

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of September 1, 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 January 26, 2016 ("SR"), a physician's report ("PR") and an assessor's report ("AR") both completed by the appellant's general practitioner (the "physician") dated January 26, 2016.
- Medical Report - Persons with Persistent Multiple Barriers ("PPMB Report") completed by the physician dated January 26, 2016
- The appellant's Request for Reconsideration ("RFR") form dated August 19, 2016 with attached letter from Canada Revenue Agency dated August 10, 2016 (the "CRA Letter") and appellant's typed timeline dated August 16, 2016 which sets out a chronology of the appellant's life (the "Timeline")

Diagnoses

- In the PR the physician diagnosed the appellant with depression and anxiety, date of onset 2010 and irritable bowel syndrome (IMS) with chronic abdominal pain, date of onset 2011. In the PR and the AR the physician indicates that he has been the appellant's general practitioner for 15+ years and has seen the appellant 11 or more times in the past 12 months.
- The PPMB Report indicates that the appellant has chronic abdominal pain/IMS, date of onset 2011 and anxiety/depression/post traumatic stress disorder, date of onset 2010.

Physical Impairment

- In the Health History section of the PR, the physician indicates that the appellant has chronic, daily abdominal pain and is unable to eat due to nausea and vomiting throughout the day. The physician indicates that the appellant is 5'1" and weighs 85.5 kg.
- In terms of physical functioning the physician reported in the PR that the appellant can walk 1 to 2 blocks unaided on a flat surface, can climb 5+ steps unaided, can lift 5 to 15 pounds and can remain seated for less than one hour.
- In the AR the physician reports that the appellant is independent with walking indoors, requires periodic assistance with walking outdoors, climbing stairs and standing, and requires continuous assistance from another person with lifting and carrying and holding. The physician explains that the appellant receives help from her family.
- In the SR the appellant states that she has trouble sleeping, insomnia or extreme fatigue, severe vomiting and nausea, severe abdominal swelling, extreme consistent chronic abdominal pain, and severe constipation to the point that she has passed out due to pain. The appellant states that she doesn't eat as it hurts too much, she can't lift anything over 10 pounds, and can't walk or stand for any length of time. She also indicates that she has IBS and that in 2010 she had her gallbladder removed and that despite medications she has difficulties managing her symptoms, requiring numerous doctor visits and tests. The appellant states that on one occasion she was found passed out in her bathroom and she came to on route to the hospital with no idea what had happened. She also reports attacks where her pulse fades, her temperature raises but she feels very cold, has shivers and sweats profusely, vomits uncontrollably, and has rectal bleeding. She states that these attacks happen randomly with no notice or reason. The appellant also states that she has had several trips to the hospital

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emergency department many times up until one year ago but then her doctor put her on some medications including prescriptions for pain control. The appellant states that she has not had to go to the hospital for emergency visits anymore but is still required to see her doctor regularly.

- The PPMB Report indicates that the appellant has had some improvement with treatment but still has vomiting and pain. The PPMB Report also indicates that the appellant is unable to do heavy lifting and prolonged standing.

Mental Impairment

- In Section B Health History the physician indicates that the appellant has difficulty managing stress from anxiety, depression, difficulty with concentration, energy and sleep.
- In the Functional Skills section of the PR, the physician indicates that there are no difficulties with communication.
- In the PR the physician indicates that the appellant has significant deficits with cognitive and emotional function in the areas of emotional disturbance, motivation and attention or sustained concentration.
- In the AR the physician indicates that the appellant's ability to communicate in all areas is good. For cognitive and emotional functioning, the physician indicates that the appellant has major impact to emotion, moderate impact to attention/concentration, motivation and other emotional or mental problems, minimal impact to memory and no impact to the remaining areas of bodily functions, consciousness, impulse control, insight and judgment, executive, motor activity, language, psychotic symptoms and other neuropsychological problems.
- In the SR the appellant states that she has depression, anxiety and PTSD. The appellant states that she has been the victim of several crimes that have caused her to go through terrible depression, anxiety and isolation as well as terrible nightmares and flashbacks of her trauma and abuse.

