

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of February 8, 2017, 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:

- MRI Brain September 29, 2016
- The appellant's PWD application form consisting of the appellant's self-report form dated October 12, 2016 ("SR"), a physician's report ("PR") and an assessor's report ("AR") dated October 12, 2016 both completed by the appellant's rheumatologist (the "physician").
- Letter from the physician dated January 27, 2017
- Letter from the appellant dated January 27, 2017
- Letter from the appellant's family physician (the "GP") dated February 2, 2017
- The appellant's Request for Reconsideration ("RFR") form signed by the appellant February 7, 2017

### Diagnoses

- In the PR the physician (who has been the appellant's rheumatologist for 20 years and seen her 2-10 times in the past 12 months, diagnosed the appellant with SLE – systemic lupus erthematosus (onset 1995) and pulmonary hypertension (onset 2001). The physician comments that the appellant's medical conditions are severe.
- In the Health History portion of the PR, the physician states that the appellant has severe SLE with pulmonary hypertension, shortness of breath on exertion, fatigue and CNS confusion.
- The letter from the GP dated February 2, 2017 indicates that the appellant was diagnosed with pulmonary hypertension, glaucoma, thrombocytopenia, and Raynaud's disease.

### Physical Impairment

- 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 has no limitation with remaining seated.
- In the AR the physician indicates that the appellant is independent with all aspects of mobility and physical ability.
- In the SR the appellant states that she was diagnosed with SLE or lupus in 1995 which is a chronic autoimmune disease in which the immune system becomes overactive, fails to recognize its own body, and mistakenly attacks its own tissues. The appellant reports fatigue, and joint and muscle pain. She states that the medications she takes for her condition make her more susceptible to viral and bacterial infections and that her condition has become significantly worse in the last two year and that she has increased fatigue, muscle and joint pain and gastrointestinal issues. The appellant also indicates that she was diagnosed with pulmonary hypertension in 2001, which causes shortness of breath, fatigue, loss of energy, chest pain, and dizziness. She also indicates that she was diagnosed with Glaucoma in 2005 and needed two surgeries. The appellant states that fatigue and loss of energy is the most significant way in which her impairments affect her and she has experienced a decline in her ability to function.
- The letter from the GP indicates that the combined effect of the appellant's diagnoses results in severe fatigue and shortness of breath.

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- In his letter dated January 27, 2017 the physician indicates that the appellant has profound fatigue, a little bit in the morning but progressive with activity. He also indicates that she has some nonspecific inflammatory joint complaints in keeping with lupus.
  - In her letter dated January 27, 2017 the appellant states that in the 22 year course of her illness she has been hospitalized numerous times from infections and complications, she has experienced prolonged periods of such severe shortness of breath that she was unable to walk more than a block without having to stop and catch her breath and has had years where she could not work. The appellant states that lupus has had a severe impact on her life and continues to do so. She states that while she may be able to walk 4+ blocks unaided on a flat surface or climb 5+ steps, those activities tire her out more than they would a normal, healthy person which only taps into her limited reserve of energy and stamina and adds to her fatigue.

### Mental Impairment

- In the PR the physician does not provide a diagnosis of a mental impairment. However the physician indicates that the appellant has significant deficits with cognitive and emotional function in the areas of executive and attention or sustained concentration.
- In the AR the physician indicates that the appellant has moderate impact in the areas of consciousness, attention/concentration and executive, minimal impact to memory and no impact in all other listed areas. He indicates that her ability to communicate in all areas is good. The physician indicates that the appellant's has good functioning with her immediate social network and marginal functioning with her extended social network.
- In the SR the appellant reports that she has experienced cognitive issues such as brain fog that leaves her feeling spacey with difficulty in concentration

