

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of June 23, 2015, which found that the appellant did not meet three of five statutory requirements of section 2 of the *Employment and Assistance for Persons With Disabilities Act* (“EAPWDA”) for designation as a person with disabilities (“PWD”). The ministry found that the appellant met the age requirement, and that in the opinion of a medical practitioner the appellant’s impairment is likely to continue for at least two years. However, the ministry was not satisfied that:

- the evidence establishes that the appellant has a severe physical or mental impairment;
- the appellant’s daily living activities (“DLA”) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and that
- 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

EAPWDA, section 2

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

## PART E – Summary of Facts

The appellant was not in attendance at the hearing. After confirming that the appellant was properly notified, the hearing proceeded pursuant to Section 86(b) of the Employment and Assistance Regulation.

The information before the ministry at the time of reconsideration included the following:

1. Three *Laboratory Investigation Results* reports all dated December 18, 2014. One shows a collection time of 7:55 and reports a cortisol level of 694. The second shows a collection time of 10:00 and reports a cortisol level of 322. The third shows a collection time of 6:45 and reports a urine creatinine level of 15.7.
2. A *To Whom It May Concern* letter from the appellant dated December 28, 2014 in which she describes her history of how she developed a hypersensitivity to electromagnetic radiation.
3. The appellant's *PWD Application* consisting of:
  - the appellant's self-report ("SR") completed by the appellant and dated March 3, 2015 in which she states "*I experience adverse health effects while in the vicinity of any and all electric, magnetic or electromagnetic fields.*" She describes her experiences from June 2012 to the present and outlines the many negative consequences of her sensitivity to smart meters, navigation and cell towers, and x-rays.
  - a physician's report ("PR") completed by a nurse practitioner on March 5, 2015 and co-signed by a physician. The nurse practitioner reported that the appellant has been her patient for 3 months and during this time she has seen the appellant 2-10 times. On the last page of the PR the physician has written "*agree with the above after consultation.*"
  - an assessor's report ("AR") also completed by the nurse practitioner on March 5, 2015 and co-signed by the same physician. On the last page of the PR the physician has again written "*agree with the above after consultation.*"
4. A undated excerpt from the EAPWDR of section 2 on which the appellant has included written comments to indicate the impact of her impairments upon her ability to perform DLAs. Beside "manage personal finances" the appellant has written "*haven't been able to hold a job because of the disability so went bankrupt.*" Beside "shop for personal needs" the appellant has written "*don't have the energy; can't drive down the road.*" Beside "use public or personal transportation facilities" the appellant has written "*can't ride the bus.*" Beside "relate to, communicate or interact with others effectively" the appellant has written "*gets depressed, negative thoughts (and) emotions not under control, have ADD.*"
5. The appellant's *Request for Reconsideration* signed and dated by the appellant on June 7, 2015. In her letter dated June 7, 2015 prepared by the appellant as part of her *Request for Reconsideration* she states "*I agree that my application did not provide enough evidence of a significant restriction to perform ADLs.*" She explains that this letter is her attempt to describe how this illness has affected her functioning.

The appellant's *Notice of Appeal* was dated July 20, 2015. Her reasons for appealing go to argument and are presented in Part F.

The ministry noted that the PR and the AR were completed by the nurse practitioner and subsequently co-signed by the physician. Accordingly, the ministry concluded that the physician would be the physician and assessor on record in the PWD application.

Accordingly, the panel reviewed the medical evidence as follows:

### Diagnoses

- In the PR the appellant's physician diagnosed her with widespread chronic myalgia and arthralgia including occipital and cervical pain, bilateral extremity pain (upper and lower), trunk pain, depression due to poor health and previous trauma (PTSD), and severe headaches. The date of onset for all of these conditions was listed as October, 2014.

