

## 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:

- Page one of a chronic pain consultation completed by a doctor (the “Doctor”) dated March 9, 2010 (the “Chronic Pain Consultation”).
- The appellant’s PWD application form consisting of the appellant’s self-report form dated April 21, 2016 (“SR”), a physician’s report (“PR”) completed by the appellant’s general practitioner (the “physician”) dated April 8, 2016, and an assessor’s report (“AR”) completed by the appellant’s physiotherapist (the “physiotherapist”) dated April 19, 2016. In the PR the physician indicates that he has been the appellant’s general practitioner for two months and has seen the appellant 2 to 10 times. In the AR, the physiotherapist indicates that she has known the appellant for two months and has seen her 2 to 10 times in the last year.
- Certificate of Health Status completed by the Doctor dated July 28, 2016 (the “Certificate”).
- The appellant’s Request for Reconsideration (“RFR”) form dated August 16, 2016 with attached two page submission.
- Letter from the appellant’s advocate dated August 17, 2016 requesting an extension of time to obtain further medical documentation.
- Revised PR dated August 18, 2016 (“Revised PR”) and revised AR dated August 23, 2016 (“Revised AR”) completed by the physician and the physiotherapist respectively.

### Diagnoses

- In the PR the physician diagnosed the appellant with chronic pain (date of onset 2005) and carpal tunnel syndrome (date of onset 2009). In the Revised PR the physician adds that the appellant also has a diagnosis of fibromyalgia (date of onset 2006), musculoskeletal and myofascial pain (date of onset 2000) and neurological-other-sciatica dyesthesia (date of onset 2010).
- The Certificate indicates that the appellant was diagnosed with the following disabling diagnoses: diffuse chronic pain syndrome, fibromyalgia/myofascial pain syndrome and hypermobility syndrome.
- The Chronic Pain Consultation indicates that the appellant was diagnosed with myofascial pain/fibromyalgia probable, chronic fatigue, anxiety, IBS, insomnia, mild scoliosis, restless legs, psoriasis, shoulder tendonitis, urinary frequency, abdominal pain NYD, carpal tunnel syndrome, and depression.

### Physical Impairment

- In the Health History section of the PR and the Revised PR, the physician indicates that the appellant has moderate to severe impairment of DLA’s with continuous pain. The physician indicates that he is awaiting previous doctor’s records, that the appellant has limited function with flares and restricted ability due to pain.
- In terms of physical functioning the physician reported in the PR that the appellant can walk 4+ blocks unaided on a flat surface, can climb 5+ steps unaided, can lift 5 to 15 pounds and can remain seated less than 1 hour. In the Revised PR the physician indicates that the appellant can walk 2 to 4 blocks unaided on a flat surface, can climb 2 to 5 steps unaided, is limited to lifting under 5 pounds and can remain seated less than 1 hour.

