

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of October 24, 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 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 June 23, 2014) along with a physician's report ("PR") and assessor's report ("AR") both signed by the appellant's specialist in obstetrics and gynecology (the "specialist"), dated June 24, 2014.
- A Work Absence Certificate from the appellant's current general practitioner (the "GP"), dated October 16, 2014, stating that the appellant had been assessed with chronic pain, anxiety, and depression, and that "Her symptoms will likely continue to disable her for the next 2 years."
- The appellant's Request for Reconsideration form dated October 14, 2014.
- The appellant's two-page written reconsideration submission dated October 9, 2014.
- A one-page letter from the appellant's mother dated October 13, 2014.
- Receipts for various prescriptions.
- A Medical Certificate – Absence from Work or School from the appellant's former childhood physician, dated March 4, 2014. The former childhood physician referenced mobility-related issues of chronic pain affecting mood, stamina, restfulness and endurance. He indicated the appellant would be getting an MRI on March 31, 2014.
- A prescription form dated November 27, 2011 indicating a diagnosis of scoliosis, with symptoms of flat feet and knee/hip/back pain.
- A Request for Massage Therapy dated November 25, 2011 wherein the appellant's former childhood physician provided a diagnosis of chronic mechanical back pain.
- Receipts for chiropractic treatment, massage and physiotherapy.
- A referral letter from the specialist, dated June 11, 2014.
- A Request for Physiotherapy signed by the appellant's former childhood physician, dated January 30, 2013, related to a diagnosis of vaganismus.
- A letter from the ministry to the specialist, dated September 29, 2014 noting that someone other than the specialist had included information in the PWD application form, and asking the specialist to confirm his endorsement of the contents (the "Enquiry Letter").

### Admissibility of Additional Information

In her Notice of Appeal, the appellant wrote that:

- She is in crippling pain for the majority of every day.
- The pain prevents her from doing household chores and caring for herself.
- Her mobility is severely restricted because the pain is overwhelming.
- She is not on any pain medications because she cannot afford medications that may help her.

Prior to the hearing, the appellant submitted to the Tribunal office a letter from the GP dated November 13, 2014. In this letter, the GP wrote that the appellant continues to have significant disability and remains unable to work because of:

- Chronic foot and calf pain due to Achilles tendinitis/plantar fasciitis which makes walking or prolonged standing difficult and at times impossible;
- Chronic vulvar pain which makes sitting painful; and
- Persisting anxiety and depression.

The appellant also provided oral testimony at the appeal hearing, as detailed in the review of the evidence below. The appellant's oral testimony, Notice of Appeal and the November 13, 2014 letter from her GP include information that is consistent with, and tends to corroborate, information that was before the ministry regarding the diagnoses of vulvar pain, anxiety and depression. There was no direct medical confirmation of foot/calf pain before the ministry at reconsideration, but ankle pain was a condition that had been raised by the appellant and was considered by the ministry at reconsideration. The ministry's position was that it had no objection to admission of the November 13, 2014 letter into evidence. For the foregoing reasons, the panel has admitted (with one exception) the above-noted additional information as oral and written testimony in support, in accordance with section 22(4) of the *Employment and Assistance Act*.

The one noted exception is that there was no information previously before the ministry about the head injury or vertigo referred to by the appellant in her oral testimony. That information cannot be said to be "in support" of the information and records that were before the ministry at the time of reconsideration. Accordingly, the panel has not admitted that information as evidence.

The ministry relied on its reconsideration decision and submitted no new information.

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The panel reviewed the evidence as follows:

#### Diagnoses

- In the PR the specialist (who at the time of completing the PWD application had seen the appellant once) diagnosed the appellant with vulvodynia, with onset in 2002. He commented that "She reports that the pain from this condition is severe enough to restrict her ability to move. She is in constant discomfort. She is also unable to perform her physical therapy due to the pain."
- Other documents detailed elsewhere herein provide additional diagnoses of scoliosis, mechanical back pain, Achilles tendonitis/plantar fasciitis, and anxiety/depression.

