

## PART C – Decision under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Social Innovation (the ministry) dated February 29, 2016 which held that the appellant did not meet 3 of the 5 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 and that a medical practitioner confirmed that the appellant has an impairment that is likely to continue for at least 2 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
- as a result of those restrictions, in the opinion of a prescribed professional, the appellant requires help, as it is defined in the legislation, 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

### Information before the ministry at reconsideration

- A PWD application comprised of the appellant's Self-report (SR) dated December 22, 2015, as well as a Physician Report (PR) and an Assessor Report (AR) both dated December 27, 2015 and completed by the appellant's general practitioner of 15 years (GP).
- A 7-page self-report dated February 17, 2016 provided in support of the appellant's request for reconsideration (the reconsideration submission).

### Additional evidence submitted on appeal and admissibility

Section 22(4) of the Employment and Assistance Act (EAA) limits the evidence that the panel may admit to information and records before the minister at the time of reconsideration and oral and written testimony in support of the information available at reconsideration.

At the hearing, the appellant referred to some of the symptoms described in her reconsideration submission and further explained that at the time the PWD application was completed, the side-effects of the chemotherapy, which are cumulative, had not kicked in. She explained that she was unaware that she could provide new information from her GP. The appellant's oral testimony was consistent with and therefore in support of the information before the ministry at reconsideration and admitted in accordance with section 22(4) of the EAA.

The ministry did not provide additional evidence at the hearing and relied on its reconsideration decision.

### Summary of relevant evidence

#### Diagnoses

The GP diagnoses stage 4 metastatic ovarian cancer.

#### Physical Impairment

In the PR and AR, the GP provides the following information.

- Cancer has spread through the peritoneal cavity causing ascites, abdominal bloating, and fluid around the lungs. As a result, energy is low, and the appellant has nausea and shortness of breath.
- Chemotherapy also causes nausea, fatigue and exhaustion, and lower immunity.
- Chemotherapy infusions are not well tolerated. Reacting adversely to the Taxol.
- The appellant is able to:
  - Stand independently (short periods only due to dizziness, weakness).
  - Walk independently indoors and outdoors (4+ blocks).
  - Climb 5+ steps unaided.

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- Lift 5 to 15 lbs. (only light loads). Carrying and holding are managed independently.
  - There are no limitations respecting the time the appellant can remain seated.

In the SR, the appellant writes that she has variable energy levels and experiences unpredictable side-effects from the disease and its treatment.

In her reconsideration submission, the appellant explains that her abilities, or lack thereof, have changed a lot since the PWD application was submitted, at which time she was only a month or so into her chemotherapy treatment. The side-effects of chemotherapy are cumulative and show up unpredictably. Side-effects impact her heart function (rapid heartbeat, shortness of breath, chest pain), leaving her unable to walk more than a few feet or climb even the slightest slope. Nerve function is impacted causing general weakness, weakness in the hands which results in shaking and dropping things, and double-vision. She also experiences nausea and vomiting. The side-effects of her once weekly chemotherapy treatments leave her out of commission for the next 3-4 days. She must move slowly and carefully because of unpredictable mobility.

At the hearing, the appellant confirmed the changes in her functioning as outlined in her reconsideration submission, adding that she is currently recovering from major surgery.

### Mental Impairment

The GP provides the following information.

- There are no difficulties with communication.
- Significant deficit with cognitive and emotional function for 1 of 11 listed areas – memory - due to chemotherapy which causes occasional short-term memory lapses leading to difficulty with word-finding.
- The appellant's ability to read is satisfactory, as opposed to good, due to difficulties with concentration resulting from the chemotherapy and word-finding is also impaired intermittently by chemotherapy.
- Difficulties with attention/concentration and memory are reported as having a minimal impact on daily functioning. No impact on daily functioning is reported for the remaining 12 listed areas of cognitive and emotional functioning.
- The section in the AR that addresses social functioning was not completed.

In her reconsideration submission, the appellant describes the impact of chemotherapy on her brain function, including short-term memory loss which has resulted in forgetting to turn the stove burner off and problems waiting for simple words to come when speaking. It also causes anxiety which leaves her unable to sleep more than an average of 4-5 hours per night.

At the hearing, the appellant stated that her thinking is clearer in the morning as it worsens during the day.

