

## PART C – Decision under Appeal

The decision being appealed is the reconsideration decision of the Ministry of Social Development and Social Innovation (the “Ministry”) dated August 19, 2014 in which the Ministry determined that the Appellant was not eligible for Persons with Disabilities (“PWD”) designation because she did not meet all the requirements for PWD designation in section 2(2) of the *Employment and Assistance for Persons with Disabilities Act*. Based on the information provided, the Ministry was not satisfied that the Appellant’s severe mental and physical impairment, 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 was satisfied that the Appellant has reached 18 years of age, in the opinion of a medical practitioner her impairment is likely to continue for at least 2 years, and that she has a severe mental and physical impairment.

## PART D – Relevant Legislation

*Employment and Assistance for Persons with Disabilities Act* (“EAPWDA”) Section 2(2) and 2(3).

*Employment and Assistance for Persons with Disabilities Regulation* (“EAPWDR”) Section 2.

## PART E – Summary of Facts

With the consent of the parties the appeal proceeded as a written hearing, in accordance with section 22(3)(b) of the *Employment and Assistance Act*.

For its reconsideration decision, the Ministry had the following evidence:

Appellant's PWD application consisting of the following three parts:

- The Appellant's self report ("SR") signed by her on March 26, 2014;
- A physician's report ("PR") dated March 24, 2014 completed by the Appellant's family physician who indicated that he has known her since she was a teenager [42 years in the AR] and he'd seen the Appellant 2-10 times in the 12 months preceding the report; and
- An assessor's report ("AR") dated March 26, 2014, also completed by the Appellant's family physician.

Appellant's request for reconsideration dated August 6, 2014, to which she attached the following documents:

- A 3-page letter dated "June 31", 2014 containing the Appellant's further submissions on reconsideration in which she refers to the information provided by her physician in the PWD application (discussed below) [the panel notes the date error and that the correct date is July 31, 2014, as noted in the submissions of her advocate]. On the third page of this letter, beside the Appellant's physician's signature and date stamp August 6, 2014, is the following: "I agree that the forgoing statement is an accurate assessment of my patient's overall medical condition and her current circumstances. After reviewing this information, I can confirm that [the Appellant's] disabling conditions will continue to persist for the long-term and are severe enough to restrict her daily living activities to the point where she requires significant assistance and supervision, or takes her considerably longer than normal to perform."
- A 2-page letter dated June 12, 2014 to the Appellant's physician from a neurosurgeon reporting about a follow-up visit with the Appellant (discussed below). Attached to the neurosurgeon's letter is a one-page blood test report dated March 25, 2014, and a 2-page MRI report dated May 9, 2014 of a scan conducted May 2, 2014 (discussed below).
- A 3-page written submission dated August 1, 2014 from the appellant's advocate.

The following is a summary of the relevant evidence from the PWD application, as well as the information before the Ministry at reconsideration, and the evidence provided at the hearing.

### *Diagnoses*

In the PR, the Appellant's physician diagnosed the Appellant with anxiety disorders onset in 1999 and osteoarthritis onset in 2010. The physician indicated the Appellant is taking mood stabilizer medication that is "sometimes helpful" and that she also needs analgesics and Tylenol arthritis continuously.

### *Physical Impairment*

In the functional skills section of the PR completed in late March 2014, the Appellant's physician indicated that the Appellant can walk unaided 1-2 blocks, climb 2-5 stairs unaided, lift under 2 kg

(under 5 lbs), and can remain seated less than 1 hour. In the mobility and physical ability section of the AR, the physician indicated that the Appellant could independently perform the listed activities of walking indoors, walking outdoors and standing, that she required continuous assistance from another person to perform the activities of climbing stairs and lifting, and takes significantly longer than typical to perform the activity of carrying and holding. The physician did not provide any comments with his answers on the AR. In the PR, the physician indicated that the Appellant does not need any aids for her impairment, but in the AR, the physician wrote “occ[asional] use of cane.”

