

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (“Ministry”) reconsideration decision dated April 21, 2017 in which the ministry found the Appellant was not eligible for designation as a Person With Disabilities (“PWD”) because she did not meet all of the criteria in Section 2(2) of the *Employment and Assistance for Persons with Disabilities Act* (“EAPWDA”). The Ministry was satisfied that the Appellant has reached 18 years of age and that her impairment is likely to continue for at least 2 years. However, based on the information provided in the PWD Designation Application (“PWD application”) and Request for Reconsideration, the minister was not satisfied that:

- the Appellant has a severe mental or physical impairment; and
- the impairment, in the opinion of a prescribed professional, directly and significantly restricts her ability to perform daily living activities (“DLA”) either continuously or periodically for extended periods; and
- as a result of these restrictions, the Appellant requires help to perform those activities through an assistive device, the significant help or supervision of another person, or the services of an assistance animal.

## 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

Information before the minister at Reconsideration included:

1. A PWD application comprised of the applicant information signed by the Appellant on August 8, 2016, a Physician Report (PR) dated September 23, 2016 and an Assessor Report (AR) dated September 23, 2016, both completed by the same physician. In the PR, the physician reported that the Appellant has been his patient for approximately five years, and that he has seen her 2 to 10 times in the past 12 months. The Appellant completed a self-report.

The PWD application included the following information:

### **Diagnosis**

#### PR

In the PR, the Appellant's diagnosis was reported as genitourinary disorder – possible form of interstitial cystitis.

#### Self-Report

The Appellant described her condition as inflammation of the bladder with an infectious component, which comes in “flares”, meaning that it is episodic. She described that flares as varying in severity and pain, involving urinary urgency and frequency, bladder pressure and pain which radiates into her back and legs.

### **Functional Skills**

#### PR

The physician provided the following information regarding any functional limitations:

- The Appellant can walk 4+ blocks unaided on a flat surface;
- Climb 5+ steps unaided;
- Lift without limitation;
- Remain seated with no limitation, with a comment that lifting and remaining seated are limited when she has urinary flare-up;
- Has no difficulties with communication (other than lack of fluency in English);
- Has significant deficits with cognitive and emotional function in the areas of Memory, Emotional disturbance and Attention with the comment, “deficits related to periods of flare-up.”

#### AR

The physician provided the following information for Mental or Physical Impairment (Abilities):

- Ability to Communicate: Speaking, Reading, Writing and Hearing are good.
- Mobility and Physical Ability: walking indoors and outdoors are reported as independent, with a notation that they take significantly longer if having flare-ups; climbing stairs and standing are independent; lifting and carrying and holding are reported to require periodic assistance and to take significantly longer than typical with the notation “periodic assistance from friend/roommate if having flare-ups”.

The physician wrote that the mental or physical impairments that impact the Appellant's ability to manage DLA are “physical: pain (urinary frequency) and mental: poor sleep (anxiety/depression/focus problem)”.

The physician reported the following impacts for the 14 areas of Cognitive and Emotional Functioning:

- No impact in 10 areas: consciousness, impulse control, insight and judgement, executive, motivation, motor activity, language, psychotic symptoms, other neuropsychological problems and other emotional or mental problems.
- Major impact in 4 areas: bodily functions, emotion, attention/concentration and memory, with the comment “major impact when having a flare-up”.

## Self-report

The Appellant reported that the pain affects her thinking and sometimes is so bad that she stays in bed, making working impossible and affecting her ability to perform daily living activities. She wrote that pain medication is not effective, she has significant anxiety and her sleep is affected.

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

### PR

The physician checked *No*, the Appellant has not been prescribed medication/treatment that interferes with her ability to perform DLA.

### AR

#### Personal Care

- The Appellant is independent in all 8 aspects of personal care and is reported to take significantly longer than typical with dressing, grooming, bathing and toileting “related to having a flare-up”.

#### Basic Housekeeping

- The Appellant requires periodic assistance from another person “related to flare-ups”.

#### Shopping

- The Appellant is independent in reading prices and labels, making appropriate choices and paying for purchases and is reported to require periodic assistance from another person with going to and from stores and carrying purchases home, “related to flare-ups”.

#### Meals

- Meal planning and safe storage of food are independent; food preparation and cooking are reported to require periodic assistance from another person, with no comment.

#### Pay rent and bills

- All 3 aspects, banking, budgeting and pay rent and bills, are independent.

#### Medications

- All 3 aspects, filling/refilling prescriptions, taking as directed and safe handling and storage, are independent.

