

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of May 25, 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 form dated September 28, 2015 ("SR"), a physician's report ("PR") and an assessor's report ("AR"), both completed by the appellant's general practitioner (the "physician") on September 8, 2015.
- Letter from the ministry's Health Assistance Branch Adjudicator to the physician dated February 25, 2016 seeking clarification regarding the appellant's cognitive and emotional function.
- The appellant's letter dated May 3, 2016 ("Appellant's Letter") with her Request for Reconsideration ("RFR") form dated April 27, 2016 with a new page 18/28 of the AR completed by the physician ("AR2").

### Diagnoses

- In the PR the physician diagnosed the appellant with left sided breast cancer, date of onset 2012 and mood disorder, post-traumatic stress and depression, date of onset 2009. The physician indicates that he has known the appellant 2 years and has seen her two to ten times in the past 12 months.

### Physical Impairment

- In the Health History portion of the PR, the physician states that the appellant has a history of breast cancer and left sided mastectomy in 2012 and that she is currently on a medication but her post cancer bone pain and perilymph fistula cause pain and excessive fatigue.
- In terms of physical functioning the physician reported in the PR that the appellant can walk less than one block unaided on a flat surface, can climb 5+ steps unaided, can lift 5 to 15 pounds and can remain seated 1 to 2 hours.
- For Section B – Mental or Physical Impairment in the AR, the physician does not provide any information in response to question one regarding the appellant's physical impairments that impact her ability to manage DLA.
- In the AR the physician indicates that the appellant is independent with climbing stairs and standing but requires periodic assistance from another person with walking indoors, walking outdoors, lifting and carrying and holding, noting that it takes the appellant 3 or 4 times longer than normal and needs help with longer distances or heavier loads.
- In the SR the appellant states that her left breast was removed because of cancer in 2012 and that she has removed lumps from the right breast. The appellant states that she took chemical therapy for six months and radiation therapy for one month and is required to take ongoing medication to control the disease with six months check ups with the specialist. The appellant states that she has many symptoms that her arms ache every time she moves or lifts something, her legs make it difficult to walk and she takes breaks every 3 steps, that she always has a headache and needs to sleep. The appellant also states that she has a disabled child who is 16 years old and she cannot help him a lot.
- In the Appellant's Letter she states that her main problem is pain all over her body, that she is exhausted, and that she cannot lift more than 5 to 8 pounds.

### Mental Impairment

- In the Health History portion of the PR the physician indicates that the appellant is an immigrant from war in other countries and was a witness to war events, that she is depressed, frustrated, has poor motivation, and difficulty performing DLA's.
- In the PR under Section D – Functional Skills, the physician indicates that the appellant does not have any difficulties with communication other than a lack of fluency in English. The physician indicates that the appellant has significant deficits with cognitive and emotional function in the areas of executive, memory, emotional disturbance, motivation and attention or sustained concentration.
- In the AR, the physician indicates that the appellant's ability to communicate with speaking, reading, writing and hearing is good (mother tongue only). For Section B – Mental or Physical Impairment question four, the physician did not identify any impact on the appellant's cognitive and emotional function.
- In the Appellant's Letter she states that she is suffering from extreme depression and post traumatic stress disorder and that she forgets things, loses things and does not remember what she talked about.
- In the AR2, the physician indicates that the appellant's mental impairment has seven major impacts in the areas of emotion, insight and judgment, attention/concentration, executive memory, motivation and motor activity. The physician indicates that there are three moderate impacts in the areas of consciousness, impulse control and other emotional or mental problems. He indicates that there are two minimal impacts in the area of bodily functions and other neuropsychological problems. The physician indicates that there is no impact to the areas of language or psychotic symptoms. With respect to motor activity the physician indicates both no impact and major impact.
- The physician comments that the appellant has limited ability to function and her DLA's are affected due to poor motivation, depression and dependency. He also states that she has pseudo-dementia.

