

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of August 8, 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 appellant did not attend the hearing. Having confirmed that the appellant was notified, 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 February 21, 2014) along with a physician's report ("PR") and assessor's report ("AR") both signed by the appellant's family physician, dated March 31, 2014.

The panel reviewed the evidence as follows:

### Diagnoses

- In the PR the appellant's physician diagnosed her as having chronic back and leg pain and an anterior cruciate ligament ("ACL") injury to the right knee. He commented that the appellant injured her back in a fall in 2009.

### Physical Impairment

- In terms of physical functional skills, the physician reported in the PR that the appellant can walk for 2 to 4 blocks unaided on a flat surface, climb 5+ stairs unaided, can do "no lifting", and can remain seated for less than 1 hour. He indicated that the appellant has periodic restrictions with outdoor mobility.
- In the AR the physician reported that the appellant independently manages walking indoors and outdoors, climbing stairs, and standing. He reported that she requires periodic assistance with lifting/carrying/holding, commenting "limited."

In her self-report the appellant wrote that:

- she broke her left ankle in 2000, and tore the ACL in her right knee in 2007;
- the right knee locks up after she walks 2 blocks;
- if she stands for a while she can resume walking, but her back pain limits the amount of time she can stand;
- she is unstable when she walks much more than 2 or 3 blocks;
- she cannot lift anything more than 5 pounds;
- if she "does more than that" she is unable to move the next day;
- she does not like to take pills for pain but does so when the pain is bad.

### Mental Impairment

- In the PR the physician did not provide a diagnosis of a mental impairment, and reported that the appellant had no significant deficits with cognitive and emotional function.
- In the AR the physician indicated that with respect to the appellant's ability to communicate, her speaking and hearing are good, her writing is satisfactory, and her reading is poor.

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- Section B.4 of the AR deals with cognitive and emotional function, and includes instruction to the assessor to complete the section “for an Applicant with an identified mental impairment or brain injury.” The physician left this section blank except for the comment “N/A”.

### DLA

In the PR the physician indicated that the appellant:

- has not been prescribed any medications or treatments that interfere with DLA;
- Is not restricted in the DLA of *personal self-care, meal preparation, management of medications*, or the indoors aspect of the DLA *mobility indoors and outdoors*;
- requires periodic assistance with the DLA of *basic housework* and *daily shopping*, as well as with the outdoors portion of *mobility indoors and outdoors*;
- can walk 1 and a half blocks then her legs go numb;
- can do some housework before her back causes too much pain.

In the AR the physician indicated that the appellant independently manages all tasks related to all DLA except that she needs periodic help with *basic housekeeping* and with carrying purchases home. The physician reported that the appellant independently manages all aspects of *social functioning*, and that she has good functioning with respect to both her immediate and extended social networks.

### Help

- The physician reported that the appellant does not require prostheses or aids for her impairment, and that the appellant does not have an assistance animal.
- In the AR the physician indicated that help is provided to the appellant by family and friends, but in response to questions in the form asking him to provide detail as to the type of help received or required by the appellant, the physician provided no further information.

## PART F – Reasons for Panel Decision

The issue on 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 the appellant does not require help to perform DLA as a result of those restrictions.

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**

Implicit in the appellant's self-report is her position that her chronic back, leg and ankle pain together constitute a severe physical impairment. She wrote that her mobility and lifting capacity are limited.

The ministry's position is that the evidence does not provide a clear and consistent picture of the degree of restrictions the appellant may have. The ministry argued that the impacts described by the

physician are more in keeping with a moderate degree of impairment, and that there is not enough evidence to establish a severe physical 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. The legislation makes it clear that the determination of severity is at the discretion of the minister, taking into account all of the evidence. However, the legislation is also clear that the fundamental basis for the analysis is the evidence from a prescribed professional – in this case, the appellant's physician.

In terms of walking and stair climbing, the physician's evidence indicates that the appellant's physical functional skills are in the mid- to upper range of the scale. While the physician indicated that the appellant can do no lifting, he reported that the appellant only requires periodic assistance with housework, and the appellant stated in her self-report that she can lift up to 5 pounds.

As discussed in more detail in these reasons for decision under the heading Significant Restrictions to DLA, the limitations to the appellant's physical functioning do not appear to have translated into restrictions to her ability to manage DLA.

For the foregoing reasons, and considering the evidence as a whole, the panel finds that the ministry reasonably determined that the evidence does not establish that the appellant has a severe physical impairment.

### Severe Mental Impairment

The appellant advanced no argument with respect to a mental impairment.

The ministry's position is that the evidence does not establish a severe mental impairment. The ministry argued that the physician's evidence indicated that the appellant does not have any difficulties with communication.

### Panel Decision

The physician provided no diagnosis of a mental impairment.

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 physician's evidence indicates that the appellant is not significantly restricted with respect to *decision making* in that she independently manages the decision making aspects of *meal preparation*

(meal planning), *daily shopping* (making appropriate choices), *manage personal medication* (filling/refilling/taking as directed), *manage personal finances* (banking, budgeting) and *social functioning* (appropriate social decisions).

The physician's evidence also indicates that the appellant is not significantly restricted with *social functioning* in that she independently manages all tasks related to this DLA, and she has good functioning with respect to both her immediate and extended social networks.

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 chronic pain limits her mobility and her ability to lift/carry/hold, which in turn significantly limits her ability to perform DLA.

The ministry's position is that the evidence is not sufficient to demonstrate that the appellant's impairment significantly restricts her ability to perform DLA either continuously or periodically for extended periods. The ministry stated that while the physician indicated that the appellant requires periodic assistance with the DLA of *basic housework*, *daily shopping* and the outdoor component of *mobility indoors and outdoors*, there is no information as to the frequency or duration of these 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 family physician. 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.

The physician's evidence indicates that the appellant independently manages almost all aspects of all DLA. In the three areas where the physician has indicated the appellant requires periodic assistance

– *basic housekeeping*, the carrying purchases home aspect of *daily shopping*, and mobility outside the home – the physician has provided no information on the frequency or duration of the required assistance.

Considering the evidence as a whole, the panel concludes that the ministry reasonably determined that the evidence is insufficient to show on the balance of probabilities that the appellant's ability to perform her DLA is significantly restricted either continuously or periodically for extended periods.

### **Help with DLA**

The appellant's position is that she requires help with DLA due to the restrictions she experiences.

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.