

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated November 25, 2016, which found that the appellant did not meet three of the five statutory requirements of Section 2 of the *Employment and Assistance for Persons with Disabilities Act* for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement and that her 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,
- as a result of these restrictions, the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

## PART D – Relevant Legislation

*Employment and Assistance for Persons with Disabilities Act* (EAPWDA), Section 2

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR), Section 2

## PART E – Summary of Facts

The evidence before the ministry at the time of the reconsideration decision included the Persons With Disabilities (PWD) Application comprised of the applicant information and self-report dated June 6, 2016, a physician report (PR) and an assessor report (AR), both dated June 1, 2016 and completed by a general practitioner (GP) who has known the appellant for 5 months and who has seen the appellant 2 to 10 times in that period.

The evidence also included the appellant's Request for Reconsideration dated November 10, 2016, with the appellant's attached notes.

### **Diagnoses**

In the PR, the GP diagnosed the appellant with DDD [degenerative disc disease] lumbar spine, with no date of onset provided. Asked to describe the appellant's mental or physical impairments that impact her ability to perform daily living activities, the GP wrote: "...DDD lumbar spine with sciatica symptoms."

### **Physical Impairment**

In the PR and AR, the GP reported that:

- In terms of health history, the appellant has "...severe pain to low back with sciatica symptoms. Unable to stand/walk more than 15 minutes; cannot lift more than 10 lbs.; poor sleep due to chronic pain."
- The appellant does not require any prostheses or aid for her impairment.
- For functional skills, the appellant can walk 1 to 2 blocks unaided, climb 2 to 5 steps unaided, lift 2 to 7 kg. (5 to 15 lbs.), and remain seated less than 1 hour.
- The appellant is independently able to stand and takes significantly longer (note: "takes 3 times longer") than typical with walking indoors and walking outdoors and climbing stairs. She requires continuous assistance from another person with lifting and carrying and holding, with a note that she "needs help."
- In the section of the AR relating to assistance provided through the use of assistive devices, the GP did not identify any of the listed items as being required by the appellant.

In her self-report and her Request for Reconsideration, the appellant wrote that:

- She cannot sit or stand long as it makes her back inflame, which makes it worse.
- The pain runs down her left leg to the ankle and it is unbearable.
- There are times the pain keeps her up through the night so she gets no sleep.
- On a good day, she is able to walk the distance of one city block with minimal (2 to 3) rests.
- She finds the use of stairs extremely painful after only a couple of steps, developing a shooting pain that radiates throughout her lower back and continues through her left leg down to her ankle.
- For her back, there is not much she can do other than lie down or, as a last resort, take some pain medication.
- Transitioning from any sitting, standing or lying position is painful.

### **Mental Impairment**

In the PR and AR, the GP reported:

- The appellant has no difficulties with communication.
- The appellant has no significant deficits in her cognitive and emotional functioning.

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- In the AR, the appellant has a good ability to communicate in all areas, specifically with speaking, reading, writing, and hearing.
  - For the sections of the AR assessing impacts to cognitive and emotional functioning and social functioning, the GP indicated that these sections are not applicable to the appellant.

In her Request for Reconsideration, the appellant wrote that sometimes she is in so much pain that she becomes depressed and withdrawn. She wishes she was able to live an active, normal life but her disability prevents her from doing so.

### ***Daily Living Activities (DLA)***

In the PR and AR, the GP indicated that:

- The appellant has not been prescribed medication that interferes with her ability to perform DLA.
- In the AR, the appellant is independently able to perform every task of most listed DLA, specifically: move about indoors and outdoors (taking 3 times longer than typical), personal care, meals, pay rent and bills, and medications. With the personal care DLA, the appellant takes significantly longer than typical with dressing (note: “difficult to bend), with bathing (note: “difficult to get in and out of tub”), and with transfers in/out of bed and on/off of chair (note: “takes 2 times longer”).
- Regarding the basic housekeeping DLA, the appellant requires continuous assistance from another person with laundry and basic housekeeping, with a note that she “needs help.”
- For the shopping DLA, the appellant is independent with reading prices and labels, making appropriate choices, and paying for purchases. She requires continuous assistance from another person with the tasks of going to and from stores (note: “needs a ride”) and carrying purchases home (note: “needs help”).
- Regarding the transportation DLA, the appellant is independent with getting in and out of a vehicle although it takes her 2 times longer than typical and with using transit schedules and arranging transportation, and requires continuous assistance from another person with using public transit, with the comment: “...can’t walk to bus stop.”