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- In the AR the physiotherapist indicates that the appellant is independent with all aspects of mobility and physical ability commenting that the appellant is able to perform activities but needs frequent breaks and can't continue for prolonged periods of time. In the Revised AR, the physiotherapist indicates that the appellant uses assistive devices and takes significantly longer than typical with walking indoors, walking outdoors and climbing stairs, explaining that she requires a cane or walking stick when flared and uses hand rails with climbing stairs when flared. The physiotherapist indicates that the appellant requires periodic assistance from another person with lifting and uses an assistive device for carrying and holding, explaining that she uses a wrist brace most times.
  - In the SR the appellant states that she has many disabilities including hypermobility joint disorder, which affects all of the ligaments in her body. She has tendonitis, cubital and carpal tunnel syndrome, hip, knee, and foot problems. Her temporal mandibular joint disorder causes headaches and facial pain. Her spine is very tender from the base of her neck to the tip of her tailbone and she has pain spanning out in through her shoulders, shoulder blades and lower back. She suffers with internal pain in her abdomen and intestines. She has chronic cystic ovarian fibrosis, which often gives her pain, especially during her menstrual cycle. The appellant states that her carpal and cubital tunnel condition greatly affects her daily life as she experiences severe shocks, numbness and pins and needles accompanied by throbbing from her shoulder to her fingertips regularly throughout the day, making all tasks much more difficult. The appellant also states that her fibromyalgia makes a lot of the chronic pain and it is also very exhausting, leaving her feeling quite tired all the time.
  - In the RFR the appellant states that her disabilities are many including hyper-mobility joint disorder, fibromyalgia, myofascial pain, diffuse chronic pain, carpal and cubital tunnel syndrome, neurological pain from her neck down through her arms and from her lower back down through her hips into her leg, sensory impairment in her hands and legs, arthritis, asthma, digestive disorders (IBS/colitis), chronic spinal pain, degenerative disk and musculoskeletal/connective tissue disorders, chronic tendonitis in both shoulders, temporomandibular joint disorder, chronic cystic ovarian fibrosis, chronic fatigue and she suffers from non-restorative sleep. The appellant states that the neurological pain often reaches all the way up from her neck and shoulder blade down through her arm like electric shocks to her fingertips; they pulsate for many hours at a time leaving her arms unusable. She states that she often requires splinting for recovery when this occurs and takes a week or more to recover. She requires assistive devices of splints and braces for these conditions. The appellant states that she always has pain in her lower back, varying in intensity which throbs, often pulsating outwards into her hips creating great discomfort when walking, sitting or standing. Bending and reaching often create sparks of pain shooting out from this area resulting in spasms and sometimes collapse. She states that her internal problems are often quite severe and that her IBS/colitis gives her regular pain and discomfort, diarrhea, bloating, painful abdomen, nausea, and urgency to use the washroom. She adds that the term "with flares" (as stated in the PR and AR) refers to when her conditions are in an inflamed state, which happens often with activity and usually takes two to six weeks to recover from.
  - The Chronic Pain Consultation indicates that the appellant has had many different kinds of pain for years, noting that she describes her worst pain in her low back, worse with different movements which radiates down her legs and many weight bearing activities such a sitting and standing worsens the pain. The Doctor notes that the appellant reports her pain somewhere between 6-8/10 with some variability. She also reports some mid and upper back pain and is hypermobile, easily cracking her knuckles. The Doctor indicates that the appellant

reports disrupted sleep, but that investigation for sleep apnea was negative. The Doctor notes that the appellant reports that a lot of her pain is between her shoulder blades and many weight bearing activities such as sitting and standing worsens the pain. The Doctor notes that the appellant has tried numerous therapies and currently finds chiropractic helpful although she would be interested in trying acupuncture.

### Mental Impairment

- In the Chronic Pain Consultation the Doctor states that the appellant has anxiety and depression.
- 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, noting chronic pain and depression interaction. Under Part F – Additional Comments the physician indicates that chronic pain negatively impacts her mood. In the Revised 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 physiotherapist indicates that the appellant's ability to communicate with speaking, reading and hearing is good but that her communication with writing is poor as she is only able to write for short periods of time. For cognitive and emotional functioning, the physiotherapist indicates that the appellant has moderate impact in the area of bodily functions but no impact to the remaining areas, explaining that the appellant has significant sleep disturbance, especially when her shoulder/arm flares. In the Revised AR the physiotherapist indicates that the appellant is only able to write for short periods of time up to 20 minutes. For cognitive and emotional functioning the physiotherapist indicates that the appellant has major impact to bodily functions, moderate impact in the area of of emotion, motivation and motor activity, minimal impact in the areas of consciousness (drowsy) and attention/sustained concentration and no impact in the remaining areas.
- In the RFR the appellant reports that she is mentally drained.

### DLA

- In the PR and the Revised 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 and the Revised PR, the physician indicates that the appellant's DLA of meal preparation and basic housework are continuously restricted and that her DLA of personal self care, daily shopping, mobility inside the home, mobility outside the home and use of transportation are periodically restricted. The physician indicates that her DLA of management of medications, management of finances, and social functioning are not restricted. With respect to her periodic restrictions the physician indicates that some activities exacerbate her pain more than others. Regarding the degree of restriction the physician indicates that some activities are more restricted than others (e.g. cooking).
- In the AR the physiotherapist indicates that the appellant is independent with all aspects of personal care, paying rent and bills, medications and transportation. The physiotherapist indicates that the appellant is independent with reading prices and labels, making appropriate choices, paying for purchases, meal planning and safe storage of food but that she requires periodic assistance with laundry, basic housework, going to and from stores and carrying

purchases home, noting that she needs help when flared. The AR indicates that the appellant also requires periodic assistance with food preparation and cooking and needs help when her hands and shoulder are flared. Under additional comments, the physiotherapist indicates that the appellant needs assistance from friends and family but there are no safety concerns.