### Severity of Impairment:

#### *Physical Impairment*

- The physician commented in the *Health History* portion of the PR that *"(the appellant) suffers on a daily basis with the disabilities outlined in this document. She is unable to live or work or even visit people, in areas with high electromagnetic radiation. She gets severe headaches and muscle aches impairing her ability to work or function in certain, multiple settings."*
- The physician reported that the appellant's impairment is likely to continue for two years or more and states; *"So far the lifestyle modifications (the appellant) has made have helped her improve her health, but so far we have not found treatments to help. We are looking to complementary medicine for support with treatment."*
- In regard to *Functional Skills* the physician reported that the appellant can walk 4+ blocks unaided on a flat surface, climb 5+ steps unaided, lift 5-15 pounds, and has no limitation on how long she can remain seated.
- In the AR the physician noted that the appellant can independently walk indoors, walk outdoors (although she is unable to walk in any areas with any electromagnetic radiation), climb stairs and stand. But she requires periodic assistance with lifting anything greater than 5-10 pounds, or carrying over 10 pounds.

#### *Mental impairment*

- In the PR the physician indicates that the appellant has no difficulties with communication but lists the following significant deficits with cognitive and emotional function: consciousness, memory, emotional disturbances, motivation, and attention or sustained concentration. The physician commented *"(she) becomes very disabled with these symptoms when exposed to environmental electromagnetic radiation."*
- In the AR the physician assesses as "good" the appellant's ability in speaking, reading, writing and hearing but comments *"stuttering triggered by exposure to EMR"*. In terms of *Cognitive and Emotional Functioning* the physician has written "N/A". The section on *Social Functioning* (which is only to be completed if the applicant has an identified mental impairment) has been left blank. In addition the physician did not complete the sections which request a description of how the applicant's mental impairment affects her relationships with her immediate social network and extended social network.

### Restrictions in performing DLA

- In the PR the physician indicates that the appellant has not been prescribed medication and/or treatments that interfere with her ability to perform daily living activities. The physician listed the following DLA as restricted: basic housework, daily shopping, mobility inside and outside the home and use of transportation, and noted that they are periodic restrictions. He adds the following note to explain *"Periodic effects on ADLs – severity based on exposures to triggers. However, triggers are prominent in environment."* The physician listed the following DLA as not restricted: personal self care, meal preparation, management of medications, management of finances and social functioning.
- In the AR the physician explained that *"(the appellant) is unable to function in areas with electromagnetic radiation; EMR greatly impacts her ADLs. The appellant is tired and fatigued, with*

*body aches and decreased memory after such exposures; including brainfog (?)*.” The physician has noted that the appellant is “independent” in regard to all DLA except for the following which require periodic assistance: lifting, carrying & holding, carrying purchases home and using public transit, but there is no description provided of the type and amount of assistance required. The physician has provided the following comment: “*Feels very ill and has flares of symptoms when in proximity to power lines; and driving along roads with parallel power lines. Only able to travel along freeways without becoming symptomatic.*”

Help required/provided

- In the PR the physician indicates that the appellant does not require any prostheses or aids for her impairment.
- In the AR the physician states that the appellant “*Needs ongoing assistance with lifting heavy objects –e.g. groceries.*” The physician confirms that the appellant does not have an assistance animal and the section listing assistive devices used by the appellant has been left blank.

At the hearing the ministry reviewed the reasons for concluding that the appellant was not eligible for the PWD designation. The reasons go to argument and are discussed in part F.

## PART F – Reasons for Panel Decision

The issue in this appeal is whether the ministry's decision to deny the appellant designation as a 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. In particular, was the ministry reasonable in determining that the appellant does not have a severe physical or mental impairment, and that in the opinion of a prescribed professional the appellant's impairments do not directly and significantly restrict her from performing DLA either continuously or periodically for extended periods, and that as a result of those restrictions the appellant does not require help to perform DLA.

The relevant legislation is as follows:

### **EAPWDA:**

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.

**EAPWDR section 2(1):**

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.

