APPEAL #

PART C – Decision under Appeal

The Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated 29 May 2015 determined that the appellant did not meet 3 of the 5 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 was likely to continue for at least 2 years. However, the ministry was not satisfied that

- the appellant had a severe mental or physical impairment and
- that the appellant's mental or physical impairment, in the opinion of a prescribed professional, directly and significantly restricted her daily living activities (DLA) either continuously or periodically for extended periods and
- that as a result of those restrictions, in the opinion of a prescribed professional, the appellant required help 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

APPEAL #

PART E – Summary of Facts

The appellant was not in attendance at the hearing. After confirming that the appellant was notified of the date and time, the hearing proceeded under s. 86(b) of the Employment and Assistance Regulation.

The following evidence was before the ministry at the time of reconsideration:

- A 3 page PWD Application– Applicant Information (the self report – SR) dated 18 February 2015, signed by the appellant and a registered nurse as a witness indicating that the appellant's health was worsening and that she had been recently diagnosed with fibromyalgia. It takes her 10 to 15 minutes to get out of bed and she can cook for herself and her children for no more than 15 minutes and then needs help and must rest for 20 – 25 minutes. It takes her twice the time to sweep and she cannot lift more than 5 lbs grocery bags. She stated she needed help to use transit and that after walking more than 2 city blocks, her legs and feet get very sore. It takes her almost three times more than before to write a letter and her hands and arms get very sore. She has migraines and when that occurs she needs to rest in a cool dark room.
- An 8 page Physician Report (PR) dated 5 February 2015 completed and signed by the appellant's physician, a general practitioner (GP), indicated the following:
    - Specific diagnoses: Recurrent migraines (onset July 2011), mechanical back pain (onset 2012) and chronic venous insufficiency (onset 2009). In the Diagnostic Codes, there are handwritten asterisk marks beside the codes "6.0 Neurological disorders – others", "8.6 Chronic venous insufficiency" and "13.8 Fibromyalgia". The word "migraines" is also handwritten beside "6.0 Neurological disorders – other".
    - Health history:
        - Recurrent migraines: patient said it made it difficult to concentrate on daily tasks – sometimes she is in bed all day – was seen by neurologist – CT scan normal.
        - Chronic mechanical / lower back pain: patient said it was difficult to walk long distances / stand for prolonged periods of time; aggravated by patient's overweight, picking up and carrying children.
        - Chronic venous insufficiency: recurrent varicose veins in lower legs; patient complained of recent onset of pain in lower legs when walk / stand longer; x-rays and ultrasound both legs: NAD; patient consulted surgeon.
    - Some medications can cause drowsiness and duration to be determined.
    - The appellant did not require any prostheses or aids for her impairment.
    - The impairment was likely to continue for 2 years or more from that date and the GP explained that migraines are likely to be long term but could be controlled by medication. Most of her disabilities are likely to improve with weight loss.
    - In terms of functional skills, the GP indicated that the appellant could walk 2 to 4 blocks unaided, she could climb 5+ steps unaided, she was limited to lifting no more than 16 kg, she could remain seated 1 to 2 hours and had no difficulties with communication.
    - In terms of significant deficits with cognitive and emotional functions, the GP identified 2 areas: emotional disturbance and motivation and commented that the appellant complained that she sometimes felt "down" or demotivated because of her pain.
    - In terms of DLA, the GP did not indicate whether her impairment directly restricted her ability to perform DLA but identified 3 activities that were restricted continuously: meal preparation, basic housework and mobility outside the home. The 7 other activities

