



PART C – Decision under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Social Innovation (the ministry) dated 12 August 2014 denying the appellant designation as a person with disabilities (PWD). The ministry determined that the appellant did not meet all of the required criteria for PWD designation set out in the *Employment and Assistance for Persons with Disabilities Act*, section 2. Specifically, the ministry determined that the information provided did not establish that the appellant has a severe mental or physical impairment that in the opinion of a prescribed professional

- (i) directly and significantly restricts her ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and,
- (ii) as a result of those restrictions, she requires help to perform those activities.

The ministry determined that the appellant satisfied the other 2 criteria: she has reached 18 years of age and her impairment in the opinion of a medical practitioner is likely to continue for at least 2 years.

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 reconsideration consisted of the following:

1. The appellant's PWD Designation Application dated 29 November 2013. The Application contained:
  - A Physician Report (PR) dated 29 November 2013, completed by the appellant's general practitioner (GP) who has known the appellant since 2005 and has seen her 2-10 times in the past year.
  - An Assessor Report (AR) of the same date completed by the same GP.
  - A Self Report (SR) completed by the appellant.
2. The appellant's Request for Reconsideration, dated July 2014.

(In the reconsideration decision, the ministry referred to a PWD application completed by the appellant's GP on 05 January 2014 and an AR completed on 05 March 2014. The panel can find no PR or AR of those dates in the appeal record. The only PR and AR in the appeal record are those referred to in paragraph 1. above. At the hearing the appellant stated that the only application she submitted was the one dated 29 November 2013. The ministry representative stated that the ministry's records show that the appellant was issued only one application package, explaining that the 05 January and 05 March dates must be a "clerical error." On this basis and as the reconsideration decision refers to evidence submitted in the 29 November application, the panel accepts the "clerical error" explanation.)

In the PR, the GP diagnoses the appellant's impairments as thoracic kyphosis – congenital with scoliosis (onset 1973), thoracic compression fractures due to trauma (onset 1981), chronic back pain (onset 1981), degenerative disc disease, lumbar spine (onset 1981), chronic headaches (onset October 2013). The GP adds: "Long term back pain. Significantly [worse since] 2004 + [increasing] since. Unable to work since Jan. 2013." There is no diagnosis of a mental health disorder.

The panel will first summarize the evidence from the PR and AR relating to the appellant's impairments as it relates to the PWD criteria at issue.

### Severity/health history

#### *Physical impairment*

PR:

Under health history, the GP writes:

- Unable to work.
- Unable to do daily chores.
- Constant back pain daily.
- Daily headaches."

Under additional comments, the GP writes:

"Has seen multiple specialists, considered surgery, had facet joint injections but not improved. On medications to try to manage pain but not successful in allowing ability to return to work.

\_\_\_\_\_

Specialists have diagnosed with chronic pain syndrome & do not feel there is anything further that can be done for her.”

The GP indicates that the appellant has not been prescribed medication and/or treatments that interfere with her ability to perform DLA.

As to functional skills, the GP reports that the appellant can walk 1 to 2 blocks unaided (the GP notes: “then stops due to pain”), climb 5+ steps, can lift under 5 lbs. and can remain seated less than 1 hour.

### *Mental impairment*

PR:

The GP indicates that the appellant has no difficulties with communication.

The GP assesses the appellant with significant deficits with cognitive and emotional function in the areas of emotional disturbance and motivation, and no additional comments were provided by the GP.

AR:

The GP assesses the appellant’s ability in speaking, reading, writing and hearing as good.

### Ability to perform DLA

AR:

The GP reports that the appellant lives with family.

Regarding mobility and physical ability, the GP provides the following assessments: walking indoors, walking outdoors and climbing stairs – periodic assistance from another person and takes significantly longer than typical; standing – “limited time;” lifting and carrying and holding – continuous assistance from another person or unable. The GP comments: “Must limit activity significantly to do any of the above.”

With regard to cognitive and emotional functioning, the GP assesses the appellant's mental impairment as having a moderate impact on daily functioning in the areas of emotion, attention/concentration, executive, memory, motivation. No impact is reported in the other 9 listed areas. The GP comments: “Due to chronic pain [the appellant] experiences anxiety & during periods of increased pain has difficulty with the above functions.”