DLA

The GP provides the following information.

Personal care

- All listed tasks are managed independently.

Basic Housekeeping

- Both laundry and basic housekeeping are managed independently.

Shopping

- Going to and from stores (does not drive, needs a driver) and carrying purchases home require periodic assistance.
- Reading prices and labels, making appropriate choices, and paying for purchases are managed independently.

Meals

- All listed tasks are managed independently.

Paying Rent and Bills

- All tasks are managed independently

Medications

- Filling/refilling prescriptions require periodic assistance (driving). Taking as directed and safe handling and storage are managed independently.

Transportation

- All listed tasks are managed independently, though public transit is rarely used due to compromised immune system.

In her reconsideration submission, the appellant notes that her doctors have advised that she avoid public places due to her compromised immune system. At the hearing, the appellant clarified that prior to her illness she did not drive and used to walk to the store.

Need for Help

The GP reports that assistance is provided by friends and the appellant's partner. The GP does not identify the need for assistive devices and indicates that the appellant does not require an assistance animal.

## PART F – Reasons for Panel Decision

### **Issue on Appeal**

The issue on 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:

- a severe physical or mental impairment was not established;
- the appellant's daily living activities (DLA) are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and
- as a result of those restrictions, in the opinion of a prescribed professional, the appellant does not require help, as it is defined in the legislation, to perform DLA?

### **Relevant Legislation**

#### **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.

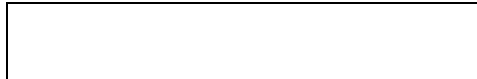
(3) For the purposes of subsection (2),

(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.

(4) The minister may rescind a designation under subsection (2).

**EAPWDR**

**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 authorized under an enactment to practice the profession of

- (a) medical practitioner,
- (b) registered psychologist,
- (c) registered nurse or registered psychiatric nurse,
- (d) occupational therapist,
- (e) physical therapist,
- (f) social worker,
- (g) chiropractor, or
- (h) nurse practitioner.

**Severe Impairment**

The legislation provides that the determination of severity of impairment is at the discretion of the minister, taking into account all of the evidence including that of the appellant. However, the legislation is also clear that the fundamental basis for the analysis is the evidence from a prescribed

professional respecting the nature of the impairment and its impact on daily functioning. While the legislation does not define “impairment”, the PR and AR define “impairment” as a “loss or abnormality of psychological, anatomical or physiological structure or functioning causing a restriction in the ability to function independently, effectively, appropriately or for a reasonable duration.” While this is not a legislative definition, and is therefore not binding on the panel, in the panel’s opinion, it reflects the legislative intent and provides an appropriate analytical framework for assessing the degree of impairment resulting from a medical condition.

### Physical Impairment

The appellant’s position is that as a result of her medical condition and the side-effects from the chemotherapy, she experiences symptoms including bloating, fatigue, numbness in her extremities, and general weakness, which severely impact her physical functioning.

The ministry’s position is that the GP’s assessment of the appellant’s physical functional skills in the PR is not indicative of a severe impairment of physical functioning and that the GP did not describe the severity of the appellant’s low energy, fatigue, shortness of breath, or lowered immunity. Also, in the AR, while noting fatigue and nausea, the ability to lift only light loads, and the ability to stand only for short periods due to dizziness and weakness, the GP reports independence with all listed areas of mobility and physical ability and does not describe how long the appellant is able to stand. The ministry concludes that, while diagnosed with a serious medical condition, the information provided in the PR, AR, and appellant’s self-reports does not establish a severe impairment of physical functioning.

### Panel Decision

The appellant is diagnosed with stage 4 metastatic ovarian cancer, a condition the ministry readily acknowledges is a serious medical condition. The appellant’s evidence is that due to the cumulative effects of her chemotherapy treatment which had just begun when the PWD application was completed, her physical functioning has significantly deteriorated. However, no additional information has been provided by the GP. The GP reports some limitations to the appellant’s physical functioning arising from her medical condition, including being able to stand for short periods only, due to dizziness and weakness, and being limited to lifting somewhere between 5 to 15 pounds. It is not clear what is meant by “short periods” and the appellant is reported as being able to independently walk 4+ blocks and climb 5+ steps. Additionally, it is unclear where the ability to lift only light loads falls within the 5 to 15 pound range, and the appellant is reported as independently managing both housekeeping and meal preparation, both of which involve lifting and carrying.