(personal self care, management of medications, daily shopping, mobility inside the home, use of transportation, management of finances and social functioning) were not restricted.
        - In terms of the degree of restrictions to those 3 areas, the GP commented: "Prolonged standing / walking esp. when carrying heavy objects becomes painful. Pain with bending, kneeling."
        - The GP indicated that the appellant needed assistance with meal preparations (patient's family members) and housework (family member), most of the time.
    - In terms of general additional comments, the GP mentioned that the appellant did not have previous hospitalization related to these conditions and that referrals to neurologist and rheumatologist were pending. The GP indicated that the appellant believed that her pain might be fibromyalgia. Blood work, x-rays, CT-scan and ultrasound were essentially normal.
    - The appellant had been the GP's patient for 3 ½ years and had seen the GP 11 or more times during the previous 12 months.
- An 11 page Assessor Report (AR) dated 18 February 2015, completed and signed by a registered nurse (RN) indicated the following:
    - The appellant lives with her family.
    - She listed the appellant's mental and physical impairments as: Fibromyalgia, chronic migraine headaches, chronic venous insufficiency resulting in headaches, generalized body pain and severe lower leg pain with numbness to hands and feet intermittently.
    - The appellant's speaking, reading, writing and hearing abilities are satisfactory but she must wear corrective lenses to read.
    - In terms of mobility and physical ability, she takes significantly longer than typical: 3 times as long for walking indoors and outdoors and climbing stairs (must use handrails); standing for less than 10 minutes is tolerable; maximum lifting is a pot of coffee; carrying and holding maximum 5 lbs each hand with the comment that she can carry small grocery bag hanging from hand only – she uses a cross body strap for purse. She also indicated that the appellant told her she must rest 15 – 20 minutes after about 10 minutes of very moderate activity (walking, doing dishes etc.).
    - In terms of cognitive and emotional functioning, the assessor indicated that the appellant was diagnosed with depression with anxiety features and panic attacks at 16 years of age by former physician but declined medication. The RN identified 2 areas with major impacts:
        - bodily functions (historically big problem) with the comment that the appellant was then on stronger medications for 2 months and that improved sleep but there were side effects and may need to cease taking this; and
        - motivation with the comment that it was diminished significantly due to intensity of pain.
        - There is no mention as to whether the other 12 areas of cognitive and emotional functioning were impacted or not and no further comment.
    - In terms of DLA, the appellant is independent in the following areas:
        - Shopping: reading prices and labels, making appropriate choices and paying for purchases.
        - Meals: meal planning.
        - Pay rent and bills: banking.
        - Medications: filling / refilling prescriptions and safe handling and storage.
        - Social functioning with the comment that she had no difficulties, appeared quite

reserved, soft spoken and insightful.

- In terms of personal care, she takes significantly longer than typical for dressing, grooming, bathing, transfers in and out of bed or chair with the comment that each of these activities took 3 – 4 times longer than prior to onset of illness and the RN added that clothes were easy – no buttons or zippers, just pull on or slip on shoes, boots etc. The RN did not complete the areas about toileting, feeding self and regulate diet.
- For laundry and basic housekeeping, the RN indicated that the appellant needed continuous assistance from another person with the comment that she could not carry a laundry basket or bend into washer and unable to vacuum but gets help from a family member.
- Regarding shopping, she took significantly longer going to and from stores and needed continuous assistance for carrying purchases home with the comment that family members visit her daily to assist with child care, laundry and grocery shopping.
- For meals, she needed continuous assistance for food preparation and cooking with the comment she needed assistance all the time and that she gets family members to visit her daily to help with food preparation and remind her to take medications. She needed periodic assistance for safe storage of food with the comment that it depended on size and weight of items – she was able with light items.
- She needed periodic assistance for budgeting and continuous assistance for paying rent and bills with the comment that the ministry pays directly rent and hydro.
- She also needed periodic assistance for taking medications as directed with the comment that she needed a reminder more than half the time.
- In terms of transportation, she took more than 3 times longer for getting in and out of a vehicle and using public transit while she took significantly longer than typical for using transit schedules and arranging transportation but without any explanation.
- Her functioning was good in terms of immediate (she keeps to herself mostly) and extended (able but finds it very difficult) social networks.
- The assessor did not indicate what support/supervision was required that would help maintaining the appellant in the community and did not identify any safety issue.
- The appellant's family and a community organization helped her.
- The appellant did not need any assistive device or assistance animal but would find bathing aids helpful.
- There was no additional comment and the RN's sole source of information was an office interview with the appellant, one time, as a first contact with her, with the comment that the appellant was referred to her by the ministry to assist with assessment.