DLA

- In the PR the physician indicates that the appellant has not been prescribed any medication and/or treatments that interfere with her ability to perform DLA.
- In the PR the physician indicates that the appellant's DLA are not restricted in the areas of personal self care, management of medications, mobility inside the home, use of transportation, management of finances or social functioning. The physician indicates that the appellant's DLA of meal preparation, basic housework, daily shopping are continuously restricted. He indicates that the appellant's mobility outside the home is restricted but he does not identify whether the restriction is continuous or periodic.
- In the AR the physician indicates that with personal care the appellant is independent with dressing, grooming, bathing, toileting, transfers (in/out of bed) and transfers (on/off of chair) but requires periodic assistance from another person. The physician indicates that the appellant requires continuous assistance with basic housekeeping. With respect to shopping the physician indicates that the appellant is independent with reading prices and labels, making appropriate choices and paying for purchases but requires periodic assistance going to and from stores and continuous assistance with carrying purchases home. Where assistance is required the physician indicates that the appellant receives help from her family. With respect to meals the physician indicates that the appellant is independent with meal planning

and safe storage of food but requires periodic assistance from another person with food preparation and cooking. The physician indicates that the appellant requires periodic assistance with all aspects of paying rent and bills, medications, transportation and social functioning. The physician indicates that the appellant has good functioning with respect to her immediate and extended social networks.

- In the SR, the appellant states that she is unable to perform DLA such as washing dishes, sweeping, mopping, laundry, cooking as she gets worn out and has to take several breaks just to get a task done. The appellant states that she needs help with preparing meals, basic housework, daily shopping, help getting around outside and inside when in flare up, lifting things, standing, climbing stairs, carrying and holding things.

Help

- In the PR, the physician indicates that the appellant does not require any prosthesis or aids for her impairment. The physician indicates that the appellant needs assistance from family for meal preparation, housework and shopping.
- In the AR the physician indicates that the appellant receives help with DLA from family and friends. The physician indicates that the appellant does not have an Assistance Animal.
- In the SR the appellant states that she requires daily assistance from friends and family to help overcome her challenges.

Additional information provided

The appellant's Notice of Appeal dated September 9, 2016 completed by an advocate states that there are a number of omissions and that the physician did not complete the PR or AR forms correctly. The Notice of Appeal indicates that the appellant is working with a social worker and mental health clinicians who has significant information to build her case, which will demonstrate that the appellant meets the criteria required for PWD designation.

At the hearing the appellant stated that she wakes up in pain, and her abdomen often swells 12 to 14 inches so she "looks like a beach ball" that can take up to one week to decrease. She vomits regularly and her children have had to call 911 several times due to her passing out. She has severe constipation. She stated that she has difficulty with DLA including cooking, shopping, getting up and down stairs (goes down stairs on her bum), and is unable to work. She reports that lifting and any activities using her abdominal muscles are very challenging as they cause her increased pain.

At the hearing the appellant's advocate, a social worker, stated that he has just started to work with the appellant recently and it is clear that the PWD application was improperly completed as the physician did not fully report the appellant's symptoms. The advocate stated that the appellant cannot work, has severe stomach pain despite medications and long periods of time without bowel movements causing severe pain. Although the appellant is accessing services and going to counseling, she has ongoing symptoms and her condition is getting worse. The advocate states that although the physician in the AR reports that there is no impact to her bodily functions that is not accurate and that the appellant has moderate to major impact in this area.

Admissibility of New Information

The ministry did not object to the information in the Notice of Appeal or the appellant or advocate's



oral evidence. The panel has admitted the information in the Notice of Appeal and the oral evidence 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)(b) of the *Employment and Assistance Act*. In particular, the additional information provides further explanation about the appellant's medical condition, impacts on her DLA, and help needed.

At the hearing, the ministry relied on the reconsideration decision.

PART F – Reasons for Panel Decision

The issue on this appeal is whether the ministry's decision to deny the appellant designation as a PWD was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. In particular, was the ministry reasonable in determining that the appellant does not have a severe physical or mental impairment, and that in the opinion of a prescribed professional the appellant's impairments do not directly and significantly restrict her from performing DLA either continuously or periodically for extended periods, and that as a result of those restrictions the appellant does not require help to perform DLA?

