

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of January 6, 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 July 23, 2015) along with a physician’s report (“PR”) completed by the appellant’s general practitioner (the “physician”) dated July 29, 2015 and assessor’s report (“AR”) completed by a doctor of chiropractic (the “chiropractor”), dated August 6, 2015. The appellant’s self-report consists of a questionnaire workbook (the “Workbook”) provided by her local ministry office and completed by the appellant.
- A questionnaire developed by the appellant’s advocate and completed by the physician on December 9, 2015 (the “Physician’s Questionnaire”).
- A questionnaire developed by the appellant’s advocated and completed by the chiropractor on December 16, 2015 (the “Chiropractor’s Questionnaire.”)
- A letter from the appellant’s landlord, dated December 8, 2015 (the “Landlord’s Letter.”)
- A number of medical imaging reports and referral letters for the period 2006 to 2015 (collectively referred to as the “Medical Reports”).
- The appellant’s written statement included with her Request for Reconsideration of December 1, 2015.
- Printout of Wikipedia article on obesity.

### Admissibility of Additional Oral Information

The oral statements of the appellant and her representative added additional detail that substantially tended to reiterate, or otherwise corroborate information that had been before the ministry at reconsideration. The panel accepted these statements into evidence in accordance with section 22(4) of the *Employment and Assistance Act*.

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

The panel reviewed the evidence as follows:

### Diagnoses:

In the PR the physician diagnosed the appellant with osteoarthritis (mostly feet and ankles and some wrists/hands), fibromyalgia (neck, shoulders, and back), carpal tunnel syndrome, irritable bowel syndrome (“IBS”), and anxiety/depression/insomnia neurosis. In response to a question in the PR asking for the applicant’s height and weight if relevant to the impairment, the physician indicated a BMI (body mass index) of 36, which according to the Wikipedia article may indicate either “severe” obesity or “morbid” obesity.

### Physical Impairment:

In the PR the physician reported that:

- He has been the appellant’s physician for 18 years and has seen her 7 times in the past 12 months.
- The appellant displays “moderately severe variable symptoms – unable to sit, stand, walk, climb stairs for any duration.”

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- In terms of functional skills the appellant can walk 2 to 4 blocks unaided on a flat surface, climb 2 to 5 steps unaided, can lift 5 to 15 pounds, and can remain seated for less than 1 hour.
  - In response to the question “How does the medical condition impair this person?” the physician replied that the appellant’s Workbook “gives intricate detail.”

In the AR the chiropractor reported that:

- He has known the appellant since 1993 and has seen her 2 to 10 times in the past year. He conducted an office interview with the appellant as an additional information source to complete the AR.
- The appellant is independent in her ability to walk indoors/outdoors, climb stairs, and stand. She requires periodic assistance with lifting/carrying/holding. He commented “Prolonged standing painful. Stairs difficult at times.”

In the Physician’s Questionnaire, he indicated that the cumulative effects of the appellant’s impairments are “severe to her” and “quite disabling for her.”

In the Chiropractor’s Questionnaire, he responded to the question about the cumulative effects of the appellant’s impairments by stating in part that “...even if at present she appears not to qualify, her health challenges are putting her on a pathway to that end even though she is doing her best to circumvent this...” He expressed his professional opinion that the appellant would benefit from 1-2 treatments per week to “remain functional” in the years to come.

In the Landlord’s Letter he stated that:

- The appellant’s IBS causes her to be constantly in and out of the bathroom all day.
- Her osteoarthritis has her starting each day limping from mild pain in her feet and ankles. If she sits for more than an hour it takes longer to stand up and get moving again.
- If she grips any kind of tools (gardening, cooking, crafting, cleaning, writing) her hands ache badly for the rest of the day.
- Insomnia disrupts the appellant’s sleep by waking every hour or two. She has frequent afternoon naps because of this.
- Fibromyalgia causes moderate to severe pain in her upper legs and/or upper back, shoulders and neck 3-5 times a week, sometimes lasting for several hours.
- An organic diet used to ease the symptoms of IBS and fibromyalgia, but the appellant can’t afford organic foods anymore.
- Depression and anxiety have stopped the appellant from attending social events with her friends.

In the Workbook the appellant stated that:

- She experiences burning and tingling pain in her hands and feet. Her elbow sometimes “locks up”.
- Her feet get sore much faster if she has to walk on an uneven surface or gravel.
- If she grips anything for too long her hands will flare up and stay achy for days.