Based on the physical functional skills and level of physical independence reported by the GP, the panel finds that the ministry reasonably determined that the information does not establish a severe impairment of the appellant’s physical functioning.

### Mental Impairment

The appellant’s position is that the chemotherapy has impacted her brain function, causing both

short-term memory loss and confusion.

The ministry acknowledges that the appellant is currently experiencing limitations to her cognitive and emotional functioning in the areas of memory and attention/concentration, but that the GP has not identified a major impact on daily functioning in any category and did not complete the section of the AR addressing social functioning. Based on the assessments provided by the GP and the appellant's self-reports, the ministry concludes that a severe impairment of mental functioning has not been established.

*Panel Decision*

The appellant is not diagnosed with a mental impairment or brain injury. The GP reports that due to chemotherapy the appellant experiences intermittent impacts on her short-term memory, also described as occasional memory lapses leading to difficulty word-finding, and difficulties with concentration, which is noted to impact her ability to read. These impacts on short-term memory and concentration are noted as having a minimal impact on daily functioning. As the ministry notes, a major impact on daily functioning is not reported for any aspect of cognitive and emotional functioning. Additionally, the GP has not identified any difficulties with social functioning. Based on this information, the panel finds that the ministry reasonably determined that the information does not establish that the appellant has a severe mental impairment.

**Restrictions in the ability to perform DLA**

The appellant's position is that due to her compromised immune system and the other side-effects from chemotherapy, her daily functioning has been increasingly impacted.

The ministry notes that the GP has reported the appellant as independently managing all but three listed activities, and does not describe the frequency or duration of the periodic assistance from another person required for these activities. The ministry also notes that the inability to drive and resulting need for assistance from others is not considered indicative of a restriction to DLA. The ministry relies on the assessment of DLA by a prescribed professional, the GP, and concludes that there was not enough evidence to confirm that the appellant has a severe impairment that significantly restricts her ability to perform DLA continuously or periodically for extended periods.

*Panel Decision*

The legislative requirement respecting DLA set out in section 2(2)(b) of the EAPWDA is that the minister be satisfied that as a result of a severe physical or mental impairment a person is, in the opinion of a prescribed professional, directly and significantly restricted in the ability to perform DLA either continuously or periodically for extended periods. Consequently, while other evidence may be considered for clarification or support, the ministry's determination as to whether or not it is satisfied, is dependent upon the evidence from prescribed professionals. DLA are defined in section 2(1) of the EAPWDR and are listed in both the PR and the AR sections of the PWD application with the opportunity for the prescribed professional to check marked boxes and provide additional narrative.



In this case, the prescribed professional, the appellant's GP, reports that the appellant independently manages all listed tasks of all DLA, with the exception of needing the periodic assistance of another person with two tasks of the DLA shopping, going to and from stores and carrying purchases home, and one task of the DLA medications, filling/refilling prescriptions. For both going to and from stores and filling/refilling prescriptions, as the ministry notes, the GP's narrative "does not drive" is not reflective of a need for assistance arising from a physical or mental impairment but rather because the appellant does not drive and the appellant confirmed that she did not drive prior to her illness. As the ministry also notes, there is no description of the periodic assistance required to carry purchases home. Based on the level of independence performing DLA reported by the GP, the panel finds that the ministry reasonably determined that the assessments do not establish that a severe impairment significantly restricts DLA continuously or periodically for extended periods as required by section 2(2)(b)(i) of the EAPWDA.

### **Help to perform DLA**

The appellant argues that the impact on her abilities from the chemotherapy has increased and she no longer does her own shopping.

The ministry's position is that because it has not been established that DLA are significantly restricted, it cannot be determined that 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. Help is defined in subsection (3) as the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform a DLA.

The establishment of direct and significant restrictions with DLA is a precondition of the need for help criterion. As the panel found that the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established, the panel also finds that the ministry reasonably concluded that it cannot be determined that the appellant requires help to perform DLA as required by section 2(2)(b)(ii) of the EAPWDA.

### **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, was reasonably supported by the evidence, and therefore confirms the decision.