

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated May 6, 2015 which found that the appellant did not meet all of the 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 she has an impairment that is likely to continue for at least two years. However, the ministry was not satisfied that the evidence established 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

The evidence before the ministry at the time of the Reconsideration Decision included:

1. The appellant's PWD Application comprised of:

- The Applicant Information and Self-report ("SR") prepared by the appellant and dated November 13, 2014; and
- The Physician Report ("PR") and Assessor Report ("AR"), both dated February 9, 2015 and both prepared by the appellant's general practitioner ("the GP") of 8 years; and

2. The appellant's Request for Reconsideration ("RFR") dated May 5, 2015 to which is attached a note from the GP dated May 1, 2015 ("the GP Note").

### **Additional Evidence and Admissibility**

At the hearing, the appellant's advocate provided the panel with a letter that she sought to have admitted as evidence in support of the appellant's appeal ("the Advocate Letter"). The letter was prepared by the advocate and forwarded to the GP with a request that he confirm the information in the body of the letter by re-producing it in a separate letter.

The information in the Advocate Letter referred to the information in the PWD application. Specifically, it referred to the appellant's arthritis and torticollis diagnoses and the associated pain, the impact on her functional skills and DLA and the help that she requires from family and friends. No new diagnoses or information was included in the letter which was signed by the GP on June 9, 2015 with the added comment "I agree with the above." The ministry representative did not object to the Advocate Letter being admitted as evidence.

Section 22(4) of the *Employment and Assistance Act* ("EAA") provides the legislative test for the admissibility of evidence at a hearing. Section 22(4)(b) refers to oral or written testimony in support of the information and records referred to in paragraph 22(4)(a). For the Advocate Letter to be admitted by the panel at hearing, it must be in support of the PWD application. It cannot be "new" evidence that does not corroborate or substantiate the evidence at reconsideration. If it is admitted as evidence, the weight to be attached to it is a matter for determination by the panel.

The panel finds that the evidence in the Advocate Letter is consistent with the PWD application and as such it is admitted pursuant to section 22(4)(b) of the *EAA* on the basis that it is in support of the information and records that were before the ministry when the decision being appealed was made.

### **Diagnoses**

In the PR, the appellant is diagnosed by the GP as follows:

1. Seizure disorder – Date of onset "1980's";
2. Torticollis;
3. Essential tremor; and
4. Post-traumatic arthropathy.

No date of onset is provided by the GP for diagnoses 2, 3 and 4 but rather they are collectively noted as "chronic".

In the Advocate Letter the GP has confirmed that the appellant suffers from Torticollis and arthritic joints in her left knee and ankles.

***Physical Impairment***

In the RFR, the appellant states that she suffers from torticollis, maybe as a result of multiple seizures and that she cannot hold her head still as it is in constant motion. She describes this as a very painful condition related to cervical dyslonia and to Parkinson's Disease. She writes that the GP will continue with further investigations into the progression of her condition. The appellant describes a "worst day scenario," which she says she has seen more than in the past, as including her being unable to get out of bed or bathe alone out of fear of a seizure or a fall. The appellant writes that her daughter helps her but she has a family of her own. In the GP note, the GP asks that the appellant's PWD application be reconsidered.

In the SR, the appellant writes that she suffers from seizures which are of unknown origin, arthritis in her left knee and left wrist and depression. She writes that she is unable to walk very far and that after about three blocks the pain in her ankle begins and sometimes swells making it hard to walk on and prevents her from many tasks and duties such as shopping and going to appointments. The appellant describes her wrist as "painful and bothersome" and that on some days she is unable to hold a coffee cup, do dishes or carry anything around that weighs more than a pound or two and that her daughter cooks for her, helps with her shopping and does her laundry.

In the PR, the GP sets out the appellant's health history. He writes that the appellant suffers from seizures and queries whether they are alcohol withdrawal related. He notes that the appellant does not take medication and that an MRI of her head in 2004 was negative. With respect to the appellant's torticollis, the GP describes that condition as chronic in nature and affecting the cervical spine to the right side with mild pain. The appellant's arthritis is described by the GP as being "post trauma and operations" especially in the left knee and left ankle. Finally, the GP notes that the appellant has a family history of diabetes and that her impairment is likely to continue for two years or more describing the duration as indefinite.