In the neurosurgeon’s June 12, 2014 letter, he writes that the Appellant reports that she continues to have ongoing low back pain with bilateral leg pain (more on the right than the left) and that she feels the pain gets worse with driving, vacuuming and lifting. The neurosurgeon indicates that the Appellant says she is only able to walk 2 blocks before she has to stop, and only able to stand for 15 minutes before she has to sit. The neurosurgeon writes, “she is working 4 hrs/day, 2 days per week and feels that at the end of the shift her pain is quite severe.” Referring to the MRI of May 2, 2014, the neurosurgeon reports that the Appellant has mild to moderate disc bulges and facet osteoarthropathy resulting in mild to moderate spinal stenosis. The neurosurgeon indicates that the Appellant will receive epidural pain injections.

In the July 31, 2014 letter, the Appellant reports that she can walk 1-2 blocks, but only in “ideal circumstances on flat, level ground” and that walking this distance takes her 3-5 times longer than normal and she requires frequent stops to relieve her pain. She reports that she can climb 2-5 steps but with a handrail and a rest stop before continuing and that “all basic mobility tasks” take her three-to-four times longer than normal. The Appellant indicates that she avoids lifting altogether due to significant pain and weakness resulting from her osteoarthritis.

### *Mental Impairment*

In the PR, the physician reported significant deficits with cognitive and emotional function in five areas – consciousness, executive, perceptual psychomotor, emotional disturbance, and motivation. The physician noted, “cataract O.R. May 9, 2014.” In the AR, the physician indicated that the Appellant’s ability to communicate was good in the areas of speaking, reading and writing, but that her hearing was poor. In the section of the AR regarding cognitive and emotional functioning, the physician indicated that her impairment has a major impact in 3 of the listed areas (bodily functions, emotion, and motivation), a moderate impact in 6 of the listed areas (consciousness, attention/concentration, executive, memory, motivation and motor activity), minimal impact in 2 areas (impulse control and “other emotional or mental problems”) and no impact in the remaining 4 listed areas (insight and judgment, language, psychotic symptoms, and other neuropsychological problems). The physician did not provide any commentary with his answers in this section of the AR. The Appellant’s physician indicated in the AR that she can function independently in the 5 listed areas for social functioning, including making appropriate social decisions, developing and maintaining relationships, dealing appropriately with unexpected demands, and securing assistance from others, but that she has marginal functioning in her immediate and extended social networks.

In the July 31, 2014 letter, the Appellant reported that, in addition to the cognitive and emotional functioning impacts noted by her physician in the PR, she has impaired short-term memory functions and an inability to concentrate.

### *Severity of Impairments*

In the PR, the physician wrote the following comment to indicate the severity of the Appellant's medical conditions: "persistent continuous and prolonged depression and anxiety that has failed to respond to SSRIs [medications] – insomnia and fatigue prolonged & severe. Low back pain with sciatica, [right] knee osteoarthritis that is also prolonged and continuous. Tried [pain injections] that have failed to help." The panel notes that in its reconsideration decision, the Ministry was satisfied that the evidence establishes that the Appellant's physical and mental impairments are severe.

### *Daily Living Activities*

In the PR, the Appellant's physician reported that the Appellant has been prescribed medications that interfere with her ability to perform DLA and wrote, "felt some confusion at times." The Appellant's physician did not complete the DLA portion of the PR because he completed the AR for the Appellant. In the AR, the physician indicates that the mental or physical impairments that impact the Appellant's ability to manage her DLA are "drops things, in & out of bath, vacuuming, dishes." In completing the DLA checklists set out in the AR, the Appellant's physician has indicated that the Appellant can independently perform all of the listed tasks in the DLA of personal care, meals, paying rent and bills, and medications. For the DLA of basic housekeeping, the physician has indicated that the Appellant can independently perform the task of laundry, but requires periodic assistance from another person for the task of basic housekeeping. The physician indicates that the Appellant can independently perform 3 of the listed tasks of the DLA of shopping (reading prices and labels, making appropriate choices, and paying for purchases), but that she requires periodic assistance for the task of going to and from stores, and continuous assistance with the task of carrying purchases home. For the DLA of transportation, the physician indicates that the Appellant requires periodic assistance with the task of getting in and out of a vehicle, and that she takes significantly longer than typical with the tasks of using public transit and using transit schedules and arranging transportation. The Appellant's physician did not provide any commentary in the AR to explain his answers.

