so, blinded herself to the reality of her limitations. She tried to "paint a prettier picture" of what she can/cannot do. Since 2012 she has started to ask for help and realized as time went on that she needs even more help.
- Even simple housecleaning is beyond what she can handle. Her daughter saw the state of her floors and gave her a cleaning service as a gift.
- She almost always uses a grocery cart to lean on when shopping and she shops several times a week so there is not a huge amount of groceries to carry.

In the letter dated March 24, 2014, the appellant's physician wrote:

- On the initial assessment, the appellant was not realistic about her true impairments and a lot of the things she thought she could do. Some of the tasks the appellant is able to do, she can do "only on very occasional good days."
- Dressing, grooming and bathing takes significantly longer than normal person. Shower: has been suggested that she get seat in shower to help with mobility. Transfers in and out of chair- needs arms to press up. Transfers in and out of bed- appellant typically rolls off the bed or will pull herself up on the slats of the bed. Both of these take significantly longer than normal person.
- Housekeeping- She is able to do small loads of laundry at a time. She uses a cleaning service to wash floor, bathrooms etc. as she is not able to do these things by herself. Able to do small tasks for short periods, takes longer than normal person and usually has significant pain afterwards.
- Shopping- walking in stores, uses cart to lean on, going to shopping center will need a walker. Carrying purchases, she uses cart to get them to the car. Put them in smaller, lighter bags that she does not have to carry too heavy.

### ***Need for Help***

The physician reported in the AR that:

- The help required for DLA is provided by the appellant's family.
- In the section of the report indicating assistance provided through the use of assistive devices, the physician did not indicate that any devices are used.

In her Request for Reconsideration, the appellant added that:

- She will be moving across the street from her daughter which will be a great help.
- There are times when having aids in her bathroom would be helpful (bars/shower stool) but as she has to rent, she has to have her landlord agree to these.

In her Notice of Appeal dated April 17, 2014, the appellant expressed her disagreement with the ministry's reconsideration decision and wrote that she would like to explain how her disability does truly affect her daily lifestyle (have to grocery shop only when she is in less pain, for example) and many other issues.

At the hearing, the appellant provided a letter dated May 5, 2014 in which her chiropractor wrote:

- On examination on April 10, 2014, he finds that the appellant's symptoms have persisted with no significant improvement.
- She continues to suffer from debilitating migraines, frequent neck pain and parathesia in the right hand and arm.
- Signs of degenerative disc disease are present with chronic low back pain and hip pain, sciatica and swelling in the legs.
- She experiences a generalized global muscle and joint soreness which flares up with even light activity.
- Pain in the TMJ continues, as does broad spectrum allergic reactions (including to some medications) and clinical depression has recently deepened with recent family losses.
- The appellant's physical abilities are significantly limited, especially lifting, carrying, climbing stairs or prolonged sitting.
- Her concentration is fleeting, making it hard to focus on tasks or attend to details. She finds she can no longer work as a [her occupation].
- At home, she can manage some cooking but often is too sore or tired to shop. She depends on others for house cleaning and to help with chores.

At the hearing, the appellant and her advocate stated:

- The appellant has looked at different options for her treatment and has gone to a chiropractor, who provided a letter. She has also used a procedure called "dry needling" which is like acupuncture, which she has also tried but she was allergic to the needles. She has gone for physiotherapy but was not making much headway and she found it hurt. With the alignments done by the chiropractor she finds that the treatments relieve some of the stress and pain and helps to a degree.
- She was involved in MVA's in the past and the imaging and other reports are with doctors in another province and she thought her family physician might have access to some information.
- There has been degeneration since these MVA's, not because of something new but just through the aging process.
- She has gone to different pain management courses with physiotherapy and counseling and OA seminars.
- The difficulty is that she is allergic to many medications but she has found one pain medication that helps. If she has an allergic reaction, she will end up covered in hives from head to toe. She cannot take any anti-inflammatory medications. If she did not take pain medication every day, she would not be able to move because of the pain.
- When she had the surgery for her cataracts, she had to be tested for an allergic reaction because they had to use some form of anti-inflammatory and they chose the one with the lesser reaction. She had a reaction but she was losing her vision and needed the surgery.
- On the mental side, she has gone through deep depression in the past and she discovered that she had a reaction to all the prescribed medication. She has gone through counseling with support by her friends and family.
- A close family member recently passed away and she inherited a walker and cane. She used

a shopping cart to lean on before and will start using the walker when out shopping. She has not used the cane yet but then she does not walk much.

