

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of December 4, 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 and that she has a severe mental impairment. However, the ministry was not satisfied that:

- the evidence establishes that the appellant has a severe physical 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

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 August 14, 2014, left blank but reference made to a handwritten attached letter (the "Self Report Attachment"); a physician's report ("PR") and an assessor's report ("AR"), both completed by the appellant's general practitioner (the "physician") on August 18, 2014. As the physician also completed the AR, she did not complete the DLA (Section E) of the PR.
- The appellant's Request for Reconsideration dated November 21, 2014 with attached reconsideration submission ("RFR"). With the RFR the appellant also provided a revised Section E of the PR completed by her physician dated November 25, 2014 (the Revised PR).
- PWD Designation Decision Summary dated October 31, 2014.

In her Notice of Appeal the appellant states that both she and her physician feel that they have established that she meets the criteria for PWD designation. The appellant requests further explanation regarding the reasons for the denial and requests further reconsideration in relation to how her mental impairment affects her physical abilities.

### *Admissibility of New Evidence*

At the hearing the appellant and her advocate provided additional oral testimony regarding her impairments and circumstances. The appellant stated that it is very difficult for her to get up and get going in the morning, that she struggles to deal with the demands of her three children, two of whom have special needs and differing nutritional demands, that she has pain in her neck, back, jaw, legs and tooth and suffers from severe depression and anxiety. The appellant stated that she performs DLA but they take her much longer and "come with a cost".

The panel admitted the oral testimony into evidence as it was in support of the information before the ministry at the time of reconsideration in accordance with section 22(4) of the *Employment and Assistance Act*. In particular, the oral testimony provided additional information regarding the appellant's physical impairment and the impact on her functioning which corroborated evidence available at reconsideration.

### Diagnoses

- In the PR the physician (who had known the appellant since 2001 and seen her two to ten times in the past 12 months) diagnosed the appellant with depression (onset December 2013), anxiety disorder (onset December 2013), back pain, jaw pain and chronic fatigue syndrome (onset 2014).
- In the AR the physician described the appellant's impairments that impact her ability to manage DLA as being her severe emotional depression and anxiety.

### Physical Impairment

- In the Health History portion of the PR the physician commented that the appellant suffers from severe chronic fatigue syndrome related to her chronic stress with taking care of her

three children as a single parent. The physician states that the appellant's daughter born in early 2000 suffers from attention deficit, hyper activity and developmental delay, requiring constant care. The physician states that the appellant's son born early 2000 also requires a lot of care and attention. The physician states that the appellant reports chronic fatigue, back pain and jaw pain relating to her duties as a single parent.

- In the Additional Comments section of the PR the physician commented that the appellant suffers from chronic anxiety and depression, including post partum depression after her daughter and son's births in early 2000. The physician notes that the appellant's daughter's developmental delays persisted with behavioral and conduct disorder with temper outburst, hyperactivity, inattention and eating disorder, requiring 24-hour supervision and care. The physician notes that the appellant's son born in early 2000 also requires a lot of care. The physician notes that the appellant's severe depression persisted with aggravation in the last year, affecting her function and DLA. The physician notes that the appellant is chronically fatigued, has lost weight and is anxious. She complains of back pain, jaw pain, problems with medication, planning her day, making meals and doing her general chores. The physician notes that the appellant's impairment in her functioning is persistent.
- In terms of physical functioning the physician reported in the PR that the appellant can walk 4+ blocks unaided on a flat surface, can climb 5+ stairs unaided, can lift 5 to 15 pounds, and that the length of time she can remain seated is unknown.
- In the AR the physician reported that the appellant independently manages walking indoors and standing. She reports that the appellant takes significantly longer with walking outdoors and climbing stairs (due to fatigue), and lifting/carrying/holding (due to weakness).

In the Self-Report Attachment the appellant reported:

- That she has constant exhaustion, low energy and chronic fatigue.
- That it takes a lot to just get out of bed in the morning, especially getting her children ready for school, and that it is physically draining to cook meals for her family.
- That getting up, climbing stairs, getting into the shower are exhausting and DLA are difficulty as she has extreme neck and back pain and excruciating migraines.
- That she has severe pain and discomfort for two years relating to a root canaled tooth and requires a night guard for her mouth.
- Reading gives her migraines, as she requires a new glasses prescription.

