

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of January 13, 2015, which found that the appellant did not meet two 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, that in the opinion of a medical practitioner the appellant’s impairment is likely to continue for at least two years, and that the appellant has a severe mental impairment. However, the ministry was not satisfied that:

- the appellant has a severe physical impairment;
- that 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 September 24, 2014 but not completed; a physician's report ("PR") and an assessor's report both completed by the appellant's family physician (the "physician") on September 22, 2014.
- Letter from the ministry to the appellant dated November 25, 2014 advising that her PWD application was denied with attached PWD Decision Summary.
- The appellant's Request for Reconsideration form dated January 7, 2015 with attached reconsideration submission.

### Diagnoses

- In the PR the physician (who had known the appellant for 5 years and seen her 11 or more times in the past 12 months) diagnosed the appellant with COPD (onset 2013), CKD (onset 2014) and anxiety/depression (onset 2001).
- In the AR the physician described the appellant's impairments that impact her ability to manage DLA as being "shortness of breath, tiredness, lack of motivation/concentration – difficulty with social situations".

### Physical Impairment

- In the Health History portion of the PR the physician notes recent onset of COPD with increased shortness of breath that is moderate to severe and CKD moderate.
- In terms of physical functioning the physician reported in the PR that the appellant can walk 1 to 2 blocks unaided on a flat surface, can climb 5+ stairs unaided, can lift 5 to 15 pounds, and has no limitations with being seated.
- In the AR the physician reported that the appellant's impairments are shortness of breath and tiredness. The physician reports that the appellant independently manages walking indoors, takes significantly longer with walking outdoors, climbing stairs and standing, and requires periodic assistance from another person with lifting and carrying and holding.

In the RFR the appellant reported that she:

- Was sickly as a child, prone to infections, which impacted her schooling and work. She was diagnosed with COPD in 2013 and kidney failure and that her life has gone downhill.
- She states that she can't walk far and uses a cane outside. She has trouble breathing, uses a puffer twice a day, and has trouble getting in and out of her car.

### Mental Impairment

- In the Health History portion of the PR the physician commented that the appellant has a long history of anxiety/depression that can be very severe, that medication helps. The physician notes that the appellant has a "lack of motivation/energy/tired all the time/doesn't like society/being in public. Avoids shopping, etc. Can overeat which doesn't help; wants to sleep all the time/cries a lot".
- In terms of functional skills the physician notes that the appellant has significant deficits with cognitive and emotional function in the areas of executive, memory, emotional disturbance,

motivation, impulse control and attention or sustained concentration.

- In the AR the physician indicated that the appellant's impairments are "shortness of breath, tiredness, lack motivate/concentration – difficulty with social situation".
- The physician indicates that the appellant's ability to communicate with respect to speaking, reading, writing, and hearing is good.
- The physician reports that the appellant's mental impairment has a major impact on 7 of 14 categories of cognitive and emotional function: emotion, impulse control, attention/concentration, executive, memory, motivation, and motor activity. She reports moderate impact to bodily functions. She reports minimal or no impacts in the 6 remaining categories.

In the RFR the appellant reported that she:

- Has a history of anxiety, stress and depression for which she had previously obtained counseling but since her last job and diagnosis of COPD and kidney failure her life has gone downhill.
- She reports that her memory is not good, she has little or no motivation, cannot concentrate for long and that her depression causes her not to want to bathe, eat properly, or do basic housekeeping. She has difficulty with financial management which restricts her shopping. She also states that she does not socialize much because of anxiety attacks.

#### DLA

- In the AR the physician indicated that the appellant takes significantly longer with dressing, grooming, bathing, toileting, laundry, and basic housekeeping due to shortness of breath, tiredness and lack of motivation but that the appellant is independent with feeding self, regulating diet and transfers (in/out of bed) and transfers (on/off of chair).
- The physician notes that the appellant takes significantly longer with going to and from stores, making appropriate choices and carrying purchases home due to shortness of breath, tiredness, lack of motivation and social anxiety but is independent with reading prices and labels and paying for purchases.
- The physician notes that the appellant takes significantly longer with meal planning, food preparation, cooking, getting in and out of a vehicle and using public transit due to shortness of breath, tiredness and lack of motivation but is independent with safe storage of food, banking, budgeting, paying rent and bills, filling/refilling prescriptions, taking medications as directed, safe handling and storage of medications and using transit schedules and arranging transportation.
- The physician described the appellant as requiring continuous support with developing and maintaining relationships, interacting appropriately with others, dealing appropriately with unexpected demands and securing assistance from others due to severe social anxiety but is independent with making appropriate social decision.
- She reports that the appellant has very disrupted functioning with respect to her immediate social networks due to social anxiety and marginal functioning with respect to her extended social networks.