- She has a supportive relationship with her daughter and a small group but is otherwise very isolated and not leaving her residence that often and sometimes cannot get out to her group study because of pain.
- There is an auto-immune component to her condition so she has flares of her condition and some days are worse than others. Sometimes when she has flare-ups, they will last for 2 to 5 days at a time.
- With her TMJ pain and headaches, the pain can affect the whole side of her body and she has had it go on for 3 to 4 weeks and "everything comes to a halt."
- She feels that she is "just coping" and sleep is a huge issue for her. She will only get a half hour to an hour at a time and a regular night's sleep is 2 to 4 hours of sleep. She ends up getting sleep whenever she can. She can only lie down for a while and then has to get up and walk around because of the pain.
- She does her own laundry because she has in-suite appliances so she does not have to carry baskets any distance. Her daughter gifted a monthly cleaning service and they do the heavy cleaning, like washing floors and walls and bathroom, because she is a pretty clean person. She does the dishes and the laundry. She once tried to help her daughter with some heavy cleaning and ended up losing the use of her arm for up to a month.
- She can cook her own meals because the cooking is only for one person. She will cook enough to last for a few days at a time so she only has to cook every third day or so. Because of her pain and lack of sleep, she has less of an appetite and does not eat 3 meals per day.
- She has problems with her memory and she has to put sticky notes everywhere in her apartment to remind herself to bring things or to do things. She will forget in a short time otherwise.
- She has had to cancel appointments because she found she was too sore to attend.
- It takes her a few hours in the morning before she is "loose enough" to do her personal care and she has to use easy hairstyles, for example, that she is able to manage.
- When she was working, she pushed through the pain because it was her only source of income. She was working part-time until last spring but she lost her clients because she was not reliable. She could not commit to work a certain number of days per week because she did not know how her pain would be each day.
- She is moving June 1<sup>st</sup> to be closer to her daughter. She does not need to live in a facility but she will have her daughter's help to do her laundry and housecleaning. Her daughter will be able to do her shopping for her.
- She is able to get in and out of bed and she can bathe by using the rails in the bathroom. There is no space for a shower chair and any modifications would require the landlord's approval.
- She has difficulty getting down into a vehicle and prefers taller vehicles, such as trucks and SUV's, which she can climb in and out of. She gets rides places with her friends.
- She has not been referred to an occupational therapist. She has never felt the need to see an occupational therapist because she has been through all that before.
- The doctors only see her on her better days because on her bad days she would cancel any appointments. She believes she has been seeing her family doctor for more than 2 years.
- The advocate has provided naturopathic services to the appellant in trying to deal with her allergies through counseling and mind modalities and trying to reduce her reactivity. She has also treated the appellant's pain through infrared saunas, detox, and craniosacral therapy.

- The appellant sought the advocate's treatment because she had received these treatments in another province, and she was not referred through her family physician.
- She could not find a client that will allow her to work at home where she has an excellent chair at the right height in her home office.

***Admissibility of New Information***

The ministry did not object to the admissibility of the chiropractor's letter and did not raise an objection to the admissibility of the information in the oral testimony on behalf of the appellant. The letter and the oral testimony provided new information regarding the appellant's impairment. This information provides additional detail with respect to issues addressed in the original PWD application. The panel has admitted this new information as being in support of information and records that were before the ministry at the time of reconsideration, in accordance with s. 22(4) of the *Employment and Assistance Act*.

The ministry relied on its reconsideration decision.