#### Physical Impairment

- In terms of physical functional skills, the specialist reported in the PR that the appellant can walk for less than one block unaided on a flat surface, climb 5+ stairs unaided, has no limitations in lifting, and can remain seated for less than 1 hour.
- In the AR the specialist reported that the appellant takes significantly longer than typical with walking indoors and outdoors, commenting that she "takes a lot of breaks" and "can't walk a full kilometer." The specialist also indicated that the appellant takes significantly longer than typical with carrying/holding, commenting "difficult due to pain." Finally, the specialist indicated that the appellant is independent with standing and lifting.
- During her oral testimony, the appellant responded to a question from the panel regarding the ministry's Enquiry Letter, stating that when the specialist was completing the PR and AR, he had asked the appellant to write the answers to some of the questions. In reply to the Enquiry Letter, the specialist initialed each page of the AR and PR to signify his endorsement of what the appellant had written on those forms.

- The appellant's written comment in the section of the AR dealing with mobility and physical ability was "depending on level of pain periodic assistance from another person is required for carrying items, or delivering groceries, etc."
- In his June 11, 2014 referral letter, the specialist wrote that the appellant's vulvodynia is "severe and debilitating enough [that] she be referred to the chronic pain clinic." He noted that the GP had already referred the appellant to the chronic pain clinic.

In her self-report the appellant wrote that:

- Simply wearing underwear or pants causes her pain to increase.
- At least a few times a week the pain becomes intolerable to the point where she has to lay down to let the pain subside.
- She is tired most of the day due to sleep disturbance.
- Toileting is difficult and painful.

In her written reconsideration submission of October 9, 2014 the appellant wrote that:

- The vulvodynia is "by far the cause of the most severe pain."
- She was treated in high school for major depression and generalized anxiety.
- Two years ago she sustained an ankle injury which results in her beginning to limp noticeably after 5-10 minutes due to ankle pain. An MRI on her ankle was inconclusive.
- Laser therapy seemed to be helping to reduce her ankle pain but "this only treated the symptoms and not the problem since the pain always returned within 2-3 days."
- She ceased chiropractor and massage therapy for her back, knee and hip pain because the vulvodynia makes her unable to lie in the prone position which is required for these therapies. Since ceasing the therapies the pain has returned to the level it was before treatment.
- Her former childhood physician had originally misdiagnosed her with vaganismus.
- She is not restricted in how much she can lift, but she can't carry things that require both hands since her ankle affects her balance. If she can put the items in a backpack she can carry as much as the average person. However, the more she carries the more difficult and painful it is to walk.
- As of May 2014 the GP put the appellant on an 18 month wait list for the pain clinic.
- She was prescribed one pain medication that interacted with her anti-depressant.
- Other pain medication has either been not tolerated by her body or is ineffective.
- Medical marijuana reduced pain but left her unable to perform the most basic tasks.
- Her physical and mental issues interact with each other.

In her oral testimony the appellant stated that:

- If she walks as much as a block it leaves her in such pain that she can't do anything the rest of the day. How far she can walk depends on the time of day because the pain fluctuates.
- The condition of vulvodynia is progressive and once the pain is triggered it will remain for most of the day and usually continues to build.
- Sitting causes her pain to build.
- Her mother does her grocery shopping depending on her availability.
- She had a severe head injury a while ago which her GP suspects is causing vertigo.
- She was hospitalized for three months in high school for mental health issues.

Mental Impairment

- In the PR the specialist indicated that the appellant has no difficulties with communication. He indicated that the appellant has significant deficits with cognitive and emotional function in the areas of emotional disturbance (depression/anxiety), motivation, and attention/sustained concentration. He commented "the pain she feels affects her emotionally."
- In the AR the appellant (subsequently initialed by the specialist) described her impairment as "chronic pain impacts mood, attention."
- In the AR the specialist reported the appellant's ability to communicate as being good in all respects. He indicated that the appellant suffers a major impact in one of 14 categories of cognitive and emotional function: bodily functions. He indicated moderate impacts in four categories: consciousness, emotion, attention/concentration, and motor activity. He reported minimal or no impact in the remaining 9 categories.
- In commenting on the impacts on cognitive and emotional function the specialist wrote "Spends a lot of time in bathroom because of pain."

