

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) Reconsideration Decision dated July 15, 2016 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 and that she has an impairment that is likely to continue for at least two years. However, the ministry was not satisfied that the evidence established that:

- the appellant has a severe mental or 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 ministry representative did not attend the hearing. After confirming that the ministry was notified, the hearing proceeded under Section 86(b) of the Employment and Assistance Regulation.

The evidence before the ministry at the time of the Reconsideration Decision included:

1. The appellant's Persons With Disabilities ("PWD") Application comprised of:
  - The Applicant Information and Self-report ("SR") completed by the appellant and dated January 18, 2016;
  - The Physician Report ("PR") dated March 9, 2016 prepared by the appellant's general practitioner ("GP") who treated the appellant 11 or more times in the 12 months prior to completing the PR;
  - The Assessor Report ("AR") dated January 26, 2016, prepared by a psychiatric nurse ("the nurse") who saw the appellant to complete the AR, and that the source of the information used to complete the PWD application was "office interview with applicant";
2. The appellant's Request for Reconsideration (RFR) dated June 29, 2016 in which she states that:
  - Her disability and how they affect her daily living activities (DLA);
  - Her GP has confirmed her disability, that it is severe and significantly restricts her DLA;
  - The nurse's comments explain the task that take significantly longer to complete and why;
  - She tries to stay independent but DLA that take 20 minutes to a couple of hours longer to complete take a toll on interest and motivation;
  - The judicial review of Hudson vs. Employment and Assistance Appeal Tribunal, 2009 (hereon referred to as the Hudson's case) supports her position; and
  - The adjudicating officer did not take section 8 of the Interpretation Act into consideration.
3. Medical Report – Employability, signed and dated by the appellant's GP on November 16, 2015, in which the GP indicates the appellant's primary medical condition as peripheral neuropathy, that it is severe, it is likely to continue for 12-18 months, and it not episodic in nature. The GP lists the appellant's restrictions in part as "chronic foot pain – cannot stand for long periods".
4. 1-page print out on neuropathy and the burning feet syndrome, which describes the condition, targeted demography, possible causes, co-morbidity and states that "neuropathy is rarely a serious medical problem and almost never impairs walking or other important functions through life".
5. 3-page consultation report dated October 30, 2015.

### ***Diagnoses***

In the PR, the GP notes that the appellant has been diagnosed with peripheral neuropathy (onset July 2015) and osteoporosis (onset February 2016).

### ***Physical Impairment***

In the SR, the appellant describes her disabilities' symptoms as including "fatigue, loss of concentration, loss of motivation, and sharp burning pain or numbness in feet". She describes how her medical conditions affect her life and ability to perform her DLA. The appellant also provides a list

of the medications she takes to manage her medical conditions.

In the PR, the GP states that the appellant has severe peripheral neuropathy with chronic pain, restless legs and sensation changes. In addition she has a compression fracture T7. The GP indicates that the conditions are likely to continue for 2 years or more, the appellant can walk 1-2 blocks unaided on flat surfaces, climb 2-5 stairs, lift 5-15lbs, can remain seated for less than 1 hour and has no difficulties with communication. The GP adds that the appellant has not been prescribed any medication or treatment that interfere with her ability to perform DLA's and does not require any prostheses or aids for her impairment.

In the AR, the nurse reports that the appellant is independent in all listed tasks of mobility and physical ability but takes significantly longer with walking indoors, walking outdoors, climbing stairs, and carrying and holding.

### ***Mental Impairment***

The appellant has not specifically commented on any conditions or symptoms related to mental impairment in the RFR or the SR.

In the PR, the GP has not diagnosed the appellant with a mental disorder and has answered "No" to the question of whether the appellant has any significant deficits with cognitive and emotional function.

In the AR, the nurse notes that the appellant's ability to speak, read, write and hear are good. In response to the question whether the appellant is impacted by way of a mental impairment or brain injury the nurse has indicated that the appellant has major impacts in the areas of bodily functions and motor activity, and that all other listed areas have either a moderate impact or no impact. The nurse also notes that the appellant is independent with good functioning in all aspects of social functioning listed on the PWD application.

### ***Daily Living Activities***

In the PR, the GP has indicated that the appellant is continuously restricted with personal self care, meal preparation, basic housekeeping, daily shopping, mobility outside the home, and use of transportation, with a comment that "severe restriction". Social functioning is indicated as periodically restricted with the comment "when pain is severe cannot socialize – happens often".

In the AR, the nurse notes that the appellant is independent in all listed tasks of DLA and that bathing toileting, transfers (in/out of bed), laundry, basic housekeeping going to and from stores, carrying purchases home, food preparation, cooking, and getting in and out of a vehicle take significantly longer – anywhere from 10% to 50% longer depending on the task.

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

In the PR, the GP notes that the appellant does not require any prostheses or aids for her impairment. In the AR, the nurse indicates that the appellant does receive some help for DLA from family members and friends. But does not receive assistance through the use of assistive devices.



### **Evidence On Appeal**

1. Notice of appeal (NOA) signed and dated July 28, 2016, in which the appellant expresses her disagreement with the reconsideration decision.

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

At the hearing the appellant's advocate reviewed the SR, PR, AR, the Hudson's case, and the interpretation act.

At the hearing the appellant provided testimony describing her day-to-day challenges living with peripheral neuropathy. She also described that pain management is difficult and the side effects of various medications. She also stated that the GP has been her doctor for about 20 years.