The GP indicates that with respect to functional skills, the appellant can walk 2-4 blocks and climb one flight of stairs unaided, lift 2 to 7 kg and remain seated for less than one hour.

In the AR, the GP reports that the appellant lives alone and is able to communicate satisfactorily through speaking, reading, writing and hearing and notes that she has a grade 10 education. The GP indicates that the appellant is independent with all aspects of mobility and physical ability other than lifting, carrying and holding which take significantly longer than typical and for which she requires periodic assistance from another person. The GP notes that these tasks take twice as long as they previously did.

In the Advocate Letter, the GP agrees with the advocate that the appellant has a severe physical impairment and that she suffers from painful arthritic joints in her left knee and ankles which inhibits her ability to walk any real distances of more than a few blocks and also great discomfort as a result of her Torticollis which is painful and can cause severe pain. He further agrees that the appellant can walk but can have difficulty navigating while stepping on and off of curbs.

***Mental Impairment***

In the SR, the appellant writes that she suffers from depression and that this has worsened due to her loss of mobility. She writes that she can no longer do the things she used to love including playing with her grandchildren as she used to or having them over alone out of concern that she may have a seizure or a fall. She writes that her fear of having seizures has led to her not leaving her apartment, which in turn has contributed to her depression. When her depression is severe she locks herself inside.

In the PR, the GP does not diagnose the appellant with depression or a mental disorder and notes that she has no significant deficits with cognitive and emotional function. In the AR, the GP does not note any impacts on

the appellant's daily cognitive or emotional functioning.

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

In the PR, the GP comments "Person with persistent multiple barriers" and "ADL's independent; some assistance required for IADL's".

In the AR, the GP reports on the assistance required by the appellant relating to the impairments that directly restrict her ability to manage her DLA as follows:

- In the area of Personal Care, the appellant is independent while dressing, grooming, bathing, toileting, feeding herself and transfers in and out of bed and on and off of a chair. She is noted as requiring periodic assistance regulating her diet but no further comments are provided in that regard.
- In the area of Basic Housekeeping, the appellant requires periodic assistance from another person with laundry and basic housekeeping and the GP comments that she takes twice as long with both than previous.
- With Shopping, the appellant is independent going to and from the store and paying for purchases but requires periodic assistance reading prices and labels, making appropriate choices and carrying purchases home with this last activity being noted as taking significantly longer than typical.
- For tasks related to Meals, the GP noted the appellant as being independent with safe storage of food and requiring periodic assistance from another person with meal planning, food preparation and cooking.
- For Paying Rent and Bills, the appellant is independent with banking, budgeting and paying rent and bills.
- For tasks relating to her medications, the appellant is independent in all aspects including filling and refilling prescriptions, taking medications as directed and safe handling and storage of medications. The appellant is described as requiring periodic assistance from another person using public transit where available and using transit schedules and arranging transportation.

With respect to social functioning, the GP has not indicated in the AR whether the appellant requires any support while making appropriate social decisions, developing and maintaining relationships, interacting appropriately with others, dealing appropriately with unexpected demands or securing assistance from others. Similarly, the GP has not commented in the AR on whether the appellant's mental impairment impacts on her immediate and extended social networks.

In the Advocate Letter, the GP agrees with the advocate that the appellant requires assistance from her daughter "at least once a day" to assist her while showering and that she also receives additional assistance "in all of the areas mentioned on the application" from her daughter and a small group of friends with shopping, cleaning her home and taking care of other DLA that take her twice as much time to complete as in the past.

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

In the SR, the appellant writes that her daughter and some of her friends help her with daily tasks and that without them she would not be able to manage. In the PR, the GP did not indicate that the appellant requires an assistive device. In the AR, the GP indicates that the appellant receives help from family and comments further that the appellant may need more assistance in the near future. The GP does not indicate in the AR that the appellant requires assistance through the use of assistive devices or assistance animals.

In the Advocate Letter, the GP agrees with the advocate that the appellant receives assistance from her daughter and friends with showering and "all of the areas mentioned on the application."

**Evidence At Hearing*****The Appellant's Advocate***

At the hearing, the appellant's advocate gave oral evidence in support of the appeal. The advocate works at a support centre where the appellant has attended 2 or 3 times each week over the last 6 years. The advocate stated that the appellant has significant arthritis, walks slowly and experiences a lot of pain. The appellant avoids pain medication as she has concerns about become addicted to it. She volunteers a couple of hours each week at the support centre but can only do so for about an hour each time due to her physical condition and the associated pain.