The appellant, either herself or through her representative, stated in oral testimony that:

- She has to go to the bathroom 20 to 40 or more times a day.
- She wakes up several times a night and gets little to no REM sleep. If she did not have

insomnia she could probably manage her other conditions through diet and exercise. She tried sleep medication prescribed by her physician but experienced adverse side effects.

- She is often so fatigued by lack of sleep that for reasons of safety she foregoes driving to get essentials, thereby often having to do without.
- The physician demonstrated his endorsement of the Landlord's Letter by underlining various passages in it.

### Mental Impairment

In the PR the physician reported that:

- The appellant has no difficulties with communication other than decreased hearing in her right ear.
- The appellant has significant deficits in 3 of 12 categories of cognitive and emotional function: emotional (depression), motivation, and language (auditory), with no other comments provided.

In the AR the chiropractor reported that:

- The appellant's ability to communicate is good in terms of speaking/reading/writing, and satisfactory in terms of hearing.
- The appellant experiences major impacts in 3 of 14 categories of cognitive and emotional function: emotion, attention/concentration, and motor activity. She experiences moderate impacts in another 4 categories: consciousness, impulse control, executive, and motivation. There are minimal or no impacts in the remaining 7 categories. He commented "Depression/anxiety".

In the Workbook the appellant reported that:

- With respect to communication skills, she has difficulty using pens and pencils and difficulty hearing.
- She experiences depression, fear, and lack of motivation.
- Social activity is "way down" because of pain, or the anticipation of pain.

### DLA

In the PR the physician reported that:

- The appellant has not been prescribed any medications or treatments that interfere with her ability to perform DLA.
- The appellant's impairments directly and continuously restrict her ability to perform four of the ten prescribed DLA: meal preparation, basic housework, daily shopping, and mobility indoors/outdoors. He indicated there are no restrictions with the remaining DLA.
- All DLA take longer and cause pain during and well after finishing.
- The appellant has to ask her landlord for help daily due to hands and feet symptoms.

In the AR the chiropractor reported that:

- The appellant independently manages almost all tasks related to all DLA, except that she requires periodic assistance from another person with the tasks of:
  - Feeding herself ("drops things, etc.") during the DLA of personal self-care.
  - Basic housekeeping ("Has to watch gripping cleaning equipment, etc.").

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- Carrying purchases home (“walking/carrying difficult @ times”) during the DLA of daily shopping.
  - Cooking (“fine motor control affected” in wrists and hands) during the DLA of meal preparation.
  - With respect to the DLA of social functioning, the appellant independently manages all tasks except that she requires periodic support/supervision with developing and maintaining friendships (“tends to isolate self”) and dealing appropriately with unexpected demands (“gets stressed/anxious.”) She exhibits good functioning in both her immediate and extended social networks.
  - The appellant “...is not in a position to be gainfully employed for any significant positions as she has too much pain [and] dysfunction as a result in her wrists/hands, ankles/feet [and] spine.”

In the Physician’s Questionnaire he agreed that the appellant has had to downsize to a small travel trailer in order to manage household chores and that her landlord helps her on a regular basis with lifting and carrying. The physician stated that the Landlord’s Letter provides an “excellent summary”.

In the Workbook the appellant reported that:

- With respect to the DLA of social functioning, she is unable to maintain relationships, and often declines invitations because her food allergies make her feel awkward.
- Regarding meal preparation, she has trouble with “small manual finger tasks”, chopping/peeling, using a can opener, lifting/carrying pots, holding/gripping.
- She sometimes has to force herself to eat as she has no appetite due to pain.
- She has no difficulty with the management of medication.
- She has no difficulty with managing finances except for controlling impulse buying.
- She has difficulty with most tasks related to housekeeping, which takes “longer than it should” and leaves her sore afterwards.

In her written statement as part of her Request for Reconsideration, the appellant stated that her landlord assists her with lifting, carrying, and yard work.

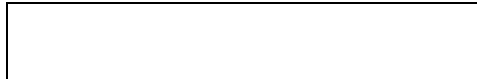
In the Landlord’s Letter he indicated that the appellant does the “chores for her home [and] life” herself because she has no one else to do them. He stated that he helps the appellant as much as he can, but he has health issues of his own. He also stated that with all these issues it would be impossible for the appellant to maintain full time work for any length of time, and the only reason the appellant is able to continue her part-time work is because her employer is very understanding of her health issues.

Help with DLA:

In the PR the physician indicated that:

- The appellant lives alone in a travel trailer on her landlord’s property.
- The appellant has to ask her landlord for help daily due to her hand/foot symptoms.
- The appellant requires prostheses or aids for her impairment, in the form of a disability parking permit.

