

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of January 12, 2016 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 information before the ministry at the time of reconsideration included the following:

- The appellant's PWD application form consisting of the appellant's self-report dated June 30, 2015 along with a physician's report ("PR") completed by the appellant's general practitioner (the "physician") dated August 24, 2015 and assessor's report ("AR") completed by a social worker (the "social worker"), dated July 18, 2015. The social worker attached 5 typed pages to the AR in order to provide more detail about the appellant's impairments (the "AR Appendix").
- A letter from the social worker to the ministry's reconsideration officer dated December 18, 2015.

### Admissibility of Additional Information

Prior to the hearing, the appellant submitted to the Tribunal office the following::

1. A letter from the physician, dated January 20, 2016.
2. A letter from the social worker, dated December 17, 2015.
3. A letter from the social worker, dated January 25, 2016.

In Document 1 the physician primarily endorsed the information that had previously been provided by the social worker, and included more details regarding the appellant's health history. Document 2 appears to be an earlier draft of the social worker's letter to the reconsideration officer dated December 18, 2015. The panel finds that Documents 1 and 2 are consistent with, and tend to corroborate, information that was before the ministry regarding the appellant's impairments. Accordingly, the panel has admitted Documents 1 and 2 into evidence in accordance with section 22(4) of the *Employment and Assistance Act*. Document 3 consists substantially of argument and the panel has accepted it as such.

On appeal, the panel heard oral testimony from the appellant. The oral evidence provided additional detail that was consistent with, and tended to corroborate, information that had been before the ministry at reconsideration and the panel has admitted it into evidence.

The ministry relied on its reconsideration decision and provided no additional information.

### Preliminary Matters

1. On appeal, the appellant informed the panel that the social worker had been intending to appear as her advocate, but he had suffered a serious health issue and would not be available to attend before April, if then. The appellant said she had contacted Tribunal staff and had been advised that she had the option of attending the hearing to request that the hearing be adjourned. After explaining the hearing process to the appellant, and assuring her that her wishes with respect to whether or not she wanted to adjourn would be accorded considerable weight, the appellant said that she would be able to answer questions about herself but that she wouldn't be able to explain statements made by the prescribed professionals in the documentation. Ultimately she stated that she would leave it up to the panel as to whether the hearing should proceed. The ministry took no position on adjournment but confirmed that it was ready to proceed if that was the panel's decision.

After conferring privately, the panel decided to proceed with the hearing. The statutory regime contemplates that an appeal will generally be heard within 15 business days of delivery of the Notice of Appeal to the Tribunal. In this case, the social worker will apparently not be available until April at the earliest, and it is not certain that he will be available even then. The panel concluded that regardless of the outcome of the appeal it would be in the appellant's best interests to have it adjudicated sooner rather than later, since she would either be in a position to be eligible for assistance sooner, or she would be in a position to reapply for PWD designation with a better idea of any deficiencies in her evidence.

2. The appellant stated, as noted by the social worker in his letter of January 25, 2016 that on the first page of Appendix A of the reconsideration decision, the ministry referenced the evidence of a medical practitioner (referred to herein as "Doctor X") which the appellant says she does not know and has never met. She pointed out that there is no other reference to Doctor X anywhere in the appeal record. She argued that this circumstance raises the question as to whether the reconsideration officer "may possibly have been attending to some other source of information at the same time as attending to [the appellant's] file." She requested that this should be considered as one of her reasons for appeal "because of suspicion that this name comes from a different reference and may have influenced the decision of the Adjudicator."

The appellant has the right to see and fully respond to any evidence relied upon by the ministry. If the ministry did rely on evidence from a Doctor X that was not shared with the appellant, it would be grounds for finding the ministry's decision to be unreasonable. The ministry representative stated that the ministry sometimes does retain an independent medical practitioner on a file, but that the medical practitioner and his evidence would always be explicitly disclosed. On reviewing the record and considering the context, the panel finds it likely that the ministry's reference to Doctor X was simply an inadvertent error. The ministry referred to the physician's evidence in great detail throughout its reconsideration decision, but there is only the one paraphrased reference to Doctor X's evidence. In the panel's view, the evidence referred to by the ministry in the impugned passage likely reflects the ministry's assessment of the physician's evidence rather than that of an unknown Doctor X. Accordingly, the panel finds that the ministry's reference to Doctor X is not a basis for rescinding its reconsideration decision.