### DLA

- In the PR the physician has not checked yes in response to the question whether the appellant's impairment directly restricts her ability to perform DLA. However, he then indicates that the appellant's impairment directly and continuously restricts her ability to perform DLA periodically in the areas of meal preparation, basic housework, daily shopping, and social functioning, noting increases with fatigue. The physician indicates that the appellant is 5'0" and weighs 105 pounds. He indicates that she has not been prescribed any medication and/or treatments that interfere with her ability to perform DLA.
- In the AR, the physician indicates that the appellant requires periodic assistance in the areas of basic housekeeping, shopping (going to and from stores and carrying purchases home), Meals (meal planning, food preparation, and cooking) but is independent with all other listed aspects of DLA. With respect to social functioning the physician indicates that the appellant is independent with appropriate social decisions, interacting appropriately with others and securing assistance from others but requires periodic support/supervision with developing and maintaining relationships and dealing appropriately with unexpected demands.
- In the SR the appellant states that her work productivity has decreased to less than half of what it used to be in years past and she is less active in the community. She used to enjoy hobbies such as playing the piano but has become more and more dependent on her family members to help with household chores and responsibilities such as cleaning and grocery shopping. On days she can work, she is exhausted to the point that she has no energy to prepare a healthy dinner or take care of household chores, so she has been eating with her family more often.

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- In his letter dated January 27, 2017 the physician states that the appellant is independent to personal care including dressing and washing. She does limited cooking and housework because of shortness of breath on exertion. He indicates that she has been encouraged to keep up an exercise program with walking up to 15 minutes a day. He indicates that as she has been struggling to work 15 hours per week it would be reasonable for her to take a period of time off work to see if she cannot rehabilitate and improve her function of day to day activity.
  - In her letter dated January 27, 2017 the appellant states that her chronic fatigue significantly limits her ability to prepare her own meals and take care of household activities. She states that there is hardly a day that goes by in which she is not fatigued from doing the normal things that are required to live independently. She states that if she decides to do some cleaning, she does not have the energy or stamina to prepare dinner. She states that if she lifts 15 pounds of groceries from her car to her door, or even takes multiple trips to carry them in, that tires her to take care of other responsibilities.
  - In his letter dated February 2, 2017 the GP indicates that the appellant lives in a self-contained suite in her parents' home. He indicates that despite her conditions she has attempted to work on an on-call basis 15 to 20 hours per week but in his opinion is only able to work less than 50% of full time.

#### Help

- In the PR the physician reports that the appellant does not require any prosthesis or aids for her impairment. The PR indicates that the appellant requires assistance from family and friends on an ongoing basis, with details provided in the AR. The PR indicates that the appellant requires assistance, especially with tasks that require too much exertion, such as meal preparation, basic housework and shopping.
- In the AR the physician indicates that the appellant receives assistance from family. He indicates that she does not use assistive devices or have an assistance animal.
- In the SR and in her letter dated January 27, 2017, the appellant states that she relies significantly on her parents who are well into their old age. She states that her mother does the vast majority of cooking and she eats with her parents 5 days of the week. She states that she relies on her brothers 3-4 times a week to help with one household chore or another when the fatigue overwhelms her, such as cleaning the bathroom or picking up groceries. The appellant states that she does not know what she would do without the support of her family.
- In his letter dated February 2, 2017 the GP indicates that the appellant relies on her parents for housework, cleaning, laundry and meal preparation, noting that the appellant estimates that she is 80% dependent on her aging parents for this support.

#### **Additional information provided**

In her Notice of Appeal the appellant states that she disagrees with the ministry's reconsideration decision because her chronic diseases have a significant impact on her ability to take care of herself independently. She states that she is significantly dependent upon family to care for her.

Prior to the hearing the appellant provided a submission containing two Echo Reports dated December 14, 2015 and July 5, 2016 (the "Echo Reports"). The Echo Report dated December 14, 2015 indicates that the appellant's RV function has improved and PASP measures less when compared to a previous study of 12/8/14. The Echo Report dated July 5, 2016 indicates that there was no significant change since the study of December 14, 2015.

At the hearing the appellant provided oral evidence about her conditions. The appellant stated that her symptoms have increased in the past two year and that fatigue is the biggest disabling issue. She also reports that she has experienced increased gastrointestinal issues and infections as her immune system is suppressed by the medications required to treat her lupus. The appellant stated that she has increasing dependence on her family and that due to fatigue she is unable to work and meet her basic living tasks. The appellant reports she is not able to live independently and requires assistance. The appellant stated that she has significant worry about her future and feels that PWD designation is her only option.