- In the Revised AR the physiotherapist indicates that for grooming the appellant takes significantly longer than typical and uses an assistive device and that for bathing she requires periodic assistance from another person and she uses an assistive device. The physiotherapist indicates that she requires continuous assistance from another person with feeding self, explaining that others must help with cutting food most often due to paresthesia in her hands. With respect to shopping the physiotherapist explains that the appellant needs help with going to and from stores and carrying purchases home when flared. For food preparation the physiotherapist indicates that the appellant requires continuous assistance from another person when her hand and shoulder are flared and due to hand paresthesia. With respect to transportation the Revised AR indicates that the appellant uses an assistive device getting in and out of a vehicle as she uses a walking stick when flared.
- The AR indicates that the appellant is independent with all aspects of social functioning and that she has good functioning with her immediate and extended social networks. In the Revised AR, the physiotherapist indicates that the appellant requires periodic support/supervision with developing and maintaining relationships, explaining that she has difficulty with maintenance of relationships due to pain and fatigue. The physiotherapist also indicates that the appellant requires periodic support/supervision securing assistance from others. The Revised AR indicates that the appellant has marginal functioning with respect to her immediate social networks; the physiotherapist explains that she has a significant decrease in the number and quality of relationships due to pain and fatigue and she feels somewhat withdrawn. The Revised AR indicates that the appellant has marginal functioning with her extended social networks indicating that she has had a significant decrease in community involvement.

### Help

- In the PR, the physician indicates that the appellant does not require any prostheses or aids for her impairment. The physician states that the appellant does not need assistance with DLA but that more time is required. In the Revised PR the physician indicates that the appellant requires a wrist brace, walking cane and handrails with flares (becoming more frequent). The physician also indicates that the appellant requires assistance with meal preparation and housework.
- In the AR the physiotherapist indicates that the appellant requires help with DLA from family and friends. The physiotherapist indicates that the appellant uses a cane, explaining that she has used a cane and crutch in the past but not at present. The physiotherapist indicates that the appellant does not have an Assistance Animal. In the Revised AR the physiotherapist indicates that the appellant needs assistance with housekeeping and meal preparation. The physiotherapist also indicates that the appellant routinely uses a prosthesis (teeth), splints and braces (wrist, elbow, knee) and bathing aids (braces and handrails). The physiotherapist also indicates that the appellant requires additional support rails in her home.
- In the RFR the appellant indicates that she uses assistive devices such as handrails for more than 3-4 steps and walking canes/sticks for any distance of more than 3-4 blocks.

### **Additional information provided**

In her Notice of Appeal dated October 5, 2016, the appellant states that the Doctor, physician and physiotherapist all believe that she is an eligible candidate for PWD. The appellant states that she suffers from depression and anxiety but that these mental conditions were not declared clearly. The appellant states that she feels that they understand what information is required now for the ministry to properly understand her conditions.

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 ministry did not object to the information in the Notice of Appeal. The panel has admitted the information in the Notice of Appeal finding that 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 regarding the appellant's mental condition.

The ministry provided a submission indicating that the ministry was relying on the reconsideration summary provided in the Record of Ministry Decision. The appellant accepts the ministry's submission as argument.

## PART F – Reasons for Panel Decision

The issue on this appeal is whether the ministry's reconsideration 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:**

#### **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 is in a prescribed class of persons or that the person has a severe mental or physical impairment that

(a) in the opinion of a medical practitioner or nurse 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. The ministry notes that the information provided in the PR indicates that the appellant has a "*moderate to severe impairment*" and "*limited function with flares*". The ministry reviewed the PR and the AR and found that the information provided is indicative of a moderate, not severe impairment. The reconsideration decision also notes that in the AR the physiotherapist completed the section for Cognitive and Emotional Functioning indicating that the appellant has moderate impact to bodily functions, explaining that she has significant sleep disturbance, especially when shoulder/arm flared. The ministry's position is that as the PWD application does not identify a mental impairment or brain injury, this comment is accepted as an impact due to the appellant's physical condition but not as an impact resulting from a mental disorder.

The reconsideration decision indicates that in the Revised PR and the Revised AR the physician and



physiotherapist provide re-assessments of the appellant's basic physical functional skills, which are different than in the PR and the AR. The ministry's position is that while the physician and the physiotherapist indicate that the appellant's impairment is significant during her flares, the reports are vague with regard to the appellant's baseline physical functioning during the absence of flares and neither provides details to explain the frequency or duration of her flares. In particular, the ministry notes that the physician indicates that the flares "become more frequent" but there is no further explanation provided. The ministry also notes that the Certificate is also silent regarding these details and does not mention the appellant's flares or explain how her diagnoses impact the appellant's physical functioning.