\* \* \*

The panel reviewed the evidence as follows:

#### Diagnoses

- In the PR the physician (who has known the appellant for 4 years) provided diagnoses of depression (onset prior to 2010), anxiety (onset prior to 2010), and fibromyalgia (onset 2013).
- The physician commented "...has tried to work and major effort has been put into her education. Worsening anxiety + mood along with soft tissue pain is now really affecting her social functioning."

### Physical Impairment

In the PR the physician reported that:

- “Psychosomatically [the appellant] carries a lot of soft tissue pain and myalgia which greatly affects her ability to be physically active. Until the last 2 years, she was running regularly...”
- In terms of physical functional skills, the physician reported in the PR that the appellant can walk 4+ blocks unaided on a flat surface, climb 5+ stairs unaided, can lift 5 to 15 pounds, and can remain seated for 1-2 hours.

In his letter of January 20, 2016 the physician wrote that:

- He is now aware that the information he had provided in the PR “did not fully support the information given to you from [the social worker].”
- He fully supports and endorses the information provided by the social worker.
- The appellant is “extremely vulnerable and is absolutely not fit to be working in any capacity.”
- She is awaiting consultation with a rheumatologist regarding her soft tissue and joint pains, “which are currently quite debilitating for her and prevent her from completing many ADL’s.”

In the AR and AR Appendix the social worker reported that:

- The appellant “reports to feel severe muscle and joint pain all of the time and about ½ the time it is completely debilitating.”
- The appellant takes significantly longer than typical with mobility indoors/outdoors and climbing stairs, and requires continuous assistance with standing, lifting, carrying/holding.
- The appellant uses furniture to support herself when walking indoors, and can walk less than 1 block outdoors.
- She can carry “8 lbs in each hand a distance of 10-20 feet.”
- The appellant experiences shortness of breath with all activities including personal care.

In his letter of December 18, 2015 the social worker stated that:

- The appellant “has reiterated that [the social worker’s] notations are correct. Walking is variable. Five of seven days of the week on average she is not able to walk for more than half a block.”
- The appellant “reiterated that five pounds, if held to her chest, is the maximum amount she could carry.”

In her self-report the appellant stated that:

- She uses furniture and the assistance of others to move around. She walks on days that she is able to.
- She doesn’t always get a full night’s rest.

### Mental Impairment

In the PR the physician indicated that:

- The appellant has no difficulties with communication, but then indicated “cognitive” as a cause of difficulties.
- The appellant has “significant life trauma” and “suffers from depression and fleeting anxiety...her anxiety is marked, her concentration poor, energy levels very diminished.”
- The appellant has significant deficits with 4 of 12 categories of cognitive and emotional

function: memory, emotional disturbance, motivation, and attention/sustained concentration.

- Regarding the estimated duration of the impairment, the physician commented “significant life events, very emotional person.”

In his letter of January 20, 2016 the physician wrote that:

- The appellant’s mental health “has been affected by life events, both past and current and, this has resulted in cognitive strain. My initial completion of the PWD did not highlight this to the extent that is true. Having consulted with [the social worker], who has had the ability to spend far longer with [the appellant] than I, I agree both her physical and mental health has been severely affected.”

In the AR and AR Appendix the social worker reported that:

