

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of March 31, 2015 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

The appellant did not attend the hearing. Having confirmed that the appellant was notified, the panel proceeded with the hearing in accordance with section 86(b) of the Employment and Assistance Regulation.

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 December 22, 2014 along with a physician's report ("PR") completed by the appellant's general practitioner (the "physician") dated December 1, 2014 and assessor's report ("AR") completed by the physician, dated December 1, 2014.
- A letter of referral from the physician to a rheumatologist, dated October 26, 2014.
- A letter from a neurologist to the physician, dated December 4, 2014.
- A letter from the physician to the ministry, dated March 17, 2015.
- A medication sheet for the appellant printed on March 17, 2015.

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The panel reviewed the evidence as follows:

### Diagnoses

In the PR the physician (who has treated the appellant for a number of years and who has seen her 11 or more times in the past year) provided a diagnosis of epilepsy with onset in 2012. The physician indicated the appellant has seen a neurologist about her epileptic seizures (which he described as "disabling") and she is receiving treatment for them. He also indicated that she has a connective tissue disorder (CTD) which he described as "not yet diagnosed." He reported that the appellant had apparently seen a rheumatologist as a child who diagnosed her with rheumatoid arthritis and fibromyalgia. The physician noted that the appellant has "joint pains" and he has referred the appellant to a rheumatologist to confirm the latter diagnoses.

### Physical Impairment

- In terms of physical functional skills, the physician reported in the PR that the appellant can walk for 4+ blocks unaided on a flat surface, climb 5+ stairs unaided, can lift 5 to 15 pounds, and has no limitations to remaining seated.
- The physician commented that the assessment to be conducted by the rheumatologist will be helpful in determining the appellant's disability status, limitations, and prognosis.
- In the AR the physician reported that the appellant's impairment "fluctuates with seizures." He also reported that she independently manages walking indoors, walking outdoors, climbing stairs, and standing. The physician indicated that the appellant requires periodic assistance with lifting, carrying and holding ("depends on pains"), and commented that epilepsy can affect her mobility and physical ability.
- In her self-report the appellant stated that she gets grand mal seizures during her sleep, and petit mal seizures that are brought on by déjà vu episodes during her waking hours – up to three and four times a day. She also stated that she was diagnosed with rheumatoid arthritis at age 14, which causes sore hands, back, knees and feet. She reported that her hands are starting to deform.

- In his letter of December 4, 2014 the neurologist wrote that the appellant continues to have seizures even on medication, and he proposed increasing the dosage with the comment “Hopefully a bit more [medication] is all that’s necessary to control things.” He reported that “She really doesn’t describe the daytime events of déjà vu right now. She says they actually slowed down after she stopped [another medication].”
- The neurologist noted that the appellant reported grinding her teeth and shaking during nighttime seizures, but she reported it seems to stop when her boyfriend wakes her up.
- In his letter of March 17, 2015 the physician wrote that the appellant was currently pregnant, and described her epilepsy as being “quite severe.” He reported that in January 2015 she was admitted to the hospital intensive care unit “in status epilepticus.” She was intubated on life support and in critical condition. The physician stated that the appellant’s connective tissue disorder is to be assessed by the rheumatologist, but that appointment is still pending. He expressed the opinion that “her neurological condition warrants her application for disabilities.”

### Mental Impairment

- In the PR the physician indicated that the appellant has no difficulties with communication. In the AR he described the appellant’s ability to communicate as good in all respects.
- In the PR the physician reported that the appellant has “no” significant deficits with cognitive and emotional functioning. In the AR the physician indicated that the appellant experiences minimal impacts in two of fourteen categories of cognitive and emotional function: *consciousness* and *attention/concentration*. The remaining categories show no impact. The physician commented “Postictal period affect this.”

### DLA

In the AR the physician reported that:

- The appellant has been prescribed a medication that interferes with her ability to perform DLA. The anticipated duration of the medication is “indeterminant”.
- In the AR the physician reported that the appellant independently manages all tasks related to the DLA of personal self-care, management of personal finances (pay rent and bills), management of personal medications, use of transportation, and social-functioning. He reported that the appellant has good functioning with both her immediate and extended social networks. He indicated that the appellant requires periodic assistance to carry purchases home from shopping, to perform basic housekeeping, and to do food preparation/cooking depending on pains and seizures. He reported that her need for this periodic assistance fluctuates with the frequency and impact of the seizures.
- In her self-report the appellant wrote that some days she can’t cook or clean due to pain from her rheumatoid arthritis.
- In his letter of December 4, 2014 the neurologist indicated that because of the appellant’s pregnancy she was no longer on the medication that the physician reported as interfering with the appellant’s ability to perform DLA.

### Help

- In the PR the physician reported that the appellant does not require any prostheses or aids for her impairment, and in the AR he stated that the appellant does not have an assistance

animal. He reported that the appellant receives assistance with DLA from family and friends, and commented that "This depends and changes with her pain/stiffness and severity of seizures.

*Admissibility of Additional Information*

In her Notice of Appeal the appellant wrote that she can't function on medication and that she can't function most days. The panel finds that this information is consistent with and tends to corroborate information that was before the ministry at the time of reconsideration (the physician's statement in the PR that the appellant is on medication that interferes with her ability to perform DLA). The appellant also wrote that she shakes all the time. There was evidence of shaking before the ministry in the neurologist's letter of December 4, 2014. Accordingly, the panel has accepted these statements by the appellant as supporting evidence in accordance with section 22(4)(b) of the *Employment and Assistance Act* (the "EAA").

