

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of October 23, 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 dated May 14, 2014 along with a physician's report ("PR") completed by the appellant's general practitioner (the "GP") dated May 27, 2014 and assessor's report ("AR") also completed by the GP and dated May 27, 2014.
- The appellant's four-page reconsideration submission dated October 16, 2014.
- A letter from the appellant's mother dated October 16, 2014.
- A letter from the appellant's brother dated October 16, 2014.
- A letter from a consulting neurological physician dated January 7, 2003.
- A letter from the GP dated October 7, 2014.
- Diagnostic imaging reports dated May 31 2006, December 7 2011, and October 16 2012.

On appeal the appellant submitted a letter from the GP dated November 18, 2014. The letter confirms that the appellant is awaiting consultation from a neurologist regarding her diagnosed impairments of spina bifida and thoracic-lumbar scoliosis and its impact on her functions. This information is consistent with and tends to corroborate information that was before the ministry at the time of reconsideration, and the panel has accepted it as written testimony in support in accordance with section 22(4) of the *Employment and Assistance Act*.

The ministry relied on its reconsideration decision and provided no additional information.

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The panel reviewed the evidence as follows:

### Diagnoses

In the PR, the GP (who has known the appellant for more than 10 years and who has seen her 2-10 times in the past year) diagnosed her with spina bifida occulta at L5 and thoracolumbar scoliosis. The appellant has had both conditions since birth.

### Physical Impairment

- In terms of physical functional skills, the GP reported in the PR that the appellant can walk for 4+ blocks unaided on a flat surface, climb 5+ stairs unaided, can lift 15 to 35 pounds, and can remain seated for one to two hours.
- In the PR the GP wrote that "Spina bifida caused low back pain low to moderate in severity. Worse with walking. Pain radiates in both legs. Walking is generally OK until it is prolonged. Thoracolumbar scoliosis is causing pain in mid to lower back. It is worse with strenuous activity. Pain is episodic when leaning over goes numb sometimes for 2-3 days."
- In the AR the GP reported that the appellant independently manages all aspects of mobility and physical ability including walking indoors and outdoors, climbing stairs, standing, lifting, and carrying/holding.

In the diagnostic imaging report dated October 16, 2012 the assigned physician reported that

- No cause for the appellant's leg pain was seen.
- Isolated small spina bifida defect involving the posterior elements of the L5 vertebra.
- No evidence of spinal dysraphism or associated anatomical abnormalities was seen.
- No evidence of degenerative disc disease, intradural mass lesion, or radiculopathy was seen.

In the diagnostic imaging report dated December 7, 2011 the assigned physician noted that:

- There is a shallow mid lumbar levoscoliosis with alignment otherwise normal.
- No vertebral body deformity.
- Disc spacing appears preserved throughout.
- The presence of spina bifida occulta is not typically associated with low back symptoms.

In the diagnostic imaging report dated May 31, 2006 the radiologist reported:

- With respect to the scoliosis "Body contours appear unremarkable and disk spacing as seen appears well maintained.
- With respect to the spina bifida "There is failure of fusion of the spinous process at L5, which is not likely of any clinical relevance."

In her self-report the appellant wrote that:

- She has slight scoliosis in her upper spine between her shoulder blades that causes pain and goes numb quite often – over half of each week.
- She is beginning to develop thyroid problems which are not too bad yet which causes fatigue sometimes along with regular hypothyroid symptoms. She also suffers from hives.
- Three or more times a week her sleep is interrupted with aching arms and legs.
- She can't sleep comfortably anywhere other than her own bed at home without it causing severe back pain. This causes her to avoid staying at other peoples' houses.
- If she accidentally bumps any part of her arms or legs it causes the entire limb to ache badly. Her wrist, though, will "just go numb for a few hours."
- When her arms ache they feel weak and cold and she can't lift anything heavy without pain or struggling. If her legs ache they feel weak and walking or standing hurts.
- Standing always feels better than sitting. If the top of her back is against a hard surface for too long a lump forms that hurts to the touch and lasts for a day or two.
- Menstrual cramps cause her back to hurt twice as much and often will keep her in bed, though she can sometimes manage them enough to do a few daily chores.
- When she is dehydrated her back feels worse so she avoids soft drinks and limits her coffee intake.
- Her GP has referred her to a neurosurgeon which may take six months to a year to get an appointment.