- In her request for reconsideration dated 26 May 2015, the appellant indicated that her condition had worsened since she applied for PWD designation and that the pain had increased. She could walk only one block before having to rest and she could sit for only 15 – 20 minutes. Her right arm was going numb 3 to 5 times daily if not elevated and she used a brace for her wrist. She was on painkillers for her back and needed help to cook, clean and write. Her spouse did most of the housework and she spent most of her time lying down. Her medications were making her very drowsy and sleepy and she got really bad migraines when the weather is nice.

In her Notice of Appeal dated 10 June 2015, the appellant reiterated that she was having increased problems since she applied for PWD and that her physician did not indicate that she was diagnosed with fibromyalgia because she was waiting to see a specialist to confirm the diagnosis.

APPEAL #

PART F – Reasons for Panel Decision

The issue under appeal is whether the ministry's determination that the appellant has not met all of the eligibility criteria for designation as a PWD because it was not satisfied that

- the appellant had a severe mental or physical impairment and
- that the appellant's mental or physical impairment, in the opinion of a prescribed professional, directly and significantly restricted her DLA either continuously or periodically for extended periods and
- that as a result of those restrictions, in the opinion of a prescribed professional, the appellant required help to perform DLA

was either a reasonable application of the legislation or reasonably supported by the evidence. The ministry determined that the age requirement and that her impairment was likely to continue for at least 2 years had been met.

The criteria for being designated as a person with disabilities are set out in s. 2 of the EAPWDA and s. 2 of the EAPWDR. Section 2 of the EAPWDA states:

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;
"health professional" repealed
"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 of the EAPWDR provides further clarification:
2 (1)For the purposes of the Act and this regulation, **"daily living activities"**,
(a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following activities:
(i) prepare own meals;
(ii) manage personal finances;

(iii) shop for personal needs;
(iv) use public or personal transportation facilities;
(v) perform housework to maintain the person's place of residence in acceptable sanitary condition;
(vi) move about indoors and outdoors;
(vii) perform personal hygiene and self care;
(viii) manage personal medication, and

(b) in relation to a person who has a severe mental impairment, includes the following activities:
(i) make decisions about personal activities, care or finances;
(ii) relate to, communicate or interact with others effectively.

(2) For the purposes of the Act, **"prescribed professional"** means a person who is

(a) authorized under an enactment to practise the profession of
(i) medical practitioner,
(ii) registered psychologist,
(iii) registered nurse or registered psychiatric nurse,
(iv) occupational therapist,
(v) physical therapist,
(vi) social worker,
(vii) chiropractor, or
(viii) nurse practitioner, or

(b) acting in the course of the person's employment as a school psychologist by
(i) an authority, as that term is defined in section 1 (1) of the *Independent School Act*, or
(ii) a board or a francophone education authority, as those terms are defined in section 1 (1) of the *School Act*, if qualifications in psychology are a condition of such employment.

The ministry acknowledged that the appellant meets 2 of the conditions for PWD designation in that she is at least 18 years of age and that her impairment is likely to continue for at least 2 years. However, the ministry argued that she did not meet the other 3 criteria.

The physician and the assessor reports:

The ministry argued that more weight should be given to the PR than to the AR because the GP had known the appellant for 3 ½ year and had seen her more than 11 times in the previous 12 months while the RN completed the AR after only one office interview with the appellant and there was no evidence that she provided a detailed assessment of the appellant's ability to perform DLA from having a history of contact and recent experience with her.

Panel decision:

The panel notes that the GP had an history of repeated contacts for over 3 ½ years with the appellant while the RN acted as a witness for the appellant's SR on 18 February 2015 and completed the AR the same day, in which she indicated that she had known the appellant for only 1 day, that it was her first contact with her and her sole information source used to complete her report was an office interview with the appellant. Consequently, it would be reasonable to conclude that the assessment provided in the AR came mostly from the appellant and not from a history of contact between the appellant and the RN. For those reasons, the panel finds that the ministry's decision to give more

weight to the PR was reasonable.