In the AR the chiropractor indicated that assistance with DLA is provided by friends. In response to a



question as to what help the appellant may require that is not currently available, the chiropractor replied that she “May need help for shopping, meal prep, household chores, etc.” He indicated that she routinely uses “nutritional aids” as an “assistive device”, and that no other equipment or device is required. The chiropractor reported that the appellant does not have an assistance animal.

## 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

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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.

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### **Severe Physical Impairment**

The appellant's position is that the cumulative impacts of her osteoarthritis, fibromyalgia, carpal tunnel syndrome, irritable bowel syndrome, and obesity result in a severe physical impairment. She argued that these conditions exacerbate each other on alternate days, and are in turn made worse by her mental impairments. The appellant emphasized the reference to severe obesity in the Wikipedia article and the physician's reference to moderately severe variable symptoms affecting functionality. She also argued that by his references to the Workbook and the Landlord's Letter in the PR and the Physician's Questionnaire respectively, the physician endorsed the descriptions of the severity of the impairments contained in those documents, and thereby indicated that they should be given considerable weight.

The ministry's position, as set out in its reconsideration decision, is that the appellant's limitations in mobility and physical ability indicate a moderate, rather than severe, physical impairment. The ministry argued that because of inconsistencies between the information provided by the physician and the chiropractor, it is difficult to develop a clear and coherent picture of the degree of impairment. Finally, the ministry argued that the Physician's Questionnaire and the Chiropractor's Questionnaire do not describe limitations or restrictions with mobility, physical ability, or functional skills.

#### **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.

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 chiropractor. 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 constitute an improper fettering of discretion. It is a role of the professionals to provide the evidence on which the ministry may make its determination.

The level of physical functioning described by the physician in the PR is in the mid-range of the scale. His information on this is consistent with that of the chiropractor's description of mobility and physical ability, which describes the appellant as independently managing these functions, except for requiring periodic assistance with lifting/carrying/holding. The appellant's evidence in the Workbook and her reconsideration statement, along with the landlord's evidence in the Landlord's Letter provide additional detail with respect to pain and restrictions experienced by the appellant as a result of her medical conditions. They indicate that the assistance provided by the landlord is in regard to "lifting, carrying and yardwork." Presumably the help with lifting is for weights in excess of the appellant's 5-15 pound lifting capacity as noted by the physician in the PR. The Medical Reports primarily tend to corroborate the diagnoses provided by the physician - they don't contain material evidence with respect to functional skills.

As discussed in more detail in the subsequent section of this decision under the heading Significant Restrictions to DLA, the appellant's physical condition does not appear to have translated into significant restrictions in her ability to manage her DLA independently.

Based on the foregoing evidence and analysis, the panel finds that the ministry reasonably determined that the evidence falls short of demonstrating a severe physical impairment.

### **Severe Mental Impairment**

The appellant did not expressly advance an argument with respect to severe mental impairment, but she argued that her depression and anxiety exacerbate her physical impairments and thus impact her functioning. She argued that her physical conditions also exacerbate the emotional and cognitive impacts. She relied on the evidence of the physician and chiropractor to confirm that she experiences cognitive and emotional dysfunction.

The ministry's position is that the evidence does not establish a severe mental impairment. The ministry argued that there are inconsistencies in the evidence of the physician and the chiropractor regarding the extent of cognitive and emotional impacts. The ministry also argued that there is no information on the frequency or duration of the support/supervision required by the appellant in tasks related to social functioning as identified by the chiropractor.

### **Panel Decision:**

The evidence indicates that though the appellant has reduced hearing in one ear, and has difficulty gripping a pen/pencil, her communication skills are satisfactory to good.

Section 2(1)(b) of the EAPWDR prescribes two DLA that are specific to mental impairment – make decisions about personal activities, care or finances (decision making), and relate to, communicate or interact with others effectively (social functioning).

The evidence indicates that the appellant is not significantly restricted with respect to decision making

in that, according to the chiropractor's evidence in the AR, she independently manages the decision making aspects of personal self-care (regulating diet), daily shopping (making appropriate choices), manage personal medication (filling/refilling/taking as directed), managing finances (pay rent and bills, budgeting) and social functioning (appropriate social decisions). The chiropractor's evidence is consistent with the physician's (who also noted no restrictions to social functioning or decision making in the PR) and the appellant's evidence in the Workbook. On balance the panel concludes that the evidence indicates the appellant is not significantly restricted with the DLA of decision making.