DLA

In the PR the specialist indicated that:

- The appellant has not been prescribed any medications or treatments that interfere with DLA;
- The appellant is not restricted in the DLA of *personal self-care, meal preparation, or management of medications*.
- The appellant is continuously restricted with the DLA of *daily shopping*, the outdoor aspects of *mobility indoors and outdoors*, and *use of transportation*.
- The appellant is periodically restricted with the DLA of *basic housework* and the inside aspect of *mobility indoors and outdoors*.
- The specialist provided no response with respect to the DLA *management of finances or social functioning*.
- In this section of the PR the appellant provided a comment explaining the term "periodic" to mean "when pain increases past manageable levels, unable to perform given tasks."

In the AR the specialist reported that:

- The appellant independently manages all aspects of the DLA of *personal self-care, meal preparation, manage personal finances, and manage personal medications*.
- The appellant requires periodic assistance with the DLA *basic housekeeping*, with the appellant indicating she takes twice as long as typical to perform this DLA.
- With respect to the DLA of *daily shopping*, the appellant requires periodic assistance with the tasks of going to/from stores and carrying purchases home, described as "if alone, must take several rest breaks." She independently manages the other tasks.
- The appellant independently manages most tasks related to the DLA use of transportation, but the appellant commented in the AR that she requires transportation to the bus stop.
- With respect to the DLA *social functioning*, the specialist indicated the appellant independently manages all tasks except that she is "unable to maintain a relationship." He reported that she has marginal functioning in terms of both her immediate and extended social functioning, commenting "pain restricts this." In response to a question regarding the help required by the appellant with respect to *social functioning*, the specialist wrote "Doesn't need any assistance on a regular basis."

In her letter of October 13, 2104 the appellant's mother wrote that:

- In the past two years she has increasingly been required to drive the appellant to appointments and to help with grocery shopping.
- The appellant's pain and depression frequently leave her unable to cook, shop, and complete housework.
- The appellant's social life has come to a complete halt.
- Hopefully the pain clinic will help with her physical disabilities.

In response to questions from the panel, the appellant stated that:

- Her mother helps her with DLA one to three times per week.
- The MRI of her ankle was inconclusive – she will be attending the pain clinic for both vulvodynia and her ankle.
- The specialist had asked her if she could as much as a kilometre and she had said “no”. She can walk about two to three minutes without pain.
- She does go shopping on her own about once a week. She mostly stays at home.
- Her GP told her that there are some pain medications that may be able to help her but they will cost thousands of dollars, which she cannot afford. The cost may be covered once she gets to the pain clinic.

#### Help

- In the PR the specialist reported that the appellant does not require prostheses or aids for her impairment. In the AR he commented that a cane “will help with balance.” He indicated that the appellant does not have an assistance animal.
- In the AR the specialist indicated that the appellant's mother helps her once per week.

## 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 pain of her vulvodynia, her scoliosis and her ankle injury constitutes a severe physical impairment. She argued that the pain is overwhelming and prevents her from caring for herself. She also argued that pain medication is either not tolerated by her body, is ineffective, has too many side effects, interacts negatively with other medications, or is too



expensive.

The ministry's position is that the appellant's physical functional skills, as reported by the specialist, are more in keeping with a moderate degree of impairment. The ministry argued 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 specialist, the GP, and the appellant's former childhood physician.