The ministry also notes that in the RFR the appellant states that her "flares usually take 2-6 weeks to recover from and happen often with activity" but this information speaks to her recovery period from the flares, not the experience of the flares themselves. The RFR states that flares happen "often with activity" but the ministry states that it may only speculate as to how frequently the flares occur, the duration that they occur and what types of activity trigger them.

The ministry's position is that the information provided is not sufficient to determine that the appellant's overall ability to manage activities requiring mobility and physical ability is significantly restricted for extended periods of time and represents a significant restriction to the appellant's overall functioning. The ministry's position is that the reports from the appellant's physician and physiotherapist indicate that the appellant's physical functioning abilities are limited during her flares but the frequency and duration of the flares is unknown.

The appellant's position is that she has a severe physical impairment resulting from her many physical disabilities including hyper-mobility joint disorder, fibromyalgia, myofascial pain, diffuse chronic pain, carpal and cubital tunnel syndrome, neurological pain from her neck down to her legs, arthritis, asthma, digestive disorders (IBS/colitis), chronic spinal pain, degenerative disk and musculoskeletal/connective tissue disorders, chronic tendonitis in both shoulders, temporomandibular joint disorders, chronic cystic ovarian fibrosis, and chronic fatigue. The appellant's position is that she lives with significant pain and functional limitations. The appellant's position is that the information provided by the physician, physiotherapist, Doctor, Chronic Pain Consultation and herself demonstrate that she meets the criteria for PWD designation.

#### *Panel Decision*

The PR indicates that the appellant was diagnosed with chronic pain and carpal tunnel syndrome but in the Revised PR the physician add the diagnoses of fibromyalgia, musculoskeletal/myofascial pain and neurological – other –sciatica dyesthesia. The Certificate also indicates that the appellant was diagnosed with diffuse chronic pain syndrome, fibromyalgia/myofascial pain syndrome and hypermobility syndrome. While the Doctor states that this "*should qualify her for disability status*", 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.

The panel notes that in the Chronic Pain Consultation, the Doctor indicates that the appellant was diagnosed with myofascial pain/fibromyalgia probable, chronic fatigue, IBS, insomnia, mild scoliosis,

restless legs, psoriasis, shoulder tendonitis, urinary frequency, abdominal pain NYD, previous uterine cysts and carpal tunnel syndrome, the report is six years old and only the first page of the report is provided. In addition, in the Certificate, the Doctor does not confirm all the previous diagnosis. Given the age of the Chronic Pain Consultation and the missing pages, the panel finds that the ministry reasonably determined that the Chronic Pain Consultation may not accurately represent the appellant's current medical conditions, impairments, or abilities to function and that without the complete report the information provided is not helpful evidence.

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.

While the information provided indicates that the appellant has several serious medical conditions, and while the physician indicates that the appellant has moderate to severe impairment of DLA's, the information from the physician and the physiotherapist in the original and revised PWD application contains many inconsistencies with little or no explanation provided for the changes between the PR and the Revised PR and between the AR and the Revised AR.

For example, in the PR, the physician indicates that the appellant can walk 4+ blocks unaided on a flat surface, can climb 5+ steps unaided, can lift 5 to 15 pounds and can remain seated less than 1 hour but in the Revised PR the physician indicates that the appellant can only walk 2 to 4 blocks unaided on a flat surface, can climb 2 to 5 steps unaided, is limited to lifting under 5 pounds and can remain seated less than 1 hour. The physician has not provided any explanation for the difference in opinion despite the fact that the Revised PR was completed only four months after the PR. In the PR the physician indicates that the appellant's impairment is lifelong chronic pain syndrome and that she was having improvement in pain and function with her current regime. In the Revised PR the physician does not change this statement and does not provide any information to indicate that there has been a change in the appellant's condition to explain the worsening of her condition.

In the AR the physiotherapist indicates that the appellant is independent with all aspects of mobility and physical ability commenting that the appellant is able to perform activities but needs frequent breaks and can't continue for prolonged periods of time. In the Revised AR, the physiotherapist indicates that the appellant uses an assistive device and takes significantly longer than typical with walking indoors, walking outdoors and climbing stairs, explaining that she requires a cane or walking stick when flared and uses hand rails with climbing stairs when flared. The physiotherapist indicates that the appellant requires periodic assistance from another person with lifting and uses an assistive device for carrying and holding, explaining that she uses a wrist brace most times. In both the AR and the Revised AR, the physiotherapist indicates that the appellant is independent with all aspects of mobility and physical ability and is able to perform activities alone but needs frequent breaks. While the Revised AR indicates that the appellant uses assistive devices and takes significantly longer than typical with some tasks, the physiotherapist does not provide further information on how much longer than typical it takes or why this information was not included in the AR.

