

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “Ministry”) May 4, 2015 reconsideration decision in which the Ministry determined that the Appellant did not meet all of the requirements for designation as a person with disabilities (“PWD”) under Section 2 of the *Employment and Assistance for Persons with Disabilities Act*. 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 established that:

- the Appellant has a severe physical or mental impairment;
- the Appellant’s daily living activities are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and,
- 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

*Employment and Assistance for Persons with Disabilities Act* (“EAPWDA”) Section 2(2) and 2(3).

Employment and Assistance for Persons with Disabilities Regulation (“EAPWDR”) Section 2.

## PART E – Summary of Facts

For its reconsideration decision, the Ministry had the following evidence:

### 1. Appellant's PWD application consisting of:

- Her self-report dated January 30, 2015.
- A physician's report signed by a doctor (hereafter "Dr. A.") on February 1, 2015. The doctor indicated that he saw the Appellant once in the past 12 months; however, he also wrote "we have had only a few encounters, but she has attended this clinic for several years, and I have reviewed all her old records". This doctor also added and signed under the following statements in the Health History section of the report:
  - "I am forced to print out many pages of various consultations in order to give you an idea of the extent of the previous condition".
  - "Note: This application was previously completed (March 2013) and there has been continuation of physical symptoms and exacerbation of mental/emotional status".
- An assessor's report signed by Dr. A on February 16, 2015, indicating he has known the Appellant for more than 5 years.
- Printouts of consultations from January 1, 2010 to February 16, 2015 at a local hospital, which are referred to by Dr. A in the physician's report.
- Copy of a Medical Report-Employability Form for an application for Persons with Persistent Multiple Barriers, signed by a different physician (hereafter "Dr. B") on November 7, 2013. Dr. B did some of the consultations noted in the printout.
- Copy of another Medical Report-Employability Form for an application for Persons with Persistent Multiple Barriers, signed by a third physician (hereafter "Dr. C") on September 21, 2010. Dr. C also did some of the consultations noted in the printout.
- Hospital Operative Reports dated March 9, 2011, March 9, 2011; Hospital Discharge Summaries dated September 8, 2011, September 6, 2011, and July 7, 2010.

### 2. Appellant's request for reconsideration signed on April 30, 2015.

The Panel notes that the consultation printouts and medical reports have information about the Appellant's medical conditions and surgeries, which Dr. A indicated he referred to. Dr. A's physician's and assessor's reports also have the most recent information addressing the PWD criteria at issue in this appeal. Therefore, the Panel will summarize only the information from Dr. A and the Appellant's information under the relevant criteria for PWD designation.

### Diagnoses

Dr. A diagnosed the Appellant with type II DM [type II diabetes mellitus] with peripheral neuropathy, hypothyroidism, constant anxiety over bowel control/ostomy, depression and chronic pain since bowel surgery, COPD [chronic obstructive pulmonary disease] secondary to past tobacco abuse, and degenerative/osteoarthritis. Dr. A also wrote that the diabetes and its complications are progressive, as is COPD; chronic abdominal pain will persist and there is no remedy.

### Physical Impairment

The Appellant described her disabilities as follows:

- She has COPD, osteoarthritis, anxiety and depression caused by her diverticulitis.
- She has no control over her bowel movements which causes her great anxiety; she can never plan for an accident; she has a colostomy bag, which has burst many times while she was

working; that was devastating for her and still is, given the type of industry she worked in.

- She has become depressed because she has to look at her body every day and ask “why me?” she cannot foresee day by day in this condition; planning always for extra clothing.
- She has become less social in her community, not knowing when her colostomy bag will burst; surgery with the hope of reversing this condition didn’t work; she had to go back in for another colostomy and that will not be reversed because of damage.
- Her pain level from her colostomy is always at 8 out of ten; osteoarthritis causes her constant lower back pain.
- She cannot lift items; she needs assistance all the time from friends, family; she has no get up and go to clean her house because of the pain in her back and lower left leg.
- With her COPD, she carries a puffer in order to walk a little more than a block; while she was working she had to stop every few minutes to catch her breath.

For physical functioning skills, Dr. A reported in the physician’s report that the Appellant:

- Can walk unaided on a flat surface for 1-2 blocks; can climb 5+ steps unaided, can lift under 5 lbs.; and remain seated – “unknown”.
- Does not require any prostheses or aids for her impairment.

In the assessor’s report, Dr. A indicated that the Appellant:

- Independently manages walking indoors, walking outdoors, climbing stairs and standing.
- Needs periodic assistance with lifting, and with carrying and holding – “minimal lifting – less than 5 lbs., so housework, shopping etc. all affected.”