With respect to social functioning, the evidence of the physician in the PR and the chiropractor in the AR is that the appellant is not significantly restricted. The chiropractor indicated that the appellant has good functioning with respect to her immediate and extended social networks, though she periodically has a tendency to withdraw.

On balance, the evidence indicates that while the appellant does experience deficits in cognitive and emotional functioning as described by the physician and the chiropractor, those deficits have not translated into significant restrictions in the appellant's social functioning, decision making, or her ability to communicate. Based on this evidence, the panel finds that the ministry reasonably determined that it does not establish a severe mental impairment.

### **Significant Restrictions to DLA**

The appellant's position is that severe physical and mental impairments directly and significantly restrict her ability to perform DLA. She argued that more weight should be given to the physician's evidence than to the chiropractor's evidence as the chiropractor was not aware of the appellant's IBS and its impacts at the time he completed the AR and the Chiropractor's Questionnaire. She stated that there is no legislative requirement that both the medical practitioner and the assessor have to have the same opinion – a difference between the professional opinions is no basis to deny the appellant's application. She also argued that there is no legislative requirement to provide evidence of the frequency or duration of restrictions to DLA, but that the ministry expressly relied on the lack of such evidence as a basis for denial.

The ministry's position is that there is not enough evidence to confirm that a severe impairment significantly restricts the appellant in her ability to perform DLA continuously or periodically for extended periods. The ministry argued that there was no evidence of how much longer than typical the appellant takes to perform DLA, and that the chiropractor did not describe the frequency or duration of the periodic assistance required for specified DLA.

### **Panel Decision:**

Section 2(2) of the EAPWDA requires that a severe impairment directly and significantly restricts the appellant's ability to perform the prescribed 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

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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 argued by the appellant, there is no statutory requirement for the physician’s and chiropractor’s evidence to be the same. It is the role of the finder of fact (the ministry, or on appeal the panel) to assess the evidence and weigh it in context.

In the current case, both the physician and the chiropractor have known the appellant for a long period of time. In the panel’s view, the appellant’s assertion that she did not discuss her IBS with the chiropractor is not a sufficient basis to substantially discount the chiropractor’s evidence. The physician indicated in the PR that the appellant experiences direct restrictions in 4 of the 10 prescribed DLA: meal preparation, basic housework, daily shopping, and mobility indoors/outdoors. However, the physician also indicated the appellant is being able to walk 2-4 blocks unaided and the chiropractor assessed her as independent in walking indoors and outdoors. In both the PR and the Physician’s Questionnaire, in response to questions regarding the degree of restriction to DLA, the physician referred to the Landlord’s Letter. The Landlord’s Letter sets out a significant amount of detail regarding symptoms experienced by the appellant, but with respect to DLA essentially just confirms that the appellant does her household “chores” herself because no one else is available to help. There is little or no detail with respect to how much longer than typical the appellant requires with DLA, which would provide some indication of the significance of her restrictions. Both the physician and the appellant described the landlord’s assistance as largely being limited to lifting and carrying. There is little or no other detail with respect to restrictions to the 10 prescribed DLA.

The AR form provides for more detail in that it breaks each DLA down into discrete tasks. The chiropractor indicated that the appellant manages almost all tasks related to all DLA independently. For the minority of tasks for which she requires periodic assistance, there is no indication as to frequency or duration of the assistance required. Essentially, the chiropractor’s evidence is consistent with that provided by the physician, the landlord and the appellant – that though her impairments do restrict her DLA, she manages them almost entirely independently. The chiropractor indicated that the appellant’s medical conditions have her “on the pathway” to more significant restrictions, and that regular treatments would help her to “remain functional.” The evidence currently before the panel does not establish that her restrictions to DLA are significant (as contemplated by the legislation) at this time.

There are references in the evidence to the impact the appellant’s medical conditions have on her ability to work at paid employment. The panel notes that employability is not a statutory criterion regarding PWD designation – unlike the CPP disability pension, the focus of the legislation is on the ability to perform DLA. Paid employment generally requires a higher level of functioning than DLA.

Based on the foregoing evidence and analysis, the panel finds that the ministry reasonably determined that the evidence is insufficient to establish that a severe impairment significantly restricts the appellant in her ability to perform DLA continuously or periodically for extended periods.

**Help with DLA**

The appellant's position is that she requires help with DLA, though there is no one to provide her with help except her landlord.

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 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, the panel must rely on the evidence before it and apply the legislation as written. Accordingly, for the reasons provided above, the panel finds that the ministry's decision finding the appellant ineligible for PWD designation is a reasonable application of the legislation in the appellant's circumstances. The panel therefore confirms the ministry's decision.