Also in her Notice of Appeal the appellant stated that she can't speak. The panel can find no evidence that an inability to speak was before the ministry at the time of reconsideration, and the appellant's statement on this point is contrary to that of the physician who described the appellant's ability to speak as being "good". The appellant's statement about not being able to speak cannot be said to be "in support" of information that was before the ministry, and the panel has not admitted it as evidence as per section 22(4)(b) of the EAA.

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

## 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.

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**Severe Physical Impairment**

The appellant's position is that her epilepsy constitutes a severe physical impairment that is compounded by rheumatoid arthritis and connective tissue disorder. She stated that she suffers from sore hands, back, knees and feet, that she has grand mal seizures in her sleep, that she shakes all the time, and that she sometimes has three or four petit mal seizures during the day that are brought on by episodes of déjà vu. The appellant relied on her physician's letter of March 17, 2015 to argue that her epilepsy is "quite severe" and that it is a life-threatening condition.

The ministry's position, as set out in its reconsideration decision, is the evidence of the appellant's physical functional abilities is not sufficient to establish a severe physical impairment. The ministry argued that no information is provided on how often the appellant requires assistance with lifting/carrying/holding.

**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 ministry – the ministry must be "satisfied" that the statutory criteria for granting PWD designation are fulfilled. In making its determination the ministry must consider all the relevant

evidence.

While the legislation is clear that the fundamental basis for the analysis is the evidence from prescribed professionals, in exercising its decision-making power the ministry cannot merely defer to the opinion of the professionals with respect to whether the statutory requirements are met as that would amount to an improper fettering of discretion. The professional evidence has to be weighed and assessed like any other evidence. Accordingly, in this case the physician's use of the term "severe" to describe the appellant's epilepsy, while being an indication of the physician's opinion, does not determine whether the statutory criterion is met.

The appellant's physical functional skills as described by the physician in the PR are generally in the mid-range to high end of the scale. The physician reported in the AR that the appellant independently manages all aspects of mobility and that she needs periodic assistance with lifting/carrying/holding. There is evidence that the effects of the appellant's impairments are episodic in nature depending on the frequency and intensity of her seizures. The appellant wrote in her self report that she has up to three or four petit mal seizures a day brought on by episodes of déjà vu (as well as grand mal seizures during sleep), but the neurologist's evidence indicated that the daytime episodes had decreased or ceased since the appellant stopped using a particular medication. Though the physician indicated in the AR that the appellant is periodically restricted in some tasks related to three DLA (basic housekeeping, daily shopping, and meal preparation), he didn't provide any detail about how often those periods occur or how long they last other than to write that they fluctuate with the frequency and impacts of the seizures.

The appellant stated in her Notice of Appeal that she shakes "all the time". The neurologist's letter of December 4, 2014 referenced shaking during seizures, but indicated that the appellant reported that the shaking "seems to stop" if her boyfriend wakes her up. Otherwise, there is no other medical evidence of shaking causing impairment.

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.

Section 2 of the EAPWDA requires that a physical or mental impairment must be diagnosed by a medical practitioner. The physician indicated that full diagnoses of rheumatoid arthritis and connective tissue disorder are pending, and he has not provided any information as to whether or how those conditions may impact the appellant's physical functioning other than the occasional reference to "pains".

The evidence indicates that the appellant's epilepsy is a serious medical condition. However, for the foregoing reasons and considering the evidence as a whole, the panel finds that the ministry reasonably determined that the evidence falls short of establishing that the appellant has a severe physical impairment.

### **Severe Mental Impairment**

The appellant advanced no argument with respect to a mental impairment.

The ministry's position is that the evidence does not establish a severe mental impairment. The ministry referred to the physician's evidence about there being minimal or no impacts to cognitive and emotional functioning, and no difficulties with communication.

Panel Decision:

The legislation (EAPWDA section 2(2)) requires that a severe impairment must be identified by a medical practitioner and be confirmed as being likely to continue for at least 2 years. The physician has provided no diagnosis of a mental health condition. There is no evidence to show that the appellant has any significant difficulty with communication, decision-making or social functioning, and the evidence of the physician overwhelmingly shows minimal or no impact in terms of cognitive and emotional functioning.

Based on the foregoing evidence, the panel concludes the ministry reasonably determined that the appellant does not have a severe mental impairment.

**Significant Restrictions to DLA**

The appellant's position is that her impairments significantly restrict her ability to manage her DLA such as basic housekeeping, meal preparation, and daily shopping. She argued that some days she cannot cook or clean because of pain, and that she can't function on most days.

The ministry acknowledged that the appellant has serious medical issues, but argued that there is not 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. The ministry argued that the physician provided no evidence as to how often assistance is required.

Panel Decision

The legislation – s. 2(2)(b)(i) of the EAPWDA – requires the minister to substantially assess direct and significant restrictions of DLA in consideration of the opinion of a prescribed professional, in this case the appellant's physician and the neurologist. 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 physician indicated in the AR that she is unrestricted with the prescribed DLA of personal self-care, management of medications, management of finances, use of transportation, and social functioning. He also indicated in the AR that the appellant independently manages the DLA of mobility indoors and outdoors, though her seizures can have an effect that the physician has not defined. There is no evidence to demonstrate that the appellant is significantly restricted with the DLA of decision making. The detailed analysis of DLA in the AR – which breaks DLA down into discrete tasks – indicates that the appellant does have some periodic restrictions with some tasks related to the DLA of basic housekeeping, daily shopping, and meal preparation, but the physician has provided insufficient supporting narrative. For example, he’s provided no explanation as to the nature of the help provided to the appellant or how frequently she requires it.

On balance, the panel finds that the ministry reasonably concluded that the evidence is insufficient to demonstrate that the appellant’s DLA are 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, for the foregoing reasons, 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.