

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated March 12, 2015 which found that the appellant did not meet three of the five statutory requirements of Section 2 of the *Employment and Assistance for Persons with Disabilities Act* for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement and that her 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,
- as a result of these restrictions, the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

## PART D – Relevant Legislation

*Employment and Assistance for Persons with Disabilities Act* (EAPWDA), Section 2

*Employment and Assistance for Persons with Disabilities Regulation* (EAPWDR), Section 2

## PART E – Summary of Facts

With the consent of both parties, the hearing was conducted as a written hearing, pursuant to section 22(3)(b) of the *Employment and Assistance Act*.

The evidence before the ministry at the time of the reconsideration decision included the Person With Disabilities (PWD) Application comprised of the applicant information dated November 20, 2014, with no completed self-report, a physician report (PR) dated November 21, 2014 by a general practitioner who has known the appellant for more than 5 years, and an assessor report (AR) dated November 10, 2014 completed by a chiropractor who has treated the appellant for the last 3 years.

The evidence also included the appellant's Request for Reconsideration dated March 9, 2015 with the following documents attached:

- 1) Diagnostic Imaging Study dated August 6, 2014;
- 2) Diagnostic Imaging Study dated September 4, 2014; and,
- 3) Radiology Report dated October 23, 2014.

### **Diagnoses**

In the PR, the appellant was diagnosed by the general practitioner with fibromyalgia, with an onset in March and August 2014, and chronic headaches, Irritable Bowel Syndrome (IBS), central sensitization to pain, and chronic low back pain/ osteoarthritis c-spine and l-spine, all with an onset of August 2014. In the AR, asked to describe the impairments that impact the appellant's ability to manage daily living activities, the chiropractor wrote "chronic pain secondary to fibromyalgia and degenerative disc disease (DDD)." There is no mental health diagnosis.

### **Physical Impairment**

In the PR, the general practitioner reported that:

- Regarding health history, "This patient is moderately impaired due to her medical conditions. The conditions make it difficult to engage in activities involving heavy lifting. Time limits are required for many activities so muscle pain does not increase. Activities are also limited by the patient's fatigue, which increases with stress. Headaches and irritable bowel associated with the other medical conditions contribute to fatigue and decreased concentration. Central sensitization to pain requires pacing of activities so as to not precipitate an increase in pain, resulting in impairment of function."
- The appellant does not require an aid for her impairment.
- Regarding the degree and course of impairment, the remedial treatments are reported to include: "1) a consistent, gentle exercise program, 2) managing stress."
- For functional skills, the appellant can walk 4 or more blocks unaided, she can climb 2 to 5 steps, lift under 2 kg. (under 5 lbs.), and she can remain seated less than an hour.
- In the additional comments: "The chronic pain- myofascial (fibromyalgia), plus central sensitization and headaches and irritable bowel syndrome fluctuate in this patient day to day and often during a day. This makes it difficult to make plans/commitments. The muscle pain is sensitive to over-activity which also makes it difficult to commit to activities. This requires daily management by the patient which she is discovering and is working on so to maximize her ability to function."

In the AR, the chiropractor indicated that:

- The appellant is independent with walking indoors and walking outdoors, with climbing stairs

and with standing. She requires periodic assistance from another person with lifting and with carrying and holding, described by the chiropractor as “repetitive or more than 20 lbs. leads to pain.”

- In the section of the AR relating to assistance provided through the use of assistive devices, the chiropractor identified bathing aids, described as “bars in bathtub.”

In her Request for Reconsideration, the appellant wrote:

- She enclosed copies of her MRI and CT scan results, keeping in mind that those results do not show the pain she endures 9 out of 10 days.
- Walking is painful.
- Her pain is indefinite.

In the Diagnostic Imaging Study dated August 6, 2014, a comparison is made with tests in April 2007 and the findings included:

- “Slight C5-6 and mild-moderate C6-7 disc space loss, both worse than before, associated with early uncovertebral osteophyte formation (worse left), indicating two-level cervical DDD.
- Vertebral body and remainder disc heights are preserved.
- Normal facets and prevertebral soft tissues.”