In the SR, the Appellant reported the following: "can't think straight, always in pain, it's getting harder every day to clean & vacuum, walk very long (can't), drive any distance, sleep (can't), sit ½ hr, get in and out of the bath, dropping things now, miserable most of the time, there's days I don't want to even get up, hard to lift and open cans and jars, no motivation."

In the July 31, 2014 letter, the Appellant indicates that on a typical day, she suffers debilitating pain, depression and anxiety to the extent she stays mostly at home and remains socially isolated. She reports that her joints are very painful in the morning and it takes her at least three times as long to get out of bed, shower and get dressed, but that most days she lacks sufficient motivation to do these things. She also indicates that she cannot sit down in a bathtub and her shower routine takes her three to four times longer than normal. Her daily symptoms prevent her from performing her basic housekeeping, laundry, meal planning, cooking regular healthy meals, and shopping for groceries and other person needs. She indicates that her anxiety prevents her from taking public transit or competently handling unexpected demands.

### *Help with Daily Living Activities*

In the AR, the Appellant's physician indicated that the Appellant receives help from family and that

she waits till help is available. He also wrote that she occasionally uses a cane.

In the July 31, 2014 letter, the Appellant indicated that as a result of her restrictions to walking and lifting, she requires weekly assistance from another person to carry bags of groceries and other basic needs to her home for her. The Appellant also indicates that she requires weekly assistance lifting heavy loads of laundry to the washing machine, vacuuming, washing floors and performing any daily housework task that requires bending, lifting or that is remotely physical. She reports that she would benefit from assistance at least three times a week cooking healthy meals and cleaning up after as she is limited by her osteoarthritis to standing for short periods of time. She adds that she feels she would benefit from regular counseling and requires daily supervision of a family member to ensure her emotional well-being.

*Ministry's Position*

For this appeal, the Ministry relied on its reconsideration decision.

## PART F – Reasons for Panel Decision

The issue in this appeal is whether the Ministry reasonably determined that the Appellant was not eligible for PWD designation because she did not meet all of the requirements in section 2(2) of the EAPWDA; specifically, that the Appellant's severe mental and physical impairment does not, in the opinion of a prescribed professional (i) directly and significantly restrict 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 eligibility criteria for PWD designation are set out in the following sections of the EAPWDA:  
 2 (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 "daily living activities" referred to in EAPWDA section 2(2)(b) are defined in the EAPWDR as:

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.

### Panel's decision

The panel will now consider each party's position regarding the reasonableness of the Ministry's decision under the applicable PWD criteria at issue in this appeal. The panel notes that the Ministry found that the Appellant met the criteria that she has reached 18 years of age, in the opinion of a medical practitioner her impairment is likely to continue for at least 2 years, and that she has a severe mental and physical impairment.

### Restrictions to Daily Living Activities

Through her advocate, the Appellant submits that her ability to manage daily living activities is significantly restricted by her mental and physical impairments, pointing to the information she

provided in the July 31, 2014 letter, which she argues was endorsed by her physician and is thus an opinion of a prescribed profession. The appellant and her advocate argue in her submissions on appeal that the Ministry failed to give sufficient weight to the letter of July 31, 2014 which was endorsed by her physician – that the letter is not a “self report” as indicated in the reconsideration decision – but that it is “the equivalent of a medical opinion, one that provides crucial information that was missing in the PWD application.” The advocate argues that section 8 of the Interpretation Act states that every enactment “must be construed as being remedial and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects” and, for benefit conferring legislation, any ambiguity in interpretation must be resolved in favour of the applicant.