- The appellant is “extremely emotionally labile.” (emphasis included)
- With respect to the appellant’s ability to communicate, her hearing is satisfactory, but her speaking and writing are poor (“speech is clear but tangential...writing creatively is very difficult...”) While reading the appellant “needs extreme quiet – no distractions and repetitions.”
- The appellant took 7 years to complete a 4 year degree program as she “required more time and help than average students...”
- The appellant experiences major impacts in almost all categories of cognitive and emotional functioning.
- The appellant does not like to be looking for a place to park her car, as the requirement to use her judgment can be a stressor and trigger for anxiety.
- The appellant has been resistant to medications because of “huge fear of developing addictions”, but as a result of discussions with the social worker she has agreed to raise the matter of antidepressants with the physician.
- The appellant has often experienced abuse since childhood.
- The appellant “reports to be severely depressed. There is no reason to question the accuracy of her personal assessment of her own mental health status.”
- In the social worker’s opinion there is the possibility of an undiagnosed traumatic brain injury from a car accident, developmental issues from fetal alcohol, an attention deficit (“ADD/ADHD”), or post-traumatic stress disorder (“PTSD”). There is also the “possibility of additional neuropsychological damage...”
- The appellant has had “no opportunity to explore her issues through counseling previously and the sessions with [the social worker] have indicated that such an option in future might lead to positive results for her.”
- The appellant “presented as a very difficult individuals (sic) to get straight answers from. This is in part the reason for such extensive interviewing process.”
- The appellant “reports to have difficulty with decisions...She prefers to have a passenger to navigate for her.”
- “Anxiety and depression present in a major way at this time and appear to have intensified following a tumultuous work experience after the completion of her degree...the emotional demands on her have been enormous and many are not yet resolved.”

In his letter of December 18, 2015 the social worker stated that:

- He met with the appellant for a total of 21 hours while completing the PWD application.
- The appellant’s depression and anxiety are “more than fleeting.”

In her self-report the appellant stated that:

- Her hearing is “too good” because she sometimes hears background noises louder than someone speaking. Her vision appears to be getting worse.
- Reading and writing make her feel exhausted.

In her oral testimony the appellant stated that:

- She was designated as being disabled at the university where she got her degree. She could not listen to lectures and take notes at the same time, so she was provided with the lecturer’s notes ahead of time. Without special consideration and support for her disabilities, she would not have been able to complete the program.
- She finds it embarrassing to discuss her limitations so she tends to tell others that she is fine. She often even “lies to” herself trying to deny the extent of her impairments.
- She tends to see the physician for individual issues. She did not realize until she spent time with the social worker that all her individual ailments are “tied together.”

In response to questions from the panel the appellant stated that:

- She was not with the physician when he completed the PR. The application forms went to the social worker first, then were sent to the physician by the social worker.
- She has not yet been able to see a rheumatologist.
- She hasn’t asked the physician about antidepressant medication. She has been under stress so never thought to talk to him.
- She abused drugs and alcohol for a period as a youth and fought hard to stop. Accordingly, she has a strong aversion to relying on medication.
- She would love to go to counselling on a regular basis. She has been referred to a local mental health clinic, but she never gets to see the same person twice and it is traumatizing every time she has to disclose to a new person.
- She has seen a general medical practitioner 3 or 4 times since the physician referred her to the social worker, but she couldn’t say when she last saw the physician because he works in a clinic and she often ends up being seen by other doctors.

### DLA

In the PR the physician reported that:

- The appellant has not been prescribed any medication and/or treatments that interfere with her ability to perform DLA.
- The appellant experiences periodic restrictions in 7 of the 10 prescribed DLA: personal self-care, meal preparation, basic housework, daily shopping, mobility indoors/outdoors, management of finances, and social functioning. With respect to social functioning, the physician commented “at times poor communication, slowed speech, tearful.”
- The appellant continuously experiences restrictions in the DLA of use of transportation.
- It is “unknown” as to whether the appellant experiences restrictions with the DLA of management of medications.
- The physician explained his use of the term “periodic” as “dependant of anxiety level.”
- He described the degree of restriction as “at times significant.”

In the AR and AR Appendix the social worker indicated that:

- The appellant independently manages all tasks related to the DLA of management of personal finances (pay rent and bills).
- The appellant requires continuous assistance, or takes significantly longer than typical, with almost all tasks related to almost all other DLA.
- Regarding the DLA of social functioning, the appellant has very disrupted functioning with her immediate social network (“[The appellant] has a pleasant personality and she enjoys giving her time to others but it seems she feels she has little left to give. She is clearly retreating from people.” She has marginal functioning with her extended social network (“[The appellant] will go to social activities in the community and engage superficially – though she is capable of more intense interaction with greater depth, but does not.”)