In the Diagnostic Imaging Study dated September 4, 2014, the reason for the exam is that the appellant was kicked in the back by a horse, with increased low back pain, leg cramping/sensation changes/ upper pain. The impressions included that:

- “Mild DDD is present at C5-6 level without cord or root compression.
- Moderate DDD is present at C6-7 level with transverse osteocartilaginous bar posteriorly with mild anterior effacement of the dural sac.
- Additional anterior spinal canal soft tissue density could represent artifact or disc protrusion which requires further evaluation with MRI.
- Mild left neural foraminal narrowing is also seen at C6-7 level related to uncovertebral OA [osteoarthritis].
- A mild broad-based central disc protrusion is present at L4-5 level without nerve root compression.
- Mild bilateral facet OA is present at L5-S1 level.”

In the Radiology Report dated October 23, 2014, a comparison is made with the CT of August 30, 2014 and the impressions included:

- “Mild DDD and left uncovertebral OA are present at C5-6 and C6-7 levels with mild left neural foraminal narrowing at both levels.
- A mild disc bulge and small central disc protrusion are present at L4-5 level with mild anterior effacement of the dural sac without nerve root compression.
- Mild bilateral facet OA is present at L5-S1 level.”

### ***Mental Impairment***

In the PR, the general practitioner reported :

- The appellant has no difficulties with communication.
- The appellant has no significant deficits in her cognitive and emotional functioning.
- The appellant has periodic restrictions in her social functioning, described as “when pain levels low and rested, social functioning will be less impaired than with flares of pain, stress, fatigue.”

The chiropractor also commented that “difficulty with concentrating/focus makes it difficult to follow through on tasks and slows decision-making processes, task completion.”

In the AR, the chiropractor indicated:

- The appellant has a good ability to communicate in all areas, specifically speaking, reading, writing and hearing.
- The section of the AR assessing impacts to cognitive and emotional functioning for an applicant with an identified mental impairment or brain injury is not applicable as it was not completed.
- The section of the AR assessing impacts to social functioning for an applicant with an identified mental impairment, including brain injury, is not applicable as it was not completed.

### ***Daily Living Activities (DLA)***

In the PR, the general practitioner indicated that:

- The appellant has not been prescribed any medications and/or treatments that interfere with her ability to perform DLA.
- The appellant is restricted on a continuous basis with the DLA basic housework and daily shopping.
- The appellant is restricted on a periodic basis with social functioning.
- The appellant is not restricted in the DLA of personal care, meal preparation, management of medications, mobility inside and outside the home, use of transportation, and management of finances.
- Regarding the degree of restriction, the appellant “will need to pace self in order to maintain level of function. Limits will be 1 to 2 tasks per day that only required part of the day to complete.”

In the AR, the chiropractor reported that:

- The appellant is independently able to perform every task of several listed DLA, namely: personal care (dressing, grooming, bathing, toileting, feeding self, and transfers in/out of bed and on/off chair), meals (meal planning, food preparation, cooking and safe storage of food), finances (banking, budgeting, paying rent and bills), medications (filling/refilling prescriptions, taking as directed and safe handling and storage) and transportation (getting in and out of a vehicle, using public transit, using transit schedules and arranging transportation).
- The appellant is independently able to perform most tasks of the DLA shopping, specifically going to and from stores, reading prices and labels, making appropriate choices, and paying for purchases.
- The appellant requires periodic assistance from another person with the tasks of the DLA basic housekeeping (including laundry), with a note that “lifting/bending increases pain.”
- The appellant requires periodic assistance with carrying purchases home when shopping, with a note that “lifting/bending increases pain.”

In her Request for Reconsideration, the appellant wrote:

- She cannot do dishes for too long as standing for long periods is painful.
- She cannot work unless there is a job that will let her rest when she needs to.

### ***Need for Help***

In the PR, the general practitioner reported that the appellant needs double railings on stairs and a

bar installed by the bathtub. In the AR, the chiropractor reported that the help required for DLA is provided by family and friends. In the section of the AR relating to assistance provided through the use of assistive devices, the chiropractor identified bathing aids, described as bars in the bathtub.

***Additional Information***

In her Notice of Appeal dated March 24, 2015, the appellant expressed her disagreement with the ministry's reconsideration decision and wrote that she cannot sweep, mop, vacuum, shovel, rake, or any bending and twisting. She needs help doing all these things. She is in pain 24/7 so she needs assistance with daily living activities. If she has to go back to work, it will get worse and she would not like that at all.