In the RFR the appellant stated that:

- She has little or no motivation and her depression affects her desire to bathe, eat properly, and do basic housekeeping. She states that her management of finances has gotten worse and her shopping is restricted because of finances. She has trouble getting in and out of her car,

- doesn't socialize all that much because of anxiety attacks and finds it difficult to go to church.
- She also reports nightmares regarding a prior gall bladder surgery that went badly.

### Help

- In the PR the physician reported that the appellant has not been prescribed any medications and/or treatments that interfere with her ability to perform DLA. 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 routinely uses no assistive devices to help compensate for her impairment, and that the appellant does not have an assistance animal. She noted that the appellant receives assistance for DLA from her mother.

In the RFR the appellant stated that she requires help from her mother and has friends coming in to help her clean.

In the Notice of Appeal the appellant states that she disagrees with the reconsideration decision because she has new information and clarification of previously reported information.

Prior to the hearing the appellant provided a submission containing a photograph of herself as well as a letter from her friend/advocate dated January 27, 2015 in which her friend states that she has known the appellant for 10 years. The appellant's friend states that she has watched the appellant get worse physically and emotionally and that she is no longer able to get herself ready and get to church or volunteer at a local seniors' home as she used to do. The friend states that she has seen the appellant walk up six stairs and be so out of breath that they had to get a chair for her to collapse in and that it took over 30 minutes for her heavy breathing and wheezing to subside enough that she felt comfortable to get up to move into the living area. The friend states that she has observed the appellant struggle with her daily routine. The friend states that the appellant's mother provided her help but has become ill and is no longer able to help the appellant as she did before.

Prior to the hearing, the appellant also provided a note from the physician dated February 10, 2015 (Doctors Note) in which the physician states that since completing the PR and AR the appellant has had a significant deterioration in her DLA. The physician states that the appellant is only able to walk one block before needing to stop due to shortness of breath from her COPD, that she is severely restricted with respect to lifting in that she cannot lift more than 5 pounds and would not be able to carry this any distance so she requires help with shopping from family and friends. The physician reports that the appellant needs help with laundry as she is only able to manage tiny amounts at a time. She reports that cooking is very difficult as the appellant cannot lift sauce pans, etc., and needs help or has a poor diet as she avoids lifting.

The physician reports that bathing can be difficult because the appellant can be very depressed and has poor motivation and that the appellant should have some aides such as a bath stool. The physician reports that drying is difficult due to shortness of breath and mobility. She reports that dressing is okay but bending over and lifting arms is difficult so help from another person is needed although the appellant has no one to help her. The Doctor's Note also contains handwritten notes indicating that the appellant has difficulty getting in/out of her car due to poor mobility and is unable to sit for any length of time as she gets stiff/painful.

The ministry did not object to the admission of the photograph, the letter from the appellant's

friend/advocate or the Doctor's Note.

The panel has admitted the photograph of the appellant, the letter from the appellant's friend and the Doctor's Note into evidence as they are in support of information and records that were before the ministry at the time of reconsideration, in accordance with section 22(4) of the *Employment and Assistance Act*. In particular, the new information relates to the appellant's impairments, ability to perform DLA and need for help and tends to corroborate the information available at reconsideration.

At the hearing, the appellant stated that since the PWD application was submitted, her health has deteriorated and that walking is much harder with significant shortness of breath after just one block. She stated that lifting a towel to dry herself off after a shower is hard and that even before drying she has to rest for two to three minutes. She reports that her symptoms have gradually worsened over the four and a half months time between the PWD application and the Doctor's Note. The appellant stated that most of the "puffers" she tries for her COPD are of no help although the current one she is taking that she started approximately four months ago does help a little. The appellant stated that her mother used to come over once or twice every few months to clean her house but is no longer able to do so because of her own health issues. She also stated that she had a friend come in once a month "or something like that" to help with housework but he is busy with his own life and unable to help any more so right now she has nobody to help her.

At the hearing the appellant's advocate stated that she has known the appellant for ten years and has observed her struggle with DLA and does not think that the ministry understands how, with her chronic illness, the appellant may be able to perform DLA but then can do little else for the rest of the day. The advocate stated that the appellant struggles every day, does not have any great days and is unable to live like a normal person. The advocate stated that the appellant has a difficult time going into the kitchen and making tea for a guest and is huffing and puffing afterwards and has to sit and catch her breath. The advocate stated that the appellant does not have the financial means to pay for the help she needs, that her mother is no longer able to help her, and friends can only provide limited assistance. The appellant's stress has recently increased because her mother is ill.