In her self-report the appellant stated that:

- She lifts what she needs to because “...I don’t have a choice. I pack my bags from the grocery store to the car, sometimes when I am really overtired I ask for help with carry out...”

#### Help with DLA

In the PR the first physician indicated that the appellant does not require any prostheses or aids for her impairment. In response to a question as to what assistance the appellant needs with DLA, the physician responded “general help [and] assistance from family members.”

In the AR the social worker reported that the appellant does not have an assistance animal.

In her self-report the appellant stated that she frequently asks her child to help with housework/laundry, and that she hates giving the child so much responsibility at such a young age.

## PART F – Reasons for Panel Decision

The issue on this appeal is whether the ministry's decision to deny the appellant designation as a PWD 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.

\*\*\*\*\*

### **Severe Physical Impairment**

The appellant's position is that her fibromyalgia coupled with shortness of breath, fatigue, and near constant pain constitute a severe physical impairment. She argued that the ministry substantially dismissed the social worker's evidence and gave undue weight to the physician's evidence. She stated that the physician did not initially have a full understanding of the extent of her impairments since she only gets to see him for short appointments about specific, individual issues. She also argued that the physician ultimately endorsed the assessment performed by the social worker, and that this resolves any inconsistencies in the evidence as referenced by the ministry.

The ministry's position, as set out in its reconsideration decision, is that a severe physical impairment has not been established. The ministry argued that the social worker is not a medical practitioner, and that the level of physical functioning identified by the physician is not consistent with a severe physical impairment.

#### **Panel Decision:**

A diagnosis of a serious medical condition 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. Section 2(2) of the EAPWDA requires that an impairment must be diagnosed by a medical practitioner who expresses the opinion that it is likely to continue for at least 2 years.

To assess the severity of an impairment one must consider the nature of the impairment and the extent of its impact on daily functioning as evidenced by functional skill limitations and the degree to

which performing DLA is restricted. The legislation makes it clear that the determination of severity is at the discretion of the minister. The minister must consider all relevant evidence (including that of the appellant) though the fundamental basis for the analysis is the evidence from prescribed professionals – in this case, the physician and the social worker. In exercising its decision-making power the ministry cannot merely defer to the opinion of the professionals with respect to whether the statutory requirements are met as that approach would amount to an improper fettering of discretion. The onus is on the appellant to demonstrate that she satisfies the statutory criteria for PWD designation. It is a role of the professionals to provide the evidence on which the ministry may make its determination.

In this case there are gaps and inconsistencies in the evidence which are problematic. The level of physical functioning described by the physician in the PR is at the higher end of the scale and is not indicative of a severe physical impairment. This is consistent with the physician's evidence that the periodic restrictions which apply to most DLA are dependent on the appellant's anxiety level, rather than to a physical condition, and that there is a psychosomatic element to her physical impairment. The physician's evidence contrasts starkly with the social worker's evidence which describes the appellant as someone who is unable to walk a half block. There are also internal inconsistencies in the social worker's evidence, such as his description of the appellant being able to carry 8 pounds in each hand and then subsequently stating that she can only lift 5 pounds centered near her chest. The social worker also referred to physical impairments such as shortness of breath that were not described by the physician.

In his letter of January 20, 2016 the physician endorsed the social worker's evidence, saying that he believes it is a fair and accurate representation of the appellant's "current challenges". The appellant argued that this cures the inconsistencies in the professional evidence. The panel notes that the physician had the AR and AR Appendix in hand at the time he completed the PR, but has provided no rationale as to why his evidence in the PR "did not fully support" the social worker's information at first instance, or what has caused him to change his mind in the interim. The panel has been unable to give the physician's letter of January 20, 2016 significant weight in light of its wholesale, broad-brush adoption of the social worker's evidence and the absence of an explanation for the change in his position.

Based on the level of physical functioning described by the physician in the AR, and the inconsistencies between the professionals, the panel finds that the ministry reasonably concluded that the evidence falls short of establishing a severe physical impairment.