The ministry relied on its reconsideration decision as its submission on the appeal.

***Admissibility of Additional Information***

The ministry did not raise an objection to the admissibility of the information in the appellant's Notice of Appeal, which contained corroborating information about the impact of the appellant's medical conditions considered at reconsideration. The panel admits this information as being in support of information and records that were before the ministry at the time of reconsideration, in accordance with Section 22(4)(b) of the *Employment and Assistance Act*.

## PART F – Reasons for Panel Decision

The issue on the appeal is whether the ministry's reconsideration decision, which found that the appellant is not eligible for designation as a person with disabilities (PWD), was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. The ministry found that the appellant does not have a severe mental or physical impairment and that her daily living activities (DLA) are not, 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, it could not be determined that the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

The criteria for being designated as a PWD are set out in Section 2 of the EAPWDA as follows:

### **Persons with disabilities**

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.

(4) The minister may rescind a designation under subsection (2).

Section 2(1) of the EAPWDR defines DLA for a person who has a severe physical or mental impairment as follows:

### **Definitions for Act**

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.

Section 2(2) of the EAPWDR defines prescribed profession as follows:

- (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.

### **Severe Physical Impairment**

The appellant's position is that a severe physical impairment is established by chronic pain secondary to fibromyalgia and DDD as well as chronic headaches, central sensitization to pain, and IBS. In her Request for Reconsideration, the appellant argued that she endures pain 9 out of 10 days, walking is painful and her pain is indefinite.

The ministry's position is that there is not sufficient information from the general practitioner and the chiropractor to confirm that the appellant has a severe physical impairment. The ministry wrote that the general practitioner reported that the appellant is moderately impaired due to her medical conditions and these conditions make it difficult to engage in activities involving heavy lifting. The ministry wrote that the general practitioner indicated that time limits and pacing are required for many activities. The ministry wrote that, according to the general practitioner, the appellant is able to walk 4 or more blocks unaided, climb 2 to 5 stairs unaided, lift under 5 lbs. and remain seated for less than an hour. The ministry wrote that, when assessing the appellant's mobility and physical ability, the chiropractor indicated that the appellant is independent with walking indoors, walking outdoors, climbing stairs and standing and requires periodic assistance with lifting and carrying and holding and more than 20 lbs. leads to pain. The ministry wrote that both the general practitioner and the

chiropractor indicated that the appellant is not restricted and remains largely independent in her ability to manage the majority of her daily living activities.

*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, the ministry must consider both 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 the ability to perform DLA is restricted. In making its determination the ministry must consider all the relevant evidence, including that of the appellant. However, the legislation is clear that the fundamental basis for the analysis is the evidence from a prescribed professional – in this case, the general practitioner and the chiropractor.

In the PR, the general practitioner who has known the appellant for more than 5 years diagnosed the appellant with fibromyalgia, chronic headaches, central sensitization to pain, chronic low back pain/osteoarthritis c-spine and l-spine, and IBS, and wrote that the appellant “is moderately impaired due to her medical conditions.” The general practitioner reported that the appellant’s medical conditions “make it difficult to engage in activities involving heavy lifting” and “time limits are required for many activities so muscle pain does not increase.” The general practitioner indicated that “activities are also limited by the patient’s fatigue, which increases with stress. Headaches and IBS associated with the other medical conditions contribute to fatigue and decreased concentration. Central sensitization to pain requires pacing of activities so as to not precipitate an increase in pain, resulting in impairment of function.” The general practitioner indicated that the appellant does not require an aid for her impairment and he wrote that remedial treatments for her conditions include a consistent, gentle exercise program and managing her stress.