In her Request for Reconsideration, the appellant wrote that:

- Many daily tasks she used to be able to complete on her own, she now requires assistance.
- Her 3 children help her.

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

In the AR, the GP indicated that the appellant’s friends provide help required for DLA. In the section of the AR relating to assistance provided through the use of assistive devices, the GP did not identify any of the listed items.

### ***Additional Information submitted after reconsideration***

In her Notice of Appeal dated December 6, 2016, the appellant expressed her disagreement with the ministry’s reconsideration decision and wrote that:

- Everything she does affects her back.
- The pain is unbearable and it is getting worse.
- She gets sharp pain in her back and she has fallen times when this happens.
- Her children do a lot of her chores and shopping for her.
- Walking is very hard. The shooting pain that goes down her left leg and in her back stops her

on the spot.

- She went up two steps and a sharp pain in her back caused her to fall and her son had to help her up.

The ministry relied on its reconsideration decision. At the hearing, the ministry clarified that there is no time restriction on re-applying for PWD designation, which can be done at any time.

At the hearing, the appellant's sister stated that:

- She took care of the appellant for 6 or 7 years when the appellant lived with her in another province. She started off staying in a room downstairs but she found she could not go up the stairs anymore and she had to move to the main floor.
- There was a time when they had to call an ambulance because the appellant was in so much pain. The appellant could not move and it took 4 people to get her onto the stretcher. She was taken to hospital where tests were done.
- She heard the appellant yelling and crying in the night because of pain.
- When the appellant got up in the morning, she was always "humped over" and it took ½ to 1 hour before she could straighten up. It would take the appellant about 2 hours to be functioning.
- The appellant said the pain shoots down her leg and sometimes she cannot walk because the pain is too much. Since the pain is on the inside, it is not something others can measure.
- The appellant would try to do a little and then she would stop for a 5-minute rest.
- The appellant is in "rough shape" for a young woman and the doctor has told her that her condition will not get better, that it will deteriorate.
- The appellant needs to rest a lot. In the grocery store, the appellant will walk down the aisle a little way and then needs to stop and rest. The appellant cannot stand to do the dishes- she can only stand about 5 to 10 minutes maximum and then needs to rest. The appellant tried to hang some clothes on a line and she was able to hang a couple of items and then had to quit. She cannot do things that others take for granted.
- The appellant's children thought it would be best for the appellant to live nearby them so they could help her.
- The appellant takes medication but it is more like a bandage that makes the pain "not as bad."
- Her husband asked if the appellant was going to be alright as they heard her screaming in pain every night.

At the hearing, the appellant stated that:

- She had tried to contact an advocate but was not able to connect with anyone. She was prepared to proceed with the hearing without the assistance of a representative.
- She is in constant pain. She takes medication that she believes is to help her sleep, and may also be an anti-depressant, but she still wakes through the night.
- Her life is pretty much as her sister described. The doctor does not see how she lives.
- She tries to do things but she cannot do them. Walking is the worse and climbing stairs is hard. One time she climbed 2 steps and she had to stop and rest because of the pain.
- She has known the GP who completed the PWD application reports since April 2016, when she moved to British Columbia.
- She does not use an aid, such as a cane, to help with her mobility. She stays home unless her sons can drive her.
- In a typical day she does not do anything. Her body has "seized" while she is sleeping and

she usually watches television. She cannot sit or lie for too long, she cannot sleep on her left side or on her back.

- She had an X-Ray done about a month ago but she does not know what that showed. She thinks the doctor said that her condition is about the same as it was. She thinks there may be compressed discs.
- When she lived in the other province, she had bone density scans and CT scans done, and she hopes that these records were transferred to her current doctor, but she is not sure if they were.
- She used to take pain medications during the day but she stopped because they were either too hard on her stomach or they made it so she could not function at all.

***Admissibility of Additional Information***

The panel considered the information in the Notice of Appeal and the oral testimony on behalf of the appellant as corroborating the previous information from the appellant in her Request for Reconsideration regarding the impacts of her medical conditions, which was before the ministry at reconsideration. Therefore, the panel admitted this additional information as being in support of information and records that were before the ministry at the time of the reconsideration, in accordance with Section 22(4)(b) of the *Employment and Assistance Act*.