The advocate stated that it does not make sense to her how the appellant could be found to have a severe impairment yet not meet the requirements for significant restrictions to her DLA or the need for help with DLA as a result of her restrictions. The advocate also stated that she recognized that the appellant's physician had not completed the PWD application sufficiently to address the ministry's concerns regarding how much longer than typical it takes the appellant to perform various DLA so she advised the appellant to return to her physician and obtain the Doctor's Note to address those concerns, but recognizes that the Doctor's Note still does not address how much longer it takes the appellant to perform DLA.

The ministry relied on the reconsideration decision.

## 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, 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.

\*\*\*\*\*

### **Severe Physical Impairment**

The appellant's position is that her difficulties she has with shortness of breath, walking, lifting and chronic pain from her COPD and kidney failure should be sufficient to find that she has a severe physical impairment. The appellant does not know why she has deteriorated so much in the four and a half months between the time her PWD application was submitted and the time of her Doctor's Note but says that she has gradually worsened and every day is a struggle such that she should be found to meet the criteria of having a severe physical impairment.

The ministry's position, as set out in the reconsideration decision, is that the information provided is not evidence of a severe physical impairment. The ministry argued that the functional skill limitations are more in keeping with a moderate degree of impairment, not a severe impairment. At the hearing the ministry representative stated that the reconsideration decision was made based on the information before the ministry at the time, which did not include the Doctor's Note but that the Doctor's Note, while describing increased physical limitations does not provide any information about why the appellant's condition changed so significantly in such a short period of time.

### **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 appellant's physician.

The panel notes that the information from the physician indicates restrictions of a lesser degree than reported by the appellant. However, given the emphasis on professional evidence in the legislation, where there is a difference between the evidence of the physician and the appellant, the panel has given more weight to the physician's information.

The appellant's physical functional skills as described by the physician in the PR are generally in the mid-range of the scale. This is consistent with the physician's evidence in the AR where he indicated that the appellant independently manages her mobility indoors and requires periodic assistance with lifting and carrying and holding. While the Doctor's Note indicates that the appellant's condition has worsened in the four and a half months since the PWD application was submitted, the panel notes that the noted restrictions do not change the overall range reported by the physician in the PR.

For example, in the Doctor's Note the physician notes that due to severe COPD the appellant can only walk one block before needing to stop due to shortness of breath but that does not substantially change the information in the PR where the physician indicated that the appellant could walk unaided on a flat surface one to two blocks. While the appellant wrote in her RFR that she can't walk far and uses a cane outside, the physician's report in the PR that the appellant does not require an aid for her impairment was not changed in the Doctor's Note. In the PR, the physician reported that the appellant can climb 5 or more steps unaided and the appellant's friend wrote in her letter that she has seen the appellant walk up to 6 stairs although the appellant was out of breath when she reached the last one.

On the Doctor's Note, the physician reports that the appellant's lifting is severely restricted and that she cannot lift more than five pounds and would not be able to carry this any distance. Again, that does not substantially change the initial range noted in the PR where the physician reported that the appellant's limitations in lifting was five to 15 pounds. In the Doctor's Note the physician reports that the appellant is able to dress but has difficulty bending over and lifting arms, that she is able to do laundry but in tiny amounts and that self care-toileting is no problem. Although it appears that the worsening in the appellant's condition now means that her functional limitations are at the low end of the ranges previously noted in the PR, the panel finds that her physical functional skills continue to reflect a moderate impairment as opposed to a severe impairment.

For the foregoing reasons, the panel has concluded that while the appellant's functioning is impacted by her physical impairments, the ministry reasonably determined that the evidence falls short of establishing that she has a severe physical impairment as contemplated by the legislation.

### **Significant Restrictions to DLA**

The appellant's position is that she is significantly restricted in the DLA of personal self-care, basic housekeeping, shopping, cooking, financial management, getting in and out of her car, mobility and interacting with others effectively on an ongoing basis. The appellant's position, as presented through her advocate, is that it is unfair for the ministry to find that she meets the criteria of having a



severe mental impairment but does not meet the legislated criteria of having significant restrictions to her DLA or requiring help with DLA.