In her reconsideration submission of October 16, 2014 the appellant added that her GP forgets most of the issues she tells him about and just keeps repeating that her spinal problems should not cause her pain.

In her letter of October 16, 2014 the appellant's mother wrote that the appellant has had persistent and severe leg and back pain all her life.

In his letter of October 16, 2014 the appellant's brother wrote that:

- He doesn't believe the appellant has received the proper medical diagnosis.
- The physicians have a high turnover rate and don't seem concerned about the appellant's condition since they can't diagnose it properly and say that "It shouldn't cause pain."
- The brother has seen that it causes pain every day and he has watched it get worse through the years.

#### Mental Impairment

- In the PR the GP indicated that the appellant has no difficulties with communication. In the AR the GP described the appellant's communication skills as being good in all respects.
- In the PR the GP indicated the appellant has no significant deficits with cognitive and emotional function, and confirmed this in the AR by indicating "N/A" (not applicable) when asked to describe any impacts to cognitive and emotional functioning.
- In the letter of October 7, 2014 the GP wrote that the appellant suffers from anxiety along with her physical impairments, and that anxiety will "cause and affect her functions because of social interactions with other people."
- In her reconsideration submission of October 16, 2014 the appellant wrote that she has been diagnosed with anxiety and has been seeing a counsellor. She would like to start taking medication soon if other methods can't keep it under control. She stated that she feels anxiety and depression being around other people, and that she feels "useless and worthless."
- In her letter of October 16, 2014 the appellant's mother wrote that the appellant gets anxiety attacks that last for weeks when she has to try new things. During these periods the appellant becomes severely antisocial and has trouble eating because her stomach is tied up in knots.

#### DLA

In the PR and AR the GP reported that:

- The appellant has not been prescribed any medication or treatments that interfere with her ability to perform DLA.
- The appellant independently manages all tasks associated with all DLA except that she periodically requires support/supervision with making appropriate social decisions, since she tends to avoid people when she is in pain.
- The appellant has good functioning with respect to both her immediate and extended social networks.
- The GP wrote that the appellant experiences pain with heavy lifting associated with carrying groceries and dealing with unexpected demands.
- The GP commented in the AR that the appellant is unable to drive for a long time because it causes low back pain.

In her self-report the appellant wrote that:

- If she spends a day cleaning house it hurts her spine.
- Sitting in a car too long hurts and just walking around town or spending a day shopping for groceries ends up hurting.
- She sits out sports and cannot dance for very long because of back pain.
- In terms of exercise she "stick[s] to cardio the most because weights tend to hurt my body

more. I can't do some back exercises with how my spine is but I try to do as much as I can. I usually hurt for days after and if anything is aching I can't work out."

- She avoids telling her friends about her pain because they tend to treat her differently.
- The pain makes her irritable so she tries to only see friends once or twice a week "if not less" so she does not snap at them.
- Now that she is older she can avoid people when she is in pain and surround herself with caring people.

In her letter of October 16, 2014 the appellant's mother wrote that she will do chores for the appellant and bring her food when she is in pain.

In his letter of October 16, 2014 the appellant's brother wrote that:

- Because of her scoliosis the appellant cannot get out of bed without a struggle.
- He and his girlfriend have to help the appellant into the bathroom, to shower or to dress.
- The appellant has to have food either brought to her or prepared and brought to her, otherwise she can't get out of bed to eat.
- The appellant baths at all times of day to try to alleviate the pain.
- He has to take the appellant to appointments, to pay bills, and to shop for groceries as her doctor says she's unable to drive.
- The appellant has tried to move out and live with boyfriends but she couldn't handle it as she needs constant care.
- It is rare to see the appellant allow friends over or to visit anyone.

### Help

- In the PR the GP reported that the appellant does not require any prostheses or aids for her impairment.
- In the AR the GP indicated that the appellant does not routinely use any assistive devices and does not have an assistance animal. The GP indicated that the appellant receives help with DLA from family and friends.
- In her reconsideration submission of October 16, 2014 the appellant wrote that she dislikes living with her family and would like to move out, but that she always has to have people helping her.
- In his letter of October 16, 2014 the appellant's brother wrote that she is lucky to have her family to help her try to get through her pain and anxiety.