At the hearing the ministry relied on the reconsideration decision. The ministry representative also stated that the ministry relies heavily on the information provided by the appellant's physicians.

### **Admissibility of New Information**

The ministry did not object to the appellant's oral testimony or the Echo Reports. The panel has admitted the appellant's oral evidence and the Echo Reports into evidence as they are in support of information and records that were before the ministry at the time of reconsideration, in accordance with section 22(4) of the *Employment and Assistance Act*. In particular, the Echo Reports provide further information regarding the appellant's pulmonary hypertension diagnoses.

## PART F – Reasons for Panel Decision

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

The relevant legislation is as follows:

### EAPWDA:

2 (1) In this section:

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

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

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

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

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

(b) in the opinion of a prescribed professional

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

(A) continuously, or

(B) periodically for extended periods, and

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

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

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

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

(i) an assistive device,

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

(iii) the services of an assistance animal.

## **EAPWDR section 2(1):**

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

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

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

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

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

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### **Severe Physical Impairment**

The ministry's position, as set out in its reconsideration decision, is that a diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a severe impairment and that to assess the severity of a physical impairment the ministry must consider the nature of the impairment and the extent of its impact on daily functioning as evidenced by limitations/restrictions in mobility, physical ability, and functional skills. The ministry's position is that the information provided is not evidence of a severe physical impairment. In particular, the ministry notes that although the physician indicates that the appellant has shortness of breath on exertion and has profound fatigue, he does not describe limitations to basic functional skills, noting in the AR that the appellant is independent with all aspects of mobility and physical ability. The ministry also notes that in his letter dated January 27, 2017 the physician states that the appellant has been encouraged to walk up to 15 minutes a day and when this information is considered with the reported functional abilities listed in the PR, a severe impairment of physical functioning is not established.

The reconsideration decision states that although the physician and the GP indicate that the appellant's ability to work is limited, employability or ability to work is not taken into consideration when determining eligibility for PWD designation.

The appellant's evidence is that she has a severe physical impairment resulting from chronic and continuous physical fatigue, inflammation, muscle and joint pain, shortness of breath, and gastrointestinal issues from her chronic, long term medical conditions of lupus, pulmonary hypertension and glaucoma. The appellant's position is that her impairment causes her severe fatigue and decreased energy that has increased over the past two year and that she needs help with her household tasks. The appellant argues that while she is able to perform many tasks

independently and is able to walk 4+ blocks unaided or climb 5+ steps, these tasks tire her out more than they would a normal, healthy person, which taps into her limited reserve of energy and stamina and adds to her fatigue. The appellant's position is that the information provided demonstrates that she has ongoing pain and functional limitations that support her application for PWD designation.

### *Panel Decision*

A diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a severe impairment. An "impairment" is a medical condition that results in restrictions to a person's ability to function independently or effectively.

To assess the severity of an impairment one must consider the nature of the impairment and the extent of its impact on daily functioning as evidenced by functional skill limitations and the degree to which performing DLA is restricted. The legislation makes it clear that the determination of severity is at the discretion of the minister, taking into account all of the evidence. However, the legislation is also clear that the fundamental basis for the analysis is the evidence from a prescribed professional. Employability is not a criterion for designation with PWD.

The panel notes that the physician and the GP have diagnosed the appellant with lupus, pulmonary hypertension, and glaucoma that impact her ability to work and function. However, the physician in the PR indicates that the appellant is able to walk 4+ blocks unaided on a flat surface, climb 5+ steps unaided, can lift 5 to 15 pounds and has no limitations with respect to remaining seated. In the AR the physician indicates that the appellant is independent with all aspects of mobility and physical ability. While the appellant indicates that these activities tire her out more than they would a normal, healthy person the panel notes that the physician, in his letter dated January 27, 2017 indicates that the appellant has been encouraged to walk up to 15 minutes a day and keep up an exercise program.

Although the appellant indicates that she has significant and increasing limitations and although the physician describes her conditions as severe, the panel finds that the ministry was reasonable in determining that the functional limitations reported by the physician are more in keeping with a moderate rather than severe physical impairment.

Considering all of the information, the panel finds that the ministry's decision that the information provided is not indicative of a severe physical impairment was reasonable.

