

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of May 28, 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 ministry did not attend. Having confirmed that the ministry was notified of the hearing, the panel proceeded with the hearing in accordance with section 86(b) of the Employment and Assistance Regulation.

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

- The appellant's PWD application form consisting of the appellant's self-report (dated January 8, 2014) along with a physician's report ("PR") completed by the appellant's general practitioner of 4 years (dated December 24, 2013) and assessor's report ("AR") completed by a registered social worker who had met the appellant for the first time for the purpose of completing the AR (dated December 10, 2013).
- The appellant's 3-page handwritten reconsideration submission dated May 20, 2014.

The panel reviewed the evidence as follows:

### Diagnoses

- In the PR the physician diagnosed the appellant with depression/anxiety, borderline personality disorder, multi-substance abuse, and diabetes (with possible peripheral neuropathy secondary to the diabetes). The physician wrote that the appellant has been initiated on medication for diabetes, peripheral neuropathy and depression/anxiety, and stated that the medications will attenuate her symptoms but will not cure them.
- The physician wrote that it will be difficult to assess the appellant's prognoses as her mental health issues are longstanding, and her diabetes is of unknown duration and treatment has only recently begun.
- The social worker reported the appellant's impairments as "anxiety, depression, diabetes and constant pain in legs, hands, and feet when sitting."

### Physical Impairment

- The physician commented in the health history portion of the PR that the appellant's "possible peripheral neuropathy" causes painful burning in her hands and feet which will make any activity uncomfortable for her. In terms of physical functioning the physician reported that the appellant can walk 2 to 4 blocks unaided on a flat surface, can climb 5+ stairs, can lift 15 to 35 pounds, and has no limitation with remaining seated.
- The social worker reported that the appellant requires periodic assistance with all aspects of mobility and physical ability "due to overwhelming pain." She indicated the appellant is limited to 1 hour when walking, climbing stairs, and standing, and is limited to lifting/carrying/holding less than 20 pounds.
- In her reconsideration submission the appellant wrote that her pain "is so bad that everyday it feels like I have been hit by a baseball bat and the shooting pain that runs through my body is excruciating through out my day everyday." She stated that the diabetes pain causes long periods of time when she cannot walk or even stand for more than 6 minutes at a time.
- In her oral testimony on appeal the appellant said that she had been diagnosed with post-traumatic stress disorder as a teenager, and that she spent many years addicted to drugs and alcohol. She is now "clean and sober", but while she was addicted she developed diabetes which went untreated for about 3 years, which caused nerve damage.

- The appellant stated that she cannot sit for more than 2 minutes, then she has to stand for a period of time, which causes her feet to hurt so she has to sit down again.

### Mental Impairment

- The physician described the appellant's mental impairments as being "moderately severe". She wrote that they impair the appellant's ability to manage stress appropriately and result in frequent work absences.
- The physician noted that the appellant is getting ongoing counselling which "hopefully will enable to make progress overtime."
- The physician provided no response to a question as to whether the appellant experiences any difficulties with communication, and indicated that the appellant has significant deficits in 2 of 12 categories of cognitive and emotional functioning: emotional disturbance and motivation. The social worker indicated that the appellant's ability to communicate is good in all respects.
- The social worker reported that the appellant's mental impairment had major impacts on 4 of 14 categories of cognitive and emotional functioning: bodily functions (eating problems/sleep disturbance), emotion (excessive anxiety/depression), motivation, and other neuropsychological problems (learning disabilities). The social worker reported a moderate impact on one other category: attention/concentration (poor short term memory), and minimal or no impacts on the remaining 9 categories.
- In her oral testimony on appeal, the appellant said that she has worked at paid employment off and on over the years, but that every few months her anxiety and depression would cause her to lose her job and she would rely on income assistance.
- The appellant said that she sees her physician now about once a week, and she sees her psychiatrist "regularly". She said that the psychiatrist recently took her off antidepressants.
- The appellant stated that she is highly motivated, but that her anxiety holds her back.
- In response to questions from the panel, the appellant said that:
  - She has been seeing her psychiatrist off and on since the age of 18 (more than 20 years), and recently about every 2 months.
  - She doesn't know why the psychiatrist took her off her most recent antidepressant medication, but the psychiatrist prescribed another medication which may contain an antidepressant.