### **Severe Mental Impairment**

The appellant's position is that she suffers from long-standing depression and anxiety which constitute a severe mental impairment. She argued that she has a history of trauma and abuse which causes major impacts to her cognitive and emotional functioning. She relied on the evidence of the physician and the social worker to demonstrate that she experiences cognitive and emotional dysfunction. However, for the same reasons she relied upon above under the heading Severe Physical Impairment, she argued that greater weight should be given to the social worker's evidence than to the physician's evidence from the PR, especially in light of the endorsement ultimately provided by the physician.

The ministry's position is that the evidence is indicative of a moderate, rather than a severe, mental impairment. The ministry argued that the physician described the appellant's anxiety as being "fleeting", and that he did not describe the severity, frequency or duration of her depression. The ministry also argued that the social worker relied upon symptoms of PTSD and ADD/ADHD which were not described by the physician.

*Panel Decision:*

There are significant inconsistencies between the physician's evidence in the PR and the social worker's evidence. For the reasons noted above under the discussion of Severe Physical Impairment, the panel has concluded that it cannot give significant weight to the physician's letter of January 20, 2016 endorsing the social worker's evidence.

The panel notes that the social worker identified far more major impacts to cognitive and emotional functioning than did the physician, but that in doing so the social worker took into consideration mental conditions such as possible brain trauma, PTSD, ADD/ADHD, fetal alcohol syndrome and "possible additional neuropsychological damage" which were not diagnosed by a medical practitioner.

Finally, the panel notes that there is little evidence before it regarding potential treatments to resolve or mitigate the appellant's mental impairments. The social worker stated that counselling may provide positive results for the appellant, but the only treatment regime prescribed by the professionals for the mental health issues appears to be a referral to a mental health clinic where there is no consistent treatment or follow-up. The social worker also suggested that the appellant should explore the use of antidepressants with the physician but that has not taken place. One would expect that if the appellant's functioning is impacted to the extent described by the social worker (as endorsed by the physician) that there would be some professional evidence regarding the prognosis for a comprehensive mental health treatment regime.

Based on the inconsistencies and gaps in the evidence as detailed above, the panel finds that the ministry reasonably concluded that the evidence falls short of establishing a severe mental impairment.

**Significant Restrictions to DLA**

The appellant's position is that severe physical and mental impairments directly and significantly restricted her ability to perform DLA. She argued that she is restricted in most tasks related to virtually every DLA.

The ministry's position is that there is not enough evidence to confirm that the appellant is significantly restricted in her ability to perform DLA continuously or periodically for extended periods. While acknowledging that the appellant experiences restrictions with DLA due to depression and anxiety, it argued that the physician did not describe the frequency or duration of the appellant's anxiety.

*Panel Decision:*

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. Finally, 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. Inherently, any analysis of periodicity must also include consideration of the frequency. All other things being equal, a restriction that only arises once a year is less likely to be significant than one which occurs several times a week. Accordingly, in circumstances where the evidence indicates that a restriction arises periodically, it is appropriate for the ministry to require evidence of the duration and frequency of the restriction in order to be “satisfied” that this legislative criterion is met.

As noted previously, there are significant inconsistencies in the professional evidence. The physician indicated that the appellant’s anxiety is “fleeting” and “periodic”, and that the consequent restrictions are “at times” significant, but did not describe the frequency or duration of these periods. The social worker indicated that most restrictions are continuous, but provided little actual description of the nature of any assistance received or required by the appellant.

Based on the foregoing evidence and analysis, the panel finds that the ministry reasonably concluded that this legislative criterion was not satisfied.

### **Help with DLA**

The appellant’s position is that she requires help with virtually all DLA due to the restrictions she experiences.

The ministry’s position is that since it has not been established that the appellant’s DLA are significantly restricted, it cannot be determined that significant help is required from other persons.

### **Panel Decision**

A finding that a severe impairment directly and significantly restricts a person’s ability to manage her DLA either continuously or periodically for an extended period is a precondition to a person requiring “help” as defined by section 2(3)(b) of the EAPWDA. For the reasons provided above, that precondition has not been satisfied on the balance of probabilities in this case.

Accordingly, 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 conditions affect her ability to function. However, for the foregoing reasons, the panel finds that the ministry’s decision finding the appellant ineligible for PWD designation is a reasonable application of the legislation in the circumstances of the appellant. The panel therefore confirms the ministry’s decision.