## PART F – Reasons for Panel Decision

The issue on the appeal is whether the ministry's reconsideration decision, which found that the appellant is not eligible for designation as a person with disabilities (PWD), was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. The ministry found that the appellant does not have a severe mental or physical impairment and that her daily living activities (DLA) are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods and that, as a result of those restrictions, it could not be determined that the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

The criteria for being designated as a PWD are set out in Section 2 of the EAPWDA as follows:

### **Persons with disabilities**

2 (1) In this section:

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

"**daily living activity**" has the prescribed meaning;

"**prescribed professional**" has the prescribed meaning.

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

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

(b) in the opinion of a prescribed professional

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

(A) continuously, or

(B) periodically for extended periods, and

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

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

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

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

(i) an assistive device,

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

(iii) the services of an assistance animal.

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

Section 2(1) of the EAPWDR defines DLA for a person who has a severe physical or mental impairment as follows:

### **Definitions for Act**

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

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

(i) prepare own meals;

(ii) manage personal finances;



- (iii) shop for personal needs;
  - (iv) use public or personal transportation facilities;
  - (v) perform housework to maintain the person's place of residence in acceptable sanitary condition;
  - (vi) move about indoors and outdoors;
  - (vii) perform personal hygiene and self care;
  - (viii) manage personal medication, and
- (b) in relation to a person who has a severe mental impairment, includes the following activities:
- (i) make decisions about personal activities, care or finances;
  - (ii) relate to, communicate or interact with others effectively.

Section 2(2) of the EAPWDR defines prescribed profession as follows:

- (2) For the purposes of the Act, "**prescribed professional**" means a person who is
- (a) authorized under an enactment to practise the profession of
    - (i) medical practitioner,
    - (ii) registered psychologist,
    - (iii) registered nurse or registered psychiatric nurse,
    - (iv) occupational therapist,
    - (v) physical therapist,
    - (vi) social worker,
    - (vii) chiropractor, or
    - (viii) nurse practitioner, or
  - (b) acting in the course of the person's employment as a school psychologist by
    - (i) an authority, as that term is defined in section 1 (1) of the Independent School Act, or
    - (ii) a board or a francophone education authority, as those terms are defined in section 1 (1) of the School Act,
- if qualifications in psychology are a condition of such employment.

### ***The positions of the parties***

#### ***Appellant's position***

The appellant's position is that she has a severe physical impairment as her doctor diagnosed her with degenerative disc disease and her pain is severe. The appellant argued that she cannot sit or stand long as it makes the pain worse and, on a good day, she is able to walk the distance of one city block with minimal (2 to 3) rests. The appellant argued in her Request for Reconsideration that she finds the use of stairs extremely painful after only a couple of steps, developing a shooting pain that radiates throughout her lower back and continues through her left leg down to her ankle, and there is not much she can do other than lie down or, as a last resort, take some pain medication. The appellant wrote in her Request for Reconsideration that sometimes she is in so much pain that she becomes depressed and withdrawn, although she did not directly advance a position that she has a severe mental impairment. The appellant's position is that her severe physical impairment directly and significantly restricts her ability to perform DLA on an ongoing basis and her family has to help her with chores and shopping.

#### ***Ministry's position***

The ministry's position, as set out in the reconsideration decision, is that there is insufficient evidence

to establish that the appellant has a severe physical or mental impairment as required by Section 2(2) of the EAPWDA. The ministry wrote that the GP indicated that the appellant is able to walk 1 to 2 blocks unaided, climb 2 to 5 steps unaided, lift 2 to 7 kg. (5 to 15 lbs.), and remain seated less than 1 hour and that she does not require an aid for her impairment. The ministry also wrote that the GP reported that the appellant takes 3 times longer to walk indoors, walk outdoors, and to climb stairs and she requires continuous assistance from another person with lifting and carrying and holding, with no explanation of the type or degree of assistance required. The ministry wrote that the functional skill limitations described by the GP are more in keeping with a moderate degree of physical impairment. The ministry wrote that the GP reported that the appellant has no deficits with cognitive and emotional functioning and no difficulties with communication and, therefore, does not have a severe mental impairment.

As to DLA, the ministry's position is that the information from the prescribed professional does not establish that the appellant's impairment significantly restricts her DLA either continuously or periodically for extended periods of time. The ministry noted that other than the basic housekeeping DLA and two tasks of the DLA shopping (going to and from stores and carrying purchases home) and one task of the DLA transportation (using public transit), the GP indicated that the appellant is able to manage her DLA independently. The ministry's position is that because it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required.