In her Request for Reconsideration, the appellant wrote that she enclosed copies of her MRI and CT scan results and to keep in mind that those results do not show the pain she endures 9 out of 10 days. The appellant wrote that walking is painful and her pain is indefinite. The results from the most recent radiological report, following the appellant having been kicked in the back by a horse, indicated “...mild DDD and left uncovertebral OA are present at C5-6 and C6-7 levels with mild left neural foraminal narrowing at both levels. A mild disc bulge and small central disc protrusion are present at L4-5 level with mild anterior effacement of the dural sac without nerve root compression. Mild bilateral facet OA is present at L5-S1 level.” In assessing the appellant’s functional skills, the general practitioner indicated that the appellant can walk 4 or more blocks unaided, she can climb 2 to 5 steps, lift under 5 lbs., and she can remain seated less than an hour. In the PR, the general practitioner reported that the appellant needs double railings on her stairs and a bar installed by the bathtub.

In the AR, the chiropractor indicated that the appellant is independent with walking indoors and walking outdoors, with climbing stairs and with standing. She requires periodic assistance from another person with lifting and with carrying and holding, described by the chiropractor as “repetitive or more than 20 lbs. leads to pain,” which the panel finds indicates a higher capacity for lifting than reported by the general practitioner at less than 5 lbs. In the section of the AR relating to assistance provided through the use of assistive devices, the chiropractor identified bathing aids, described as “bars in bathtub,” as the only item needed by the appellant.



Also, as discussed in more detail in these reasons for decision under the heading “Restrictions in the Ability to Perform DLA”, the limitations to the appellant’s physical functioning do not appear to have translated into significant restrictions to her ability to manage DLA. Given the characterization of the level of the appellant’s impairment, by the general practitioner and in the radiology report, as either “moderate” or “mild” and the reports of physical functioning in the moderate range, the panel finds that the ministry reasonably determined that there is not sufficient evidence to establish that the appellant has a severe physical impairment under Section 2(2) of the EAPWDA.

### **Severe Mental Impairment**

The appellant did not directly advance the position that she has a severe mental impairment although the general practitioner indicated that her social functioning is periodically restricted with flares of pain, stress, and fatigue.

The ministry’s position is that there is insufficient evidence to establish that the appellant has a severe mental impairment. The ministry wrote that the general practitioner reported that the appellant does not have significant deficits in her cognitive and emotional functioning and has no difficulties with communication. The ministry wrote that the chiropractor did not indicate that the appellant’s impairment has any impacts on her cognitive and emotional functioning.

### ***Panel Decision***

The general practitioner did not diagnose a mental disorder in the PR and reported that the appellant does not have any significant deficits with her cognitive and emotional functioning. In the AR, the chiropractor indicated that the appellant has a good ability to communicate in all areas and the sections of the AR for assessing impacts to cognitive, emotional and social functioning are not applicable to the appellant. While the general practitioner reported that the appellant has periodic restrictions in her social functioning, he described this as “when pain levels low and rested, social functioning will be less impaired than with flares of pain, stress, fatigue,” and the impacts have been related by the general practitioner primarily to the appellant’s physical diagnoses rather than to a mental health diagnosis *per se*.

Given the absence of a mental health diagnosis and impacts to the appellant’s cognitive, emotional or social functioning that relate to a mental disorder, the panel finds that the ministry reasonably determined that a severe mental impairment was not established under Section 2(2) of the EAPWDA.

### **Restrictions in the ability to perform DLA**

The appellant’s position is that her physical impairment directly and significantly restricts her ability to perform DLA on an ongoing basis to the extent that she requires the significant assistance of another person and the use of assistive devices.

The ministry’s position is that, while the ministry acknowledged that the appellant has a physical impairment, the information from the prescribed professionals does not establish that impairment significantly restricts DLA either continuously or periodically for extended periods. The ministry wrote that the general practitioner indicated that the appellant is not restricted in the majority of the listed DLA and, for those tasks of DLA that require periodic assistance, the chiropractor has not provided sufficient information to establish that there is a significant restriction in the appellant’s ability to perform these activities.

*Panel Decision*

Section 2(2)(b) of the EAPWDA requires that a prescribed professional provide an opinion that an applicant's severe impairment directly and significantly restricts her DLA, continuously or periodically for extended periods. In this case, the general practitioner and the chiropractor are the prescribed professionals. DLA are defined in Section 2(1) of the EAPWDR and are also listed in the PR and, with additional details, in the AR. Therefore, a prescribed professional completing these forms has the opportunity to indicate which, if any, DLA are significantly restricted by the appellant's impairments either continuously or periodically for extended periods.