The ministry's position is that although the physician indicates that the appellant takes significantly longer with dressing, grooming, bathing, toileting, laundry, basic housekeeping, going to/from stores, making appropriate choices, carrying purchases home, meal planning, food preparation, cooking, getting in/out of a vehicle and using public transit due to shortness of breath, tiredness and lack of motivation, the physician has not provided any information on how much longer it takes the appellant to perform these tasks and that the appellant is independent with the remainder of her DLA. The ministry also notes that although the physician indicates that the appellant requires continuous assistance with being able to develop and maintain relationships and periodic assistance in the remainder of social functioning, the physician has not provided any information on how often she requires assistance. The ministry notes that the physician writes that the appellant has very disruptive functioning with her immediate social networks and marginal functioning with her extended social networks but relies on her mother, so the ministry finds it difficult to develop a clear and cohesive picture of the degree of functioning the appellant has with her immediate social networks.

The ministry states that it could be reasonable to assume that the appellant's severe mental impairment may impact her ability to manage her DLA but the physician indicates that she can manage her DLA but they take the appellant longer to perform. The ministry's position is that they do not have enough evidence to confirm that the appellant's impairments directly and significantly restrict her ability to perform DLA either continuously or periodically for extended periods.

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 the RFR, the appellant states that she has difficulty with her DLA due to lack of motivation and depression in that she has little desire to bathe, has difficulty with financial management, getting in and out of her car and that she requires help with cleaning from friends and family but she does not provide information about how long any of these tasks take her, or how much help is provided from her friends or family.

In the AR, the physician reports that the DLA take the appellant significantly longer than usual but does not provide any information about how much longer than typical these DLA may take.

The appellant's position is that her condition has deteriorated significantly since her PWD application

was submitted and that the Doctor's Note confirms those changes. However, the panel finds that although the Doctor's Note indicates that the appellant's health has deterioration since the PWD application was submitted, the physician does not provide further information on how much longer it takes the appellant to perform her DLA. In particular, the physician did not provide information indicating how much longer than typical it takes the appellant to perform DLA such as dressing, grooming, bathing, toileting, laundry, basic housekeeping, shopping, making appropriate choices, carrying purchases home, meal planning, food preparation, cooking, getting in and out of a vehicle or using public transit. In addition, there are some inconsistencies between the physician's information that are not explained. For example, on the AR the physician indicates that the appellant takes significantly longer with toileting but on the Doctor's Note the physician reports that "self care – toileting – no problems".

With respect to the 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 evidence indicates that the appellant is not significantly restricted with decision making and is not consistent with respect to social functioning. The physician reported in the AR that the appellant independently makes appropriate social decisions as part of her social functioning, manages the decision-making aspects of her finances (banking, budgeting, pay rent and bills), her medications (taking as directed and safe handling and storage), the safe storage of food aspect of the meals DLA, and transportation (using transit schedules and arranging transportation). She is also reported as independent but takes longer with the decision-making components of the DLA of daily shopping (making appropriate choices) and meal preparation (meal planning),

Regarding the DLA of social functioning, the appellant is assessed by the general practitioner as requiring continuous support/supervision with developing and maintaining relationships, interacting appropriately with others, and securing assistance from others as a result of "severe social anxiety." The physician reported very disrupted functioning in the appellant's immediate social network and marginal functioning in her extended social network. Asked to describe the support/supervision required which would help to maintain the appellant in the community, the physician wrote in the AR: "relies on very close family (mother)" and the ministry pointed to the inconsistency given that the appellant's mother is part of her immediate social network. The physician did not address this point in the Doctor's Note but, rather, focused primarily on the appellant's physical functioning. The physician reported that the appellant has no difficulties with communication.

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 from her friend and mother. Her position is that although her mother used to help her a lot, her mother is now suffering

from her own health problems and her friend does not have time to provide assistance so she does not have anyone to help her. At the hearing the appellant provided further information about the help, stating that her mother used to help her once or twice every few months with house keeping and a friend helped her once a month.

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 argued that no mobility devices or aids are required.

### 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.

In addition, although the appellant's position is that she uses a cane, particularly in the winter, the physician, in the PR indicates that the appellant does not require the use of any assistive devices. In the Doctor's Note the physician indicates that a bathing stool would be of assistance but then indicates that the appellant has a shower. In the Doctor's Note, the physician does not indicate that the appellant requires the use of a cane.

The physician indicates that the appellant requires help but does not provide any information on what type or how much help is needed. The appellant states that she requires assistance from friends and family but the information provided at the hearing of help once a month from a friend and once every month or two from her mother reflects a minimal level of help provided. It may be that with the worsening of the appellant's health condition she does now require more help than she was previously getting but the information provided by the physician does not provide sufficient information to determine the help required.

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.