## PART F – Reasons for Panel Decision

The issue on the appeal is whether the ministry's reconsideration decision, which found that the appellant is not eligible for designation as a person with disabilities (PWD), was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. The ministry found that the appellant does not have a severe mental or physical impairment and that her daily living activities (DLA) are not, 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, it could not be determined that the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

The criteria for being designated as a person with disabilities (PWD) are set out in Section 2 of the EAPWDA as follows:

### Persons with disabilities

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.

(4) The minister may rescind a designation under subsection (2).

Section 2(1)(a) of the EAPWDR defines DLA for a person who has a severe physical or mental impairment as follows:

### Definitions for Act

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.

### **Severe Physical Impairment**

The appellant's position is that a severe physical impairment is established by the evidence of her pain due to OA of her hands and knees, rotator cuff syndrome with frozen shoulder, fibromyalgia, degenerative disc disease, TMJ [temporomandibular joint] pain and migraine headaches. The appellant argued that she is limited in the medications that she can take to relieve the pain because of her many allergies.

The ministry's position is that there is not enough information from the general practitioner to confirm that the appellant has a severe physical impairment as the assessments provided speak to a moderate degree of physical impairment. The ministry argued that, in terms of functional assessment, the general practitioner indicated that the appellant can walk less than a block unaided or up to 50 meters, climb 2 to 5 stairs unaided, lift less than 5 lbs. and remain seated for 1 to 2 hours. The ministry argued that the general practitioner reported that the appellant is independently able to do most aspects of mobility and physical abilities, although standing and lifting were noted to require periodic assistance for which frequency was not described. The ministry argued that no imaging or consult reports were provided to demonstrate the cause for the chronic pain and while some assistive devices were "suggested," there was no detail about who made the recommendation.

### ***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. In making its determination the ministry must consider all the relevant evidence, including that of the appellant. However, the legislation is clear that the fundamental basis for the analysis is the evidence from a prescribed professional – in this case, the appellant's physician.

The physician, who has known the appellant for a period of at least 2 years, diagnosed the appellant with OA of hands and knees, rotator cuff syndrome with frozen shoulder, fibromyalgia, bilateral cataracts, and degenerative disc disease. The appellant wrote in her self-report that she also gets extreme "TMJ headaches" and sometimes the pain is on the whole right side of her body, and sometimes it is the left. The appellant reiterated this information at the hearing and stated that she

has developed many allergies/sensitivities, which include many medications that could help her with the pain (i.e. anti-inflammatory medication). Although the appellant's chiropractor wrote in his letter dated May 5, 2014 that the appellant's "pain in the TMJ continues, as does broad spectrum allergic reactions (including to some medications)," the appellant's family physician did not diagnose these conditions either in the PWD application or when given an opportunity to supplement the original reports in her letter dated March 24, 2014. In her letter, the physician summarized the appellant's impairments as "known with chronic pain which affects her mobility and mental mind set; the pain is generalized due to fibromyalgia but worst back, legs/hips and shoulder; vision has improved since she had cataract surgery but does still need to wear corrective lenses." There were no additional imaging or consultation reports provided and the appellant stated at the hearing that there are many reports from her previous MVA's with doctors in another province and she thought her family physician might have access to some of this information.

In her self-report, the appellant wrote that she cannot sit, stand or lie down for very long; the arthritis in her knees makes stairs a bit of an issue, she definitely needs to use a handrail and/or take it a step at a time, and she has had issues with the rotator cuff in both shoulders and had to have cortisone shots in both (several years ago) and there are many times that her shoulders ache. While the physician indicated that the appellant requires an aid for her impairment, namely a walking cane, the appellant explained that she inherited a cane but had not yet used it because she does not walk much. In terms of functional skills, the physician reported in the PR that the appellant is able to walk less than 1 block unaided on a flat surface, climb 2 to 5 steps unaided, lift under 5 lbs., and remain seated for 1 to 2 hours. In her letter dated March 24, 2014 the physician wrote that the appellant is independent walking indoors and outdoors short distances, but anything more than 50 meters, she gets tired quickly and it has been suggested that she needs a walker. The appellant stated at the hearing that she recently inherited a walker and that she will start using it for shopping, in place of the grocery cart, but that she has not felt a need to be referred to an occupational therapist.