In the RFR the appellant states that she has muscle pain in many locations and restrictions because of her medical conditions, including a very hard time getting moving in the day and feeling exhausted. The appellant also explains that her flares usually take 2-6 weeks to recover from and happen often with activity. However, the information provided does not explain how frequently the flares occur, the

types of activity that trigger the flares or the duration of the flares and there is no information from the physician, physiotherapist or the Doctor providing details of this information.

While the information provided in the Revised PR and the Revised AR do indicate additional restrictions, there is no explanation provided for the differences, or the frequency or duration of the appellant's symptoms. Despite the additional restrictions it appears that the appellant continues to have independent functioning with all aspects of aspects of mobility and physical mobility.

Based on the available evidence the panel finds that the ministry reasonably determined that the information provided by the physician in the PR and the AR speaks to a moderate rather than severe physical impairment.

### **Severe Mental Impairment**

The ministry's position is that the information provided does not establish that the appellant has a severe mental impairment. The reconsideration decision indicates that in the PR there is no diagnosis of a mental impairment although the physician does indicate that the appellant has significant deficits with cognitive impairment in the area of emotional disturbance but that the appellant does not have difficulties with communication and her DLA regarding social functioning are not restricted. The ministry notes that in the Revised PR, the physician indicates that the appellant has additional significant deficits in the areas of motivation and attention or sustained concentration. The reconsideration decision indicates that in the AR the physiotherapist indicates that the appellant has good functioning with both her immediate and extended social networks but that in the Revised AR the physiotherapist indicates that her functioning is marginal, with no explanation for the change.

The ministry's position is that while the physiotherapist's information indicating that the appellant has had a significant decrease in the number and quality of her relationships and has minimal and moderate impact to her cognitive and emotional functioning, this information cannot be accepted as indicative of the presence of a severe impairment related to a mental impairment. The ministry's position is that while the physiotherapist indicates that the appellant's writing is poor, given her medical diagnosis of chronic pain and carpal tunnel syndrome, this information is accepted as an impact due to a physical medical condition rather than a mental disorder.

The reconsideration decision also notes that the Certificate does not provide the diagnosis of a mental disorder or any indication of a mental impairment that restricts the appellant's ability to function.

The ministry's position is that although "impairment" is not specifically defined in the PWD regulation, the PWD designation application describes it 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". The ministry must be satisfied that the appellant has a severe mental impairment based on the information provided. While the ministry notes that the appellant reports, in the RFR, that she is mentally drained, and that the physiotherapist indicates that the appellant was very active and motivated and involved in both personal, professional and community activities prior to the onset of any symptoms, and that the loss of these abilities is very significant and difficult for her, the ministry's position is that there is insufficient evidence to establish a severe impairment of the appellant's mental functioning.

The ministry's position is that based on the available information, the ministry would expect that the appellant would encounter some mental or emotional challenges, particularly when she experiences a flare. However, the ministry finds that the evidence provided does not establish the presence of a severe mental impairment.

The appellant's position is that she has constant pain that impacts her mood and ability to function leaving her mentally drained. The appellant's position is that the information provided demonstrates that she has a severe mental impairment.

### *Panel Decision*

While the physician does not diagnose the appellant with a mental impairment in the diagnosis section of the PR, the physician does indicate that the appellant has significant deficits with cognitive and emotional functioning in the area of emotional disturbance, noting that she has chronic pain and depression interaction. However the PR and the AR both indicate that the appellant's abilities with communication are good (other than poor writing due to chronic pain and carpal tunnel syndrome) and the AR indicates that she has good functioning with her immediate and extended social networks. The Revised PR indicates further significant deficits in the areas of motivation and attention or sustained concentration and the Revised AR indicates that the appellant's social functioning is marginal but neither the physician nor the physiotherapist provide any explanation for the change in the information provided.

The physiotherapist has completed section 4, cognitive and emotional functioning, even though the physician has not diagnosed the appellant with an identified mental impairment or brain injury but in the AR, the physiotherapist does not indicate any major impacts to her functioning, noting moderate impact to bodily functions, and no impact to the remaining areas. In the Revised AR, the physiotherapist changes the information provided to indicate that the appellant has major impacts in the area of bodily functions and moderate impacts in the areas of impulse control, motivation and motor activity but does not provide any explanation for the change.