In response to questions, the advocate stated that she has noticed the appellant's physical condition deteriorating over the past 6 years, particularly with respect to her torticollis and arthritis. She recalls her asking for help lifting heavy things and she has noted that she limps more and she has observed her swollen ankles caused by walking. The advocate stated that it is hard for the appellant to walk long distances.

***The Appellant***

The appellant stated that she was in a lot of pain and that she has a hard time walking and that a couple of times each week she can only walk a couple of blocks before having to sit down to take a 5-10 minute break as a result of pain and swelling in her ankles. She does not use a cane. She lives alone and receives help from her daughter with cooking, cleaning and laundry and she also receives help from her daughter-in-law, granddaughter and friends from the support centre. The appellant stated that she needs help with cooking, cleaning and laundry every third day. The appellant described her torticollis as causing her head to shake and her shoulders to ache just about every day. The appellant further stated that she had been in a bus accident approximately 10 years ago and injured her neck. The appellant gave evidence that she is able to shower when alone but doing so is stressful because she is afraid that she will fall due to a seizure.

***Ministry's Evidence At Hearing***

The ministry stated that the appellant had met the first two legislative criteria in her application for PWD designation, she had not established that she suffered from a severe physical or mental impairment or that a prescribed professional had provided his or her opinion that the appellant's impairment directly and significantly restricted the appellant's ability to perform DLA either continuously or periodically for extended periods and that as a result of those restrictions the appellant requires help to perform those activities.

The ministry noted that the GP was of the opinion that the appellant was independent with many of her DLA and that for the others she only required periodic assistance.

In response to questions, the ministry stated that it was open to the appellant to apply again for PWD designation should her circumstances worsen.

**Oral Evidence and Admissibility**

Similar to the consideration of the admissibility of the Advocate Letter, for the oral testimony of the parties or the witnesses in this matter to be admitted by the panel at hearing, it must also be in support of the PWD application. It cannot be "new" evidence that does not corroborate or substantiate the evidence at reconsideration.

The evidence of the appellant and the advocate with respect to the appellant's physical condition and impact on her functioning and ability to perform DLA is consistent with the evidence as set out in the PWD application and as such it is admitted pursuant to section 22(4)(b) of the *EAA* on the basis that the panel finds that it was

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in support of the information and records that were before the ministry when the decision being appealed was made.

## 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) under section 2 of the *EAPWDA*, 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 met the age requirement and that she has an impairment that 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.

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)(a) 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.

### **Severity of impairment**

Section 2(2)(a) of the *EAPWDA* provides that when addressing the issue of a severe physical or mental impairment in the context of a person applying for a PWD designation, that person must be found to have a severe physical or mental impairment that, in the opinion of a medical practitioner, is likely to continue for at least 2 years.

A diagnosis of a serious medical condition or conditions 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. 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 prescribed professionals – in this case, the GP.

### **Severity of mental impairment**

The appellant takes the position, as set out in the SR, that she suffers from depression due to her self-isolation and loss of mobility.

The ministry's position is that the evidence available at reconsideration does not support a finding that the appellant has a severe mental impairment.

#### *Panel Decision*

The GP has not diagnosed the appellant with depression or any other mental disorder. To the contrary, the GP specifically answers "No" in the PR to the question of whether the appellant experiences any significant deficits with cognitive and emotional function.

Section 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 GP's evidence in the AR indicates that the appellant is not significantly restricted with respect to decision making in that she independently manages all but one of the decision making aspects of the DLA of personal care as well as management of medications and finances. The appellant is noted as being independent with the management of her personal medication (filling/refilling prescriptions/taking as directed/safe handling and storage) and management of personal finances (banking, budgeting and paying rent and bills). With respect to the social functioning DLA, the GP has not provided any information in the AR to indicate that the appellant is affected in any way.

Given 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 section 2(2) of the *EAPWDA* was reasonable.

### **Severity of physical impairment**

The appellant argues that she suffers from torticollis, arthritis, seizure disorder and tremors as set out in the PR and that these together constitute a severe physical impairment.

The ministry takes the position that the appellant's physical conditions do not constitute a severe physical impairment.