## 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 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 and that she has an impairment that 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 mental or physical impairment;
- the appellant's 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.

### **Positions of the Parties**

At the hearing, the appellant's advocate argued that the GP and the nurse both confirm that the appellant has a severe impairment, that this impairment significantly restricts her ability to perform her DLA and that she requires the assistance of another person in order to complete her DLA. The appellant argues that she has met the requirements as stated in the legislation.

The ministry's position as set out in the Reconsideration Decision is that the appellant is ineligible for designation as a Person With Disabilities on the basis that the appellant had not satisfied the legislative requirements in the *EAPWDA*.

### **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 nurse.

### **Severity of mental impairment**

The appellant and her advocate did not argue that she suffers from a specific mental condition,

impairment or brain injury. She states only that her medical condition has caused her to feel depressed, anxious and a lack of motivation.

The ministry's position as set out in the Reconsideration Decision is that the evidence does not support a finding that the appellant suffers from a severe mental impairment.

*Panel Decision*

On review of the evidence, the GP has not diagnosed the appellant with a mental impairment or condition. In the PR, the GP answers "No" to the question of whether the appellant has any significant deficits with cognitive and emotional function and in the AR, the nurse indicates that the appellant experiences major impacts in 2 of the listed areas and all other have either moderate or no impact.

After reviewing the evidence as a whole as set out above, 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 mental impairment as provided by section 2(2) of the *EAPWDA*.

**Severity of physical impairment**

The appellant takes the position that she is in pain on a daily basis and that her peripheral neuropathy and osteoporosis constitute a severe physical impairment, and that the medical report, the PR, the AR and the print out on neuropathy confirm this.

The ministry's position as set out in the Reconsideration Decision is that the evidence as a whole, including the appellant's functional skill limitations, does not support a finding that the appellant has a severe physical impairment.

*Panel Decision*

As mentioned above, diagnoses of serious medical conditions do not by themselves determine that the physical impairment is severe. The appellant faces challenges but panel is of the view that the impacts of her physical impairments are not clear. In the PR the GP, who has seen the appellant 11 or more times in the past 12 month and has been her doctor for 20 years, mentioned that the appellant could walk 1-2 blocks *unaided*, climb 2-5 stairs, lift 5-15lbs and sit less than 1 hour. In the AR the nurse states that the appellant is independent in walking indoors and outdoors, climbing stairs, standing, lifting, and carrying and holding and that some of these tasks take 20% to 30% longer to perform. Though the appellant takes longer to perform the listed tasks, the panel is of the opinion that taking 20%-30% longer to complete a task is not *significantly longer* as is required by the legislation. Furthermore the AR was completed in an office interview. Therefore the appellant had input in the information that was provided. By her own account her physical function is slower but not impaired to the point that she cannot function independently.

Section 2(2) of the *EAPWDA* requires that the minister must be satisfied that a person has a severe mental or physical impairment that results in restrictions to a person's ability to function independently or effectively. The evidence given by the GP and nurse indicates that the appellant's functional ability is good. Therefore the panel finds that the ministry was reasonable in its determination that the

evidence does not support a finding that the appellant suffers from a severe physical impairment.

### **Restrictions in the ability to perform DLA**

The appellant argues that she is restricted in her ability to perform tasks of DLA due to the pain he suffers from her medical conditions. She further argues that the GP specifies the DLA tasks in which she is continuously restricted and that the nurse confirms this as he indicates that those same tasks take significantly longer to perform. Finally she argues that if a task takes longer to perform it is restricted regardless to whether it takes 5 minutes longer or 2 hours longer.

The ministry's position as set out in the Reconsideration Decision 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*. Specifically it is unclear why the GP indicates severe restrictions to DLA and the nurse indicates mild to moderate restrictions to DLA.

#### *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 at the hearing of the challenges that she faces with DLA, the legislation is clear that 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 nurse.

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.

In the PR the GP has indicated that the appellant is restricted in personal self-care, meal preparation, basic housekeeping, daily shopping, mobility outside the home, use of transportation continuously, social functioning periodically, and management of medications and finances as not being restricted. The AR, the nurse has indicated that the appellant is independent in all listed tasks of DLA and that some of them take significantly longer to perform – 10% to 50% longer. The appellant faces challenges but the impacts of her physical impairments on her ability to perform her DLA are not consistently reported by the 2 prescribed professionals that completed her PWD application. Therefore it cannot be established that that the appellant's impairment significantly restricts her ability to perform tasks of DLA either continuously or periodically for extended periods. Furthermore, taking longer to perform a task does not automatically translate into a restriction and as explained previously, the time it takes to complete must take *significantly longer* to complete in order to meet the legislative requirements.

In making its decision in this matter the panel must consider the evidence that was before the ministry



at reconsideration and therefore, considering the evidence of the GP, as set out in the PR, and the nurse, as set out in the AR, the panel concludes that the ministry reasonably concluded that the evidence was insufficient to establish that the appellant's impairment significantly restricts her ability to perform tasks of DLA either continuously or periodically for extended periods.

### **Help with DLA**

The appellant argues that she requires help with various tasks of DLA with that help coming from her friends and family.

The ministry's position as set out in the Reconsideration Decision is that because it has not been established that the appellant's 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 reasonably supported by the evidence and a reasonable application of the applicable enactment in the circumstances of the appellant, and therefore confirms the decision. The appellant is not successful in her appeal.