The relevant legislation is as follows:

EAPWDA:

2 (1) In this section:

"assistive device" means a device designed to enable a person to perform a daily living activity that, because of a severe mental or physical impairment, the person is unable to perform;

"daily living activity" has the prescribed meaning;

"prescribed professional" has the prescribed meaning.

(2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act if the minister is satisfied that the person has a severe mental or physical impairment that

(a) in the opinion of a medical practitioner is likely to continue for at least 2 years, and

(b) in the opinion of a prescribed professional

(i) directly and significantly restricts the person's ability to perform daily living activities either

(A) continuously, or

(B) periodically for extended periods, and

(ii) as a result of those restrictions, the person requires help to perform those activities.

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

(a) a person who has a severe mental impairment includes a person with a mental disorder, and

(b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires

(i) an assistive device,

(ii) the significant help or supervision of another person, or

(iii) the services of an assistance animal.

EAPWDR section 2(1):

2 (1) For the purposes of the Act and this regulation, "**daily living activities**" ,

(a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following activities:

- (i) prepare own meals;
- (ii) manage personal finances;
- (iii) shop for personal needs;
- (iv) use public or personal transportation facilities;
- (v) perform housework to maintain the person's place of residence in acceptable sanitary condition;
- (vi) move about indoors and outdoors;
- (vii) perform personal hygiene and self care;
- (viii) manage personal medication, and

(b) in relation to a person who has a severe mental impairment, includes the following activities:

- (i) make decisions about personal activities, care or finances;
- (ii) relate to, communicate or interact with others effectively.

Severe Physical Impairment

The ministry's position, as set out in its reconsideration decision, is that the information provided is not evidence of a severe physical impairment. The reconsideration decision indicates that while the physician diagnoses IBS and indicates that the appellant has chronic abdominal pain causing nausea and impacts to eating, he does not describe impacts to her physical health such as physical wasting, malnutrition, or imminent danger to health. The ministry notes that in the PR the physician indicates that the appellant can walk 1 to 2 blocks unaided on a flat surface, can climb 5+ steps unaided, can lift 5 to 15 pounds and can remain seated less than one hour, although the physician does not describe how much less than an hour the appellant can remain seated.

The ministry's position is that the physician's assessments of the appellant's ability with walking unaided, climbing steps unaided and lifting, are not considered indicative of a severe impairment of physical functioning. The reconsideration decision also indicates that while the AR indicates the appellant requires continuous assistance from another person with lifting, the PR indicates that the appellant can lift 5 to 15 pounds and there is no information to explain the inconsistency between this information. The reconsideration decision also states that the physician has not described the frequency or duration of the periodic assistance from another person required with walking outdoors, climbing stairs, and standing. The ministry's position is that it is difficult to establish a severe impairment of physical functioning based on the physician's assessments.

The ministry also notes that while the letter from CRA indicates that the appellant is eligible for the disability tax credit, that decision has no bearing on her eligibility for PWD designation.

The appellant's position is that she has a severe physical impairment resulting from IBS and severe,

consistent and chronic abdominal pain that results in pain and vomiting which severely limits her daily functioning. The appellant's position, as presented by her advocate is that the appellant's condition is worse than described by the physician in the PR and the AR and that the appellant clearly 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. Likewise the use of the word "severe" in and of itself does not establish a severe impairment.

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 PR indicates that the appellant can walk 1 to 2 blocks unaided on a flat surface, can climb 5+ steps unaided, can lift 5 to 15 pounds and can remain seated less than an hour. While the AR indicates that the appellant needs continuous assistance with lifting and carrying and holding, and the appellant states that she has difficulty with lifting as it engages her abdominal muscles and causes increased pain, the PR indicates that the appellant can lift 5 to 15 pounds and there is no further information provided by the physician to explain this inconsistency.

The appellant's Notice of Appeal indicates that there are omissions in the PWD application and at the hearing the advocate indicated that the physician did not complete the PR and AR accurately but the appellant stated that she was present when the physician completed the forms, although he went through it very quickly. The panel also notes that the information provided by the appellant indicates that she is more functionally limited than described by the physician. However, the hearing was previously adjourned so that the appellant would have time to submit further medical documentation and to have her advocate present at the hearing, but no new medical documentation has been provided by the physician to explain the inconsistencies or indicates that her condition is getting worse.

