APPEAL #

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the "ministry") reconsideration decision of June 12, 2014, 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

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 November 20, 2013) along with a physician's report ("PR") and assessor's report ("AR") completed by the appellant's physician of 5+ years – a general practitioner (both also dated November 20, 2013).

- The appellant's 2-page typewritten reconsideration submission dated May 28, 2014.

Admissibility of Additional Information

1. Prior to the hearing, the appellant sent a 5-page typewritten submission to the offices of the Employment and Assistance Appeal Tribunal.
2. At the hearing, the appellant submitted a 3 page handwritten document listing 19 symptoms of multiple sclerosis which she said she experiences.

The ministry took no position on admissibility of these documents other than to express concern that some of the information in the documents was not before the ministry at the time of reconsideration.

In reviewing the above-noted documents, as well as the appellant's oral testimony, the panel found that they provided additional detail about the appellant's condition and has admitted them as being in support of the information and records that were before the ministry at the time of reconsideration, in accordance with section 22(4) of the *Employment and Assistance Act*.

The ministry relied on the reconsideration decision and provided no additional information.

The panel reviewed the evidence as follows:

Diagnosis

- In the PR the physician diagnosed the appellant with multiple sclerosis ("MS"), which she described as "rapidly remitting/relapsing".
- In response to the question "What are the applicant's mental or physical impairments…" in the AR, the physician wrote "If fatigue, acute episode MS – cannot work, concentrate etc."

Physical Impairment

- In terms of physical functioning, the physician reported in the PR that the appellant can walk 1 to 2 blocks unaided on a flat surface, climb 5+ steps unaided, lift 5 to 15 pounds, and has no limitations to how long she can remain seated.
- In the AR the physician indicated that the appellant independently manages her walking indoors and outdoors and stair climbing, but that she needs periodic assistance with standing ("feels weak") and lifting/carrying/holding ("can't lift weak"). The physician commented "Often requires someone to help with above."
- In her self-report the appellant wrote that MS has severely impacted the left side of her body,

causing numbness, slight vision loss, inability to move/walk without help, and requiring help to dress and bathe. She wrote that cold weather causes her to fatigue easily, and MS has caused problems with short term memory.

- In her oral testimony the appellant said that she'd been seeing her physician for 8 or 9 years.
- In response to a question from the ministry, the appellant acknowledged that the list of 19 symptoms she'd submitted at the hearing was derived from an MS website, but that they all applied to her.
- In response to a question from the panel as to how often flare ups of her MS occur and how long they last, the appellant replied that they happen every day (sometimes more than once a day) or every two days, and that they can last for days or weeks.

Mental Impairment

- In the PR and AR the physician indicated that the appellant has no difficulties with communication, and that her ability to communicate is satisfactory in all respects.
- In the PR the physician reported that the appellant experiences significant deficits in 3 of 12 categories of cognitive and emotional function: memory, emotional disturbance, and attention/concentration.
- In the AR the physician indicated that the appellant's impairment causes moderate impacts to 5 of 14 categories of cognitive and emotional functioning: bodily functions, emotion, attention/concentration, memory, and motivation. The physician commented "Must avoid fatigue. Unable to sleep, concentrate or ambulate when acute attack.

DLA

- The physician indicated that the appellant has been prescribed a medication that interferes with her ability to perform DLA.
- In the PR the physician reported that the appellant has no restrictions with the 4 prescribed DLA of *personal self-care, meal preparation, management of personal medications,* and *management of finances*. The physician indicated that the appellant also is unrestricted in the indoors portion of the DLA *move about indoors and outdoors*. The physician stated that the appellant requires continuous assistance with the 3 DLA of *basic housework, daily shopping, use of transportation*, and the outdoors aspect of *move about indoors and outdoors*. She also stated that the appellant requires periodic assistance with *social functioning*, commenting "if increased fatigue, difficulty concentration [illegible]...must not get fatigued – will ppt recurrence acute episode MS."
- In the AR the physician indicated that the appellant independently manages all aspects of the 4 DLA of *personal self-care, meal preparation, manage personal finances* (pay rent and bills), and *manage personal medications.* She reported that the appellant requires periodic assistance with some aspects of 4 DLA: *basic housekeeping* (when acute attack MS); *daily shopping* (going to and from stores when acute attack MS; carrying purchases home – difficulty lifting); *use of transportation*, (difficult to access public transit when fatigued); and *social functioning* (dealing appropriately with unexpected demands – "not physical demands".) Further pertaining to *social functioning*, the physician reported that the appellant has marginal functioning with her immediate social network, and good functioning with her extended social network.
- In her reconsideration submission the appellant indicated that she lives with her husband and 2 young children. She wrote that:

- Too much heat or cold can trigger flare-ups of her MS. The flare-ups can last anywhere from a "minimum of a week to generally four weeks, the longest itself lasting over a six week time period. In that time span, my [DLA] are impaired.
- When flare-ups occur, her husband helps her to bath and wash her hair.
- When severe flare-ups occur "even driving becomes out of the question."
- She's had poor response to 2 MS medications, and will be trying a third,
- Her MS makes it difficult to find work because it affects her walking and sometimes slurs her speech.
- Her husband frequently has to remind her to take her mediations.

