

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “Ministry”) March 24, 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,
- in the opinion of a prescribed professional, 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 August 25, 2014.
- A physician's report and an assessor's report completed on November 11, 2014 by the Appellant's doctor who has known her for 15 years and seen her 11 or more times in the preceding year.
- Additional medical reports dated October 30, 2014, September 10, 2014 and July 7, 2014 referred to by the Appellant's doctor.

2. Appellant's request for reconsideration with a statement by her signed on March 4, 2015, and

- A copy of her April 5, 2013 PWD application with a physician's report signed on September 28, 2012 and an assessor's report signed on September 2, 2012 by the Appellant's doctor. The Appellant crossed out parts of the assessor's report and added information to it.
- An undated hospital summary.

Because the Appellant added her notes to the September 2012 assessor's report, the Panel will consider that document as a self-report. The Panel has summarized the evidence in the appeal reconsideration record relevant to the applicable criteria for PWD designation.

### Diagnoses

In the November 11, 2014 physician's report, the doctor diagnosed the Appellant with COPD [chronic obstructive pulmonary disease] onset more than 10 years, chronic liver disease – hepatitis C onset more than 15 years, fibromyalgia onset more than 15 years, substance related disease onset 15 years, atrophic left kidney from birth. In the September 28, 2012 physician's report, the doctor also diagnosed the Appellant with ischemic heart disease and osteoarthritis. The doctor noted, in his 2014 reports described below, that subsequent testing ruled out heart disease.

In November 2014, the doctor referred to the Appellant's substance abuse related disorders and in the 2012 reports, he wrote that the Appellant's depressive mood symptoms and disorders are secondary to her chronic diseases.

### Physical Impairment

In her self-reports of August 25, 2014 and March 4, 2015, the Appellant described her disabilities as:

- Her medical conditions render her incapable of working. When she tries to overstep her body's ability she requires someone to be with her constantly. She needs help more times than not, she cannot complete daily chores and she is bedridden for 2-5 days. These episodes are frequent, occurring five or more times a month. She can barely get out of bed to use the washroom and uses a chamber pot.
- COPD – she requires home oxygen 24/7; without it and her inhalers, she cannot climb more than 2 stairs or even walk a block; she has great difficulty performing daily activities such as cooking and cleaning.
- Degenerative rheumatoid arthritis and fibromyalgia – she has constant pain; these conditions affect her hands, legs and back; her hands and feet gnarl and twist; she cannot sit for more than ½ hour, needs to stand and/or lay down before trying to complete a task which requires sitting; she is unable to lift a full pot of coffee to pour.

- Chronic pyelonephositiis – frequent and burning urination, recurrent yeast infection and generalized exhaustion and fever.
- Chronic pancreatitis – accompanied by IBS [irritable bowel symptom]; required frequent hospitalizations, organs were shutting down and she was near death; very painful; her diet is restricted; if she doesn't eat the proper food it will flare up and she will end up in hospital.
- Hepatitis C – frequent muscle cramping further affecting her daily activities.
- Miocarditis – had 2 heart attacks, waiting to see a specialist.
- High blood pressure – poor circulation, dizziness and fatigue.

The information the Appellant added to the 2012 assessor's report is generally the same as above, and she indicated that:

- She needs continuous assistance with all areas of basic housekeeping, shopping, meals, financial matters, filling prescriptions – restricted by health conditions and finances.
- All areas of personal care take significantly longer depending on the day and pain; she can rarely muster the strength and/or desire to compete these tasks.
- Previously she did not want to admit just how much help she needs to survive; she relies on the kindness & help of family.

In the November 2014 physician's and assessor's reports, the doctor reported that the Appellant:

- Has COPD - main complaint is shortness of breath; her symptoms have become more progressive over the last year; she is now oxygen dependent; is seen by a respiratory therapist for regular PFT and follow up of oxygen need; dyspnea is grade 2 b.
- Had exercise stress test [EST] to exclude coronary or artery disease – EST was normal on October 30, 2014; main cause of her shortness of breath is progressive COPD and smoking.
- Can walk less than 1 block unaided on a flat surface, can climb 2-5 steps unaided, can lift 5-15 lbs., and can remain seated for an unlimited time.
- Manages walking indoors and standing independently; needs periodic assistance walking outdoors – for long distances more than 1 block; needs periodic assistance climbing stairs – can climb 1 flight.
- Needs periodic assistance lifting more than 30 lbs. and carrying more than 20 lbs. “mostly [illegible] from hepatitis and osteoarthritis”.