The panel notes that the Chronic Pain Consultation indicates that the appellant was diagnosed with anxiety and depression but as noted previously the report is six years old and incomplete. In addition the Certificate completed by the same Doctor in July 2016 does not indicate any diagnosis of mental impairment so it is difficult to determine whether the appellant still has those diagnoses or not. While

While the appellant reports that she is mentally drained, the information provided does indicate that she encounters some emotional challenges, the panel finds that the ministry reasonably determined that the information provided is not evidence of a severe mental impairment.

### **Significant Restrictions to DLA**

The ministry's position is that while the appellant may encounter difficulties with her ability to manage DLA due to limitations caused by her medical conditions, the information provided does not establish that a severe impairment significantly restricts her ability to manage DLA either continuously or periodically for extended periods.

The ministry finds that there is a contradiction between the information provided by the physician in the PR and the Revised PR regarding the appellant's abilities to prepare meals and complete basic housekeeping. The reconsideration decision notes that in the PR the physician indicated that the appellant had continuous restrictions with these DLA but in the Revised PR the physician indicates that she needs assistance "*with flares – wrist braces, handrails, assistance with meal preparation and housework*". The ministry's position is that the Revised PR supports a periodic rather than a continuous restriction to the appellant's abilities to complete these activities because assistance would reasonably be required during flares when her physical ability to lift is limited to less than 5 pounds and her mobility is limited such that she requires the use of assistive devices such as a cane, braces, and splints.

The ministry's position is that when asked to explain "periodic" restrictions the physician states "*some activities exacerbate pain more than others, also changes from time to time; does alone so needs more time*" and that the physician indicates that no assistance is needed but that the appellant requires more time to complete her activities. The reconsideration decision notes that when asked to provide additional comments relevant to understanding the significant of the appellant's condition, impairment and impacts to daily functioning, the physician states "*daily impacts, has a child to look after, chronic pain negatively impacts mood*". The ministry's position is that the information provided by the physician is vague and does not describe the amount of additional time required to complete her DLA so it cannot be determined whether the appellant's restriction is significant. The ministry also notes that there is no information to determine the frequency or duration of the periodic restrictions so it does not meet the legislative criteria because it is unknown whether the appellant's periodic restrictions are for extended periods of time and therefore represent a significant restriction to her overall ability to manage DLA.

The reconsideration decision notes that in the AR, the physiotherapist indicates that the appellant is independent in feeding herself but in the Revised AR the physiotherapist indicates that the appellant requires continuous assistance from another person or that she is unable to feed herself, explaining that "*others must help with cutting food most often (due to paresthesia in hands)*". The ministry also notes that the physiotherapist does not provide an explanation for this change. The ministry's position is that while this aspect of the appellant's personal care is continuously restricted, the legislative criteria is not met unless multiple aspects of a DLA are either continuously or periodically restricted for extended periods.

The ministry's position is that the AR and the Revised AR contain inconsistencies with respect to the information provided regarding the appellant's ability to perform DLA of laundry and basic housekeeping and preparing food as the AR indicates continuous assistance is needed whereas the notes provided in the revised AR indicates periodic assistance is needed when the appellant experiences flares in her symptoms. In addition the ministry notes that there is no information provided to indicate the frequency or duration of the appellant's restrictions with these DLA. The ministry's position is that based on the information provided it is unknown whether the appellant requires significant assistance to complete activities of basic housekeeping and laundry for extended periods of time.

The reconsideration decision indicates that the Certificate does not explain how the appellant's medical conditions impact her physical or mental functioning or how frequently her diagnosis restricts her DLA nor the duration of any restrictions. The reconsideration decision states that while the

Doctor states that the appellant's diagnosis should qualify her for disability status, the legislative requirement is that she have a severe physical or mental impairment (not a diagnosis) which directly and significantly restricts her ability to perform DLA and, as a result, she requires significant assistance from another person either continuously or periodically for extended periods. The ministry's position is that without more detailed information, the ministry cannot be satisfied that this legislative criterion has been met.

The reconsideration decision also indicates that while the appellant describes her diagnoses and chronic pain in the RFR, she does not provide details regarding her abilities to perform DLA, how frequently her diagnoses restrict her DLA nor the duration of any restrictions to her DLA.

The appellant's position is that the information provided by the physician, physiotherapist, Doctor and her establishes that she is an eligible candidate for PWD. In the SR the appellant states that the pain she experiences makes all tasks more difficult.