The GP assesses the assistance required for managing DLA as follows (the GP’s comments in parentheses):

- Personal care: independent for dressing, grooming, bathing, toileting, feeding self and regulating diet; independent and takes significantly longer than typical for transfers in/out of bed and on/off chair.
- Basic housekeeping: periodic assistance from another person and takes significantly longer than typical for laundry and basic housekeeping (family has to help with most chores).
- Shopping: periodic assistance from another person and takes significantly longer than typical

for going to and from stores; independent for reading prices and labels, making appropriate choices and paying for purchases; continuous assistance from another person or unable and takes significantly longer than typical for carrying purchases home.

- Meals: independent in all aspects.
- Paying rent and bills: independent in all aspects.
- Medications: independent in all aspects.
- Transportation: periodic assistance from another person and takes significantly longer than typical for getting in and out of a vehicle; using public transit and using transit schedules and arranging transportation – the GP indicates “Does not use.”

With respect to social functioning the GP assesses the appellant as independent for making appropriate social decisions, developing and maintaining relationships, interacting appropriately with others, dealing appropriately with unexpected demands and securing assistance from others. Under “other” the GP refers to social outings and comments: “Has to avoid activities due to pain – i.e. unable to go dancing.”

The GP marks “N/A” against how the appellant's mental impairment impacts her relationship with her immediate and extended social networks.

#### Help provided/required

PR:

The GP indicates that the appellant requires a prostheses or aids for her impairment, commenting: “Unable to walk in store without a shopping cart. Looking at getting walking sticks.”

AR:

For assistance provided by other people, the GP indicates that the appellant's family and friends help and that “continuous help required when pain worse. Periodic daily basis.” The GP comments that the appellant's partner and family have to do all carrying and that housework is divided so that the appellant can avoid strenuous work or carrying/lifting.

Regarding the use of assistive devices, the GP indicates that the appellant needs to hold onto a shopping cart when out. For equipment required but not currently being used, the GP wrote: “walking sticks for walking.”

The GP marks “N/A” regarding support/supervision required for social functioning.

#### Self report

In her SR, the appellant writes:

“My disability is chronic back & hip pain every day causing chronic headaches every day. I was diagnosed with scoliosis when I was – [a child]. I learned about this after the fall I had. I was born with this condition. Over the years my back has been getting worse. I also now have degenerative disc disease [and] compression fractures.

“My disability has affected me all my life in many ways. I can no longer work due to chronic pain every day. I cannot walk very far before the pain starts. I also cannot stand for very

[REDACTED]

long. As far as daily chores go, I can only do cleaning for 5 – 10 minutes, then I have to stop. I ask my children to help and do a lot of the chores I used to go out dancing a lot. I cannot do this anymore. When I go shopping it takes longer to get it done because 5 to 10 minutes into walking around the store I have to lean on the shopping cart and go very slow because of the pain in my hips and back. This is getting me down a little, some days I cry because I am so sad and it is tiring being in pain all the time. I am thankful for my family and friends because they do a lot for me like carrying groceries & cleaning, and driving me around to where I need to go, for sometimes I am in so much pain I ask to be driven around to run errands.”

In her Request for Reconsideration, the appellant writes:

“... I now use a walker to help me. Stairs I find are now difficult [and] to climb I need help. My children are doing more around the house than usual to help me. I can only have showers now because sitting in the tub is hard to get up and out. I sometimes have a hard time driving, especially on bad days when the pain is so much I cannot move, so I ask to be driven where I need to go.

“I have seen my specialist and he tells me that I need to go to a pain clinic just to help me with the pain and also need to do therapy. The pain will not totally go away and could get worse, for now I have developed arthritis. All that the pain clinic and therapy will do for me is to just help me cope with the pain that I constantly have.”

In her Notice of Appeal, dated 20 August 2014, the appellant writes:

“... It is getting harder and harder for me to climb stairs and I can no longer walk 1 or 2 blocks. I can walk half to 1 block and I use a walker. My kids are helping me more with cleaning and I find that getting harder for me.”