In the Timeline the appellant provides details of her ongoing daily struggles. For example the appellant states that in addition to abnormal and painful bowel movements, her "...head feels sometimes like I'm being scalped and I have to soak my head in a hot bath. My hair is tender to touch". The appellant reports that she to go down stairs she "... on most cases crawl down them on my butt". The appellant also states that she has been told that she has a fatty liver with liver problems in addition to IBS and that she shakes violently throughout the day and is worried about falling.

The information in the Timeline and the information from the appellant at the hearing indicate her condition is more severe than reported by the physician. While the physician may not have a full appreciation of the appellant's daily functioning and her struggles, the legislation is clear that the fundamental basis for the analysis is the evidence from a prescribed professional. Although the appellant's new advocate is a social worker and a social worker is considered a prescribed professional as per EAPWDR section 2(2)(f), the advocate, there is insufficient information to explain

the inconsistencies between the PR, AR and the additional information provided. For example, the advocate states that the information from the physician in the AR indicating that there is no impact to the appellant's bodily functions is not correct, but no new information from the physician was provided to indicate that this was an error or to describe how the appellant's bodily functions are impacted and whether the impact is minimal, moderate or major.

The physician has not confirmed the information provided by the appellant that she has a fatty liver, liver problems or the impact of that condition and the physician does not provide information regarding the appellant's violent shaking or falling. The appellant indicated that she was sitting with the physician when he completed the PR and the AR so it is not clear why the information from the physician would not be accurate and/or would be not more fully describe the appellant's condition. In addition, the advocate indicated that a new PWD application would likely need to be made.

The panel also notes that while the appellant indicates that she is unable to work due to her condition, employability is not a criterion for designation for PWD.

Based on the available evidence the panel finds that the ministry reasonably determined that the information provided speaks to a moderate rather than severe physical impairment.

Severe Mental Impairment

The ministry's position is that they acknowledge that the appellant has been diagnosed with depression and anxiety and has difficulty with concentration, energy and sleep. However, in the PR, the physician indicates that the appellant has significant deficits with cognitive and emotional functioning in the areas of emotional disturbance, motivation, and attention/sustained concentration but in the AR the physician indicates that the appellant has moderate impacts to cognitive and emotional functioning in these areas and major impact only in the area of emotion. The reconsideration decision notes that the appellant is not restricted with social functioning and has no difficulties with communication. The ministry's position is that the cumulative impact to cognitive and emotional functioning as indicated by the physician in the PR and the AR is not considered indicative of a severe impairment of mental functioning.

The ministry acknowledges that the appellant is currently experiencing limitations to her cognitive and emotional functioning due to depression, anxiety and a history of personal trauma, but based on the assessments and information provided, a severe impairment of mental functioning has not been established.

The appellant's position is that she has experienced significant trauma and abuse resulting in depression, anxiety and PTSD, which continue to impact her particularly with insomnia and sleep difficulties. The appellant's position is that her severe physical impairments also significantly impact her mood as she is frustrated with her pain, ongoing hospital admissions and inability to function without help, leaving her feeling sad, depressed and hopeless. The appellant's position is that the information provided demonstrates that she has a severe mental impairment.

Panel Decision

In the PR, the physician indicates that the appellant has significant deficits with cognitive and

emotional function in the areas of emotional disturbance, motivation, and attention or sustained concentration and difficulty managing stress from anxiety and depression. However, in the AR the physician indicates that the appellant has major impact to only one area of her functioning being emotion. The physician indicates that the appellant has moderate impact in the areas of attention/concentration, motivation, and other emotional or mental problems, minimal impact to memory and no impact to the remaining listed areas. Both the PR and the AR indicate that the appellant's social functioning is good.

The panel accepts the appellant's evidence that her physical symptoms also impact her mood and that she struggles with depression and anxiety. However, given the information in the AR and the PR the panel finds that the ministry was reasonable in determining that the cumulative impact to cognitive and emotional functioning is not indicative of a severe mental impairment.