#### *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.

In the PR and the Revised PR the physician indicates that the appellant has not been prescribed any medication and/or treatment that interfere with her ability to perform DLA.

While the PR and the Revised PR both indicate that the appellant has continuous restrictions with DLA of meal preparation and basic housework, the PR indicates that the appellant does not require assistance with DLA but that more time is required, and that some activities are more restricted than others, such as cooking. In the Revised PR the physician adds that with flares, the appellant requires wrist braces, hand rails, and assistance with meal preparation and housework. However, the physician has not provided any information to explain how often the flares occur and the frequency or duration of the assistance that is required during flares. In addition, the physician has not provided any information to explain why there is a change in the assessment.

With respect to the appellant's periodic restrictions of personal self care, daily shopping, mobility inside the home, mobility outside the home and use of transportation the physician indicates that some activities exacerbate pain more than others and that the appellant has changes from time to time, but the physician does not explain how often the periodic restrictions occur or the duration of the periodic restrictions. The panel finds that the ministry's finding that the information provided by the

physician is vague and that it cannot be determined whether the appellant's restriction is significant was reasonable.

In the AR the physiotherapist indicates that the appellant is independent with all aspects of personal care, paying rent and bills, medications and transportation. The physiotherapist indicates that the appellant is independent with reading prices and labels, making appropriate choices, paying for purchases, meal planning and safe storage of food but that she requires periodic assistance with laundry, basic housework, going to and from stores and carrying purchases home, noting that she needs help when flared. The AR indicates that the appellant also requires periodic assistance with food preparation and cooking and needs help when her hands and shoulder are flared. Under additional comments, the physiotherapist indicates that the appellant needs assistance from friends and family but there are no safety concerns.

In the Revised AR the physiotherapist indicates that for grooming the appellant takes significantly longer than typical and uses an assistive device and that for bathing she requires periodic assistance from another person and uses an assistive device. She requires continuous assistance from another person with feeding self, explaining that others must help with cutting food most often due to paresthesia in her hands. With respect to shopping the physiotherapist explains that the appellant needs help with going to and from stores and carrying purchases home when flared. For food preparation the physiotherapist indicates that the appellant requires continuous assistance from another person when her hand and shoulder are flared and due to hand paresthesia. With respect to transportation the Revised AR indicates that the appellant uses an assistive device getting in and out of a vehicle as she uses a walking stick when flared.

The reconsideration decision states that while the AR indicates that the appellant is independent with feeding herself the revised AR indicates that the appellant requires continuous assistance from another person or that she is unable to feed herself, specifically that "others must help with cutting food most often (due to paresthesia in hands). The reconsideration decision states that *"[w]hile this aspect of your personal care is continuously restricted, the legislative criterion is not met unless multiple aspects of a daily living activities (e.g., personal self care) are either continuously or periodically restricted for extended periods of time.* The panel notes that the ministry's statement does not accurately reflect the legislative criteria, which states that the ministry must be satisfied that the appellant has a severe mental or physical impairment that in the opinion of a prescribed professional directly and significantly restricts the appellant's ability to perform DLA either continuously, or periodically for extended periods.

At the same time however the panel finds that the ministry reasonably determined that the information provided does not establish that the legislative criteria was met as the information provided is vague, inconsistent, and does not demonstrate that the appellant's DLA are directly and significantly restricted either continuously or periodically for extended periods.

The AR indicates that the appellant is independent with all aspects of social functioning and that she has good functioning with her immediate and extended social networks. The Revised AR indicates that the appellant requires periodic support/supervision with developing and maintaining relationships, explaining that she requires difficulty with maintenance of relationships due to pain and fatigue. The physiotherapist also indicates that the appellant requires periodic support/supervision securing assistance from others. The Revised AR indicates that the appellant has marginal

functioning with respect to her immediate social networks explaining that she has a significant decrease in the number and quality of relationships due to pain, fatigue and feels somewhat withdrawn. The Revised AR indicates that the appellant has marginal functioning with her extended social networks indicating that she has had a significant decrease in community involvement. However the physiotherapist does not provide any information to explain why the AR and the Revised AR contain such different information with respect to the appellant's social functioning.

The AR and the Revised AR contain inconsistencies with respect to the information provided regarding the appellant's ability to perform DLA of laundry and basic housekeeping and preparing food. The AR indicates continuous assistance is needed whereas the notes provided in the Revised AR indicate periodic assistance is needed when the appellant experiences flares in her symptoms. In addition there is no information provided to indicate the frequency or duration of the appellant's restrictions with these DLA. The panel finds that the ministry was reasonable in determining that the information provided makes it difficult to determine whether the appellant requires significant assistance to complete activities of basic housekeeping and laundry for extended periods of time.