### **Mental Impairment**

In the November 2014 physician's report, the doctor reported that the Appellant has no significant deficits with cognitive and emotional function. In his November 2014 assessor's report, the doctor noted the following impacts to cognitive and emotional functioning:

- No impact to bodily functions, consciousness, psychotic symptoms, other neuropsychological problems, other emotional or mental problems.
- Minimal impact to impulse control, attention/concentration, executive, memory, language.
- Moderate impact to emotion, insight and judgement, motivation and motor activity.
- “Low mood, low energy, no motivation, chronic pain. She has no energy due to fibromyalgia”.

### **Restrictions to Daily Living Activities Reported by the Doctor**

The doctor, in the November 2014 physician's report, indicated that the Appellant has been prescribed medications and /or treatments that interfere with her ability to perform daily living

activities – she requires medications on a daily basis. In his November 2014 assessor's report, the doctor noted that the Appellant:

- Independently manages all areas of personal care, financial matters, medications and meals except for needing periodic assistance with cooking; independently gets in/ out of vehicles.
- Needs periodic assistance with laundry and basic housekeeping – no details provided.
- Needs periodic assistance with going to/from stores, carrying purchases home; independently manages reading prices/labels, making appropriate choices, paying for purchases - most symptoms due to fibromyalgia and she needs continuous oxygen due to advanced COPD.
- For social functioning – is independently able to secure assistance from others; needs periodic support/supervision with interacting appropriately with others and with dealing appropriately with unexpected demands; needs continuous support/supervision with making appropriate social decisions and with developing and maintaining relationships –“Patient with lifelong drug abuse”; no details provided about type or extent of assistance needed.
- Has marginal functioning with her immediate and extended social networks.

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

In the November 2014 assessors' report, the doctor wrote “mental health & addiction, respiratory technologist follow up.” He also reported that help is provided by family, that she needs housing and financial income, and that she needs oxygen tanks. The doctor indicated that the Appellant needs no assistance devices and no assistance is provided by an assistance animal.

In the annotated assessor's report from September 2012, the Appellant wrote/noted that:

- Because she has been sick for so long her friends are no longer willing to help and she depends solely on family.
- She would like to be able to access community service agencies that provide help but is financially unable; her lack of survival finances put a huge burden on her family.
- She needs a cane, breathing device, commode and bathing aids - a cane helps with walking; a breathing device is necessary to survive; bed pan needed for bad days; stool in shower.

### **Appeal Submissions**

For this appeal, the Appellant's advocate submitted the following documents:

1. A letter dated May 26, 2015 from a mental health and addiction nurse/case manager, but with no indication she is a registered nurse. Following a referral by the Appellant's doctor, this nurse saw the Appellant for an intake appointment on April 28, 2015, and then wrote that:

- The Appellant was carrying a small oxygen tank and wearing a nasal prong; she appeared to be out of breath walking from the lobby to the nurse's office, about a 25 foot distance.
- The Appellant completed 3 self-reports (attached), with one indicating severe depression.
- The Appellant described her multiple physical health challenges; living with chronic pain and being limited in her daily living activities; feeling sad and discouraged about her future; feeling hopeless and depressed because of her physical limitations and emotional stresses.
- A further assessment is needed for a more thorough diagnosis and treatment plan.

2. A letter dated May 12, 2015 from a home and community nurse (no indication she is a registered nurse) about a home visit with the Appellant on May 5, 2015. This nurse wrote that she was unable to do a functional assessment and there is no occupational therapist available. These were her observations from her first encounter:

- The Appellant lives with her son's family in part of a converted basement; her daughter in law prepares meals for her and she has a microwave.
  - She has an oxygen condenser in the bathroom and a portable oxygen machine.
  - She takes time to go upstairs because she fatigues easily; she requires a bath stool, a walker and a commode chair for days she is unable to get out of bed and has to use a bedpan.
  - The Appellant has almost no use of her left arm; it has progressively been getting weaker; she was barely able to lift her arm as high as her shoulder; she mentioned this to the doctor.
  - At present the Appellant does not need any home support because her family is assisting her; assistive devices will be obtained from a community organization.
  - The Appellant seldom leaves her bedroom and will need more supportive care down the road.
3. A letter dated June 10, 2015 from the Appellant's doctor stating that:
- He confirms that the Appellant has a severe and prolonged disability which is permanent, and he confirms that she has the following medical conditions: chronic obstructive airway disease; long-standing depression; active hepatitis C; combination of degenerative arthritis, addiction issues, chronic fatigue which lead to significant restrictions in her basic activities of daily living.
  - These significant restrictions exist together substantially all of the time.
  - The Appellant has been referred to a liver specialist for assessment of her chronic liver disease because of her active hepatitis C.
4. A letter dated March 20, 2014 from the same doctor stating that he has been the Appellant's family physician for 15 years. She has multiple comorbid disease which renders her incapable of completing her activities of daily living.
5. An ultrasound report dated April 27, 2015 regarding the Appellant's liver and a hospital patient visit summary for January 2012-April 27, 2015.

The Ministry did not object to the admission of these additional documents.

At the hearing, the Appellant described her health conditions as in the reports summarized above. For example, she said she has difficulty walking, climbing stairs and some days she can't get out of bed. The Appellant said that she is unable to survive without her family who are there for her all the time. She is really depressed about her situation. The Appellant confirmed that she has a cane she uses every day. She also has a walker, a bath stool and a commode chair. The Appellant said that about 3-4 months ago her whole left side and left arm started getting weaker.

Pursuant to section 22(4) of the *Employment and Assistance Act*, the Panel admits the information in the additional documents submitted for this appeal and the Appellant's oral testimony, except for the information about her left arm and side. The information about the left arm and side was not in the evidence before the Ministry when it made its reconsideration decision. All the other information is consistent with and tends to corroborate the evidence the Ministry had at reconsideration.

At the hearing, the Ministry relied on and reaffirmed 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 enactments 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 many severe physical health conditions which restrict her ability to function. She is in constant pain and there are days that she is not even able to get out of bed. Her chronic health conditions restrict her ability to walk, climb stairs and attend to personal care needs. The Appellant submitted that she needs continuous oxygen and also assistive devices for walking, bathing and toileting.

In its reconsideration decision, the Ministry wrote that it reviewed the information from the Appellant and from the doctor in his November 2014 physician's and assessor's reports. Based on this information, the Ministry determined that the Appellant's functional skill limitations are more in

keeping with a moderate degree of physical impairment and not 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 of the Appellant 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 described several health conditions which she submitted affect her functioning. Her doctor of 15 years confirmed most, but not all of them. For example, he did not report high blood pressure. The doctor also provided the most recent medical information about the Appellant's conditions in his June 10, 2015 letter, confirming the following diagnoses: chronic obstructive airway disease, active hepatitis C; combination of degenerative arthritis, addiction issues and chronic fatigue which lead to significant restrictions in her basic activities of daily living. In the November 2014 physician's report, the doctor also indicated a diagnoses of fibromyalgia and atrophic left kidney.

The Appellant's descriptions of how her medical conditions restrict her physical functioning also are not confirmed by her doctor, except for her limited ability to walk and climb stairs. The Appellant's limitations in walking and climbing stairs were also observed by the two nurses who wrote the letters admitted for this appeal. The doctor did report that the Appellant needs continuous oxygen and the home care nurse observed that the Appellant uses oxygen devices.

As for other physical functioning restrictions described by the Appellant, such as taking significantly longer with areas of personal care and being unable to get out of bed, these were not confirmed by her doctor. He reported that she independently manages all areas of personal care. Also, the Appellant noted that she needs continuous assistance with basic housekeeping and shopping, but the doctor reported only that she needs periodic assistance with these activities. As for assistive devices, the Appellant indicated that she needs and uses a bath stool, a cane and walker, and a commode chair. The home care nurse noted the same needs, but the doctor did not. He reported that the Appellant does not need assistive devices.

Based on all of the evidence, and in particular the lack of confirmation from the Appellant's doctor about the impacts of her health conditions on her functioning abilities, the Panel finds that the Ministry reasonably determined that the information did not establish a severe physical impairment.

### **Mental Impairment**

The Appellant's position is that her depression impacts her daily functioning. She also has impacts to her cognitive and emotional functioning, and needs support in areas of social functioning.