It's clear from the evidence that pain is the primary limitation to the appellant's ability to function. The specialist and the GP refer to severe and debilitating pain, and the appellant wrote in her reconsideration submission that vulvodynia is "by far the cause of the most severe pain." The specialist met with the appellant only once and based his assessment on an office interview with her. The appellant has been seeing the GP for about a year since she wrote that she chose to stop seeing her childhood physician. The specialist concluded his reports by writing that a referral had been made to the pain clinic and, given an opportunity to provide more information in the November 13, 2014 letter, the GP wrote that the appellant is awaiting her consultation with the pain clinic. The appellant has said that pain medications have been ineffective for various reasons. She also said because of pain from her vulvodynia, she had to withdraw from therapies that had been showing promise in reducing back and ankle pain. Given the appellant's position that her life has virtually come to a full stop because of excruciating pain, the panel would expect there to be some comprehensive evidence from a prescribed professional to detail the pain medications and therapies that have been assessed, to confirm their ineffectiveness or inappropriateness, and to provide some prognosis with respect to treatment at the chronic pain clinic. The piecemeal evidence on this point is not sufficient evidence to demonstrate the severity of her chronic pain.

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's position is that she suffers from severe depression and anxiety which are

exacerbated by her physical condition.

The ministry's position is that the evidence does not establish a severe mental impairment. The ministry argued that the specialist's evidence indicated that the appellant does not have any difficulties with communication, and that there are minimal to no impacts to the majority of the appellant's 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 specialist'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 specialist's evidence also indicates that the appellant is not significantly restricted with *social functioning* in that she independently manages almost all tasks related to this DLA. In the one task where the specialist indicated the appellant is not independent – ability to develop and maintain relationships – the specialist indicated that the appellant “doesn't need any assistance on a regular basis.” The specialist noted that the appellant has marginal functioning with respect to both her immediate and extended social networks, but he indicated that both of those areas are restricted by pain rather than by a mental condition.

With respect to the impacts to cognitive and emotional functioning, the specialist's comments again indicated restrictions caused by pain rather than by a mental condition.

Considering the evidence as a whole, including the specialist's evidence that the appellant's communication skills are good in all respects, 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 significantly limits her mobility and her ability to lift/carry/hold. She argued that these factors, along with her depression/anxiety, together significantly limit her ability to perform DLA.

The ministry's position is that the evidence from the specialist 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 the evidence from the GP provided no additional information regarding impacts to DLA.

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 specialist. 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.

In the appellant's case, the specialist's evidence indicates that the appellant is independently able to manage all tasks related to four of the ten prescribed DLA: *personal self-care, meal preparation, management of medications, and management of finances*. For the reasons given above under the heading Severe Mental Impairment the panel has concluded that the evidence indicates the appellant independently manages the additional DLA of *decision-making and social functioning*.

Regarding the DLA of mobility *indoors and outdoors*, the evidence indicates that the appellant's ability to walk distances outdoors is limited due to the onset of pain.

With respect to the DLA of *basic housework*, the specialist indicated that the appellant requires periodic assistance and the appellant indicated it takes her twice as long as typical to do this activity. Regarding *daily shopping*, the specialist indicated that the appellant requires periodic assistance in going to and from stores and carrying purchases home. The appellant commented that if she's alone, she has to take several rest breaks, and in her reconsideration submission she confirmed that she can carry as much as an average person if the items are in a backpack. In her oral testimony the appellant confirmed that she does go shopping on her own about once a week.

With respect to the DLA of *use of transportation*, the only limiting factor appears to be that the bus stop is too far from the appellant's home for her to be able to walk to it.

The panel notes that there is conflicting evidence with respect to the time or duration of the restrictions to the appellant's ability to perform DLA. In her Notice of Appeal the appellant referred to being in crippling pain for the majority of every day, however both she and the specialist referred to the periodicity of some restrictions (with the appellant writing that "periodic" means "when pain increases past manageable levels"). Considered in context with the moderate nature of the restrictions identified by the specialist, the evidence does not provide a compelling picture of how

often the appellant experiences significant restrictions to DLA.

Based on the foregoing analysis, 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.