### **Severe Mental Impairment**

The ministry's position is that the information provided does not establish that the appellant has a severe mental impairment. The ministry's position is that although the physician indicates that the appellant has significant deficits with cognitive and emotional functioning in the areas of executive and attention/sustained concentration, the AR indicates moderate impacts to these areas. In addition the ministry's position is that although the physician has indicate periodic restrictions with social functioning noting "*increase with fatigue*", the physician does not describe the frequency or duration of periodic restrictions with social functioning. The ministry's position is that the cumulative impact to cognitive and emotional functioning, as indicated by the physician is not considered indicative of a severe impairment of mental functioning.



The appellant's position is that she does experience some brain fog with confusion, decreased concentration, memory difficulty and some dizziness but that her physical fatigue is the most problematic of her symptoms.

*Panel Decision*

In the PR the physician did not provide a diagnoses of a mental disorder although in the health history portion of the PR he indicates "CNS confusion". In the PR the physician indicates that the appellant has significant deficits with cognitive and emotional function in the areas of executive and attention or sustained concentration but in the AR he indicates that she has moderate impact in the areas of consciousness, attention/concentration and executive and minimal impact to memory. The physician indicates that there is no impact in the areas of bodily functioning, emotion, impulse control, insight and judgment, motivation, motor activity, language, psychotic symptoms, other neuropsychological problems or other emotional or mental problems. In the AR the physician also indicates that the appellant's ability to communicate in all areas is good.

As the physician indicates that the appellant has moderate impact to three areas of her cognitive and emotional functioning, minimal impact to one area, and no impact to the ten remaining areas, and no major impact to any of the listed areas, the panel finds that the ministry was reasonable in determining that the appellant does not have a severe mental impairment.

**Significant Restrictions to DLA**

The ministry's position, as set out in the reconsideration decision, is that the information provided by the physician and the GP does not establish that a severe impairment significantly restricts DLA continuously or periodically for extended periods.

The reconsideration decision notes that in the PR the physician does not indicate whether the appellant's impairment directly restricts her ability to perform DLA but then goes on to indicate that the appellant is periodically restricted with meal preparation, basic housework and daily shopping. However the ministry's position is that the physician's comments regarding her periodic restrictions "[i]ncreases with fatigue" does not establish the frequency or duration of her periodic restriction. The ministry notes that the physician indicates that the appellant is not restricted with the majority of listed areas of DLA. The ministry also notes that in the AR, the physician indicates that the appellant requires periodic support/supervision from another person with laundry, basic housekeeping, going to/from stores, carrying purchases home, meal planning, food preparing and cooking but that she is independent with all other listed areas. The ministry notes that in the AR, the physician does not describe the frequency or duration of periodic assistance needed.

The ministry's position is that the additional information from the GP indicating that the appellant estimates that she is 80% dependent on her aging parents for support reflects that the statement is based on the appellant's self-assessment as opposed to the GP's medical assessment and that the GP does not describe restrictions to DLA outside of basic housekeeping and meals.

The ministry's position is that based on the information provided, there is not enough evidence to confirm that the appellant has a severe impairment that significantly restricts her ability to perform DLA continuously or periodically for extended periods so the legislative criteria has not been met.

The appellant's position is that she has a severe physical impairment that causes her severe fatigue, low energy, muscle pain and shortness of breath and that she is significantly restricted with her DLA. The appellant's position is that if she does some cleaning then she is unable to cook, and that she cannot perform several DLA in the same day. The appellant agrees that the GP and the physician's reports are based on the information provided to them from her because they ask her how she is doing and she provides them with information about her symptoms, abilities and restrictions and that their medical assessments are based in part upon the information she provides.

The appellant's position is that she is very dependent on her parents and family for household tasks, grocery shopping and cooking and that she does not know what she would do without them. The appellant's position is that the information provided by the physician, GP, MRI, Echo Reports, in combination with her self-reports demonstrates that her DLA are directly and significantly restricted.

