

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated December 28, 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 December 10, 2016, a physician report (PR) and an assessor report (AR), both dated July 26, 2016 and completed by a general practitioner (GP) who has known the appellant for 10 months and who has seen the appellant 2 to 10 times in that period.

A copy of an MRI for the appellant's "Knee w/o Contrast Left" dated May 10, 2016.

A copy of a CT Scan for the appellant's "Knee w/o Contrast Left" dated July 13, 2016

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

### ***Diagnoses***

In the PR, the GP diagnosed the appellant with Chronic Bilateral Knee Pain and Instability and Chronic Back Pain. The onset provided is 1987. In the AR where asked to describe the appellant's mental or physical impairments that impact her ability to perform daily living activities, the GP did not respond.

### ***Physical Impairment***

In the PR and AR, the GP reported that:

- In terms of health history, the appellant has had multiple surgeries and likely needs further surgery on her left knee. Pain and instability limit walking, stairs, climbing, squatting and bending. Moderately severe back pain limits bending and lifting and sitting is limited to 30 minutes due to back pain.
- The appellant does not require any prostheses or aid for her impairment while it is noted that she has previously tried a knee brace with limited success.
- For functional skills, the appellant can walk 2 to 4 blocks unaided, climb 5 + steps unaided, lift 2 to 7 kg. (5 to 15 lbs.), and remain seated less than 1 hour.
- The appellant requires periodic assistance from another person with walking indoors, walking outdoors, climbing stairs, standing, lifting and carrying and holding. She takes significantly longer than typical with walking indoors, walking outdoors and climbing stairs. It is noted under explain and specify assistive devices that due to knee instability, she requires assistance on bad days, 3-6 days/week with walking, climbing stairs - limited and slow.
- 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 while indicating that she should have grab bars by the shower.

In her Self-Report and her Request for Reconsideration, the appellant wrote that:

- Her life of limitations and disabilities began after she was involved in a Motor Vehicle accident in 1987.
- Her right leg is shorter than her left leg which has resulted in major knee problems. She has had 5 knee surgeries on both legs. Her major knee problems have caused her back problems.
- The appellant indicates that she has osteoarthritis in both knees and her back.
- The appellant also finds her knees constantly give out causing many falls, sprained ankles and

pain, lasting from 5 minutes to 5 hours to put her knee cap back, using methods she has learned over the years. The longer it takes the more it hurts, leaving her unable to walk and stranded when not at home. This can also happen from 3-5 times a week to 3-5 times a day depending on whether it is her knee or kneecap. It can also happen when getting up from a sitting position.

- The appellant states that she can't walk, sit or stand for more than 15-30 minutes, can't walk up or down a hill without her knee coming out and can't climb a flight of stairs.
- The appellant states that some days she can walk a block, others not at all.
- She experiences muscle spasms, pulled muscles in her back and slipped discs (very painful) because of her knees.
- She has many sleepless nights from pain and also from restless leg syndrome.
- She has tried both knee and back braces.

### ***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.
- 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 she doesn't expect anyone to understand her daily pain, and that nothing has been getting any easier for her. She states that her daily life is impacted on so many levels and in so many ways.

### ***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, under Personal Care, the appellant is independently able to perform the following listed DLA: grooming, toileting, feeding self, regulating diet, transfers (in/out of bed) and transfers (on/off chair). Periodic assistance from another person is required for dressing (note: depends on knee stability) and bathing (note: unable to use bath tub and needs assistance with shower when knee weak).
- Regarding the Basic Housekeeping DLA, the appellant requires continuous assistance from another person with laundry (note: unable to carry laundry as knee gives way sporadically) and periodic assistance from another person for basic housekeeping, (note: no/limited kneeling or squatting, depends on knee stability).
- For the Shopping DLA, the appellant is independent with reading prices and labels, making appropriate choices, and paying for purchases. She requires periodic assistance from another person with the tasks of going to and from stores and carrying purchases home (note: limited due to knee pain).
- For the Meals DLA, the appellant is independent with meal planning and safe storage of food while requires periodic assistance from another person with food preparation and cooking (note: limited standing tolerance, family helps with all meal preparation and cooking).
- Regarding Pay Rent and Bills as well as Medications, the appellant is independently able to

perform all the listed tasks.

- For the transportation DLA, the appellant is independent with using transit schedules and using public transit and arranging transportation, while for getting in and out of a vehicle, she requires periodic assistance from another person (note: needs assistance when knee feeling unstable).

In her Self-Report and her Request for Reconsideration, the appellant wrote that daily tasks that are easy to some are nearly impossible for her to do alone. Examples given are grocery shopping, walking up a hill, climbing a flight of stairs and taking a shower. The appellant states that she needs assistance for almost everything, going to the washroom, bathing, cooking, cleaning, shopping and going to Doctors appointments. Many days, the appellant indicates that she cannot make it out of bed, get up or downstairs to use the washroom or even bath without assistance. Cooking and cleaning are almost impossible most days.