At the hearing, in her opening presentation and in answers to questions, the appellant provided the following testimony:

- She explained that since she and her GP had completed the PWD Designation Application, her condition has deteriorated and her pain is getting worse, making it harder to walk up and down stairs and that she sometimes has really bad days when the pain is so bad that she cannot move: she can't even drive and the pain is too excruciating to do anything. She has more limitations than before as, over the years, her condition is getting worse and she is taking more medications. She is awaiting treatment at a pain clinic.
- She described how her bad days happen one or two days a week. On most days, on a scale of 1 – 10, her pain level is at the 6 or 7 level, but on bad days it goes up to 9 or 10. This happens if she is trying to do too much the day before. She takes a pain killer before going to bed at night and this helps her wake up in the morning without a headache. She cannot work because the pain becomes so bad.
- She last saw her back specialist in 2012 – it was that specialist who recommended a pain clinic. She had an MRI in July 2014, mainly to update her medical records since the last MRI report was from around 2003 or 2004. At about the same time as the MRI, she developed arthritis. Her back pain spreads through the soft tissue, shoulders, lower back and down her arms, making her hands tingly and numb. She cannot wash dishes because her hands

“cramp up” and the dishes might fall out of her hands.

- She stated that she now has a walker, which she uses to go to and back from the 100 ft. to her mailbox. Her children are young and are a great help to her. They carry the laundry up and down the stairs and help with meal preparation. They will do the food preparation and the cleanup afterwards, though she will not allow them to handle hot items on the stove. If a meal doesn't involve cooking, they will make their own sandwiches, etc. If she carries a jug of milk in from the car, she will be in pain by the time she gets into the house. Sometimes she throws up because of intense pain.

The ministry stood by its position at reconsideration.

The panel finds that the information provided in the appellant's Notice of Appeal and in her testimony at the hearing is in support of the information and records before the ministry at reconsideration, as it is further to her description in her Request for Reconsideration as to how her medical condition has changed since the original PWD application was submitted. Accordingly, the panel admits this evidence under section 22(4) of the *Employment and Assistance Act*.

PART F – Reasons for Panel Decision

The issue in this appeal is whether the ministry reasonably determined that the appellant is ineligible for PWD designation because she did not meet all the requirements in section 2 of the EAPWDA. Specifically the ministry determined that the information provided did not establish that the appellant has a severe mental or physical impairment that in the opinion of a prescribed professional

- (i) directly and significantly restricts her ability to perform daily living activities either continuously or periodically for extended periods; and,
- (ii) as a result of those restrictions she requires help to perform those activities.

The ministry determined that she met the 2 other criteria in *EAPWDA* section 2(2) set out below.

The following section of the *EAPWDA* applies to this appeal:

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.

The following section of the *EAPWDR* applies to this appeal:

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.

The panel will consider each party's position regarding the reasonableness of the ministry's decision under the applicable PWD criteria at issue in this appeal.

### **Severity of impairment**

For PWD designation, the legislation requires that a severe mental or physical impairment be established. The determination of the severity of impairment is at the discretion of the minister, taking into account all the evidence, including that of the applicant. However, the starting point must be medical evidence, with the legislation requiring that a medical practitioner (in this case, the appellant's GP) identify the impairment and confirm that impairment will continue for at least two years.

In the discussion below concerning the severity of the appellant's impairments, the panel has drawn upon the ministry's definition of "impairment" as provided in the PR. This definition consists of "cause" and "impact" components: "impairment is a loss or abnormality of psychological, anatomical or physiological structure or function [the cause] causing a restriction in the ability to function independently, effectively, appropriately or for a reasonable duration [impact]." The cause is usually set out as a disease, condition, syndrome, injury or even a symptom (e.g. pain or shortness of breath). A severe impairment requires the identified cause to have a significant impact on daily functioning.

The legislation requires that for PWD designation, the minister must be "satisfied" that the person has a severe mental or physical impairment. For the minister to be "satisfied" that the person's impairment is severe, the panel considers it reasonable for the ministry to expect that the information provided presents a clear and complete picture of the nature and extent of the impacts of the person's medical conditions on daily functioning.

### **Physical impairment**

In the reconsideration decision, the ministry notes that her GP wrote that the appellant was unable to work. The ministry states that the PWD application is not meant to assess employability and that employability is not a criterion for PWD designation. The ministry goes on to review the appellant's functional skill limitations reported by the GP (can walk 5+ blocks, etc.) and refers to the GP's assessment that the appellant requires continuous assistance with lifting and carrying and holding and that she requires periodic assistance and takes significantly longer than typical with walking indoors and outdoors and climbing stairs, though no information is provided on how often such assistance is required or how much longer it takes. In the ministry's opinion, the impacts described by the appellant's GP are more in keeping with a moderate degree of impairment. Therefore, based on the information provided by the GP, the position of the ministry is that there is not enough evidence to establish a severe physical impairment.