### **Panel Decision**

#### **Severe Mental Impairment**

The GP did not diagnose the appellant with a mental disorder and the GP reported that the appellant has no significant deficits with cognitive and emotional function, no difficulties with communication, and no impacts to her social functioning. Although the appellant wrote in her Request for Reconsideration that sometimes she is in so much pain that she becomes depressed and withdrawn, there were no additional letters from the GP or mental health specialists submitted on appeal to confirm a mental disorder diagnosis or to indicate that there has been a change in the appellant's mental health condition since the time of the PWD application.

Given the absence of a definitive mental health diagnosis and evidence of significant impacts to the appellant's cognitive, emotional and social functioning, the panel finds that the ministry reasonably determined that a severe mental impairment was not established under Section 2(2) of the EAPWDA.

#### **Severe Physical Impairment**

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, the ministry must consider both 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 the ability to perform DLA is restricted. In making its determination the ministry must consider all the relevant evidence, including that of the appellant. However, the legislation is clear that the fundamental basis for the analysis is the evidence from a prescribed professional – in this case the appellant's GP.

In the PR, the GP diagnosed the appellant with degenerative disc disease of her lumbar spine, with



no date of onset provided, and the GP wrote that the appellant has "...severe pain to low back with sciatica symptoms. Unable to stand/walk more than 15 minutes; cannot lift more than 10 lbs.; poor sleep due to chronic pain." At the hearing, the appellant stated that she had an X-Ray done about a month ago but she does not know what that showed, she thinks the doctor said that her condition is about the same as it was and there may be compressed discs; however, there were no medical imaging reports attached or referred to by the GP and no X-ray or CT scan reports provided on the appeal. The appellant stated at the hearing that she takes medication that she believes is to help her sleep, and may also be an anti-depressant, but she still wakes through the night. The appellant's sister stated that, when the appellant lived with her, she heard the appellant yelling and crying in the night because of pain.

For functional skills, the GP reported that the appellant can walk 1 to 2 blocks unaided, climb 2 to 5 steps unaided, lift 5 to 15 lbs., and remain seated less than 1 hour. In her Request for Reconsideration, the appellant wrote that, "on a good day," she is able to walk the distance of one city block with minimal (2 to 3) rests and she finds the use of stairs extremely painful after only a couple of steps. In her self-report, the appellant wrote that she cannot sit or stand long as it makes her back "inflamm," which makes it worse. In her Notice of Appeal, the appellant wrote that she gets sharp pain in her back and she has fallen times when this happens. There was no clarification provided regarding the frequency of the appellant's "good" days or how that compares with the appellant's functioning on a "bad" day, or how often her back becomes inflamed or she gets the sharp pain. In her Request for Reconsideration, the appellant wrote that she experiences a shooting pain that radiates throughout her lower back and continues through her left leg down to her ankle and there is not much she can do other than lie down or, as a last resort, take some pain medication. At the hearing, the appellant clarified that she used to take prescribed pain medications during the day but she stopped taking the medication because either it was too hard on her stomach or it made it so she could not function at all.

In the AR, the GP reported that the appellant is independently able to stand and does not require assistance but takes significantly longer than typical, specifically 3 times longer, with walking indoors and walking outdoors and climbing stairs. The GP reported that the appellant requires continuous assistance from another person with lifting and carrying and holding, with a note that she "needs help," with no comment to clarify whether this help is required for weights in excess of her functional skill of lifting up to 10 lbs. In the PR, the GP indicated that the appellant does not require any prostheses or aid for her impairment and, in the section of the AR relating to assistance provided through the use of assistive devices, the GP did not identify any of the listed items, including those relating to mobility, as being required by the appellant. The appellant stated at the hearing that she does not use an aid, such as a cane, to help with her mobility and she stays home unless her sons can drive her.

As discussed in more detail in these reasons for decision under the heading "Restrictions in the Ability to Perform DLA", the evidence indicates that the limitations to the appellant's physical functioning have not directly and significantly restricted her ability to perform her DLA either continuously or for extended periods, as required by the EAPWDA

Given the GP's report of a moderate level of physical functioning without the assistance of a another person or an assistive device, and a lack of evidence of the extent of the appellant's degenerative disc disease or the frequency of any exacerbations to her condition, the panel finds that the ministry reasonably determined that there is not sufficient evidence to establish that the appellant has a

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severe physical impairment under Section 2(2) of the EAPWDA.