#### *Panel Decision*

In the PR, the GP notes that the appellant has suffered from a seizure disorder since the 1980's as well as torticollis, essential tremor and post-traumatic arthropathy, all of which are chronic in nature. She is described as being able to walk 2 - 4 blocks unaided on a flat surface and climb one flight of stairs although the panel notes the appellant's evidence that she has a hard time walking due to arthritis and that her ankles swell up once in a while. She is able to lift between 2 and 7 kg and can remain seated for less than 1 hour. The GP also notes in the AR that the appellant is independent walking indoors and out, climbing stairs and standing but that she requires periodic assistance from another person with lifting, carrying and holding which take twice as long as they previously did. For those DLA that are of a physical nature such as personal self-care, meal preparation, basic housework and mobility inside and outside the home, the GP notes that the appellant is independent with some activities and that she requires periodic assistance with others. It was the appellant's evidence at hearing that she needs help with cooking, cleaning and laundry every third day.

In the Advocate Letter, the GP agrees that the appellant suffers "great discomfort" from her torticollis and that the pain is often severe enough to give her difficulty focusing on any task at hand. The GP further agrees that the appellant has painful arthritic joints in her left knee and ankles that inhibit her ability to walk any real distance of more than a few blocks. The Advocate Letter states that the appellant "does have a severe physical impairment" and the GP has agreed with this by signing the letter.

While the GP has agreed with the contents of the Advocate Letter including the assertion that the appellant has "a severe physical impairment", the panel must consider the evidence supporting that assertion. It was the appellant's evidence that she had some limitations on her functional capacity consistent with the evidence in the PR and AR. However, the panel finds that looking at the evidence as a whole, including the appellant's ability to function effectively and her independence with a number of DLA that are of a physical nature, the ministry was reasonable in its determination that the evidence did not support a finding that she suffers from a severe physical impairment as provided by section 2(2) of the *EAPWDA*.

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

The appellant's position is that her impairments directly and significantly restrict her ability to perform DLA

while the ministry's position is that it has not been established by the evidence of a prescribed professional that the appellant's ability to perform DLA has been directly and significantly restricted by her physical or mental impairments either continuously or periodically for extended periods as required by section 2(2) of the *EAPWDA*.

#### *Panel Decision*

Section 2(2)(b) of the *EAPWDA* requires that a prescribed professional, in this case the GP, provide an opinion that an applicant's severe impairment directly and significantly restricts his or her DLA, continuously or periodically for extended periods.

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 DLA, if any, are significantly restricted by the appellant's impairments, either continuously or periodically for extended periods. Employability is not a listed criterion in the legislation and as such is not a consideration in the determination of whether an applicant's DLA are restricted by a severe impairment.

The appellant's GP of 8 years has described her as independent in all tasks of personal care other than regulation of her diet for which she requires periodic assistance. No further comments are provided as to the duration of the assistance. For basic housekeeping, the appellant requires periodic assistance with both laundry and basic housekeeping and these tasks take twice as long as they did previously. With respect to shopping, the appellant requires periodic assistance reading prices and labels, making appropriate choices and carrying purchase home (which takes twice as long as it did previously) but she is independent going to and from stores and paying for purchases. The appellant is independent with all aspects of paying rent and bills and her medications. She requires periodic assistance from others with meal planning, food preparation and cooking but she is independent in the safe storage of food. The appellant requires periodic assistance using public transit and using transit schedules and arranging transportation.

As noted above, the GP has not indicated any impact on the appellant's social functioning or on her immediate or extended social networks. The GP has provided the general comment "ADL's independent" and "some assistance required for IADL's."

While the evidence demonstrates that the appellant requires periodic assistance with some DLA, she independently manages most tasks. Based on the foregoing, 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 as provided under section 2(2)(b) of the *EAPWDA*.

#### **Help with DLA**

The appellant's position is that that her impairments affect her DLA to the extent that assistance from others is necessary.

The ministry's position in the reconsideration decision is that because it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required.

#### *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. Section 2(3) of the *EAPWDA* provides that a person requires help in relation to a DLA if, in order to perform it, the person requires an assistive device, the significant help or supervision of another person, or the services of an assistance animal. In other words, it is a pre-condition to a person requiring help that there be a finding that a severe impairment directly and

significantly restricts a person's ability to manage his or her DLA either continuously or periodically for an extended period.

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, as defined by section 2(3)(b) of the *EAPWDA*, was reasonable.

### **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 a reasonable application of the applicable enactment in the circumstances of the appellant, and therefore confirms the decision.