The Ministry determined in its reconsideration decision that the information provided by Appellant’s physician did not establish that the Appellant’s impairments directly and significantly restricts her ability to perform DLA continuously or periodically for extended periods. The Ministry noted the information provided by the Appellant in the July 31, 2014 letter and determined that, taken in conjunction with the other descriptions provided by the Appellant’s physician regarding the impacts and restrictions to the Appellant’s functioning, it was not satisfied that the information establishes that the Appellant is “severely restricted in [her] ability to manage [DLA].” The Ministry found that as the majority of the Appellant’s DLA are “performed independently or require little help from others” the information from the Appellant’s physician did not establish that her impairment significantly restricts her DLA either continuously or periodically for extended periods.

#### *The Panel’s Findings*

Section 2(2)(b) of the EAPWDA requires that a prescribed professional provide an opinion that an applicant’s severe impairment directly and significantly restricts her daily living activities, continuously or periodically for extended periods. In this case, the Appellant’s physician and the neurosurgeon are the prescribed professionals. Daily living activities are defined in section 2(1) of the EAPWDR and are also listed in the PR and in the AR.

In the AR completed in late March 2014, the Appellant’s physician reported that the Appellant’s impairment restricted some of the tasks of the DLA associated with a physical impairment – in particular, the physician indicated her impairment periodically restricted her performance of three listed tasks of performing basic housekeeping, going to and from stores, and getting in and out of a vehicle, without indicating the frequency or duration the periodic assistance was required. In the July 31, 2014 letter, the Appellant qualified “periodic assistance” by reporting that she required weekly (meaning once per week) assistance with the heavier tasks of basic housework (she listed vacuuming, washing floors and performing any daily household task that requires bending, lifting or that is remotely physical) as well with lifting heavy loads of laundry to the washing machine. In the AR, the Appellant’s physician reported that her impairment continuously restricted her ability to perform the task of carrying purchases home (a task associated with her physical impairment) and in the July 31, 2014 letter, the Appellant reports that she requires weekly assistance (again, meaning once per week) from another person to carry bags of groceries and other basic needs for her.

In the AR, the physician indicated that the Appellant could independently perform all tasks associated with personal care, although he had noted “in and out of bath” as one of her impairments. The Appellant reported in the July 31, 2014 letter that, as a result of her physical impairment (painful

joints), she takes three times longer than normal to get out of bed, shower and get dressed, and that she often lacks sufficient motivation to perform these basic tasks (as a result of her depression and anxiety). In the AR, the physician also reported that the Appellant could independently perform all tasks associated with meal preparation; however, in the July 31, 2014 letter, the Appellant reports that she requires assistance "at least three times a week cooking healthy meals and cleaning up afterwards" as a result of the pain caused by her osteoarthritis.

The Appellant's long-time physician indicates in the PWD application that the Appellant does not require an aid for her impairment for mobility indoors and outdoors, and can independently walk 1-2 blocks on a flat surface and only occasionally uses a cane. While the Appellant reported in the July 31, 2014 letter that walking this distance takes her 3-4 times longer than normal due to rest breaks, she does not refer to the use of an assistive device as an aid to her mobility and is, therefore, independent in this DLA.

With respect to the two DLA that are specific to mental impairment, namely, making decisions about personal activities, care or finances (decision making) and relating to, communicating or interacting with others effectively (social functioning), the available evidence indicates that the Appellant is not significantly restricted in either. With respect to decision-making, the physician reported in the AR that the Appellant independently manages her finances (banking, budgeting, paying rent and bills) and her medications (taking as directed and safe handling). She is also reported as independent in the decision-making tasks of the DLA of daily shopping (making appropriate choices) and with the safe storage of food, although the Appellant reports in the July 31, 2014 letter that her symptoms prevent her from meal planning.

In the AR, the physician reported that the Appellant takes significantly longer than typical to perform the tasks of using public transit and transit schedules and arranging transportation, without any commentary. The Appellant indicated in the July 31, 2014 letter that her anxiety prevents her from taking public transit with no detail provided.

Regarding the DLA of social functioning, the Appellant's physician assessed her in the AR as independently able to develop and maintain relationships, to interact appropriately with others, and to secure assistance from others. Although the Appellant reports in the July 31, 2014 letter that she requires daily supervision of a family member to ensure her emotional well-being, there is no detail of the areas requiring supervision or the type or extent of supervision. The Appellant is assessed by her physician in the PR as having no difficulties with communication.