**Significant restrictions in the ability to perform DLA**

Section 2(2)(b) of the EAPWDA requires that the ministry be satisfied that a prescribed professional has provided an opinion that an applicant's severe impairment directly and significantly restricts her DLA, continuously or periodically for extended periods. In this case, the GP is the prescribed professional. DLA are defined in Section 2(1) of the EAPWDR and are also listed in the PR and, with additional details, in the AR. Therefore, the prescribed professional completing these forms has the opportunity to indicate which, if any, DLA are significantly restricted by the appellant's impairments either continuously or periodically for extended periods.

In the appellant's circumstances, the GP reported in the PR that the appellant has not been prescribed medication that interferes with her ability to perform DLA. In the AR, the GP reported that appellant is independently able to perform every task of most listed DLA, specifically: the move about indoors and outdoors DLA (taking the appellant 3 times longer than typical), the personal care DLA (tasks of dressing, bathing and transfers take longer than typical), the meals DLA, the "pay rent and bills" DLA, and the medications DLA. The GP indicated that for the basic housekeeping DLA, the appellant requires continuous assistance from another person with laundry and basic housekeeping, with a note that she "needs help," but no other comment to clarify the need for assistance given her independent mobility and ability to lift up to 10 lbs. At the hearing, the appellant's sister stated that the appellant needs to rest a lot, for example, the appellant can only stand a maximum of about 5 to 10 minutes to wash the dishes and then she needs to rest and she could only hang a few items of laundry before needing to rest.

For the shopping DLA, the GP reported that the appellant is independent with reading prices and labels, making appropriate choices, and paying for purchases and that she requires continuous assistance from another person with the tasks of going to and from stores (note: "needs a ride") and carrying purchases home (note: "needs help"). Again, there is no other comment by the GP to clarify the need for assistance given the appellant independent mobility and ability to lift up to 10 lbs. In her Notice of Appeal, the appellant wrote that her children do a lot of her chores and shopping for her. At the hearing, the appellant's sister stated that the appellant needs to rest a lot, for example: in the grocery store, the appellant will walk down the aisle a little way and then needs to stop and rest. Regarding the transportation DLA, the appellant is assessed by the GP as being independent with getting in and out of a vehicle, although it takes her 2 times longer than typical, and with using transit schedules and arranging transportation, and she requires continuous assistance from another person with using public transit, with the comment: "...can't walk to bus stop." The appellant's sister stated at the hearing that the appellant tries to do a little and then she has to stop for a 5-minute rest, and the appellant is in "rough shape" for a young woman and cannot do the things that others take for granted.

Considering the absence of evidence from the GP, as the prescribed professional, of the need for significant assistance with DLA, including a lack of evidence to establish the need for continuous assistance with some tasks of DLA given the appellant's independent mobility and ability to lift up to 10 lbs., the panel finds that the ministry reasonably concluded that there is not enough evidence from the prescribed professional to establish that the appellant's impairment significantly restricts her ability to manage her DLA either continuously or periodically for extended periods, thereby not satisfying the legislative criterion of Section 2(2)(b)(i) of the EAPWDA.

**Help to perform DLA**

Section 2(2)(b)(ii) of the EAPWDA requires that, as a result of direct and significant restrictions in the ability to perform DLA, a person requires help to perform those activities. Help is defined in subsection (3) as the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform a DLA.

In the AR, the GP indicated that the appellant's friends provide help required for DLA; however, there was no further information provided about the type of assistance provided by the appellant's friends. At the hearing, the appellant's sister stated that she helped the appellant for 6 or 7 years before she moved to British Columbia and now the appellant's 3 children help her. In the section of the AR relating to assistance provided through the use of assistive devices, the GP did not identify any of the listed items, and the appellant stated at the hearing that she does not use an assistive device.

The panel finds that the ministry reasonably determined that as direct and significant restrictions in the appellant's ability to perform DLA have not been established, it cannot be determined that the appellant requires help to perform DLA as a result of those restrictions, as defined by Section 2(3)(b) of the EAPWDA.

**Conclusion**

Having reviewed and considered all of the evidence and relevant legislation, the panel finds that the ministry's reconsideration decision, which determined that the appellant was not eligible for PWD designation under Section 2 of the EAPWDA, was reasonably supported by the evidence and therefore confirms the decision. The appellant's appeal, therefore, is not successful.