

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) Reconsideration Decision dated October 13, 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, that she has an impairment that is likely to continue for at least two years and that she has a severe mental impairment. However, the ministry was not satisfied that the evidence established that:

- the appellant has a severe physical 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") dated March 24, 2015;
- The Physician Report ("PR") dated March 24, 2015 and prepared by the appellant's general practitioner ("GP") who has treated the appellant since June 2013; and
- Assessor Report ("AR") dated April 17, 2015 and prepared by a social worker ("SW") who has known the appellant for 6 months at the date of completion of the report;

2. A letter dated May 31, 2015 and prepared by the appellant's advocate ("Advocate Letter"); and

3. The appellant's Request for Reconsideration ("RFR") dated September 25, 2015 to which is attached a letter from the GP also dated September 25, 2015 ("GP Letter").

### Admissibility of Additional Evidence

#### Documents

Prior to the hearing, the appellant submitted additional documentary evidence in support of her appeal which had not been previously provided to the ministry. That evidence includes the following:

- Seven pages of written submissions dated November 9, 2015 and prepared by an Advocate ("Submissions");
- A two page questionnaire completed by the GP ("Questionnaire") and dated November 9, 2015; and
- A newly completed page 12 of 28 from the PWD application completed by the GP ("New Page 12").

Collectively, these documents are referred to as "the New Documents".

The appellant argues that the New Documents support the information that was before the ministry at reconsideration and that no new information is raised in them. The ministry did not object to their being admitted.

On closer review, each of the New Documents refers to and supports the information and records that were before the minister at reconsideration. More specifically, the GP's answers in the Questionnaire are consistent with the PR while the New Page 12 does not add new information but rather, seeks to clarify the original. Given these findings, the panel finds that each of the New Documents are admissible as written testimony in support of the information and records that were before the minister when the decision being appealed was made pursuant to section 22(4)(b) of the *Employment and Assistance Act* ("EAA").

#### Oral Evidence

The appellant gave oral evidence at the hearing. Her evidence included comments on her physical and mental health, her history and attendance with her GP and the impact that her conditions have had on her DLA. As the appellant's physical and mental health, their impact on her ability to perform tasks of DLA and her history with her GP were described in the PWD application, the panel finds that the appellant's oral evidence is admissible as it is in support of the information and records that were before the minister when the decision being appealed was made pursuant to section 22(4)(b) of the *EAA*.

#### Diagnoses

In the PR, the appellant is diagnosed by the GP with the following:

1. Chronic pain disorder (back, ankles, hips and knees) – date of onset is “childhood. 1980’s.”;
2. Anxiety with agoraphobia – date of onset is 2000;
3. Depression – date of onset is 2000; and
4. PTSD – date of onset is 2000.

### ***Physical Impairment***

In the SR, the appellant notes the diagnoses provided by the GP in the PR and references a “Supplement to Section 1” which is the Advocate Letter. In that letter, the author re-states the information found in the PR and the AR noting that the appellant recalls suffering from back pain as long as she can recall and becoming more acute following a motor vehicle accident at the age of 15.

In the PR, the GP comments that the appellant experiences chronic pain disorder with severe and constant pain in her low back and ankles and that the appellant recalls experiencing back pain as a child which was exacerbated by a motor vehicle accident which occurred when she was 15 years of age. The GP writes that “pain in these areas persists, is daily and impairs her function.”

With respect to functional skills, the GP comments in the PR that the appellant “has been impaired in her function on a daily basis” and notes that the appellant can walk 4 or more blocks unaided on a flat surface, climb 5 or more steps unaided, lift 15 to 35 lbs and remain seated for less than 1 hour due to restlessness, anxiety, agoraphobia and back pain. The GP adds the comment that the appellant has a sitting and standing tolerance of 15 minutes due to back pain and that lifting is impaired. The GP comments further that the appellant’s ankle pain limits the appellant’s walking and ability to exercise daily.