### DLA

- In the PR the physician indicates that the appellant's medication interferes with her ability to perform DLA because it causes fatigue.
- In the AR the physician indicates that the appellant is independent with dressing, grooming, bathing, toileting, feeding self, regulating diet, transfer (in/out of bed) and transfers (on/off of chair) but takes significantly longer (3-4 times) with dressing, grooming and bathing. The physician indicates that the appellant requires continuous assistance with laundry and periodic assistance with basic housekeeping. With respect to shopping the physician indicates that the appellant is independent with making appropriate choices and paying for purchases, but requires continuous assistance with reading prices and labels and periodic assistance with going to and from stores and carrying purchases home, noting that it takes her significantly longer to go to and from stores and carrying purchases home and can only carry less than 2 kg.
- With respect to meals the physician indicates that the appellant is independent with food preparation and safe storage of food but requires periodic assistance with meal planning and cooking as it takes her significantly longer than typical as she has to rest frequently.
- With respect to paying rent and bills the physician indicates that the appellant requires continuous assistance with banking, budgeting and paying rent and bills as she has no

knowledge of English to do this.

- The physician indicates that the appellant is independent with filling/refilling prescriptions and safe handling and storage of medications but requires periodic assistance taking medications as directed. The appellant is independent with getting in and out of a vehicle but takes significantly longer than typical. She requires continuous assistance with using public transit and using transit schedules, as she cannot comprehend.
- With respect to social functioning the physician indicates that the appellant is independent with interacting appropriately with others, dealing appropriately with unexpected demands and securing assistance from others but requires periodic assistance/supervision with making appropriate social decisions and developing and maintaining relationships. The physician indicates that the appellant has marginal functioning with respect to her immediate and extended social networks, commenting that she is functional only to look after her son and little contact outside of family.

### Help

- In the SR the appellant states that her family members do everything such as cleaning, shopping, cooking and taking care of her.
- In the PR the physician reports that the appellant does not have any prosthesis or aids for her impairment. In Section E – Additional Comments of the PR, the physician indicates that the appellant’s husband has to help with most DLA’s.
- In the AR the physician indicates that the appellant receives assistance from family, but does not require any assistive devices and does not have an assistance animal.

### **Additional information provided**

In her Notice of Appeal dated May 31, 2016, the appellant states that more information will be provided from her physician and specialist.

The appellant provided a letter dated June 10, 2016 stating that she has attached a letter from the physician with more information about her daily living, about living with pain and that she has a severe impairment. She asks that the ministry reconsider her disability. The appellant provided a letter from her physician dated June 9, 2016 (the “Physician’s Letter”) in which he states that the appellant takes significantly longer (up to four times as long) with dressing, grooming, transferring, shopping, and meal planning. The physician states that the appellant requires supervision for higher cognitive function tests such as banking, budgeting, paying rent and bills. He states that her pain is specifically in her chest due to breast cancer and she is very limited with lifting anything above 10 pounds. She is unsure of herself and cannot go out alone, and has poor adaptation skills due to her limited English, poor memory, and concentration. The physician indicates that the appellant’s post-traumatic stress disorder causes her to be isolated and withdrawn and she requires constant support and supervision with poor memory and concentration. He also indicates that her social networks are limited, that she has low self-esteem, and is unsure of herself.

The appellant provided a submission dated July 18, 2016 consisting of a letter from her specialist dated July 5, 2016 (the “Specialist Letter”) indicating that the appellant has post-traumatic stress syndrome manifesting itself with a major depression with cognitive impairment. The specialist indicates that a number of investigations are pending and we will then make a decision as to what will be the most appropriate treatment. The appellant also provided a printout from a pharmacy listing

her medications.

The ministry provided a submission dated July 26, 2016 stating that it had reviewed the Physician's Letter but that the new information does not impact the outcome of the decision. The ministry states that the physician reports that the appellant has post-traumatic stress syndrome manifesting itself with a major depression with cognitive impairment and that a number of investigations are pending prior to determining the most appropriate treatment. The ministry states that there is insufficient evidence provided to demonstrate that the appellant has a severe impairment that directly and significantly restricts her ability to perform her DLA or that she requires significant help with those activities. The ministry did not object to the appellant's new information.