In her self-report, the appellant wrote that she has pain from injuries from MVA's and fibromyalgia on a daily basis and has to take pain medication every 6 hours. She also wrote that if she does a little too much exercise when the pain level is lower, she ends up being in extreme pain for several days afterwards. At the hearing, the appellant stated she once tried to help her daughter with some heavy cleaning and ended up losing the use of her arm for up to a month. The appellant and her advocate stated that there is an auto-immune component to the appellant's condition so she has flares of her condition and some days are worse than others and, sometimes when she has flare-ups, they will last for 2 to 5 days at a time. In his letter of May 5, 2014, the chiropractor wrote that the appellant's generalized global muscle and joint soreness flares up with even light activity. In the AR, the appellant's physician assessed the appellant as independent with walking indoors and outdoors, she uses the handrail and takes significantly longer than typical with climbing stairs "one at a time", is both independent and requires periodic assistance with standing (no explanation provided), and requires periodic assistance with lifting (note: "depends on day- some days able to do on own") and no assessment was provided for carrying and holding. In her letter, the physician wrote that, for lifting and carrying and holding, the appellant is not able to carry more than 5 lbs and standing for "short periods is OK but for longer than 10 minutes has pain and has to take a break."

The evidence of the physician and the appellant is that the appellant experiences some flares in her condition with both good days and bad days and that her experience of pain is often aggravated by excessive activity such as physical exercise or heavy cleaning. At the hearing, the appellant stated that she has found a pain medication that she is able to tolerate and which helps to relieve her pain

but if she did not take pain medication every day, she would not be able to move. The appellant stated she is working with a chiropractor and a naturopathic doctor and finding some pain relief with various pain management therapies. The panel finds that the ministry reasonably concluded that the appellant is independently able to do most aspects of mobility and physical abilities, taking breaks while standing and requiring periodic assistance with lifting up to 5 lbs. "some days." The panel, therefore, finds that the ministry reasonably determined that there is not sufficient evidence to establish that the appellant has a severe physical impairment under section 2(2) of the EAPWDA.

### **Severe Mental Impairment**

The appellant's position is that a severe mental impairment is established by the evidence of her depression. The appellant argued that she is limited in the medications that she can take to relieve her depression because of her many allergies.

The ministry's position is that there is insufficient evidence to establish that the appellant has a severe mental impairment. The ministry argued that the physician indicated that the appellant has deficits with cognitive and emotional functioning in the areas of emotional disturbance, motivation and attention or concentration and, when assessing the impacts on daily functioning, the physician reported that there are major impacts in the areas of bodily functions (sleep) and motivation, as well as moderate impact to emotion, attention/concentration, executive, memory and motivation, and minimal or no impacts to the remainder of her cognitive and emotional functioning. The ministry argued that the physician also indicated that the appellant has no difficulties with communication or significant restrictions with social functioning, given the level of interaction and connection with family friends.

### **Panel Decision**

In the PR, the physician diagnosed depression, with onset in 2006. In the PR, the appellant's physician reported that the appellant has no difficulties with communication and, in her letter dated March 24, 2014, that her reading has improved since eye surgery and is now satisfactory and her writing remains poor due to periodic shoulder pain. The appellant is assessed by her physician as having significant deficits in cognitive and emotional functioning in the area of emotional disturbance, motivation and attention or sustained concentration with no further comment or description provided by the physician. With the additional information provided by the physician in her letter, the impacts to the appellant's daily functioning are assessed as major in the area of bodily functions (poor sleep) and motivation (the physician noted: "when she is depressed and in a lot of pain, she does not want to get out of bed, even says no to things that she usually would enjoy doing, like looking after grandchildren"). The appellant has moderate impacts in the areas of executive (note: "difficulty with abstract thinking and organizing, not able to plan ahead"), emotion, attention/concentration, and memory. In the AR, there are no impacts reported in the remaining 7 areas of functioning. The physician commented in her letter that the appellant's cognitive functioning is impacted by her physical inability to do things, financial stress, pain, stress from loss of independence, and grief from losing a family member. The panel finds that the physician has described impacts mostly from the appellant's physical experience of pain rather than from a mental health condition per se, as well as the situational experience of grief as a result of a recent loss.