In the RFR the appellant states that after discussion with her physician, it is understood that she is not able to walk over 4 blocks or climb more than five steps on a consistent basis and that her chronic fatigue and back pain make it impossible for her to carry out these tasks on a daily basis. The appellant states that her physician had misunderstood the question on the PR to mean if the appellant had to complete those items in an emergency situation, or if she had no choice, then she would be able to complete these tasks once, but not on a repeated, daily basis.

### Mental Impairment

- In the Health History portion of the PR the physician commented that the appellant suffers from severe chronic fatigue syndrome, depression and anxiety disorder related to her chronic stress with taking care of her three children as a single parent. The physician states that the appellant's daughter born early 2000 suffers from attention deficit, hyper activity and developmental delay, requiring constant care. The physician states that the appellant's son born early 2000 also requires a lot of care and attention. The physician states that the

appellant reports chronic fatigue and generalized anxiety relating to her duties as a single parent.

- In the Additional Comments section of the PR the physician commented that the appellant suffers from chronic anxiety and depression, including post partum depression after her daughter and son's births in early 2000. The physician notes that the appellant's daughter's developmental delays persisted with behavioral and conduct disorder with temper outburst, hyperactivity, inattention and eating disorder, requiring 24-hour supervision and care. The physician notes that the appellant's son born early 2000 also requires a lot of care. The physician notes that the appellant's severe depression persisted with aggravation in the last year, affecting her function and DLA.
- Under the heading Degree and Course of Impairment the physician comments that the appellant's depression is chronic and her mood disorder affects her ability to cope with her family condition.
- In the PR the physician indicated that the appellant has no difficulties with communication. In the AR the physician described the appellant's speaking, reading and hearing as "good" and her writing as "satisfactory".
- In the PR the physician indicated that the appellant suffers significant deficits in four of twelve categories of cognitive and emotional function: executive, emotional disturbance, motivation, and attention/sustained concentration.
- In the AR the physician indicated that the appellant's impairments have a major impact on 2 of 14 categories of cognitive and emotional function: emotion and motivation and moderate impact on 7 of 14 categories: bodily functions, impulse control, insight and judgment, attention/concentration, executive and other emotional or mental problems. The physician notes minimal impact to 4 of 14 categories: consciousness, motor activity, language and other neuropsychological problems. She reported no impact to psychotic symptoms. The physician commented that the appellant's depression and anxiety affects her DLA and self-care.

In the Self-Report Attachment the appellant reported that she:

- Experiences a lot of anxiety, stress, depression, lack of motivation and feelings of being overwhelmed and suffers from post traumatic stress disorder (PTSD).
- That she has significant difficulty and stress dealing with her daughter's special needs which include frequent outbursts requiring the appellant to be available at all times.
- That her children are opposite and are in constant battles and that she has difficulty feeding them on her budget

#### DLA

- As the physician also completed the AR, she did not complete the DLA section of the PR.
- In the AR the physician indicated that the appellant independently manages all tasks related to the three DLA of *personal care, medications and use of transportation*. She also indicated that the appellant independently manages most tasks related to the DLA of *daily shopping* (except that it takes significantly longer going to and from stores and making appropriate choices) and *meals* (safe storage of food). The physician described the appellant as taking significantly longer with *basic housekeeping tasks* (laundry and basic housekeeping), *meals* (meal planning, food preparation and cooking) and *paying rent and bills* (banking budgeting and paying rent and bills). She reported that the appellant's comprehension of talk is affected by her fatigue, anxiety and depressed mood. The physician states that the appellant requires periodic supervision with all tasks related to *social functioning* (appropriate social decisions, ability to develop and maintain relationships, interacting appropriately with others, ability to

deal appropriately with unexpected demands, and securing assistance from others).

- In the AR the physician indicates that the appellant has marginal functioning with her immediate social network and very disrupted functioning with respect to her extended social networks.
- In the Revised PR the physician states that all DLA except the use of transportation are restricted but the physician did not provide any indication of whether the restrictions are continuous or periodic. The physician notes that the appellant's severe anxiety restricts her ability to interact with others, and this severely impacts her DLA.

In the Self-Report Attachment the appellant stated that:

- She is overwhelmed with her DLA due to her pain, anxiety, depression, PTSD, low energy, chronic fatigue, low motivation, and the demands of her children.
- Getting up, climbing stairs and getting into the shower to bathe is exhausting and it takes all she has to get going.
- Her ability to do basic housekeeping is impaired as keeping her home in order, doing dishes, cleaning up, vacuuming or yard work causes extreme neck and back pain and due to pain in her legs it takes her longer to do her daily chores.
- It takes all she has to get out of bed in the morning and it is difficult to get her children up and ready in time for school.
- That she has difficulty providing meals to meet her daughter's nutritional needs

#### Help

- In the PR the physician reported that the appellant does not require prostheses or aids for her impairment.
- In the AR the physician indicated that the appellant has no outside help and is a single mother living with her two young children.
- In the Revised PR the physician comments that the appellant will benefit from counseling and other assistance.
- In the Self-Report Attachment, the appellant states that she requires financial assistance to help to provide proper meals and to meet her children's nutritional needs, a properly fitted mouth guard, new glasses, counseling and support to assist her with her children.