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

In the AR, the GP indicated that the appellant's family provides all help currently. 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 January 10, 2017, the appellant expressed her disagreement with the ministry's reconsideration decision and wrote that:

- She is getting worse day by day.
- She has had 7 surgeries since she was 8 years old and this is a lifetime of surgeries that is progressing.
- She has to undergo surgery again on February 16, 2017.
- She has to undergo surgery every 4-5 years and as she ages, the time frame gets smaller and she undergoes more pain.

At the hearing, the appellant testified that her medical condition is worsening and that she has had a history of surgeries since 1987. She stated that she is scheduled for ACL reconstruction surgery on February 16 which will require a 6 weeks recovery period and 2 years of rehabilitation. The appellant further testified that she does not have a mental condition. She stated that her GP is relatively new to her as she found him after a move to the area in 2013. She stressed that her GP had access to 35 years of her medical records and although he had only known her for about 10 months when he completed her PWD application, he has recently provided a letter of confirmation.

The appellant testified that her ability to perform DLA has significantly worsened, she now uses a cane for support and she cannot prepare meals, shop, manage her personal grooming (needs help to shower), do basic housework and use transportation without the help of another person. Her 13 year old son accompanied her to the hearing as she cannot physically support herself outside the home.

The appellant submitted a letter from her GP dated January 27, 2017 who confirmed that he had been her GP since September 2015 and that he had reviewed the appellant's medical records from her previous physician. The GP reported that the appellant has chronic back pain and bilateral knee pain and instability that are worsening. "She now needs assistance with all ADLs requiring lifting, walking, climbing or prolonged standing. She will require further knee surgery in the near future."

While the ministry did not object to the new information they did remark that these details were not available at the time of reconsideration. The ministry relied on its reconsideration decision.

***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*.

The panel however did not accept all details included in the appellant's GP's letter dated January 27, 2017 specifically, the information which referred to the appellant's ability to perform DLA's as this was new information that was not consistent with the GP's reports at reconsideration. Therefore, the panel did not admit 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 that is worsening daily. The appellant argues that her knees constantly give out causing many falls, sprained ankles and pain; lasting from 5 minutes to 5 hours to put her knee cap back, using methods she has learned over the years. The longer it takes the more it hurts, leaving her unable to walk and stranded when not at home. This can happen from 3-5 times a week to 3-5 times a day depending on whether it is her knee or kneecap. The appellant testified that her ability to perform DLA is directly and significantly restricted on an ongoing basis and her family and/or friend always have to help her. She now uses a cane for support and cannot prepare meals, shop, manage her personal grooming (needs help to shower), do basic housework and use transportation without the help of another person.

The appellant indicated that she does not have a mental impairment.

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

The ministry's position is that the information is more in keeping with a moderate impairment, specific to the appellant's physical health. The ministry wrote that the GP indicated that the appellant is able to walk 2 to 4 blocks unaided, climb 5 or more steps unaided, lift 5 to 15 lbs., and remain seated less than 1 hour. The ministry also wrote that the GP in the AR reported that the appellant requires periodic assistance with walking indoors/ outdoors, climbing stairs, lifting and carrying/ holding, with a note that states knee instability, needs assistance on bad days which are 3-6 days per week. Further the GP states that walking and climbing stairs is limited and slow. There is no information on what type of assistance the appellant periodically needs for all aspects of her mobility and physical abilities. She does not use prostheses or aids. The minister would expect that needing periodic assistance with every aspect of her mobility and physical abilities, the appellant would require the use of a cane/walker or some form of a knee brace perhaps a custom knee brace. In addition, the ministry finds that the appellant's functional limitations are not that of a severe physical impairment as she can walk 2 to 4 blocks unaided, lift 5 to 15 lbs. and climb 5 or more steps unaided, just slowly. The ministry also notes that the level of restriction that the appellant describes is not nearly the level of restriction and limitation as outlined by her GP.

Further, the ministry's position is that the GP does not diagnose a mental condition nor does he suggest that the appellant may have a mental condition in the narrative of his report. The appellant does not have any significant deficits to or impacts upon her cognitive or emotional functioning; therefore, a mental impairment cannot be established.

The ministry has established that the information provided is not in keeping with the restrictions, limitations and degree of a severe physical or mental impairment. Therefore, for all the aforementioned reasons, the minister cannot establish a severe physical or 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 notes that the appellant requires periodic assistance with dressing, bathing, basic housekeeping, going to/from stores, carrying purchases home, food preparation, cooking and getting in/out of a vehicle. The description for these activities depends on the stability of the appellant's knee; however, there is no information to describe the frequency, duration or nature of periodic assistance required by the appellant. While the GP noted that the appellant's bad days are 3-6 days per week, there is no confirmation that each of the aforementioned daily living activities are in need of periodic assistance for extended periods of time. The GP indicated that the appellant has a continuous restriction to laundry as she is unable to carry the laundry as her knee gives way sporadically, however, this in and of its self does not indicate that the appellant's impairment directly and significantly restricts her DLA continuously or periodically for extended periods of time. Therefore, with all the information considered, the minister cannot establish that the appellant's daily living activities are directly and significantly restricted continuously or periodically for extended periods of time.