Severity of impairment:

The legislation clearly provides that the determination of severity of impairment is at the discretion of the minister, taking into account all of the evidence including that of the appellant. However, the legislation is also clear that the fundamental basis for the analysis is the evidence from a prescribed professional respecting the nature of the impairment and its impact on daily functioning.

A diagnosis of a serious medical condition or conditions does not in itself determine PWD eligibility or establish a severe impairment. While the legislation does not define "impairment", the PR and AR form define "impairment" as a "loss or abnormality of psychological, anatomical or physiological structure or functioning causing a restriction in the ability to function independently, effectively, appropriately or for a reasonable duration." While this is not a legislative definition, and is therefore not binding on the panel, in the panel's opinion, it reflects the legislative intent and provides an appropriate analytical framework for assessing the degree of impairment resulting from a medical condition.

Severe physical impairment:

The ministry argued that the evidence was not sufficient to establish a severe physical impairment given that according to the PR the appellant did not require any periodic or continuous assistance to manage any of her physical functioning and that the AR indicated that the appellant did not use any equipment or devices to help compensate for her impairments. The ministry also argued that the GP did not diagnose fibromyalgia.

The appellant argued that she had fibromyalgia but wrote in her Notice of Appeal that her GP did not diagnose her with that illness because she was waiting for a specialist to confirm. She also argued that her condition was deteriorating and that the pain had increased. She could walk only one block before having to rest and she could sit for only 15 – 20 minutes. Her right arm was going numb 3 to 5 times daily if not elevated and she used a brace for her wrist.

Panel decision:

The panel notes that the GP did not include the diagnosis of fibromyalgia in the PR while the RN did include it in the AR. The panel also notes that there was an asterisk beside '13.8 Fibromyalgia' on page 9 of 28 of the PR, and the physician's specific comments to the effect that it was the appellant's belief that she had fibromyalgia and the GP was considering a referral to a specialist accordingly.

The appellant faces a number of physical restrictions and limitations stemming from her medical condition but the panel notes that the PR states she does not need assistance for most of her physical functioning (walking 2 to 4 blocks and climbing 5+ steps unaided for instance) and can lift up to 16 kg. The panel takes into consideration that in terms of lifting, there is a significant discrepancy between the PR and the AR: the former indicated the appellant could lift up to 16 kg while the latter indicated she could only lift a coffee pot; as mentioned above, more weight is given to the PR. Additionally, according to the PR, she does not require any assisting devices or equipments to help

compensate with her impairment, other than the assessor mentioning that bathing aids would be "helpful". Thus, the panel finds the ministry reasonably determined that there was not enough information to establish a severe physical impairment.

Severe mental impairment:

The ministry argued that there is no medical evidence of any mental impairment, thus it cannot be said that the appellant suffers from a severe mental impairment.

The appellant argued that she was depressed because of her physical condition and that her medications made her drowsy and sleepy.

Panel decision:

The panel notes that the GP did not diagnose a mental illness and commented that the appellant's depression and drowsiness are likely a result of her physical illness. While the GP indicated "significant" deficits with cognitive and emotional functions (emotional disturbance and motivation) the GP also indicated they were also the result of pain and indicated no difficulties with communication. The panel also notes the RN indicated the appellant was diagnosed with depression at age 16 and that there were 2 areas of cognitive and emotional functioning (bodily functions and motivation) that are affected by the medication the appellant is taking and of the pain she is suffering.

S. 2(1)(b) of the EAPWDR prescribes two DLA that are specific to mental impairment: making decisions about personal activities, care or finances (decision making) and relating to, communicating or interacting with others effectively (social functioning). The RN indicated that the appellant is not significantly restricted with respect to decision making in that she independently manages shopping (reading prices and labels, making appropriate choices and paying for purchases), meal planning, banking (while there is an indication of periodic assistance from another person for budgeting and continuous assistance for paying rent and bills, the comment suggests that most of those decisions are already made by the ministry that pays rent and hydro directly), filling/refilling prescriptions and safe handling and storage of medications. In terms of social functioning, the page is struck off (with the comment to the effect that there are no difficulties) and the appellant is assessed as having good functioning for relationship with immediate and extended social networks.