## 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 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.

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**Severe Physical Impairment**

The appellant's position is that between the PR and the AR the physician has confirmed that the appellant has a severe physical impairment, with severe chronic pain in her neck, back, jaw and chronic fatigue requiring significant ongoing help. The appellant also argued in the SR that she has pain due to a problematic tooth and pain in her legs.

In the RFR the appellant states that significantly is defined as "large enough to be noticed or have an effect", "very important" or "having a special meaning". The appellant's position is that the definition of significantly explains the impact that her physical and mental health concerns have on her mobility. The appellant also states that the Revised PR, which indicates restriction to all noted DLA except use of transportation further supports her position that she has a severe physical impairment.

The ministry's position, as set out in its reconsideration decision, is that the information provided is evidence of a moderate impairment rather than a severe physical impairment. The ministry argued that the functional skill limitations are not significantly restricted and that the physician did not describe how much longer it takes the appellant to perform tasks so it is difficult to determine whether the amount of additional time required for walking outdoors, climbing stairs, lifting and carrying and holding represents a significant restriction to her mobility and physical ability.

**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. Likewise, the use of the word "severe", in and of itself,

does not necessarily confirm that the appellant has a severe physical impairment.

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 appellant's physician.

The appellant's physical functional skills as described by the physician in the PR (ability to walk 4+ blocks, claim 5+ stairs unaided and lift from 5 to 15 pounds) indicate little impairment to the appellant's functional skills. This is somewhat inconsistent with the physician's evidence in the AR where she indicates that the appellant is independent with walking indoors and standing but takes significantly longer with walking outdoors and climbing stairs due to fatigue, and lifting, carrying and holding due to weakness. In addition the physician does not provide any additional comments in the PR or AR to indicate how much longer than typical it takes the appellant to perform the impacted tasks.

In the RFR the appellant states that after discussion with her physician it is understood that she is not able to walk over 4 blocks or climb more than five steps on a consistent basis and that while she could perform these tasks once if she had to, she could not do so on a repeated, daily basis. However, while the appellant may have discussed this information with her physician there is no further information from the physician to confirm her opinion in that regard. Although the appellant provided the Revised PR in which the physician indicates that the appellant's impairment directly restricts her ability to perform DLA of personal self care, meal preparation, management of medications, basic housework, daily shopping, mobility inside and outside the home, management of finances and social functioning, the physician notes this is due to depression and cognitive impairment, not because of any physical impairment. In addition, the physician has not provided any further information indicating why these tasks are noted as restricted on the Revised PR whereas the AR indicates that the appellant is independent with most of the same tasks.

In addition, on the AR, the physician notes the appellant's depression and anxiety as impairments that impact her ability to manage her DLA, rather than any physical impairment.

While the panel has concluded that the appellant's functioning is impacted by her physical impairments there are numerous inconsistencies in the information provided by the physician. There are also numerous inconsistencies between the information from the appellant as compared to the information from the physician. It may be that the physician has not accurately reflected the appellant's limitations but based on the numerous inconsistencies and lack of information from the physician confirming a severe physical impairment, the panel finds that the ministry reasonably determined that the evidence falls short of establishing that she has a severe physical impairment as contemplated by the legislation.

### **Severe Mental Impairment**

The appellant's position is that her depression, anxiety, chronic fatigue and PTSD together constitute a severe mental impairment and that the reconsideration decision is not clear in that it initially



indicates that she does not have a severe mental impairment then later states that the ministry is satisfied that she does have a severe mental impairment.

The ministry's position as set out in the reconsideration decision is inconsistent. In the heading "Decision Under Consideration" the decision states that the appellant does not have a severe physical or mental impairment and on page two of the decision, under the heading "Reconsideration Decision" the box for severe impairment is checked as "No". However, in the body of the reconsideration decision severity of the impairment is checked as "Yes" and in the analysis with respect to mental functioning, the reconsideration decision indicates that the ministry has determined that the appellant has a severe mental impairment. In particular the reconsideration decision states that the information provided by the physician demonstrates that the appellant experiences depression and anxiety, that the appellant's cognitive and emotional functioning areas are impacted, that she requires periodic support or supervision with all aspects of her social functioning, and has disrupted functioning with her extended social networks. The reconsideration decision indicates that the ministry determines that the information provided establishes that the appellant has a severe mental impairment.