In terms of social functioning, the appellant is assessed by the physician as independent in all areas: in making appropriate social decisions, developing and maintaining relationships, interacting appropriately with others, dealing appropriately with unexpected demands and securing assistance

from others. The physician did not provide further comments to the appellant's social functioning but reported that the appellant has marginal functioning in both her immediate and extended social networks. The appellant wrote in her self-report that, with help from family, friends, and professionals, she is trying to keep a positive outlook and, in her Request for Reconsideration, that she gets frustrated with her limitations at times but her faith and a great group of friends has kept her spirits uplifted.

The appellant stated at the hearing that she has gone through deep depression in the past and she discovered that she had a reaction to all the prescribed medication but she has gone through counseling with support by her friends and family. The advocate stated at the hearing that the appellant has a supportive relationship with her daughter and a small group but is otherwise very isolated and not leaving her residence often and sometimes cannot get out to her group study because of pain. The panel finds the isolation described by the advocate again relate more to the appellant's experience of physical pain than to a mental health condition and that the ministry reasonably determined that, in light of the appellant's evidence, her social functioning is better than marginal. The panel finds that the ministry reasonably concluded that, overall, the evidence of impacts to the appellant's social and cognitive/emotional functioning is not sufficient to establish a severe mental impairment, pursuant to section 2(2) of the EAPWDA.

#### **Restrictions in the ability to perform DLA**

The appellant's position is that her physical and mental impairments directly and significantly restrict her ability to perform DLA on an ongoing basis to the extent that she requires the significant assistance of another person, namely her family and friends.

The ministry's position is that the appellant's physician indicated that she is independent in a majority of her DLA and, for those aspects that require periodic assistance or take significantly longer than typical, there is no indication of how often assistance is required or how much longer it takes the appellant. The ministry acknowledged that the appellant has limitations due to her medical issues; however, the evidence from the physician is not sufficient to confirm that the appellant's impairments directly and significantly restrict her ability to perform DLA either continuously or periodically for extended periods.

#### ***Panel Decision***

Section 2(2)(b) of the EAPWDA requires that a prescribed professional provide an opinion that an applicant's severe impairment directly and significantly restricts her DLA, continuously or periodically for extended periods. In this case, the appellant's physician is the prescribed professional. DLA are defined in section 2(1) of the EAPWDR and are also listed in the PR and, with additional details, in the AR. Therefore, a prescribed professional completing these forms has the opportunity to indicate which, if any, DLA are significantly restricted by the appellant's impairments either continuously or periodically for extended periods.

In the appellant's circumstances, her physician reported in the AR that the appellant is independent with moving about indoors and outdoors and, while indicating the need for a walking cane, the appellant clarified at the hearing that she has not yet used the cane as she does not walk much. In her Request for Reconsideration, the appellant described her walk across the court in front of her residence but wrote that is the extent of her walk, and "even that isn't done on a daily basis." In her letter date March 24, 2014, the appellant's physician wrote that some of the tasks the appellant is

able to do, she can do "only on very occasional good days."