- In her appeal submission, the appellant reported restrictions to virtually all DLA as follows:
  - *Personal self-care* - Difficulty remembering to perform basic hygiene; husband has to help reach some parts of her body unless she sits down to do so; husband sometimes has to help her dress.
  - *Meal preparation* – has to sway back and forth to shift weight while standing at counter to ease pain from hip to knee; generally understands recipes but sometimes has to ask for help; sometimes keeps food items too long till they go bad; only prepares one meal a day – husband or eldest son does the rest; sometimes forgets to eat for 2 or 3 days or is too fatigued to eat.
  - *Manage personal medications* – she manages to remember to take her morning mediation but her husband has to remind her to take it at night; her husband and physician have to remind her to buy more probiotics.
  - *Basic housework* – she can wash dishes but her husband does the rinsing and drying; she can't bend over far enough to clean the bath tub, at times she tries to vacuum the floors but has to stop; she can dust as long as she doesn't have to bend over too long; she forgets to do laundry and has to be reminded to do it; some days she is well-motivated to complete housework, other days she is not; she sometimes forgets to water the house plants.
  - *Daily shopping* – generally has someone with her to help lift items; tends to buy the cheapest item rather than "stand in an [a]isle long enough to figure out what is best for my family"; son and daughter or husband usually go shopping with her; tends to get anxious and claustrophobic.
  - *Move about indoors and outdoors* – lives in a two-story home and has trouble with stairs; has to use both arms to push herself out of a chair but sometimes requires her husband's help to get up; as long as she has something to pull herself up with she "tend[s] to get around some-what well"; on worse days has to lean against the walls and gets dizzy spells; can walk up to a block before her entire body starts to get tingly or numb.
  - *Use of transportation* - too claustrophobic to use public transportation.
  - *Managing personal finances* – difficult to remember how much money she has when shopping; sometimes finds it difficult to remember to pay bills;
  - *Social functioning* – suffers from depression, anxiety, confusion; difficult to interact with strangers; unable to maintain a healthy friendship or relationship; when in desperate need seeks out a family member, health professional or support group.
- In her oral testimony the appellant stated that she has had to learn to compensate and to "work around" her MS to get things done. For example she sometimes crawls up the stairs at home or sits on the counter top while cooking.
- In response to a question from the panel, the appellant confirmed that she had prepared the 5

page appeal submission.

Help

- In the PR the physician reported that the appellant requires glasses as an aid for her impairment. In the AR the physician indicated that the appellant requires no other assistive devices, and she does not have an assistance animal.
- The physician stated that the appellant receives assistance with DLA from her family, but that she requires help with "home care re: laundry, cleaning, meals and child care."

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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 the fatigue and pain she experiences as a result of her MS constitutes a severe physical impairment. She said that her MS has not been responsive to medication and that virtually all activities are restricted by her disease. She argued that the physician was under too much time pressure and didn't provide enough detail about her impairment.

The ministry's position, as set out in its reconsideration decision, is that there is not enough evidence to establish a severe physical impairment. The ministry stated that the appellant's functional skills are more in keeping with a moderate degree of impairment.

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. However, 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.

In the appellant's case, the evidence provided by the physician in the PR with respect to the appellant's physical functional skills indicates that she is in the mid-range of functionality. This is consistent with her evidence in the AR that the appellant independently manages walking and climbing stairs, and that she needs periodic assistance with standing and lifting/carrying/holding.

It's apparent from the evidence of the physician and the appellant that the degree of restriction she experiences is variable – worsening when she is having a flare up. Several times the physician referred to restrictions experienced by the appellant during an "acute episode." The physician has provided no evidence of how frequently these acute episodes occur or how long they last.

As discussed in more detail in the subsequent section of this decision under the heading Significant Restrictions to DLA , the physical 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 physical health issues which are likely to progress over time, the ministry reasonably determined that the evidence falls short of establishing that she has a severe physical impairment as contemplated by the legislation.

Severe Mental Impairment

The appellant's position is that the cognitive effects of her MS impact many of her DLA and constitute a severe mental impairment.