Given the absence of medical evidence of a mental illness and the evidence that was available at reconsideration concerning the extent to which the appellant is independent in areas where her mental impairment could be expected to impact her daily functioning, the panel concludes that the ministry's determination that there is not sufficient evidence to establish that the appellant has a severe mental impairment under s. 2(2) of the EAPWDA was reasonable.

Daily living activities:

The ministry argued that there were discrepancies within the PR and between the PR and the AR in terms of the appellant's ability to perform her DLA such that there was not enough evidence to establish that her impairments directly and significantly restricted DLA continuously or periodically for extended periods.

The appellant argued that her condition had deteriorated since the reports were completed and that because of pain in her hands, back and the use of painkillers, she needed help to cook, clean and write. She argued that her spouse had to do almost all the housework when he was not working and she depended on him to cook.

Panel decision:

The panel notes that, on the one hand, the GP indicated that the appellant could walk unaided 2 to 4 blocks, climb 5+ stairs, lift up to 16 kg, remain seated for 1 – 2 hours and that her ability to manage her personal self-care, medications, daily shopping, mobility inside the home, use of transportation, finances and social functioning were not restricted. On the other hand, the GP indicated the appellant needed continuous assistance with meal preparation, basic housework and mobility outside the home. There are also discrepancies between the PR and the AR in terms of DLA. For instance, the GP indicated the appellant was not restricted in her ability to manage her personal self-care, while the RN indicated the appellant took significantly longer (3 to 4 times) for dressing, grooming and bathing. Another example is the management of medications where the GP stated that she was not restricted while the RN indicated the appellant required continuous assistance with taking medications as directed and she needs reminding by family members more than half the time.

In general, the evidence shows that the appellant benefits from help from other persons, family members, in a number of areas. But, when asked directly what support/supervision the appellant required which would help to maintain her in the community, the assessor did not mention anything; likewise for safety issues. As well, to the question, “If help is required but there is none available, please describe what assistance would be necessary”, there is no comment; likewise for assistance provided through the use of assistive device, other than “would find bathing aids helpful”.

Keeping those discrepancies within the PR and between the PR and the AR in mind, and taking into account that the ministry reasonably determined that additional weight had to be given to the PR for the reasons mentioned above, the panel concludes that the evidence was inconsistent and that the ministry reasonably determined that there was not enough evidence to establish that the appellant’s impairments directly and significantly restricted DLA continuously or periodically for extended periods.

As a result of those restrictions, help required to perform DLA:

The ministry argued that since DLA are not significantly restricted, it cannot be determined that significant help is required from other persons and that no assistive device is required.

The appellant argued that she needed help from family members for cooking, cleaning and writing.

Panel decision:

Given the evidence as described above, the panel finds that while there is evidence the appellant does benefit from the assistance of family members for cooking and housework and such assistance makes her life easier, given the panel’s finding that the ministry reasonably determined that direct and significant restrictions in the appellant’s ability to perform DLA have not been established, the panel

further finds that the ministry's conclusion that it cannot be determined that the appellant requires help to perform DLA as a result of those restrictions was reasonable.

Conclusion:

The panel acknowledges the appellant's difficulties caused by her medical condition and that it does have an impact on her daily functioning. However, based on the above analysis and evidence, the panel comes to the conclusion that the ministry reasonably determined that the appellant does not have a severe physical or mental impairment and that a prescribed professional did not establish that an impairment directly and significantly restricted her ability to perform DLA either continuously or periodically for extended periods and that, as a result of those restrictions she requires help to perform those activities under s. 2(2) of the EAPWDA. Consequently, the panel finds the ministry's decision was reasonably supported by the evidence and is a reasonable application of the applicable enactment in the circumstances of the appellant and confirms the decision.