With the consent of both parties, the hearing was conducted as a written hearing pursuant to section 22(3)(b) of the *Employment and Assistance Act*.

### **Admissibility of New Information**

The panel has admitted as evidence the information in the appellant's Notice of Appeal, submission dated June 10, 2016 with the Physician's Letter and submission dated July 18, 2016 with the Specialist's Letter and pharmacy printout as it is information in support of information and records that were before the ministry at the time of reconsideration, in accordance with section 22(4) of the *Employment and Assistance Act*. In particular, the new information corroborates the information at reconsideration respecting the appellant's impairment, difficulties with DLA and assistance needed.

The panel has accepted the ministry's submission dated July 26, 2016 as argument.

## 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.

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### **Severe Physical Impairment**

The ministry's position, as set out in its reconsideration decision, is that the information provided is not evidence of a severe physical impairment. In particular, the ministry notes that in the PR the physician indicates that the appellant can walk less than one block unaided, can climb 5+ steps unaided, is limited in lifting to 5 to 15 pounds and can remain seated for 1 to 2 hours. The ministry also notes that in the AR the physician indicates that the appellant takes significantly longer and requires periodic assistance with walking indoors, walking outdoors, lifting and carrying and holding, takes significantly longer climbing stairs and standing and takes 3 to 4 times longer and needs help with longer distances or heavier loads. The ministry's position is that as the physician did not indicate the frequency and duration of the period of assistance from another person that the appellant requires with walking indoors and outdoors, lifting, carrying and holding, it is difficult to establish a severe physical impairment.

The appellant's position is that she has a severe physical impairment with pain all over and perilymph fistula that causes her to be very fatigued, and that the information provided by the physician is sufficient to find that she meets the criteria for PWD designation.

#### *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.

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, taking into account all of the evidence. However, the legislation is also clear that the fundamental basis for the analysis is the evidence from a prescribed professional.

Although the appellant reports constant pain in her body, the information in the PR indicates that the appellant is able to climb 5+ stairs unaided and can remain seated for 1 to 2 hours. In the AR the physician indicates that the appellant is independent with climbing stairs and standing, but requires periodic assistance from another person with walking indoors, walking outdoors, lifting and carrying and holding. It is not clear why the appellant is able to climb 5+ stairs unaided but can only walk less than one block unaided. While the appellant has serious medical conditions, which cause her pain and impact her physical functioning, the panel finds that the ministry's decision, which found that the information provided is not sufficient to establish a severe physical impairment, was reasonable.

### **Severe Mental Impairment**

The ministry's position is that the information provided does not establish that the appellant has a severe mental impairment. The ministry acknowledges that the appellant has certain limitations to her cognitive and emotional functioning due to depression and post-traumatic stress; however, the ministry determined that the information provided does not establish that the appellant has a severe mental impairment. In particular the ministry notes that the appellant's level of reading, writing, speaking and hearing is good (mother tongue only). The ministry also states that the physician has not described the support/supervision that is required to help the appellant maintain in the community or provide any indication of safety issues with regards to social functioning.

The appellant states that she is suffering from extreme depression and post-traumatic stress disorder, that she is exhausted, forgets things, loses things and cannot remember what she talks about and that she is depressed and angry about her situation. The appellant's position is that the information provided in the PR, AR, and additional information from the physician and the specialist, are sufficient to demonstrate that she has a severe mental impairment.

#### *Panel Decision*

The panel finds that the ministry's determination that the appellant does not have a severe mental impairment was not reasonable. In the PR, the physician indicates that the appellant has significant deficits with cognitive and emotional functioning in the areas of executive, memory, emotional disturbance, motivation and attention or sustained concentration. While the physician did not initially complete question 4, cognitive and emotional functioning on the AR, the ministry wrote to the physician and asked whether there were any major impacts to the appellant's cognitive and emotional functioning and if so, what areas are impacted. The physician provided the AR2 which indicates that there are major impacts to seven areas (emotional, insight and judgment, attention/concentration, executive, memory, motivation, and motor activity) and moderate impact to three areas (consciousness, impulse control and other emotional or mental problems), minimal impact to two areas (bodily functions and other neuropsychological problems) and no impact to motor activity, language or psychotic symptoms.