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 from other persons.



**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. Additionally, the appellant has not presented an argument in this regard. 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. "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 Chronic Bilateral Knee pain and instability and Chronic Back Pain with an onset of 1987. The GP wrote that the appellant has had multiple surgeries and likely needs further surgery on her left knee. Pain and instability limit walking, stairs, climbing, squatting and bending. Moderately severe back pain limits bending and lifting and sitting is limited to 30 minutes.

For functional skills, the GP reported that the appellant can walk 2 to 4 blocks unaided, climb 5 + steps unaided, lift 2 to 7 kg. (5 to 15 lbs.), and remain seated less than 1 hour. In the AR the GP indicated that the appellant requires periodic assistance from another person with walking indoors, walking outdoors, climbing stairs, standing, lifting and carrying and holding. She takes significantly longer than typical with walking indoors, walking outdoors and climbing stairs. It is noted that due to knee instability, she requires assistance on bad days which are 3-6 days/week with walking, climbing stairs - limited and slow. The appellant stated in her Request for Reconsideration that her knees constantly give out causing many falls, sprained ankles and pain; lasting from 5 minutes to 5 hours to put her knee cap back and the longer it takes the more it hurts, leaving her unable to walk and stranded when not at home. The appellant argues that she can't walk, sit or stand for more than 15-30 minutes, can't walk up or down a hill without her knee coming out and can't climb a flight of stairs. The appellant states that some days she can walk a block, others not at all.

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 while he did note that she should have grab bars by the shower. The appellant stated that a knee brace does not work and that she does use a cane, to support herself and that she cannot leave the home alone.

The panel notes that there are significant inconsistencies between the information provided by the appellant and the information reported by the GP. The appellant's description of her pain and limitations is considerably different than that reported by the physician making it more difficult to determine the extent of the appellant's impairment or restrictions. The panel acknowledges that the information in the PWD application was recorded in July 2016 and the appellant has indicated that her condition has worsened over time. The panel has no doubt that the appellant suffers from a physical impairment but when assessing the severity of the impairment, the ministry must consider the PR and AR provided by the prescribed professional.

Given the GP's report of a moderate level of physical functioning with the appellant requiring periodic assistance from another person on bad days, 3-6 days/week and without acknowledging the use of an assistive device, the panel finds that the ministry reasonably determined that the assessment provided was not sufficient to establish that the appellant has a 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.

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 under Personal Care, the appellant is independently able to perform the following listed DLA: grooming, toileting, feeding self, regulating diet, transfers (in/out of bed) and transfers (on/off chair). Periodic assistance from another person is required for dressing (note: depends on knee stability) and bathing (note: unable to use bath tub and needs assistance with shower when knee weak). Regarding the Basic Housekeeping DLA, the appellant requires continuous assistance from another person with laundry (note: unable to carry laundry as knee gives way sporadically) and periodic assistance from another person for basic housekeeping, (note: no/limited kneeling or squatting, depends on knee stability). For the Shopping DLA, the appellant is independent with reading prices and labels, making appropriate choices, and paying for purchases. She requires periodic assistance from another person with the tasks of going to and from stores and carrying purchases home (note: limited due to knee pain). For the Meals DLA, the appellant is independent with meal planning and safe storage of food while requires periodic assistance from another person with food preparation and cooking (note: limited standing tolerance, family helps with all meal preparation and cooking). Regarding Pay Rent and Bills as well as Medications, the appellant is independently able to perform all the listed tasks. For the transportation DLA, the appellant is independent with using transit schedules and using public transit and arranging transportation, while for getting in and out of a vehicle, she requires periodic assistance from another person (note: needs assistance when knee feeling unstable).

The appellant's information in her SR and Request for Reconsideration is that she needs assistance for almost everything; going to the washroom, bathing, cooking, cleaning, shopping and going to

Doctors appointments. Many days, the appellant indicates that she cannot make it out of bed, get up or downstairs to use the washroom or even bath without assistance. Cooking and cleaning are almost impossible most days. At the hearing, the appellant indicated that she cannot prepare meals, shop, manage her personal grooming (needs help to shower), do basic housework and use transportation without the help of another person.

Considering the absence of information 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 from another person with some other tasks of DLA besides “laundry”, 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 family provides help required for DLA; however, there were no details about the type of assistance provided other than with food preparation and cooking. At the hearing, the appellant stated that she couldn’t manage without the help of her 13 year old son and a friend. 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 for mobility while the appellant stated at the hearing that she uses a cane and that she cannot physically support herself outside the home.

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.