#### *Panel Decision*

The legislation – s. 2(2)(b)(i) of the EAPWDA – requires that the minister be satisfied that in the opinion of a prescribed professional, a severe mental or physical impairment directly and significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods. The term "directly" means that there must be a causal link between the severe impairment and the restriction. The direct restriction must also be significant. Finally, there is a component related to time or duration. The direct and significant restriction may be either continuous or periodic. If it is periodic it must be for extended periods. Inherently, any analysis of periodicity must also include consideration of the frequency. All other things being equal, a restriction that only arises once a year is less likely to be significant than one, which occurs several times a week. Accordingly, in circumstances where the evidence indicates that a restriction arises periodically, it is appropriate for the ministry to require evidence of the duration and frequency of the restriction in order to be "satisfied" that this legislative criterion is met.

The information from the physician in the PR indicates that the appellant has periodic restrictions with meal preparation, basic housework, daily shopping and social functioning but the physician only indicates "[i]ncreases with fatigue" as an explanation of periodic. In the AR the physician indicates that the appellant requires periodic support and supervision from another person in the areas of laundry, basic housekeeping, going to and from stores, carrying purchases home, meal planning, food preparation, cooking, developing and maintaining relationships and dealing appropriately with unexpected demands. However the physician does not provide further information to explain the frequency or duration of the period support/supervision required.

The information from the GP indicates that the appellant relies on her parents for housework, cleaning, laundry and meal preparation estimating that she is 80% dependent on her aging parents for this support. The GP does not specify whether the appellant's restrictions with DLA are continuous or periodic and he does not provide any further information to explain the nature or frequency of the assistance provided. The GP's report is based on the information provided to him by the appellant and that is consistent with the information provided by the appellant in the SR, her subsequent letter, and oral testimony. However this information is not consistent with the information provided by the physician in the PR and the AR which indicates that while the appellant requires

some periodic assistance with some aspects of DLA, she is independent with the majority of listed aspects of DLA.

While the appellant's position is that the medications she is prescribed do impact her ability to perform DLA because they suppress her immune system leaving her more vulnerable to infections, the physician in the PR indicates that the appellant has not been prescribed medications that interfere with her ability to perform DLA. The panel finds that the ministry's decision to rely on the physician's information in this regard was reasonable as the physician has not provided any subsequent information supporting the appellant's statements regarding the impacts of her prescriptions.

The subsequent letter from the physician dated January 27, 2017 indicates that the appellant is independent in personal care including dressing and washing, that she does limited cooking and housework because of shortness of breath on exertion and that she has been encouraged to keep up an exercise program with walking up to 15 minutes a day. This additional information does not provide any further information indicating that the appellant requires more support with her DLA and does not provide further information regarding the frequency and duration of assistance needed.

While the appellant states that the Echo Report indicate that her respiratory function has decreased, based on the Dimensions levels noted on the Echo Report, the panel is unable to interpret the Echo Reports. In addition, the Echo Report dated July 5, 2016 concludes that there is no significant change from the Echo Report dated December 14, 2015.

While the information provided indicates that the appellant has difficulties with some aspects of some DLA, based on all of the information provided, the panel finds that the ministry was reasonable in determining that the evidence is insufficient to show that the appellant's ability to perform her DLA is significantly restricted either continuously or periodically for extended periods as required by EAPWDR section 2(2)(b).

### **Help with DLA**

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

The appellant's position is that she has a severe physical impairment, that she is dependent on her family, and does not know what she would do without them. The appellant's position is that her lack of energy and chronic fatigue make every DLA a struggle.

### ***Panel Decision***

The PR indicates that the appellant does not require any prosthesis or aids for her impairment but there is no information about help needed. The AR indicates that the appellant receives help from family and friends. The AR indicates that the appellant does not require the use of assistive devices and does not have an Assistance Animal. The SR, appellant's subsequent letter, and oral testimony indicate that she receives help from her parents and the letter from the GP indicates that she estimates that she is 80% dependent on her parents for support.

Although the panel finds that the appellant requires some help with some tasks, 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 was reasonable in determining that the appellant does not have a severe impairment that directly and significantly restricts her ability to manage her DLA either continuously or periodically for an extended period of time, the necessary precondition is not satisfied.

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

**Conclusion**

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 decision and the appellant is not successful in her appeal.