The position of the appellant is that, because of her multiple medical conditions, she suffers from chronic pain that is with her all the time and sometimes on 2 days of the week reaches 9 or 10 on a scale of 1 – 10: she cannot do anything on those days. Her condition has deteriorated since the PWD



application was submitted in November 2013, to the point where she can now only walk one half to 1 block using a walker. She submits that it is unreasonable that the ministry would find that she does not have a severe physical impairment.

### *Panel findings*

The evidence is that GP has diagnosed the appellant with multiple muscular-skeletal conditions that cause chronic pain and headaches and that she has been "unable to work since Jan. 2013". In the health history section of the PR, where the GP is asked to describe the severity of impairment, the first reference is "unable to work." And, in the additional comments, that the pain medications are "not successful in allowing ability to return to work." For an impairment to be a "severe impairment," section 2 of the EAPWDA requires that the ministry must be satisfied that the evidence demonstrates restrictions to a specified degree in certain specified areas of daily functioning. The legislation reads that for PWD designation, the minister must be satisfied that "the person has a severe mental or physical impairment that ....directly and significantly restricts the person's ability to perform [prescribed] daily living activities and as a result of those restrictions, the person requires help [an assistive device, the significant help or supervision of another person, or the services of an assistance animal to perform those activities.]" As ability to search for, accept or continue in employment is not listed as one of prescribed DLA, the panel finds that the ministry reasonably held that employability is not a factor in assessing eligibility for PWD designation.

The appellant, in her Request for Reconsideration, in her Notice of Appeal and at the hearing, stated that her condition has deteriorated since the original PWD application was completed in November 2013: for instance, she now can walk only one half to 1 block, and only by using a walker. However, the extent of increased limitations in her daily functioning has not been confirmed by the GP. In the PR, the GP indicated that the appellant was, at that time, "looking at getting walking sticks" and that she needs to hold on to a shopping cart when walking in a store, The appellant is describing her pain level as 6 – 8, sometimes increasing to 9 or 10, on a scale of 1 – 10. However, while referring to the appellant awaiting treatment at a pain clinic, the GP has not provided any confirmation of this degree of pain, other than to comment in the AR that sometimes her pain is "worse", or any detailed description of how this level of pain would be expected to restrict daily functioning.

As the ministry noted, in the AR, the GP has assessed the appellant as requiring periodic assistance from another person and taking significantly longer than typical for walking indoors and outdoors and climbing stairs, but no explanation is provided as to how often, in what way or under what circumstances such periodic assistance is required or how much longer than typical it takes. The GP comments: "Must limit activity significantly to do any of the above," but no explanation is provided as to what this means on an hourly or daily basis.

In light of the above analysis, and considering that the GP has assessed the appellant as able to walk 1 – 2 blocks unaided, climb 5+ stairs and lift up to 5 lbs, the panel finds that the ministry was reasonable in concluding that the impacts described by the GP are not sufficient evidence of a severe degree of impairment and that the ministry was reasonable in determining that a severe physical impairment has not been established

### *Mental impairment.*

In the reconsideration decision, the ministry notes that the GP has indicated that the appellant has significant deficits with cognitive and emotional functioning in the areas of emotional disturbance and motivation. In assessing the impacts on cognitive and emotional functioning, the GP also indicated moderate impacts with emotion, attention/concentration, executive, memory and motivation due to her chronic pain. In addition the GP indicates that the appellant does not have any difficulties with communication and her ability in speaking, reading, writing and listening are good. Based on the information provided by the GP, the position of the ministry is that there is not enough evidence to establish a severe mental impairment.

The appellant's position is that, considering the degree of pain she suffers daily, the deficits to cognitive and emotional functioning identified by her GP, and the multiple moderate impacts to her cognitive and emotional functioning, there is sufficient evidence to establish a severe mental impairment.