In the AR, the SW comments that the appellant’s physical health includes chronic pain due to back and ankle problems. The SW notes that the appellant is independent with all aspects of communication (speaking, writing, reading and hearing) and that she is independent walking indoors, lifting, carrying and holding but that with the latter three tasks she does the minimum amount. The appellant is noted by the SW as requiring periodic assistance walking outdoors due to agoraphobia, anxiety and pain issues and that she also requires periodic assistance climbing stairs and standing depending on her back and foot pain.

In the GP Letter, the GP writes that the appellant is significantly disabled and that her back symptoms in the last few weeks are getting significantly worse. Despite the GP’s advice in the PR that the appellant can walk 4 blocks, the GP adds that the appellant limps significantly while walking limited distances and climbs stairs with great difficulty and limping in pain. The GP adds in the Questionnaire that she believes that the appellant has a severe physical impairment that is becoming worse.

### ***Mental Impairment***

In the Advocate Letter, the author refers to the comments of the GP in the PR, stating that the appellant suffers from agoraphobia and severe anxiety secondary to childhood trauma and that further, that the appellant suffers from depression causing her to experience persistent sadness and irritable mood, changes in sleep, appetite and energy, difficulty thinking, concentrating and remembering things, lack of interest in or pleasure from activities she previously enjoyed and feelings of guilty, worthlessness, hopelessness and emptiness. The advocate further writes that the appellant suffers from post-traumatic stress disorder.

In the PR, the GP comments that the appellant has a severe anxiety disorder due to childhood trauma as well as agoraphobia. The GP comments further that the appellant’s mental health problems significantly impair her function on a daily basis and that she has significant deficits in cognitive and emotional function in the areas of emotional disturbance, motivation and attention or sustained concentration.

In the AR, the SW notes the various impacts of the appellant's mental impairment on her functioning as follows (underlined words in parentheses): moderate to major impact on emotion and motivation, moderate impact on bodily functions (poor hygiene, sleep disturbance, insomnia), impulse control and attention/concentration, minimal impact on consciousness, insight and judgment, executive, memory and motor activity and no impact on language, psychotic symptoms and other neuropsychological problems. The SW adds the comment that the appellant is primarily influenced by anxiety ("agoraphobia"), depression and pain symptoms.

In the GP Letter, the GP writes that the appellant is "continuously and substantially impacted to a moderate or severe degree in most areas of her cognitive and emotional function." In the Questionnaire, the GP writes that she believes that the appellant has a severe mental impairment including anxiety, depression and worsening agoraphobia.

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

In the PR, the GP comments that the appellant "has impaired function on a daily basis with performing [DLA]." The GP notes that the appellant is continuously restricted with basic housework, daily shopping, mobility inside and outside of the home, use of transportation and social functioning. The GP notes further that the appellant is periodically restricted with personal self care and meal preparation and not restricted in her management of medications or management of finances. Where the appellant is periodically restricted, the GP has added the comment that this means that she is impaired on "most days". The GP notes further that with respect to social functioning, the appellant withdraws and isolates herself and avoids contact with others due to depression and agoraphobia.

The GP provides further comments with respect to a number of tasks of DLA, writing that it is difficult for the appellant to maintain personal self care, specifically bathing and dental hygiene, due to low mood and motivation. The appellant's ability to shop and use transportation is described as significantly affected by agoraphobia. The appellant cooks very easy meals due to pain and decreased motivation and energy.

In the AR, the SW notes that the appellant is independent with all tasks of personal care including dressing, grooming, bathing, toileting, feeding herself and regulating her diet and transfers in and out of bed and on and off of chairs. The SW comments that sometimes the appellant will have no motivation to bathe which will last "for days" and that she neglects healthy eating.

The SW notes that the appellant can independently perform all tasks of basic housekeeping but sometimes finds it hard due to a lack of motivation. The appellant is similarly described as independent with all tasks of shopping.