In the Physician's Letter, the physician provides further information that the appellant is unsure of



herself and cannot go out alone, has poor adaptation skills due to limited English but also due to poor memory and concentration, that her PTSD causes her to be isolated and withdrawn and that she requires constant support and supervision. The physician also indicates that the appellant has limitations with her social network contacts, has low self-esteem, and is unsure of herself.

The Specialist's Letter indicates that the appellant has post-traumatic stress syndrome manifesting itself with major depression and cognitive impairment. The specialist indicates that when attempting to complete the Folstein Mini Mental Status Examination the appellant was not oriented, calculation was impaired and first recall was impaired. The specialist indicates that there are concerns about her cognitive status and that the appellant asks the same questions repeatedly and repeats the same stories. The specialist also notes that the appellant misplaces things and has delusions people are stealing from her; she has had hallucinations, has anxiety attacks, and gets short of breath and palpitations.

In its submission the ministry states that the new information does not impact the outcome of their decision but the panel finds that as the physician has clearly responded to the ministry's question regarding the appellant's cognitive and emotional functioning and listed seven areas of major impact and three areas of moderate impact, the ministry did not reasonably take the new information into consideration. The information provided by the physician in the AR2 is consistent with the appellant's information in the SR and when considered with the Physician's Letter and the Specialist's Letter, the panel finds that the ministry's decision was not reasonable. In particular, the physician states that the appellant requires constant support and supervision and cannot go out alone, requires supervision for higher cognitive function tests. When this is considered with the information in the AR2 and the Specialist Letter the panel finds that the ministry was not reasonable in determining that the appellant's impairment impacting her cognitive and emotional functioning does not establish a severe mental impairment.

### **Significant Restrictions to DLA**

The reconsideration decision indicates that while the ministry acknowledges that the appellant has certain limitations resulting from fatigue and chronic pain, the frequency and duration of these periods are not described in order to determine if they represent a significant restriction to the appellant's overall level of functioning. The reconsideration decision also states that the minister is not satisfied that the appellant's need for continuous assistance with reading prices and labels, banking, budgeting, paying rent and bills, using public transit, using transit schedules and arranging transportation is because of a physical or mental impairment. The ministry's position is that the assessments provided by the physician are indicative of a moderate level of restriction and does not establish that a severe impairment significantly restricts daily living activities continuously or periodically for extended periods.

The appellant's position is that she has difficulty with DLA as she forgets things, loses things, does not remember what she talked about, has pain all over her body, is exhausted and takes 4 to 5 times longer with most DLA and that family members do everything such as cleaning, shopping, cooking and taking care of her. The appellant's position is that the information provided by the physician and the specialist supports her application for PWD designation.

*Panel Decision*

The legislation – s. 2(2)(b)(i) of the EAPWDA – requires that the minister be satisfied that in the opinion of a prescribed professional, a severe mental or physical 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.

The panel finds that the ministry was not reasonable in determining that the appellant does not have a severe impairment that significantly restricts daily living activities continuously or periodically for extended periods.

In the AR, the physician indicates that the appellant requires continuous assistance from another person with laundry, reading prices and labels, banking, budgeting, paying rent and bills, using public transit, and using transit schedules. While the ministry states that it is not satisfied that the restrictions with reading prices and labels, banking, budgeting, paying rent and bills, using public transit and using transit schedules are due to a severe impairment, the physician states in the AR that the appellant has comprehension difficulties, and in the Physician’s Letter, he confirms that she requires supervision for higher cognitive function tests such as banking, budgeting, paying rent and bills. The physician also indicates that the appellant has limited ability to function and that her DLA’s are affected due to poor motivation, depression and dependency, and that she has pseudodementia. In addition, the Specialist’s Letter confirms that the appellant has cognitive status problems, misplacing things, has delusions, asks the same questions repeatedly and repeats the same stories, which are all factors that would be consistent with someone that requires supervision and assistance with these aspects of DLA.