At the hearing, the ministry representative confirmed the ministry's position is that the information establishes that the appellant has a severe mental impairment. Therefore the panel will not address the criterion of severe mental impairment.

### **Significant Restrictions to DLA**

The appellant's position is that she is significantly restricted in the DLA of laundry, housekeeping, shopping, budgeting, making appropriate choices and dealing with life's daily tasks. The appellant's position is that she becomes very overwhelmed, it takes her a lot to get going and everything takes her longer due to her pain, chronic fatigue, anxiety and depression. The appellant also argued that she takes significantly longer than typical to perform many DLA. The appellant's position is that the revised PR when taken into consideration with the AR and her evidence is sufficient for the ministry to find that her impairments directly restrict her ability to perform DLA.

The ministry acknowledges that the appellant has certain limitations resulting from depression and anxiety that impact her ability to manage DLA, particularly housekeeping and shopping, but the ministry's position is that the information provided by the physician is indicative of a moderate level of restriction, not a significant restriction to the appellant's overall level of functioning. The ministry notes that there is no indication from the physician as to which tasks require continuous or periodic assistance or if she is unable to manage any DLA. The ministry's position is that the information provided by the physician does not establish that the appellant's severe impairment significantly restricts DLA continuously or periodically for extended periods of time.

### **Panel Decision:**

The legislation – s. 2(2)(b)(i) of the EAPWDA – 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 that 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 examining the evidence the panel noted that there is a significant degree of inconsistency and lack of clarity with respect to the degree of restriction the appellant faces with her DLA. For example, in the AR the physician indicates the appellant is independent with all aspects of personal care, namely dressing, grooming, bathing, toileting, feeding and regulating self and transfers in/out of bed and on/off of chair. However, on the Revised PR the physician reports that the appellant's DLA of personal self-care and mobility inside and outside the home are restricted. Despite indicating that these activities are restricted the physician did not provide any further information indicating whether the restrictions were continuous or periodic and no explanation as to why the information in the Revised PR is different than in the AR.

In the AR the physician indicates that the appellant takes significantly longer with meal planning, food preparation and cooking but there is no indication of how much longer. On the Revised PR the physician indicates that the appellant's DLA of meal preparation is restricted but again, she does not indicate whether that restriction is continuous or periodic.

In the AR the physician indicates that the appellant is independent with all aspects of medications (filling/refilling prescriptions, taking as directed and safe handling and storage) but in the Revised PR the physician reports that the appellant's DLA of management of medications is restricted. Again the physician did not provide any further explanation of whether that restriction is continuous or period or provide any explanation for the inconsistency between the AR and the Revised PR.

On the AR the physician notes that the appellant's DLA of laundry and basic housekeeping take significantly longer and on the Revised PR the physician indicates that her basic housework is restricted. However, the physician did not provide any further information to indicate if the restriction is continuous or periodic or how much longer it takes the appellant to complete these DLA. In addition, on the AR, under Part E – Additional Information, the physician notes that the appellant is reluctant to take medications due to her religious beliefs.

In the AR the physician reports that the appellant is independent with the DLA of transportation (getting in and out of a vehicle, using public transit and using transit schedules and arranging transportation) and on the Revised PR the physician indicates that this DLA is not restricted.

In her Self-Report Attachment and at the hearing the appellant stated that her DLA take much longer than normal because of pain, anxiety, stress and being overwhelmed. The appellant stated that sometimes she will go to the fridge and whether it is full or empty she looks inside and cannot think of what to make.

The onus is on the appellant to demonstrate that she satisfies the legislative criteria to qualify for PWD designation. While the evidence does indicate that the appellant experiences some restrictions to her ability to manage DLA, it does not demonstrate on the balance of probabilities that those

restrictions are significant.

Based on the foregoing analysis, the panel concludes that the ministry reasonably determined that the evidence is insufficient to show 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 significant assistance with DLA but that she does not have any family or friends that are available to help her. The appellant's position is that she requires financial assistance with a mouth guard, new glasses, nutritional food items and assistance with her children due to their special needs requirements. The appellant's physician reports that the appellant would benefit from counseling and other assistance.

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.