For tasks relating to meals, the appellant is described by the SW as requiring periodic assistance from another person with meal planning, food preparation, cooking and safe storage of food and the SW adds the comment that the appellant often relies on restaurants and fast food.

The SW notes that the appellant can independently perform all tasks relating to the payment of rent and bills, medications and transportation.

With respect to social functioning, the SW has indicated that the appellant is independent in her ability to develop and maintain relationships and interact with others but that she has limited contact with anyone. With respect to her ability to deal appropriately with unexpected demands and securing assistance from others, the SW writes that these areas are "not applicable" as the appellant has very limited contact or support from anyone. Similarly, the SW writes that the appellant isolates due to agoraphobia and depression with the result that she receives minimal support or contact from others when making appropriate social decisions.

The SW adds that the appellant experiences marginal functioning in both her immediate and extended social networks, highlighting that she has little significant participation and communication, minimal relationships and minimal acts to fulfill basic needs.

In the GP Letter, the GP writes that the appellant is restricted in her ability to do DLA on a daily basis and she disagrees with the SW's assessment of the appellant's ability to develop and maintain relationships and "on several other issues." In the Questionnaire, the GP writes that constant pain impairs her ability to walk for long distances and that she has to stop to rest. The appellant is also described as being impaired from leaving her home due to agoraphobia and that she cannot lift her children.

In the New Page 12, the GP has not made any changes to the original page 12 of the PR other than to add that where the appellant is periodically restricted, that equates to "80% of the time" and that she has impairments in self-care, grooming, bathing and meal preparation. The appellant feeds her children the simplest things possible due to depression, anxiety, low motivation and infrequent access to the store. The appellant's impaired social functioning is attributed to agoraphobia.

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

In the PR, the GP notes that the appellant does not require any prostheses or aides for her impairment but that she requires help with housework as well as child care in order to attend group therapy. In the AR, the GP indicates that the appellant's mother helps her with her children and that the appellant does not require assistance through the use of assistive devices or assistance animals.

In the Questionnaire, the GP writes that the appellant's friends drive her to the grocery store as she is unable to walk there or carry purchases home and that another friend cleans her home on a regular basis. Due to her agoraphobia, the appellant has significant difficulty leaving her home on a daily basis and that she has difficulty going out in public on a daily basis.

### **Evidence On Appeal**

#### ***Appellant's Evidence At Hearing***

At the hearing, the appellant stated that she has been with the GP for 3 years now and that she has 3 children. She stated further that she has seen the SW 4 times for counselling related to her PTSD, anxiety and depression and that each session is 1 hour in duration. The appellant acknowledged seeing the GP 8 times in the 12 months prior to the PR being completed but that she had additional interaction with the GP when she would take her children to the GP for medical treatment. The appellant described her agoraphobia as causing her to be uncomfortable being outside of her apartment. She noted that a friend has helped drive her to the store and that the same friend has done some shopping for her.

In response to questions, the appellant was unclear as to whether she had met with the GP to assist in the preparation of the New Page 12.

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

At the hearing, the ministry stated that it relied on the reconsideration decision and that more specifically, the appellant did not satisfy the legislative criteria that are required for the PWD designation. In response to questions, the ministry stated that it considered all of the documentary evidence in reaching its decision.

## 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, that she has an impairment that is likely to continue for at least two years and that she suffers from a severe mental impairment. However, the ministry was not satisfied that the evidence establishes that:

- the appellant has a severe physical 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 and the SW.

### **Severity of mental impairment**

As noted above, the minister determined in the Reconsideration Decision that the appellant suffers from a severe mental impairment.

### **Severity of physical impairment**

The appellant's position is that her chronic pain constitutes 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 writes that the appellant "has been impaired in her function on a daily basis (pain, mental health) for several years." This opinion is contrasted however against the GP's evidence that the appellant's functional skills include the ability to walk 4 or more blocks and climb 5 or more steps unaided, lift 15-35 lbs and remain seated for less than 1 hour. Similarly, in the Questionnaire the GP writes that the appellant has a

severe physical impairment which has existed for years and which is worsening but on review of the GP Letter, the advice of the GP is that the appellant maintains virtually the same level of functionality in respect of her ability to walk, climb stairs and remain seated albeit with pain, with the only change being the appellant's ability to lift which, according to the GP in the GP Letter is now reduced to nil.