### DLA

- In response to a question in the PR as to whether the appellant has been prescribed any medications or treatments that interfere with her ability to perform DLA, the physician wrote "She may have hypoglycemic episodes on her diabetic medication if sugars are not monitored closely."
- In the PR the physician indicated that the appellant has periodic restrictions with 4 of the 10 prescribed DLA: *meal preparation, basic housework, daily shopping*, (because of pain in hands, wrists and feet) and *use of transportation*. She reported the appellant has continuous restrictions with the DLA of *social functioning* (because of anxiety/depression and resulting avoidant behaviour and self medication). The physician indicated no restrictions with the DLA of *personal self-care, management of personal medications, management of personal finances, and mobility indoors and outdoors*.
- The social worker reported that the appellant requires periodic or continuous assistance with most tasks of most DLA, and commented that the appellant "Must have a friend with her whenever she goes out in public or her anxiety becomes overwhelming." With respect to the DLA of *social functioning*, the social worker concluded that the appellant is functional – though

marginally – with respect to her immediate and extended social networks, commenting that the appellant “isolates self except few good friends” and “isolates self and will not communicate unless provoked”. The social worker indicated that the appellant independently makes appropriate social decisions and interacts appropriately with others, but that she needs periodic support/supervision with developing/maintaining relationships, and continuous support/supervision dealing appropriately with unexpected demands and securing assistance from others.

- With respect to *use of transportation*, the social worker indicated that the appellant takes up to 3 times longer than typical getting in and out of “lower cars”, and that she prefers to walk rather than take public transportation because of anxiety.
- In her self-report the appellant wrote that DLA are difficult and she needs someone to help daily due to severe pain. She wrote that “I need help sometimes leaving my home as my anxiety (sic) is very high and tend to have panic attacks regularly.”
- In her reconsideration submission the appellant wrote that she does not often leave her home alone. She stated that “I need help within my home to basic housekeeping (sic), preparing meals, laundry, grocery shopping...”
- In her oral testimony the appellant said that her 2 children were removed from her home in February because of someone else who was living in her home. She said that she currently has 2 roommates, and that she has been advised that her children are going to be returned to her custody.
- In response to questions from the panel, the appellant stated that:
  - When her children are home she plans meals for them up to a week ahead of time, but when she’s cooking for herself she “keep[s] it simple.” Recently one of her roommates has been doing some cooking for her.
  - She has high anxiety and hyperventilates when she has to go grocery shopping. She has to take a list, and will walk out of the store if there are a lot of people. She relies on a friend or roommate for support when she goes to the store, but she has to go shopping because usually if someone else does it for her they get the wrong things.

### Help

- The physician and the social worker both indicated that the appellant does not require any prostheses or aids for her impairment. The social worker also confirmed that the appellant does not have an assistance animal.
- The physician reported that the appellant requires assistance from others to carry groceries, open jars, and use utensils for cutting food during meal preparation.
- The social worker indicated that the appellant receives assistance from her children, friends, psychiatrist, and AA.

### Admissibility of Additional Information

In her oral testimony the appellant provided additional information regarding her impairment and their impacts on her ability to manage DLA. This information generally provides additional detail with respect to matters raised in the original PWD application. Accordingly, 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 did not attend the hearing and submitted no additional information.

## 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 pain she experiences as a result of her diabetes and related neuropathy constitutes a severe physical impairment. She said that she experiences constant pain which limits all physical activities.

The ministry's position, as set out in its reconsideration decision, is that the evidence does not establish a severe physical impairment. The ministry stated that the appellant's functional skills are not significantly restricted and that no assistive devices are routinely used.

### Panel Decision

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

To assess the severity of an impairment one must consider the nature of the impairment and the extent of its impact on daily functioning as evidenced by functional skill limitations and the degree to which performing DLA is restricted. A medical barrier to the appellant's ability to engage in paid employment is not a legislated criterion for severity. In making its determination the ministry must consider all the relevant evidence, including that of the appellant. While the legislation is clear that the fundamental basis for the analysis is the evidence from prescribed professionals, in exercising its decision-making power the ministry cannot merely defer to the opinion of the professionals with respect to whether the statutory requirements are met as that approach would amount to an improper fettering of discretion. The professional evidence has to be weighed and assessed like any other evidence.

In the appellant's case, because the social worker had only met the appellant for the first time in order to complete the AR, and because the social worker did not have the benefit of the physician's diagnoses or clinical reports, the panel has given more weight to the physician's evidence where the two are inconsistent with each other.