In the AR, the physician indicates that the appellant requires periodic assistance with basic housekeeping, carrying purchases home, meal planning, cooking, taking medications as directed, making appropriate social decisions, and developing and maintaining relationships. In the AR, the physician indicates that the appellant takes significantly longer than typical with these activities as she has to rest frequently, and in Section E of the AR the physician indicates that the combined affects of the depression, post cancer pain and medication have her fatigued and in chronic pain so it makes it difficult for her to perform DLA’s.

In the reconsideration decision, the ministry notes that the legislation requires that the appellant’s restrictions be both significant and either continuous or periodic for extended periods in order to be eligible for PWD designation. The ministry acknowledges that the legislation does not specifically require the frequency and duration of the restrictions to be explained but that the ministry finds this information valuable in determining the significance of the appellant’s restrictions. The panel finds that the while the ministry finds information regarding the frequency and duration of the restrictions valuable, the reconsideration decision clearly indicates that the legislation does not specifically require that the frequency and duration of the restrictions has to be explained. However, the ministry then states that it is not satisfied that the appellant meets the legislative criteria because the frequency and duration of the restrictions is not explained. The panel finds that the ministry’s position in this regard is not consistent and is not a reasonable application of the legislation in the appellant’s circumstances.

The panel finds that the physician has provided considerable explanation about the appellant's restrictions. For example, in the AR, the physician indicates that it takes the appellant 3 to 4 times as long to perform dressing, grooming and bathing. He states that it takes her significantly longer than typical to carry purchases home and is limited to carrying less than 2 kg, he indicates that with meal planning, food preparation and cooking she has to rest frequently and her husband helps. In the Physician's Letter, he states that she requires constant support and supervision with social functioning, which is a description of the duration of the restrictions. He also indicates that her medications interfere with her ability to perform DLA because they cause fatigue. The physician also states that the appellant cannot go out alone.

When considering all of the evidence, the panel finds that the ministry was not reasonable in determining that the evidence is insufficient to show that the appellant's ability to perform her DLA is significantly restricted either continuously or periodically for extended periods as required by EAPWDR section 2(2)(b).

### **Help with DLA**

The ministry's position is that, as it has not been established that DLA are significantly restricted therefore, it cannot be determined that significant help is required from other persons.

The appellant's position is that she has requires significant help with DLA due to her mental impairment, chronic pain and fatigue.

### ***Panel Decision***

In the PR, the physician indicates that the appellant does not require any prosthesis or aids for her impairment but requires help from her husband with most DLA's. In the AR, the physician indicates that help is required for DLA's and is provided by family. In the Physician's Letter the physician indicates that the appellant requires assistance with transferring and shopping, requires supervision for higher cognitive function tests such as banking, budgeting, paying rent and bills, that she cannot go out alone, has poor adaptation skills due to limited English but also due to her poor memory and concentration, and that she requires constant support and supervision with respect to social functioning.

The ministry determined that the appellant did not meet the legislative criteria of EAPWDA section 2(3)(b) on the basis that it was not establish the DLA were significantly restricted. However, the ministry did not provide any further indication that it considered the information about the assistance that the appellant requires and as the panel finds that the ministry was not reasonable in determining that the appellant does not have a severe impairment that significantly restricts DLA continuously or periodically for extended periods, the ministry was also not reasonable in determining that the appellant does not require help with DLA.

The panel finds that the ministry was not reasonable in determining that the necessary precondition has not been satisfied in this case. The panel finds that the ministry's decision that the appellant did not satisfy the legislative criteria of EAPWDA section 2(3)(b) was not reasonable.



**Conclusion**

Having reviewed and considered all of the evidence and the relevant legislation, the panel finds that the ministry's reconsideration decision finding the appellant ineligible for PWD designation was not reasonable based on the evidence and was not a reasonable application of the legislation in the circumstances of the appellant. The panel therefore rescinds the ministry's decision and the appellant is successful in her appeal.