In the AR, prepared 4 months prior to the GP Letter, the SW has assessed the appellant as independent walking indoors and with lifting, carrying and holding minimum amounts, while requiring periodic assistance with walking outdoors, climbing stairs and standing.

The evidence of the GP as between the PR and the GP Letter is that the appellant has maintained her functional capabilities, albeit with pain, other than her ability to lift. The AR similarly indicates that the appellant is largely independent in her functional capabilities other than the requirement of periodic assistance with some. Given the state of the appellant's functional abilities as set out above and considering the evidence as a whole, the panel finds that the ministry was reasonable in its determination that the evidence did not support a finding that the appellant 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 she is directly and significantly restricted performing several DLA. The appellant's advocate specifically points to the evidence of the GP, both in the PR and the GP Letter, and argues that in making its determination, the minister must allow for the possibility of inconsistencies between the PR and the AR and that the opinion of the GP alone should suffice and be preferred over that of the SW, particularly given that the PR is more detailed and that the GP has a longer professional relationship with the appellant.

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 his 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 provide an opinion that an applicant's severe impairment directly and significantly restricts his or her DLA, continuously or periodically for extended periods. In the present case, while the appellant has provided evidence of the challenges that she faces with DLA both in the SR and through her direct evidence, the legislation is clear to satisfy the criteria the evidence must come from a prescribed professional. In the present case, this evidence has been provided by two prescribed professionals - the GP and the SW.

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. It is not uncommon that two different prescribed professionals completing the PR and the AR make inconsistent, or in some cases, wholly opposite findings. Where such a scenario arises, the panel may determine that one should be preferred over another dependent on the evidence but it must be remembered that the panel in this case is not tasked with replacing the ministry's reconsideration with its own. Rather, the panel must determine whether, after reviewing all of the evidence, the reconsideration decision is reasonably supported by the evidence or alternatively, a reasonable application of the applicable enactment in the circumstances of the appellant.



In the PR, the appellant's GP has described her as requiring continuous assistance with tasks of DLA that are of a physical nature including basic housework, daily shopping and mobility inside and outside the home. However, the panel views this opinion in light of the GP's evidence that the appellant is able to walk 4 or more blocks, climb 5 or more steps and lift items that weigh between 15 and 35 lbs. While the GP has added in the GP Letter that the appellant's physical condition has worsened, the impact on her DLA remains the same in the New Page 12 as it did in the PR.

Turning to the AR, the panel notes that the SW has assessed the appellant as being independent in all tasks of DLA other than meal planning, food preparation, cooking and safe storage of food and that for each, she requires periodic assistance from another person, often relying on fast food and restaurants.

While the appellant's advocate submits that the opinion of the GP alone should be preferred in making a determination of the appellant's ability to perform DLA, the panel must consider all of the evidence in making its determination particularly given that the SW has relied on the GP's evidence in the PR in reaching her conclusions. In the present case, the panel has found that the evidence of the GP in respect of the appellant's functional abilities, both in the PR and the GP Letter is inconsistent with the evidence of her ability to perform tasks of DLA. Further, the SW has, after interviewing the appellant and reviewing the PR, assessed the appellant's ability to perform DLA as demonstrably different than the GP.

The evidence in this matter is not such that the panel may prefer that of one prescribed professional over another. While the GP and the SW have differing opinions (as they are entitled to) as to the appellant's ability to perform tasks of DLA, there are further inconsistencies within the PR and the GP Letter. Given these inconsistencies, 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 she requires assistance with DLA due to her physical and mental impairments.

The ministry's position 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 a reasonable application of the applicable enactment in the circumstances of the appellant, and therefore confirms the decision.



PART G – Order