Significant Restrictions to DLA

The reconsideration decision states that the minister is not satisfied that the appellant has a severe impairment that, in the opinion of a prescribed professional, directly and significantly restricts her ability to perform DLA continuously or periodically for extended periods. The reconsideration decision indicates that while the PR indicates that the appellant has continuous restrictions with meal preparation, the AR indicates that the appellant is independent with two areas of "meals" and. The PR indicates that the appellant has continuous restrictions with daily shopping, but in the AR, the physician indicates that the appellant is independent with three areas of shopping and only requires continuous assistance with one of five listed areas of shopping. The ministry also notes that the physician does not describe the frequency of the appellant's restrictions with mobility outside the home. The ministry also notes that in the AR the physician indicates that the appellant is independent with the majority of listed DLA and although he indicates that she requires periodic assistance from another person with feeding self/regulating diet, going to/from stores, food preparation and cooking, he does not describe the frequency or duration of the periodic assistance needed.

The ministry's position is that it relies on the medical opinion and expertise of the physician to determine whether the appellant's impairment meets the legislative criteria, and that based on the information in the PR, AR, PPMB Report and CRA Letter, there is 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.

The appellant's position is that due to severe abdominal pain and swelling she has difficulty with DLA including cooking, shopping, housework and that she needs help. The advocate argues that the appellant is living with a severe, lifelong condition that impacts her significantly and she requires help and therefore she meets the criteria 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 applicant's ability to perform DLA either continuously or periodically for extended periods. The term "directly" means that there must be a causal link between the severe impairment and the

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

The AR indicates that the appellant is independent with most of the listed areas of DLA: dressing, grooming, bathing, toileting, transfers (in/out of bed), transfers (on/off of chair), reading prices and labels, making appropriate choices, paying for purchases, meal planning, safe storage of food, all aspects of paying rent and bills, all aspects of medication, transportation and social functioning.

The physician indicates that the appellant requires continuous assistance from another person with basic housekeeping and carrying purchases home and periodic assistance with feeding self/regulating diet, going to and from stores, food preparation and cooking. However, the information in the AR is not consistent with the information in the PR with respect to meals. For example, the PR indicates that the restriction to meals is continuous, yet in the AR the physician indicates that the restriction is periodic only with respect to two of four listed areas of DLA, being food preparation and cooking. In addition, the physician does not provide any indication of the frequency or duration of the periodic assistance needed.

The panel again notes that the information from the appellant and the advocate indicates that the appellant is more restricted with DLA than is reported by the physician. However, given the inconsistencies between the information provided and the lack of any further information from the physician with respect to the frequency and duration of the periodic assistance required and/or clarification as to the errors on the PR and the AR identified by the advocate, the panel finds that the ministry reasonably determined that the appellant’s impairment does not significantly restrict DLA either continuously or periodically for extended periods as required by EAPWDA section 2(2)(b)(i).

Help with DLA

The ministry notes that the physician indicates that the appellant is provided assistance by family and friends but does not require any prostheses or aids for her impairment. The ministry’s position is that, as it has not been established that DLA are significantly restricted as a result of a severe impairment, it cannot be determined that significant help is required from other persons.

The appellant’s position is that she requires help with DLA including cooking, shopping and housework. The advocate argued that the appellant is accessing various community services and needs ongoing help as a result of her severe impairment and restrictions to DLA.

Panel Decision

In the PR, the physician indicates that the appellant does not require any prostheses or aids for her impairment. The PR indicates that the appellant needs assistance from family for meal preparation, housework and shopping and the AR indicates that the appellant receives assistance from family and

friends. In the AR, the physician indicates that the appellant does not have an assistance animal.

Although the appellant needs and receives some assistance from family and friends, 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. As the panel finds that the ministry reasonably determined that the appellant does not have a severe impairment that directly and significantly restricts her ability to manage her DLA either continuously or periodically for an extended period of time, the necessary precondition has not been satisfied.

The panel finds that the ministry's decision that the appellant did not satisfy the legislative criteria of EAPWDA section 2(3)(b) was therefore reasonable.

Conclusion

The panel acknowledges that the appellant has serious medical conditions that impact her functional ability and her ability to perform DLA. However, having reviewed and considered all of the evidence and the relevant legislation, the panel finds that the ministry's decision finding the appellant ineligible for PWD designation is reasonable based on the evidence and is a reasonable application of the legislation in the circumstances of the appellant.

The panel therefore confirms the ministry's reconsideration decision and the appellant is not successful in her appeal.