### **Mental Impairment**

In the physician’s report, Dr. A reported that the Appellant had significant deficits with cognitive and emotional functioning in the area of emotional disturbance (e.g., depression, anxiety). He added “chronic pain/depression syndrome and social isolation due to pain, depression and anxiety.” In the assessor’s report, Dr. A reported the following impacts to cognitive and emotional functioning:

- Major impact to motivation (e.g., lack of initiative, loss of initiative).
- Moderate impact to bodily functions (toileting problems, sleep disturbance, pain, ostomy care)
- Moderate impact to emotion and to other emotional or mental problems.
- Minimal impact to consciousness, attention/concentration, memory and motor activity.
- No impact to impulse control, insight and judgement, executive, language, psychotic symptoms or other neuropsychological problems.
- “Chronic depression associated with pain, continual anxiety regarding potential ostomy leakage, unpredictable episodes of increased pain. Pain medication can cause drowsiness and memory problems”.
- “Adverse effect of pain is poor concentration on tasks at hand and memory. Major impact from pain leading to depression and therefore poor motivation.”

### **Dr. A’s Assessment of Restrictions to Daily Living Activities**

Dr. A reported that the Appellant has been prescribed medications that interfere with her daily living activities. He describes one medication for pain control as having mental and other adverse effects. In the physician’s report, Dr. A indicated that the Appellant’s impairment directly restricts her ability to perform daily living activities as follows:

- Continuous restrictions to ability to perform personal self-care, meal preparation, basic house work, daily shopping, mobility inside and outside the home, and to social functioning.

- No restrictions to ability to manage medications, use of transportation and finances.
- “Chronic pain impacts all activity”; and as for degree of restriction – “these problems are severe and increasing”.
- For continuous restrictions with social functioning - “social isolation due to pain, depression and anxiety”.

In the assessor’s report, Dr. A wrote: “Essential constant pain that is exacerbated by any physical activity. Depression and anxiety lead to social isolation”. Dr. A reported that the Appellant’s ability to communicate in all areas is satisfactory. As for any assistance the Appellant needs to manage daily living activities, Dr. A indicated that the Appellant:

- Independently manages all areas of meal planning/preparation, paying rent and bills, medications and transportation.
- Independently manages all aspects of personal care, but for bathing – “slowed by pain and ostomy care, but independent”.
- Needs periodic assistance with laundry and basic housekeeping – pain when lifting, pushing, pulling, etc.
- Independently manages all aspects of shopping, except needs periodic assistance with carrying purchases home – “due to pain”.
- For social functioning, independently manages making appropriate social decisions, interacting appropriately with others and securing assistance from others.
- Needs periodic support/supervision developing and maintain relationships – “social isolation”.
- Needs periodic support/supervision dealing appropriately with unexpected demands – “social isolation.”
- Has marginal functioning with her immediate social network; and very disrupted functioning with her extended social network.

Dr. A provided no information about the extent or frequency of periodic assistance or periodic support/supervision needed by the Appellant.

### **Help with Daily Living Activities**

In the physician’s report, Dr. A wrote that the Appellant needs assistance with housework, shopping and transportation. In the assessor’s report, Dr. A indicated that friends provide assistance. Also, the Appellant needs an ostomy appliance.

### **Hearing Submissions**

At the hearing, the Appellant described the same health conditions as she described in her self-report and as Dr. A noted. She said she can no longer work in the industry she used to, there are few other jobs where she lives and at her age she cannot move to start somewhere else. The Appellant stated that because of her medical conditions she cannot do most tasks, such as vacuuming, sweeping floors, or lifting or carrying things. She relies on help from community members, her brother and her daughter, who is living with her temporarily and taking care of everything.

The Appellant also submitted that her physical health conditions impact her mentally and emotionally. She is very embarrassed and gets very emotional about her situation. She said that she does not want to go out anywhere because she is always concerned about the bag leaking or breaking.

The Appellant submitted three documents for this appeal. One of them consists of copies of pages from the physician’s report and the assessor’s report originally completed by Dr. A, but with additional

comments written on certain pages, and either signed or initialed on June 5, 2015 by a fourth doctor (hereafter “Dr. D”). The Appellant explained that Dr. A was no longer available, so she met with Dr. D and provided him with the information that he added, as follows:

- In the physician’s report for difficulties with communication – “due to chronic pain and anxiety escalating”.
- In the physician’s report, for restrictions to daily living activities and what assistance is needed – “As back and forth motion of cleaning/vacuuming/to carry groceries in and out of vehicle”.
- In the physician’s report, under additional comments – “bag breakage problematic”.
- In the assessor’s report, under mobility and physical ability – “ostomy bag complicating factor”.
- In the assessor’s report, under daily living activities additional comments – “chronic pain, spiraling mood and ostomy bag complicating things”; “Independent in & out. Lower vehicles problematic and need another person to grab arm”.
- In the assessor’s report, under marginal immediate social network functioning – “chronic pain, low mood & anxiety added [illegible]; under very disrupted extended social network functioning – “social isolation, low mood aggravating situation “.
- In the assessor’s report, under assistance provided “[illegible] behavior of [illegible] and social isolation complicating factors”.
- In the assessor’s report in additional information – “issues with ostomy i.e. bag exploding really [illegible].”