**Severe Physical Impairment**

The appellant's position is that she suffers from hypersensitivity to electric, magnetic and electromagnetic radiation. Her symptoms include widespread myalgia and arthralgia including occipital and cervical pain, bilateral extremity pain (upper and lower), trunk pain, depression due to poor health and previous trauma (PTSD), and severe headaches. In her PWD application she states that she suffered from ". . . frequent urination, muscle wasting, brain fog, ADD, muscle soreness

*leading to stiffness, leading to pain and eventually becoming crippled over in my lower back, pain throughout my internal body especially kidneys and ovaries.*” She argues that exposure to electrical appliances such as electric lawnmowers, vacuums, and appliances such as stoves will cause her to bleed. In addition, exposure to wifi, cell towers and smart meters have made the appellant symptomatic. In her *Notice of Appeal* the appellant states that she recently found a lump in her breast and speculates that she has probably developed cancer but has been unable to find a doctor who can diagnose and treat her.

The ministry notes that in the PR, the physician reported that the appellant can walk 4+ blocks unaided on a flat surface, climb 5+ steps unaided, lift 5-15 pounds, and has no limitation on how long she can remain seated. In the AR, the physician noted that the appellant can independently walk indoors, walk outdoors (although she is unable to walk in any areas with any electromagnetic radiation), climb stairs and stand. But she requires periodic assistance with lifting anything greater than 5-10 pounds, or carrying over 10 pounds. The ministry notes that the physician has not indicated the frequency and duration of such assistance. In addition, the ministry observes that the PR and the AR report that the appellant can independently manage almost all of her daily living activities including several tasks such as basic housekeeping and cooking which require a certain level of physical capabilities. Further, the PR and the AR indicate that the appellant does not use any prostheses or require any equipment or devices to help compensate for her impairments. The ministry concludes that there is not enough information provided by the physician/assessor to confirm that the appellant has a severe physical impairment.

#### Panel Decision

The panel notes that in the PR the appellant’s level of functional skills are only limited insofar as lifting is concerned. In the AR the physician has indicated that the appellant requires periodic assistance for lifting and carrying & holding and comments “Needs assistance to lift greater than 5-10 lbs; or carry over 10 lbs”. But there is no indication that this periodic assistance is required for an extended period of time as required by section 2(2)(i) of the EAPWDA. Accordingly, the panel finds the ministry reasonably determined that the appellant had not established a severe physical impairment.

#### Severe Mental Impairment

The appellant advanced no argument with respect to a severe mental impairment, although she did identify “depression” as one of the diagnosed medical conditions from which she suffers.

The ministry notes that in the PR the appellant’s physician indicates that the appellant has no difficulties with communication, but has significant deficits in the following cognitive and emotional functions: consciousness, memory, emotional disturbance, motivation, impulse control and attention or sustained concentration. The physician commented “*(she) becomes very disabled with these symptoms when exposed to environmental electromagnetic radiation*” but no comment has been provided to explain how frequently they occur. In the AR, the physician reports that the appellant’s ability to communicate is “good” for speaking, reading and writing and hearing although he comments that stuttering is triggered by exposure to EMR. The physician has written “N/A” for the section on *Cognitive and Emotional Functioning* and has left the *Social Functioning* section blank. The ministry’s position, as set out in its reconsideration decision, is that there is not enough information from the physician/assessor to establish a severe mental impairment.

Panel Decision

The panel notes that the physician/assessor has written “N/A” for the section on *Cognitive and Emotional Functioning* and has left the *Social Functioning* section blank. These two sections are to be completed only if the applicant has an identified mental impairment. Accordingly, it appears that the physician is not supporting such a diagnosis. In addition, the appellant’s deficits in cognitive and emotional functions lack any indication from the physician/assessor of the frequency with which they occur. Finally, the panel notes that the appellant’s ability to communicate is “good”. Consequently, the panel concludes that the ministry reasonably determined that the evidence does not demonstrate a severe mental impairment.

Significant Restrictions to DLA

The appellant’s position, as outlined in the comments she appended to the excerpt from the EAPWDR section 2 indicate that she needs assistance with managing personal finances, shopping for personal needs, using public or personal transportation facilities, and relating to, communicating or interacting with others effectively. In her letter of June 7, 2015 the appellant argues that the following DLAs are restricted: managing personal finances, housework (and yard work), making meals and shopping for food. She also notes that she is unable to walk 4 blocks where there are power lines or in town. Finally, she notes that her sleep is disturbed and she frequently feels depressed during the morning and early afternoon.