The evidence indicates that the appellant's physical impairment is substantially based on pain due to secondary peripheral neuropathy. The physician is tentative about the existence of neuropathy – describing it as being "possible". The physician also wrote that the prognosis is uncertain and that the appellant had "only recently" begun treatment. She indicated that time will be needed to determine how well the condition will respond to treatment.

This evidence, in conjunction with the physician's description of the appellant's physical functioning which is in the mid-range of ability, supports the ministry's conclusion that the evidence does not establish a severe physical impairment. In the panel's view the ministry's determination on this criterion was reasonable.

### **Severe Mental Impairment**

The appellant's position is that her depression, anxiety, and learning disability constitute a severe mental impairment. The appellant argues that she usually cannot leave her home alone, and so cannot independently manage her DLA.

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 there is no recent psychiatric assessment to substantiate the appellant's evidence regarding the effects of her mental health condition.

### 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*. She also independently manages the decision-making tasks related to *social functioning* (makes appropriate social decisions) and *meal preparation*, as the appellant indicated that she generally plans meals a week in advance when her children are living with her. The social worker indicated that the appellant requires continuous assistance with making appropriate choices during the DLA of *daily shopping*, but the appellant's testimony indicated that the nature of the support is with respect to dealing with her anxiety, not with making appropriate choices. On balance the panel concludes that the evidence indicates the appellant manages her own *decision making*.

With respect to *social functioning*, the evidence indicates that the appellant functions at a marginal level, sufficient to meet her basic needs. She has a tendency to self-isolate, but she also has a network of "few good friends".

With respect to functional skills, the evidence indicates that the appellant's ability to communicate is good in all respects. The social worker has indicated major impacts to 4 categories of cognitive and emotional functioning, in contrast to the physician's evidence that 2 categories have significant deficits. As discussed above, the panel has given more weight to the physician's evidence. The panel notes that after more than 20 years of seeing her psychiatrist, one would expect that the appellant would have submitted some corroborating medical information from her psychiatrist to demonstrate the severity of her impairment and the prognosis for its treatment.

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, 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 DLA is significantly restricted by pain and anxiety. She argued that pain limits virtually all of her physical activities, and that she must have a friend with her whenever she goes out in public or her anxiety becomes overwhelming.

The ministry's position is that as the appellant's functional skills are not significantly restricted, and as remedial measures have been undertaken including medication to ameliorate her symptoms, the information from the prescribed professionals does not establish that impairment significantly restricts the appellant's DLA either continuously or periodically for extended periods.



### 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 entirely appropriate for the ministry to require evidence of the duration and frequency of the restriction in order to be "satisfied" that this legislative criterion is met.

There are references in the evidence to the impact the appellant's medical conditions have on her ability to work at paid employment. The panel notes that employability is not a statutory criterion regarding PWD designation – the focus of the legislation is on the ability to perform DLA.

The physician indicated that the appellant's ability to perform 5 DLA is restricted: *meal preparation, basic housework, daily shopping, and use of transportation* (all periodically), and *social functioning* (continuously). However, the examples given by the physician and the appellant as to the nature of the restrictions do not indicate that the restrictions are "significant". The physician indicated that the appellant periodically requires assistance with carrying groceries (presumably in excess of the 20 pound lifting limit noted by the social worker), opening jars, and cutting food during *meal preparation*. With respect to *use of transportation*, the evidence of the social worker indicates that the appellant has difficulty getting in and out of "lower cars", and that she prefers to walk rather than to use public transit. With respect to *basic housework*, the physician merely indicated that the appellant periodically has difficulty due to pain in hands, wrists and feet. There is no indication as to how often these periods occur or how long they last. The panel notes also that the physician has indicated that the appellant has only recently started on treatment to ameliorate the effects of the diabetes, and that it is too early to determine the extent to which treatment may reduce her symptoms. Similarly, with respect to restrictions caused by the appellant's mental condition, there is no evidence from the appellant's psychiatrist to verify or describe the extent of the restrictions.

The panel's assessment of the DLA of *decision-making and social functioning* was provided in the previous section under the heading Severe Mental Impairment.

Considering the evidence as a whole, the panel is of the view that the ministry reasonably concluded that the evidence does not establish that the appellant's impairments 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 friends and roommate to perform 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.