

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of October 27, 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

EAPWDA, section 2

Employment and Assistance for Persons with Disabilities Regulation (“EAPWDR”), section 2

## PART E – Summary of Facts

With the consent of the parties the hearing was conducting in writing, in accordance with section 22(3) of the *Employment and Assistance Act*.

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 form dated May 20, 2014 along with a physician's report ("PR") completed by the appellant's general practitioner (the "physician") dated May 14, 2014 and assessor's report ("AR") completed by the physician, dated June 27, 2014.
- The appellant's Request for Reconsideration form, dated October 20, 2014, with attached one page hand-written statement;
- A prescription form from the physician's office with five prescriptions noted.
- A Medical Report – Employability form completed by the physician and dated January 4, 2014.

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The panel reviewed the evidence as follows:

### Diagnoses

In the PR the physician (who has known the appellant for about two years and has seen her two to ten times in the past year) provided diagnoses of osteoarthritis (knees) and diabetes mellitus. She described the osteoarthritis as being "progressive", "gradually getting worse", and "will eventually need surgery." In the Medical Report – Employability the physician identified osteoarthritis as the primary medical condition and diabetes as the secondary medical condition, while describing the appellant's medical conditions as "moderate". In the AR the physician also referred to shoulder pain in addition to knee pain.

### Physical Impairment

- In terms of physical functional skills, the physician reported in the PR that the appellant can walk for one to two blocks unaided on a flat surface, climb 2 to 5 stairs unaided, can lift 5 to 15 pounds, and can remain seated for one to two hours.
- In the AR the physician indicated that the appellant independently manages all aspects of mobility and physical ability, but that she takes significantly longer than typical with walking outdoors (walks slower than normal due to pain knees), climbing stairs, standing (unable to stand for prolonged periods), lifting (< 10 pounds), and carrying/holding (< 6 pounds). The physician commented "Walking takes 1 ½ - 2 times longer walking outdoors. Has to rest every 8-12 [illegible]."
- In the AR the physician commented "Anti-inflammatory analgesics affects but dose limited due to diabetes mellitus."
- In the Medical Report – Employability, in response to a question asking her to describe the nature of any restrictions specific to the appellant's medical conditions, the physician wrote "Difficulty standing & walking for more than 20 to 25 min."
- The appellant did not complete the self-report form. In her reconsideration statement she wrote that she takes medication daily for diabetes, high blood pressure, kidney problems, and

chronic pain. She also wrote that she sometimes experiences swelling in her arms and numbness in her hands.

### Mental Impairment

- In the PR the physician indicated that the appellant has no difficulties with communication other than a lack of fluency in English. In the AR she described the appellant's speaking and hearing as "good", and described her reading and writing as "poor" with the comment "level of education."
- In the PR the physician indicated the appellant has no significant deficits with cognitive and emotional function, and confirmed this in the AR by noting no impacts to any of the 14 categories of cognitive and emotional function.

### DLA

In the PR the physician reported that:

- The appellant has not been prescribed any medications or treatments that interfere with her ability to perform DLA.
- The appellant is unrestricted in her ability to perform the DLA of *personal self-care, meal preparation, management of medications, management of finances, and social functioning*.
- The appellant is unrestricted with the indoors aspect of the DLA *mobility indoors and outdoors*.
- The appellant is continually restricted in the DLA *use of transportation*.
- The appellant is periodically restricted in the DLA of *basic housework, daily shopping, and the outdoors component of mobility indoors and outdoors*.
- She explained her use of the term "periodic" as meaning the appellant is "unable to carry heavy groceries for continuous period, but can do light shopping", and commented "She is able to perform most activities of daily living except gardening, [vacuuming], and lifting heavy items/groceries."

In the AR the physician indicated that:

- The appellant independently manages all aspects of all DLA, except for requiring periodic assistance with the task of "carrying purchases home" while performing the DLA of *daily shopping*.
- The tasks of "reading prices and labels" and "paying for purchases" (related to the DLA of *daily shopping*) are "N/A" [not applicable] because the appellant "doesn't read English language." The physician commented "Lives with her children, who do most of the 'buying' for her."
- Tasks related to the DLA *basic housekeeping* take 1 ½ to 2 times longer than typical.
- The tasks of transfers in/out of bed and getting in/out of a vehicle take 1 ½ times longer than typical.
- Tasks related to the DLA of *meal preparation* take significantly longer than typical except for meal planning.
- The appellant's family takes care of filling/refilling the appellant's prescriptions.
- The DLA of *manage personal finances* is "N/A as doesn't speak or read or write English language."
- The appellant independently manages all aspects of the DLA of *social functioning*, and that

she has good functioning with both her immediate and extended social networks.