For personal care, the appellant's dressing, grooming, bathing, transfers in and out of chair and transfers in and out of bed take significantly longer than for a normal person. She is independently able to feed herself and regulate her diet. At the hearing, the appellant stated that she adapts her personal care, such as the type of hair style, to approaches that she can manage. With basic housekeeping, the appellant is independently able to do small loads of laundry at a time and she is able to do small tasks of housekeeping for short periods although this takes longer than normal person. She uses a cleaning service once per month to wash floor, bathrooms etc. as she is not able to do these things by herself. The appellant stated at the hearing that she is a clean person and does the dishes and the laundry as the appliances are conveniently located in her residence which minimizes the amount of carrying required. For shopping, she uses a cart to lean on and will use the walker she inherited at the shopping centre. For carrying purchases, she uses the cart to get her purchases to the car and puts them in smaller, lighter bags that are not too heavy to carry. In her Request for Reconsideration, the appellant wrote that she shops several times a week so there is not a huge amount of groceries to carry.

For the remaining DLA, the physician did not provide an update in her March 24, 2014 letter and indicated in the AR that the appellant is independent with 2 out of 4 tasks of the DLA meals and takes significantly longer than typical with food preparation and cooking (note: "pain"). At the hearing, the appellant stated that she can cook her own meals because the cooking is only for one person. She will cook enough to last for a few days at a time so she only has to cook every third day or so. The physician wrote in her letter that the appellant is independent with all tasks of paying rent and bills, managing her medications, and 2 of 3 tasks of managing her transportation, taking significantly longer than typical with getting in and out of a vehicle. The appellant stated at the hearing that she gets ride with friends to different places and she has difficulty getting down into a vehicle and prefers taller vehicles, such as trucks and SUV's, which she can climb in and out of.

The physician did not indicate restrictions to the two DLA relating to a person with a severe mental impairment in either the AR or her letter dated March 24, 2014, namely: making decisions about personal activities, care or finances and relating to, communicating or interacting with others. The appellant is assessed as independent with her social functioning as well as with managing her finances and medications and making appropriate choices when shopping.

The panel finds that the ministry reasonably concluded that the appellant is independent in a majority of her DLA and, for those tasks of DLA that require assistance (basic housekeeping, carrying purchases home), the assistance required is for heavier chores and weights (over 5 lbs.), and, for those tasks that take significantly longer than typical, there is no indication of how much longer it takes the appellant. Overall, the panel finds that the ministry reasonably concluded that there is not enough evidence from the prescribed professional to establish that the appellant's impairment significantly restrict her ability to manage DLA either continuously or periodically for extended periods, thereby not satisfying the legislative criterion of section 2(2)(b)(i) of the EAPWDA.

### **Help to perform DLA**

The appellant's position is that she requires the significant assistance of another person to perform DLA and that assistive devices have been suggested, such as a walker, shower seat and bathroom bars.

The ministry's position is that because it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required.

*Panel Decision*

Section 2(2)(b)(ii) of the EAPWDA requires that, as a result of direct and significant restrictions in the ability to perform DLA, a person requires help to perform those activities. Help is defined in subsection (3) as the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform a DLA.

The evidence of the physician, as a prescribed professional, is that the help required with DLA is provided by the appellant's family. In the PR, the physician indicated a walking cane as an aid required for the appellant's impairment but, in the section of the AR indicating assistance provided through the use of assistive devices, the physician did not indicate that any devices are used. The appellant stated at the hearing that she inherited a cane but she had not yet used it because she does not walk much. The appellant also stated that she will soon be moving across the street from her daughter which will be a great help and there are times when having aids in her bathroom would be helpful (bars/shower stool).

The physician wrote in her March 24, 2014 letter that it has been suggested that the appellant needs a walker, but there is no further information regarding the source of this suggestion and the appellant stated at the hearing that she has not consulted with an occupational therapist regarding any suggested assistive devices. The panel finds that the ministry reasonably determined that, as direct and significant restrictions in the appellant's ability to perform DLA have not been established, it cannot be determined that the appellant requires help to perform DLA as a result of those restrictions, as defined by section 2(3)(b) of the EAPWDA.

**Conclusion**

Having reviewed and considered all of the evidence and relevant legislation, the panel finds that the ministry's reconsideration decision which determined that the appellant was not eligible for PWD designation was reasonably supported by the evidence, and therefore confirms the decision.