The Appellant also submitted letters from two co-workers, summarized as follows:

1. One co-worker stated that she witnessed the Appellant at work when her bag leaked or burst, causing problems. The co-worker wrote that the Appellant has no control over when or where her bag bursts. The Appellant’s self-esteem is totally gone and she can’t do her job to the best of her ability if she is always worried over something she has no control over.
3. The second letter is dated May 27, 2015 from the manager of a business who stated that she and the Appellant have worked together over the years at different jobs. The manager wrote that, since the Appellant’s ostomy surgery, she has not been able to perform job tasks like she used to. She cannot lift anything over 5 lbs. One time, the Appellant did not leave her home for over 2 weeks due to embarrassment and the fear of her bag bursting. The Manager wrote that, because of the Appellant’s conditions and inability to lift anything over 5 lbs. without pain, she cannot employ the Appellant.

At the hearing, the Ministry did not object to the admissibility of these additional documents or the Appellant’s testimony. The Ministry relied on and reaffirmed its reconsideration decision.

Pursuant to section 22(4) of the *Employment and Assistance Act*, the Panel admits the Appellant’s hearing testimony and the 3 additional documents she submitted as being consistent with and therefore in support of the evidence the Ministry had when it made its reconsideration decision.

## PART F – Reasons for Panel Decision

The issue in this appeal is whether the Ministry's reconsideration decision, which determined that the Appellant was not eligible for PWD designation because she did not meet all the requirements in section 2(2) of the EAPWDA, was reasonably supported by the evidence and/or was a reasonable application of the applicable enactment in the Appellant's circumstances

### Applicable Legislation

The following sections of the EAPWDA apply to the Appellant's circumstances in this appeal:

*2 (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.*

The "daily living activities" referred to in EAPWDA section 2(2)(b) are defined in the EAPWDR as:

*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.*

The Panel will consider the parties' positions under the PWD criteria at issue in this appeal.

### Physical Impairment

The Appellant's position is that she has a severe physical impairment because of the combination of her medical conditions and their impacts on her ability to function. The pain level from her colostomy and osteoarthritis limit her ability to lift items or manage housework without assistance. The Appellant also submitted that the need for an ostomy bag and worrying about when it might leak or break limits her ability to go out and to work.

In the reconsideration decision, the Ministry wrote that it considered the Appellant's self-report and all of the information from Dr. A, who completed the physician's and the assessor's reports. The Ministry determined that the impacts described by Dr. A are more in keeping with a moderate degree of

impairment. The Ministry also noted that Dr. A indicated that the Appellant uses an ostomy appliance, but the use of such an assistive device does not in itself indicate a severe impairment. Therefore, the Ministry was not satisfied that there is enough evidence to establish a severe physical impairment.

#### *The Panel's Findings*

The diagnosis of a serious medical condition does not in itself establish PWD eligibility. To satisfy the requirements in section 2(2) of the EAPWDA, there must be evidence of how and the extent to which a medical condition(s) results in an impairment that directly restricts the ability to manage the daily living activities defined in section 2(2)(b) of the EAPWDR. That legislation also clearly establishes that the Ministry makes its decision based on evidence from medical or other prescribed professionals, in addition to any information provided by the Appellant.

The Appellant submitted that she is unable to work because of her medical conditions. The Panel notes that, in contrast to the province's Person with Persistent Multiple Barriers legislation, the ability to work and/or find work is not part of the criteria for designation as a PWD.

The Appellant's description of her medical conditions and how they impact her daily functioning are generally consistent with Dr. A's diagnoses and his descriptions of how those conditions restrict her mobility inside and outside the home, and her ability to manage daily living activities such as shopping. He wrote that chronic pain impacts all activity and these problems are severe and increasing. However, Dr. A also reported that the Appellant independently manages walking indoors and outdoors, climbing stairs, standing and all physical aspects of personal care. Dr. A did note that the Appellant needs periodic assistance with lifting, and with carrying and holding, but he provided no information about the extent or frequency of help needed.

As for the information from Dr. D, the Panel notes that his notations were based on information from the Appellant from one visit. In contrast, Dr. D indicated that he knew the Appellant for more than 5 years and that he referred to other medical reports. Therefore, the Panel gives the evidence from Dr. D less weight than from Dr. A. In any event, Dr. D's evidence is generally consistent with Dr. A's. When all of the evidence is considered, the Panel finds that the Ministry reasonably determined that the evidence is more in keeping with a moderate degree of impairment and not a severe physical impairment.