In her reconsideration statement the appellant wrote that:

- Her daily routine is a challenging task from morning to night because of her medical conditions.
- Walking is a painful task and walking up/down stairs is difficult and painful.

Help

- In the PR the physician reported that the appellant does not require any prostheses or aids for her impairment.
- In the AR the physician indicated that the appellant does not use any assistive devices and does not have an assistance animal.

Neither party provided any additional information on appeal.

## 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 chronic knee pain caused by her osteoarthritis, along with her diabetes, high blood pressure, kidney problems, and hand/arm pain constitutes a severe physical impairment.

The ministry's position is that the information provided by the appellant does not establish a severe physical impairment. The ministry argued that the physician described the appellant's medical condition as being "moderate" in severity, and that the physician did not diagnose or mention pain or swelling in the appellant's arms, or describe numbness in her hands. The ministry also argued that since the physician did not describe the appellant's symptoms while on medication versus off medication, it is difficult to determine the severity of her impairment when medicated.

### 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 physician.

The appellant's physical functional skills as described by the physician in the PR are generally in the mid-range of the scale. In the AR, the physician indicated that the appellant independently manages all aspects of mobility and physical ability, though she takes about 1 ½ to 2 times longer than typical walking outdoors and has to rest periodically. In the Medical Report – Employability the physician indicated that the appellant can stand and walk for 20 to 25 minutes without difficulty. In the panel's view, all this information is consistent with the physician's description of the appellant's medical condition as being of "moderate" severity.

Section 2 of the EAPWDA requires that a physical or mental impairment must be diagnosed by a medical practitioner. The physician did not diagnose periodic swelling of arms and numbness of hands as described by the appellant, and provided no diagnosis of kidney problems or high blood pressure. Accordingly, she has not provided any information as to how those conditions may impact the appellant's physical functioning, and the panel can give little weight to the appellant's evidence of these conditions.

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 significant 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 falls short of establishing 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 provided no diagnosis of a mental impairment, and identified no significant deficits in cognitive and emotional functioning.

### 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 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), *manage personal medication* (taking as directed/safe handling and storage), *social functioning* (making appropriate social decisions) and *daily shopping* (making appropriate choices). The physician reported that the appellant's family takes care of her banking and budgeting, but explained that it is because of the appellant's limited fluency with the English language rather than because of a mental impairment. The physician also reported that the appellant's family fills/refills her prescriptions, but did not indicate this is because of any mental impairment on the appellant's part.

The uncontroverted evidence of the physician is that the appellant independently manages all aspects of *social functioning*, and that she has good functioning with both her immediate and extended social networks.

Considering that:

- there is no diagnosis from a medical practitioner as to a mental impairment,
- the appellant's ability to communicate is good except that her reading/writing are limited by her level of education,
- the appellant is not significantly restricted in terms of *decision making* and *social functioning*, and
- there is no evidence of any impacts to cognitive and emotional functioning,

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 functioning is a challenging task from morning to night due to her medical conditions. She argued in particular that walking and using stairs is difficult and painful.

The ministry's position is that the evidence is insufficient to demonstrate that the appellant's impairments directly and significantly restrict her DLA continuously or periodically for extended periods. It argued that the physician wrote that the appellant is able to perform most activities of daily living except for gardening, vacuuming, and lifting heavy items.



**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 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".

In the appellant's case, the physician has indicated that the appellant independently manages virtually all tasks related to all DLA, though she takes 1 ½ to 2 times longer than typical with some tasks. The physician indicated that the appellant requires periodic assistance carrying purchases home, but based on her evidence in the AR it would appear that assistance is limited to "heavy" weights over 6 to 10 pounds. There is no evidence as to why the appellant would not be able to use a shopping cart to carry purchases home.

The physician reported the appellant as being able to "perform most activities of daily living except for gardening, [vacuuming] and lifting heavy items/groceries." This is consistent with the detailed breakdown provided by the physician in the AR regarding the tasks related to each of the DLA. (The panel notes that gardening is not a prescribed DLA.) Read together with the physician's evidence that the appellant independently manages basic housekeeping (though taking up to twice as long as typical), the panel finds that the ministry reasonably concluded that the appellant's ability to manage her DLA is not 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**

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.