The panel accepts that the Appellant's physician endorsed her statements in the July 31, 2014 letter. However, the panel notes that there is no explanation for the discrepancies between the restrictions to the Appellant's ability to perform the tasks of her DLA as initially reported by her long-standing family physician in the PWD application completed in late March 2014, and as reported in the July 31, 2014 letter some four months later. Further, the panel finds that the Appellant's family physician's endorsement of the July 31, 2014 is in very general terms and does not provide any detail to explain the new information in the July 31, 2014 letter, stating that he "can confirm that [the Appellant's] disabling conditions ... are severe enough to restrict her daily living activities to the point where she requires significant assistance and supervision, or takes her considerably longer than normal to perform." The Appellant reports in the July 31, 2014 letter that she suffers debilitating pain, depression and anxiety to the extent that she stays mostly at home and remains socially isolated,

which is not consistent with the information provided by her neurosurgeon in his June 12, 2014 letter that she “works 4 hrs/day 2 days per week” and indicates that the Appellant is able to function in the community but “at the end of the shift her pain is quite severe.” Given these unexplained discrepancies, the panel places less weight on the information in the July 31, 2014 letter that is inconsistent with the first-hand information from the prescribed professionals.

The Panel finds that when reading together all the information provided by the Appellant’s physician in the PWD application, together with the information reported by the Appellant and endorsed by her physician in the July 31, 2014 letter, the Appellant’s physical impairment restricts her ability to perform some of the tasks of her daily living activities (in particular, carrying groceries and heavy laundry, cleaning floors and vacuuming). However, the information about the duration and frequency of the restriction provided in the July 31, 2014 letter is that she requires assistance once per week with housework and carrying groceries. While the Appellant reports that she takes significantly longer than typical – 3 to 4 times longer with some tasks of personal care – there is no information from her physician to explain why this information was not set out in the AR (which indicates she can perform all of her personal care tasks independently). Given the absence of detail from her physician to explain the discrepancies between the PWD application and the July 31, 2014 letter, the level of independence reported by the Appellant’s physician and neurosurgeon, the panel finds the Ministry was reasonable in determining that the information provided does not establish that the Appellant’s impairments significantly restrict her daily living activities either continuously or periodically for extended periods as required by subs. 2(2)(b) of the EAPWDA.

### **Help with Daily Living Activities**

The Appellant submits that because of her impairments, she needs help performing some of her DLA. In the July 31, 2014 letter, she reports she requires weekly assistance with carrying bags of groceries and other basic needs to her home for her, as well as lifting heavy loads of laundry to the washing machine, vacuuming, washing floors and any task that is remotely physical. She reports that she would benefit from assistance at least 3 times per week cooking healthy meals and cleaning after. She also reports that she feels she would benefit from regular counseling and daily supervision of a family member to ensure her emotional well-being.

The Ministry’s position is that because the evidence does not establish that daily living activities are significantly restricted, it cannot be determined that significant help is required from other persons.

### *The Panel’s Findings*

Section 2(2)(b)(ii) of the EAPWDA also requires the opinion of a prescribed professional confirming that because of restrictions in her ability to manage daily living activities, the Appellant requires help with those activities. In the AR, the physician indicated that the Appellant requires periodic help with basic housekeeping, going to and from stores, and getting in and out of vehicles, and that she requires continuous help carrying purchases home. The Appellant’s physician did not provide any commentary or detail to explain the duration and frequency of help required. In the July 31, 2014 letter, the level of assistance required is indicated as “weekly” for carrying purchases home and the heavier tasks of basic housekeeping and “up to 3 times per week” for preparing healthy meals.

Accordingly, the panel finds that the Ministry reasonably concluded that because the evidence did not

establish that the Appellant's DLA are significantly restricted, it could not determine whether the Appellant needs significant help from assistive devices or from other persons to manage her daily living activities.

**Conclusion**

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