In the appellant's circumstances, the general practitioner reported in the PR that the appellant has not been prescribed any medications and/or treatments that interfere with her DLA. The general practitioner indicated that the appellant is not restricted in the DLA of personal care, meal preparation, management of medications, mobility inside and outside the home, use of transportation, and management of finances. In the AR, the chiropractor also reported that the appellant is independently able to perform every task of several listed DLA, namely: personal care, meals, finances, medications, and transportation.

The general practitioner reported in the PR that the appellant is restricted on a continuous basis with the DLA basic housework and daily shopping. Regarding the degree of restriction, the general practitioner wrote that the appellant "will need to pace self in order to maintain level of function; limits will be 1 to 2 tasks per day that only required part of the day to complete." The appellant is assessed by the chiropractor as independently able to perform most tasks of the DLA shopping, specifically going to and from stores, reading prices and labels, making appropriate choices, and paying for purchases. The appellant requires periodic assistance with carrying purchases home when shopping, with a note that "lifting/ bending increases pain." The appellant also requires periodic assistance from another person with the tasks of the DLA basic housekeeping (including laundry), with a note that "lifting/bending increases pain." The chiropractor indicated that the appellant requires periodic assistance from another person with lifting and with carrying and holding since "repetitive or more than 20 lbs. leads to pain." In the additional comments to the PR, the general practitioner added that "...the chronic pain- myofascial (fibromyalgia), plus central sensitization and headaches and IBS fluctuate in this patient day to day and often during a day. This makes it difficult to make plans/commitments. The muscle pain is sensitive to over-activity which also makes it difficult to commit to activities. This requires daily management by the patient which she is discovering and is working on so to maximize her ability to function."

In her Request for Reconsideration, the appellant wrote that she cannot do dishes for too long as standing for long periods is painful. She cannot work unless there is a job that will let her rest when she needs to. In her Notice of Appeal, the appellant wrote that she cannot sweep, mop, vacuum, shovel, rake, or perform any bending and twisting. She needs help doing all these things. She is in pain 24/7 so she needs assistance with daily living activities. If she has to go back to work, it will get worse and she would not like that at all. As for searching for work and/ or working, the panel finds that employability is not a criterion in section 2(2) of the EAPWDA nor is it listed among the prescribed daily living activities in Section 2 of the EAPWDR.

The panel finds that the evidence demonstrates that the appellant manages most of her DLA without assistance and that the ministry reasonably determined that there is insufficient information regarding the frequency and duration of the flares of the appellant's pain to allow the ministry to determine that the periodic assistance required for some tasks is required for extended periods of time. Therefore,

the panel finds that the ministry reasonably concluded that there is not enough evidence from the prescribed professionals to establish that the appellant's impairment significantly restricts her ability to manage her DLA either continuously or periodically for extended periods, thereby not satisfying the legislative criterion of Section 2(2)(b)(i) of the EAPWDA.

### **Help to perform DLA**

The appellant's position is that she requires the significant assistance of another person or assistive devices to perform DLA.

The ministry's position is that because it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required from other persons. The ministry wrote that the appellant does not require an assistive device or the services of an assistance animal.

### **Panel Decision**

Section 2(2)(b)(ii) of the EAPWDA requires that, as a result of direct and significant restrictions in the ability to perform DLA, a person requires help to perform those activities. Help is defined in subsection (3) as the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform a DLA.

In the AR, the chiropractor reported that the help required for DLA is provided by family and friends. In the section of the AR relating to assistance provided through the use of assistive devices, the chiropractor identified bathing aids, described as bars in the bathtub. In the PR, the general practitioner reported that the appellant needs double railings on stairs and a bar installed by the bathtub.

The panel finds that the ministry reasonably determined that as direct and significant restrictions in the appellant's ability to perform DLA have not been established, it cannot be determined that the appellant requires help to perform DLA as a result of those restrictions, as defined by Section 2(3)(b) of the EAPWDA.

### **Conclusion**

Having reviewed and considered all of the evidence and relevant legislation, the panel finds that the ministry's reconsideration decision, which determined that the appellant was not eligible for PWD designation under Section 2 of the EAPWDA, was reasonably supported by the evidence and therefore confirms the decision.