The ministry's position, as set out in its reconsideration decision, is that the evidence does not demonstrate a severe mental impairment. The ministry argues that the appellant has no difficulty with communication and the impacts to cognitive and emotional functioning, as assessed by the

appellant's physician, are at most moderate.

Panel Decision

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 – according to the physician's evidence - she is not restricted in the DLA of *managing personal finances* and *managing person medications*. While the appellant has said that she finds aspects of these DLA confusing, and that she requires reminders to perform them, her evidence on these points is not sufficiently convincing to outweigh the physician's observations that the appellant independently manages these DLA.

The physician's evidence indicates that the appellant also independently manages the decision-making tasks related to *social functioning* (makes appropriate social decisions), *meal preparation,* and *daily shopping*. On balance the evidence indicates the appellant is not significantly restricted in her ability to manage her own *decision making*.

With respect to *social functioning*, the evidence indicates that the appellant functions at a marginal level regarding her immediate social network, and that she has good functioning in terms of her extended social network. The appellant said that while she has difficulty interacting with strangers and making and maintaining relationships, she seeks out family members when she needs support. On balance the panel concludes that the evidence indicates the appellant independently manages the DLA of *social functioning*.

With respect to functional skills, the physician's evidence indicates that the appellant's ability to communicate is satisfactory in all respects. This view is supported by the appellant's acknowledgement that she prepared the articulate 5 page written appeal submission.

As discussed in more detail in the subsequent section of this decision under the heading Significant Restrictions to DLA , any limitations resulting from the appellant's impairments do not appear to have translated into significant restrictions in her ability to manage her DLA independently.

Considering the evidence as a whole, including the evidence that the appellant is not significantly restricted in her ability to manage the 2 prescribed DLA that are specific to mental impairment, 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 ability to perform virtually all DLA is significantly restricted by pain, fatigue and cognitive effects of MS. She said that she would not be able to function if she didn't have her husband and children to help her with DLA.

The ministry's position is that there is not enough evidence to confirm that the appellant's

impairments significantly restrict her ability to perform DLA either continuously or periodically for extended periods. The ministry argued that as the physician indicated in the PR that the appellant requires continuous assistance with some DLA, then in the AR indicated that she needs periodic assistance for those DLA when she is having a flare up, it is difficult to develop a clear and cohesive picture of the degree of restrictions.

Panel Decision

The legislation – s. 2(2)(b)(i) of the EAPWDA – requires the minister to substantially assess direct and significant restrictions of DLA in consideration of the opinion of a prescribed professional, in this case the appellant's general practitioner. This doesn't mean that other evidence shouldn't be factored in as required to provide clarification of the professional evidence, but the legislative language makes it clear that the prescribed professional's opinion is fundamental to the ministry's determination as to whether it is "satisfied".

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.

In the appellant's case there is a degree of inconsistency in the physician's evidence on restrictions in that in the PR she identified 4 DLA for which the appellant requires continuous assistance (*basic housework, daily shopping, using transportation,* and the outside portion of *moving about indoors and outdoors*. In the AR in describing restrictions to those 4 DLA she described them as being "periodic", linking them to times when the appellant was having an acute episode or flare up. In the PR and AR the physician made several references to acute episodes or acute attacks, but she has provided no evidence as to the frequency or duration of these acute episodes. The appellant's evidence with respect to flare ups is that she gets them daily or every other day, that she can get more than one flare up in a day, and that flare ups can last for weeks. This degree of acute activity can't be reconciled with the physician's evidence of periodicity.

The panel notes also that the appellant has said that she is restricted in virtually all DLA, including those which the physician indicated the appellant can manage independently. Many of the restrictions identified by the appellant are related to cognitive and emotional functioning. For example: forgetting basic hygiene, misunderstanding recipes, forgetting to eat, forgetting to do laundry, getting claustrophobic in stores or on public transit, and forgetting to pay bills. The physician has described the cognitive and emotional impacts as being at most "moderate". On this evidence it would be difficult to conclude that these cognitive impacts result in significant restrictions to the appellant's ability to perform DLA.

Based on the inconsistency in the physician's evidence and the lack of any evidence from the physician on the frequency and duration of acute episodes, the panel finds that the ministry reasonably concluded that the evidence does not establish that the appellant's impairments directly and significantly restrict her DLA either continuously or periodically for extended periods.

Help with DLA

The appellant's position is that she requires help from her family to perform aspects of virtually all 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

A finding that a severe impairment directly and significantly restricts a person's ability to manage her DLA either continuously or periodically for an extended period is a precondition to a person requiring "help" as defined by section 2(3)(b) of the EAPWDA. For the reasons provided above, that precondition has not been satisfied on the balance of probabilities in this case.

Accordingly, the panel finds that the ministry reasonably concluded it could not be determined that the appellant requires help with DLA as defined by section 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.