The ministry notes that the appellant has not been prescribed medications and/or treatments that could interfere with her ability to perform daily living activities. In addition, the ministry acknowledges that the physician indicated that the appellant requires periodic assistance with carrying purchases home, but provided no indication of the frequency and duration of this assistance. The ministry’s position is that the evidence is not sufficient to demonstrate that the appellant’s impairment significantly restricts her ability to perform DLA either continuously or periodically for extended periods.

Panel Decision

The legislation – s. 2(2)(b)(i) of the EAPWDA – requires the minister to substantially assess direct and significant restrictions of DLA in consideration of the opinion of a prescribed professional, in this case the appellant’s physician. This doesn’t mean that other evidence shouldn’t be factored in as required to provide clarification of the professional evidence, but the legislative language makes it clear that the prescribed professional’s opinion is fundamental to the ministry’s determination as to whether it is “satisfied”.

The legislation requires that a severe impairment directly and significantly restricts the appellant’s ability to perform DLA either continuously or periodically for extended periods. The term “directly” means that there must be a causal link between the severe impairment and the restriction. The direct restriction must also be significant. Additionally, there is a component related to time or duration. The direct and significant restriction may be either continuous or periodic. If it is periodic it must be for an extended time.

The panel notes that the physician provides no indication in the PR of how frequently the appellant requires assistance to do basic housework and daily shopping, or to assist with mobility inside and outside the home, or use of transportation. Similarly, in the AR, the physician indicates that the appellant requires periodic assistance with lifting, carrying and holding, carrying purchases home and



using public transit, but no information is provided regarding how frequently such assistance is required. In addition, the panel notes that in the PR the physician has indicated that “basic housework” is periodically restricted for the appellant but in the AR the assessor indicates that the appellant is “independent” in her ability to do basic housekeeping. Accordingly, it is not clear to the panel what restrictions the appellant faces and whether these restrictions are “severe” insofar as frequency and duration.

In the PR the physician confirms that the appellant has not been prescribed any medication and/or treatments that interfere with her ability to perform DLAs.

Finally, the appellant notes that her impairment has caused her to be unable to get her business going or to continue in paid employment. The panel notes that employability is not a statutory criterion regarding PWD designation – the focus of the legislation is on the ability to perform DLA.

Accordingly, the panel concludes that the ministry reasonably determined that the evidence is not sufficient to demonstrate that the appellant’s impairment significantly restricts her ability to perform DLA either continuously or periodically for extended periods.

#### **Assistance with DLA**

In the PR the physician notes that the appellant “gains assistance from friends or volunteers for lifting, shopping”. In the AR the physician comments “*Needs ongoing assistance with lifting heavy objects – e.g. groceries*” in regard to assistance provided by other people.

The ministry’s position is that it has not been established that DLA are significantly restricted and therefore, it cannot be determined that the appellant requires significant help from other persons. The ministry notes that the appellant does not require the services of an assistance animal, as noted in the AR, and the original AR lists no assistive devices being required by the appellant.

#### **Panel Decision**

The panel notes that the appellant can independently manage almost all of her daily living activities and does not require the services of an assistance animal or assistive devices. The only forms of assistance identified by the physician are in regard to shopping for groceries and lifting/carrying items above 10 pounds.

For these reasons, the panel finds that the ministry reasonably concluded it could not be determined that the appellant requires help with DLA as defined by section 2(3)(b) of the EAPWDA.

#### **Conclusion**

The panel acknowledges that the appellant’s medical condition affects her ability to function. However, having reviewed and considered all of the evidence, and section 2 of the EAPWDA, the panel concludes that the ministry’s decision finding the appellant ineligible for PWD designation is reasonably supported by the evidence and confirms the ministry’s decision.