The Ministry wrote that it was not satisfied that the information provided by the doctor in the

November 2014 assessor's and physician's reports is evidence of a severe mental impairment.

*The Panel's Findings*

The Appellant described feeling depressed, sad, discouraged and hopeless because of her chronic health conditions and limitations. During the intake appointment, the mental health nurse noted that one of the Appellant's tests indicated severe depression, but also that further assessment is needed.

The Appellant's doctor diagnosed substance related disorders as a mental health condition in his November 2014 physician's report and in his June 10, 2015 letter he confirmed that the Appellant has long standing depression. In 2012, the doctor wrote that the Appellant's depressive mood symptoms and disorders are secondary to her chronic diseases. The doctor also reported, in November 2014, that the Appellant has no significant deficits with cognitive and emotional functioning, with only minimal impact to 5 areas of cognitive and emotional functioning, and moderate impact to emotion, insight and judgement, motivation and motor activity. He added that the Appellant has low mood, no motivation, chronic pain and no energy due to fibromyalgia. The doctor, therefore, attributes the Appellant's depression and impacts to her emotional functioning to her chronic pain and physical health conditions.

As for impacts to areas of daily activities requiring cognitive abilities, the doctor reported in the November 2014 assessor's report that the Appellant independently manages all areas of financial matters and medications. For social functioning, the doctor reported that the Appellant needs periodic support/supervision with interacting appropriately with others and with dealing appropriately with unexpected demands, and she needs continuous support/supervision with making appropriate social decisions and with developing and maintaining relationships due to her lifelong drug abuse. However, the doctor provided no information about the type or extent of support/supervision needed and no other impacts on cognitive and emotional functioning or on managing daily living activities.

Therefore, when all of the evidence is considered, the Panel finds that the Ministry reasonably determined that there is insufficient evidence of a severe mental impairment.

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

The Appellant's position is that her doctor confirmed that she has significant restrictions in her ability to do basic daily living activities. These significant restrictions exist together substantially all of the time. She submitted that because of these restrictions she needs her family's help and she uses assistive devices.

In its reconsideration decision, the Ministry reviewed the information from the doctor in the November 2014 physician's and assessor's reports. The Ministry determined that, as the majority of the Appellant's daily living activities are performed independently or require little help from others, the information from the prescribed professional does not establish that the Appellant's impairment significantly restricts 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 a severe physical or mental impairment directly and significantly restricts 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, the Appellant submitted letters from two nurses, but neither nurse indicated whether she is a registered nurse. Therefore the Panel has no information to determine if they are prescribed professionals as defined in section 2(2) of the EAPWDR. The Appellant's doctor of 15 years is a prescribed professional and therefore, it is his opinions that the Panel will review.

The doctor wrote, in June 10, 2015, that a combination of the Appellant's health conditions, including degenerative arthritis and chronic fatigue, lead to significant restrictions in her daily living activities. However, the doctor did not provide any details about which specific daily living activities are restricted and to what extent the Appellant can manage those activities. The doctor also did not explain why he provided this conclusion when in November 2014, his opinions indicate lesser restrictions.

In his November 2014 assessor's report, the doctor indicated that the Appellant independently manages all areas of personal care, financial matters, medications, and meals, except that she needs periodic assistance with cooking but he provided no details about the latter. He also provided no details about the extent or frequency of the Appellant's need for periodic assistance with basic housekeeping tasks, with shopping tasks, or her need for support/supervision in areas of social functioning such as with interacting appropriately with others, with dealing appropriately with unexpected demands, with making appropriate social decisions or with developing and maintaining relationships.

Therefore, based on the opinions of the Appellant's doctor, the Panel finds that the Ministry reasonably determined that information from the prescribed professional does not establish that the Appellant's impairments directly and significantly restrict her daily living activities either continuously or periodically for extended periods.

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

The Appellant's position is that without her family's daily help she could not manage. She also needs and uses a cane, a walker, a bath stool and a commode chair.

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*

There is evidence that the Appellant uses assistive devices and needs help from other people. However, the prescribed professional, her doctor, did not confirm that she needs or uses such devices, even in his June 10, 2015 letter. He only reported that the Appellant receives help from family.

In addition, 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 further 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 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.