#### **Mental Impairment**

The Appellant's position is that she suffers from anxiety and depression because of her physical health conditions. As she has no control over when her ostomy bag may leak or break, she has become isolated, depressed and anxious. The chronic pain she experiences also cause depression.

The Ministry's position is that, based on its review of the information, there is not enough evidence to establish a severe mental impairment.

#### *The Panel's Findings*

Dr. A wrote that the Appellant experienced depression and chronic pain since her bowel surgery. The doctor also reported impacts to cognitive and emotional functioning, such as major impact to motivation, moderate impact to bodily functions, to emotion, and to other emotional or mental problems. He added that the Appellant's chronic depression is associated with pain and her continual

anxiety regarding potential ostomy leakage and unpredictable episodes of increased pain. Dr. D also noted that the Appellant experiences socially isolation.

The Panel notes that Dr. A attributed the Appellant's mental and emotional state to her physical health conditions, and not to any separate mental health condition. The doctor did not indicate that the Appellant is undergoing any treatment for depression or anxiety. Also, although the doctor reported that the Appellant is socially isolated due to pain, depression and anxiety, the Appellant independently manages daily activities requiring cognitive abilities, such as managing her finances and medications, meal preparation and aspects of social functioning. Therefore, based on all of the information provided, the Panel finds that the Ministry reasonably determined that there is not enough evidence to establish a severe mental impairment.

### **Direct and Significant Restrictions to Daily Living Activities**

The Appellant submits that her severe physical and mental impairments restrict her ability to manage her daily living activities. She is socially isolated and needs help with tasks around her home.

The Ministry acknowledged that the Appellant has serious medical issues. However, the Ministry was not satisfied that all of the information provided demonstrates a severe mental or physical impairment that in the opinion of a prescribed professional significantly restricts the Appellant's ability to perform daily living activities either continuously or periodically for extended periods.

#### *The Panel's Findings*

To qualify for PWD designation, the Appellant must provide a prescribed professional's opinion confirming that her severe physical or mental impairment directly and significantly restricts her daily living activities, continuously or periodically for extended periods. It is not enough, however, for the prescribed professional to merely report that such activities are restricted. The prescribed professional must assess and describe the degree of restriction and the extent of assistance needed to manage the daily living activities defined in section 2(1) of the EAPWDR. The physician's and assessor's reports specifically address these legislated requirements.

In this case, Dr. A and Dr. D are prescribed professionals. However, for the reasons stated above, the Panel gives the reports from Dr. A greater weight than the information from Dr. D. In the physician's report, Dr. A reported continuous restrictions to personal care, meal preparation, basic housework, daily shopping, mobility inside and outside the home, and to social functioning. But in the assessor's report, Dr. A reported that the Appellant manages almost all daily living activities independently. The doctor indicated that the Appellant needs periodic assistance only with lifting, carrying and holding, basic housekeeping, and periodic supervision/support with two areas of social functioning. Dr. A provided no details about the extent of or the frequency of assistance the Appellant needs. Therefore, the Panel finds that the Ministry reasonably determined that the evidence did not establish that a severe mental or physical impairment directly and significantly restricts the Appellant's ability to perform daily living activities either continuously or periodically for extended periods.

### **Help with Daily Living Activities**

The Appellant's position is that because of her severe impairments and the restrictions to her ability to perform daily activities, she needs help from her community, her brother and her daughter. Her



daughter is taking care of almost everything for her. She also needs an ostomy appliance. The Ministry's position is that because the evidence does not establish that daily living activities are significantly restricted, it cannot determine that the Appellant requires significant help from other persons or an assistive device.

*The Panel's Findings*

A finding that a severe impairment directly and significantly restricts a person's ability to manage her daily living activities either continuously or periodically for an extended period is a precondition to a finding that a person requires help as defined by section 2(3)(b) of the EAPWDA. For the reasons stated above, the Panel finds that the Ministry reasonably concluded that the evidence falls short of satisfying this precondition. The Panel does note that Dr. A reported that the Appellant's friends help her, but he provided no details about the frequency or extent of such help. Therefore, the Panel finds that the Ministry reasonably concluded that it could not determine that the Appellant requires help as defined by section 2(3)(b) of the EAPWDA.

**Conclusion**

The Panel acknowledges that the Appellant's has serious medical conditions. However, having reviewed all of the evidence and the relevant legislation, the Panel finds that the Ministry's reconsideration decision finding that the Appellant was ineligible for PWD designation was reasonably supported by the evidence and was a reasonable application of the applicable enactments in the Appellant's circumstances. Therefore, the Panel confirms that decision.