The reconsideration decision indicates that the Certificate does not explain how the appellant's medical conditions impact her physical or mental functioning or how frequently her diagnosis restricts her DLA nor the duration of any restrictions. The reconsideration decision states that while the Doctor states that the appellant's diagnosis should qualify her for disability status, the legislative requirement is that she have a severe physical or mental impairment (not a diagnosis) which directly and significantly restricts her ability to perform DLA and, as a result, she requires significant assistance from another person either continuously or periodically for extended periods. The ministry's position is that without more detailed information, the ministry cannot be satisfied that this legislative criterion has been met. The panel finds that the ministry's description of the legislative criterion in this section is not accurate as it is the restriction that must be continuous or periodic for extended periods of time, not the amount of help required. However the panel finds that the ministry was reasonable in determining that the information provided by the Doctor does not explain how the appellant's medical conditions impact her functioning or how frequently her diagnosis restricts her DLA, nor the duration of any restrictions.

The panel also notes that while the appellant has provided considerable detail of her medical conditions and the pain that she experiences in both the SR and the RFR, the information provided does not provide any details regarding her ability to perform DLA, how frequently her diagnoses restrict her DLA, nor the duration of any restrictions to her DLA.

Although the reconsideration inaccurately states the legislative criteria on two occasions with respect to DLA, this does not impact the panel's finding that the ministry was reasonable in determining that the information provided does not establish that a severe physical or mental impairment directly and significantly restricts the appellant's DLA continuously or periodically for extended periods as required by EAPWDA section 2(2)(b)(i).

### **Help with DLA**

The ministry's position is that based on the evidence provided, the appellant's need for assistive devices and/or assistance from others is contingent upon the severity of her symptoms, the intensity of which appears to be episodic in nature but that no specific information is offered to define the



frequency or duration of these episodes or help needed. The ministry's position is that the periodic use of a simple assistive device, such as a wrist brace or cane, is not considered indicative of a severe impairment. In addition, the ministry's position is that a handrail does not meet the legislated definition of an "assistive device" because it is not a "device designed to enable a person to perform a DLA", rather it is a feature that is required in all stairwells and available for anyone's use.

The ministry's position is that the ministry is not satisfied that the appellant has a severe physical impairment that directly and significantly restricts her ability to perform DLA either continuously or periodically for extended periods, and as a result of those restrictions, requires significant help to perform DLA.

The appellant's position is that she needs help from family and friends and requires the use of assistive devices. The appellant's positions that she is quite disabled by her various medical conditions and needs help. In the RFR the appellant indicates that she uses assistive devices such as handrails for more than 3-4 steps and walking canes/sticks for any distance of more than 3-4 blocks.

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In the PR, the physician indicates that the appellant does not require any prosthesis or aids for her impairment. The physician states that the appellant does not need assistance with DLA but that more time is required. In the Revised PR the physician indicates that the appellant requires a wrist brace, walking cane and handrails with flares (becoming more frequent). The physician also indicates that the appellant requires assistance with meal preparation and housework. However the physician does not indicate why there is a change in his assessment or provide any information with respect to the frequency or duration of any assistance required.

In the AR the physiotherapist indicates that the appellant requires help with DLA from family and friends. The AR indicates that the appellant uses a cane, explaining that she has used a cane in the past but not at present. The physiotherapist indicates that the appellant does not have an Assistance Animal. In the Revised AR the physiotherapist indicates that the appellant needs assistance with housekeeping and meal preparation. The physiotherapist also indicates that the appellant routinely uses a prosthesis, splints, braces and bathing aids (braces and handrails).

The information provided in the PR and the AR is not consistent with the Revised PR and the Revised PR and neither the physician nor the physiotherapist has provided any explanation for the changes to their assessment. Despite these inconsistencies the panel accepts the information that the appellant does require periodic use of assistive devices such as a cane or wrist brace as that is consistent with the appellant's information; however there is no information provided to indicate the frequency or duration of the help needed. Furthermore, it is not clear if the appellant requires the use of a cane currently, given the physiotherapist's comment that the appellant used a cane in the past, but not at present.

The panel finds that the ministry reasonably determined that the information provided which indicates some periodic use of a simple assistive device is not considered indicative of a severe impairment. In addition, 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 physical or mental 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.