*Panel findings*

While the GP has identified significant cognitive and emotional deficits in two areas (with no commentary), and assessed moderate impacts to cognitive and emotional functioning in five areas, the panel notes that no mental health condition has been diagnosed and the GP linked the impacts to cognitive and emotional functioning specifically to the appellant's experience of "periods of increased pain." In addition, no difficulties with communication have been reported, and no issues identified with social functioning. Therefore, the panel finds the ministry was reasonable in determining that a severe mental impairment has not been established

**Significant restrictions in the ability to perform DLA.**

In the reconsideration decision, the ministry reviews the assessments provided by the GP regarding the appellant's ability to perform DLA. The ministry acknowledged that the appellant has serious medical issues; however, considering all the information provided by the GP, the position of the ministry is that there is not have enough evidence to confirm that the appellant's impairments directly and significantly restrict her ability to perform DLA either continuously or periodically for extended periods.

The position of the appellant is that there is sufficient evidence to demonstrate that her chronic pain significantly restricts her ability to perform DLA on an ongoing, daily basis.

*Panel findings*

The panel notes that, according to the legislation, the direct and significant restriction in the ability to perform DLA must be a result of a severe mental or physical impairment, a criterion which has not been established in this appeal. This DLA criterion must also be considered in terms of the preceding legislative language of section 2 of the *EAPWDA*, which provides that the minister may designate a person as a person with disabilities "if the minister is satisfied that" the criteria are met, including this one. In exercising the discretion conferred by the legislation, it is reasonable that the minister would expect that the opinion of a prescribed professional be substantiated by information from that professional that would satisfy the minister of direct and significant restrictions in the ability to perform DLA, either continuously or periodically for extended periods, by presenting a clear and complete

picture of the nature and extent of these restrictions.

The evidence is that in the AR the GP has assessed the appellant as independent in most aspects of DLA requiring physical effort. For some of these, this assessment is combined with an assessment that she takes significantly longer than typical, as follows:

- Moving about indoors and outdoors: walking indoors, walking outdoors, climbing stairs.
- Personal care: transfers in/out of bed, transfers on and off chair.

As noted above, no information is provided as to how much longer than typical these activities take.

The GP assesses the appellant as requiring periodic assistance from another person and taking significantly longer than typical for the following:

- Basic housekeeping; laundry and basic housekeeping.
- Shopping: going to and from stores.
- Transportation: getting in and out of vehicle.

However, no information is provided as to in what way, how often or under what circumstances such assistance is provided or how much longer than typical these activities take.

The GP assesses the appellant requiring continuous assistance from another person or unable in one aspect of one DLA, namely shopping and the aspect of carrying purchases home, with the comment that "partner & family have to do all carrying." Given the assessment in the PR that the appellant can lift up to 5 lbs, the panel finds it reasonable that the assistance required for carrying would be for purchases in excess of this weight.

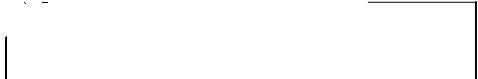
There is no evidence to suggest that, as a result of her impairments, there are any restrictions to her ability to manage the decision making or social functioning DLA – make decisions about personal activities, care or finances and relate to, communicate or interact with others effectively.

As noted above, the evidence is that while the appellant requires continuous assistance from another person or is unable to carry heavier purchases home, given the extent to which she is assessed as independent in performing most aspects of most DLA and the lack of explanation as to the degree she is restricted in other aspects of DLA where a restriction is assessed, the panel finds the ministry was reasonable in determining that there is not enough information to establish that the appellant's impairments directly and significantly restrict her ability to perform DLA either continuously or periodically for extended periods.

### **Help with DLA**

The ministry's position is that as it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required from other persons. The ministry notes that the use of assistive devices such as shopping cart and walking sticks does not in itself establish a severe impairment. At the hearing, the ministry representative stated that it was an error to imply that a shopping cart was an assistive device, as it was not designed to enable a person to perform DLA.

The position of the appellant is that she requires the significant help from others, in particular from her partner and friends for driving her to stores and appointments and carrying purchases home and from her children for chores around the home, including help with food preparation and clean-up



afterwards. She also now uses a walker to aid her mobility outside the home.

*Panel findings*

The panel notes that the legislation requires that in the opinion of a prescribed professional the need for help must arise from direct and significant restrictions in the ability to perform DLA that are either continuous or periodic for extended periods. While the evidence is that the appellant benefits from the help of her partner and others friends and from her children for some DLA, the panel finds that the ministry reasonably determined that since it has not been established that DLA are directly and significantly restricted, it cannot be determined that help is required as provided under section 2(2)(b)(ii) of the EAPWDA.

**Conclusion**

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