## 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 pain associated with her scoliosis and spina bifida constitutes a severe physical impairment. She argued that the pain significantly affects her physical functioning about half of each week.

The ministry's position is that there is not enough information to confirm that the appellant has a

severe physical impairment. The ministry argued that the GP indicated that the appellant independently manages all aspects of mobility and physical functions.

### 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 GP.

The appellant’s physical functional skills as described by the GP in the PR are generally at the high end of the scale. The panel notes that the GP has known the appellant for more than 10 years and can be expected to be familiar with her physical limitations. In the AR, the GP indicated that the appellant independently manages all aspects of mobility and physical ability. In the panel’s view, all this information is consistent with the GP’s description of the appellant’s back pain as being of low to moderate severity that gets worse with strenuous activity. It is also consistent with the opinions of the various physicians in the imaging reports which tend to indicate that they have not determined the source of her pain. The appellant has been referred for more neurological examinations which may provide supporting information related to the pain and limitations experienced by the appellant, but the panel can only consider the evidence which is currently before it.

Section 2 of the EAPWDA requires that a physical or mental impairment must be diagnosed by a medical practitioner. There is no evidence from a medical practitioner indicating diagnoses of the appellant’s thyroid condition or hives as impairments. Accordingly, the GP 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’s position is that her anxiety constitutes a severe mental impairment. She argued that her social functioning is significantly impacted and that her appetite is also negatively affected.

The ministry’s position is that the evidence does not establish a severe mental impairment. The



ministry argued that the physician indicated that the appellant has no difficulties with communication and that she does not have any significant deficits with 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 GP'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), *manage personal finances* (banking, budgeting, pay rent and bills) and *daily shopping* (making appropriate choices). The GP did note that the appellant requires periodic support/supervision with respect to making appropriate social decisions and that she tends to avoid people when she is in pain. The appellant did state, however, that now that she is older she can make the choice to avoid people when she is in pain and to surround herself with caring people.

The evidence of the GP is that the appellant independently manages all other aspects of *social functioning*, and that she has good functioning with both her immediate and extended social networks. The appellant and her family members indicated that the appellant suffers anxiety among people and that she tends to isolate herself socially because her pain causes her to be irritable. However, the appellant also indicated that she does have boyfriends from time to time and that when she is not in pain she does go out socially.

On balance, the evidence indicates that the restrictions caused to the appellant's *decision making* and *social functioning* are not significant.

Considering that:

- the appellant's ability to communicate is good in all respects
- the appellant is not significantly restricted in terms of *decision making* and *social functioning*, and
- there is no professional evidence of any impacts to cognitive and emotional functioning,

the panel concludes that the ministry reasonably determined that the evidence does not demonstrate a severe mental impairment.

### Significant Restrictions to DLA

The appellant's position is that her functioning is significantly restricted for about half of each week. She argued that she requires significant assistance from her brother, his girlfriend, and her mother to take care of her DLA.

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 GP wrote that the appellant independently manages virtually all tasks related to all 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 GP. 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 GP has indicated that the appellant independently manages virtually all tasks related to all DLA. The GP indicated that the appellant requires periodic support/supervision with one aspect of social functioning, but for the reasons discussed above under the heading Severe Mental Impairment the degree of restriction does not appear to be significant. The GP also indicated that the appellant can experience pain from heavy lifting when carrying groceries home, but based on the evidence of her physical functional skills that would presumably be for weights of more than 15 to 35 pounds. He reported that her walking mobility is "generally OK" except when it is "prolonged". The appellant has reported that, to her credit, she engages in physical exercise when she is able, and that she is able to engage in housework (though if she spends a day at it she experiences back pain.) The panel has given little weight to the evidence of the appellant's brother with respect to restrictions experienced by the appellant since it is substantially inconsistent with the evidence provided by the GP and the appellant herself.

Based on the foregoing analysis, the panel finds that the ministry reasonably concluded that there is insufficient evidence to confirm that the appellant's ability to manage 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. She argued that she is lucky to have the help of her family.

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. The ministry also argued that the appellant does not require the use of an assistive device or an assistance animal.

### 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.