#### Transportation

- All 3 aspects, getting in and out of a vehicle, using public transit and using transit schedules and using transit schedules and arranging transportation, are independent and take significantly longer than typical “when having flare-ups”.

Under additional comments the physician wrote “periodic assistance as needed by friend or family member”.

#### Social functioning

- All aspects, appropriate social decisions, able to develop and maintain relationships, interacts appropriately with others able to deal appropriately with unexpected demands and able to secure assistance from others are independent.
- The Appellant has good functioning with immediate and extended social networks.

There are no additional comments provided.

## ***Need for Help***

### PR

- The physician reported *No*, the Appellant does not require any prostheses or aids for her impairment.
- Under Additional comments (*relevant to understanding the significance of the person's medical condition*), the physician left this section blank.

### AR

- The physician reported that assistance is provided by family and friends.
  - In the section asking if help is required but there is none available, what assistance would be necessary, the physician wrote "household chores, travel, shopping and work (employment with flare-ups)".
  - Under assistance provided through the use of assistive devices, the physician wrote "N/A".
  - Assistance provided by assistance animals is marked *No*.
2. The Ministry's Persons with Disabilities Designation Decision Summary, dated March 8, 2017.
  3. The Ministry's letter to the Appellant advising her of their decision, dated March 8, 2017.
  4. The Appellant's Request for Reconsideration, signed April 11, 2017, in which she wrote that her condition severely impacts her daily life and ability to function normally, with flare-ups occurring 50% of the time and involving such bad pain that she is confined to her home and often her bed; that she requires assistance for extended periods of time and that she cannot work due to the severity and variability of her illness.
  5. A letter from a physician dated November 9, 2011, reporting that it is possible that the Appellant has a form of interstitial cystitis.

Subsequent to the Reconsideration Decision, the Appellant stated in her Notice of Appeal to the Tribunal that her condition severely affects her daily life and she does not feel that the severity and length of her flares was thoroughly acknowledged.

At the hearing the Appellant submitted a letter from her physician dated May 26, 2017. The Ministry did not object to the admission of this document. The latter was admitted as evidence by the Panel under section 22(4) of the Employment and Assistance Act as it contained information in support of the information that was before the minister when the decision under appeal was made. The Panel notes, however, that the physician's letter repeats the language in the Appellant's self-report attached to her Request for Reconsideration, and reiterates the Appellant's report of the frequency of her flare-ups and the effects of her condition, using such phrases as 'she feels' and 'she finds'. The Panel therefore places little weight on the physician's letter as reflecting the opinion of the physician.

The Appellant referred to the *Interpretation Act (RSBC 1996)* section 8 and the principles of statutory interpretation with respect to the purpose of social legislation.

The Appellant stated that her condition started in 2009, and that it is a genitourinary disorder that has a significant periodic component. She stated that it is diagnosed through a process of elimination, and she is presumed to have interstitial cystitis. She stated that her flare-ups have increased and she is never completely free from pain, which affects her energy and thinking. She stated that she always has bladder pressure, and her ability to perform DLA is affected to the point that she requires assistance to perform DLA.

The Ministry referred to the information contained in the Reconsideration Decision.

## PART F – Reasons for Panel Decision

The issue in this appeal is whether the ministry's reconsideration decision, which found that the appellant was not eligible for PWD designation, was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. Based on the information provided in the PWD application and RFR, the ministry was not satisfied that the following criteria in EAPWDA section 2(2) were met: the Appellant has a severe mental or physical impairment; and the impairment, in the opinion of a prescribed professional, directly and significantly restricts her ability to perform DLA either continuously or periodically for extended periods; and, as a result of these restrictions, she requires help to perform those activities.

The eligibility criteria for PWD designation are set out in section 2(2) of the EAPWDA as follows:

- (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.

The “daily living activities” referred to in EAPWDA section 2(2)(b) are defined in section 2 of the EAPWDR:

### Definitions for Act

**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;

For the purposes of the Act and this regulation, **"daily living activities"** ,

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

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

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

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

### ***Severe mental or physical impairment***

The diagnosis of a serious medical condition does not in itself determine PWD eligibility or provide evidence of a severe impairment. To satisfy the requirements in section 2(2) of the EAPWDA, evidence of how, and the extent to which, a medical condition restricts daily functioning must be considered. This includes the evidence from the Appellant and from a prescribed professional regarding the nature of the impairment and its impact on the appellant's ability to manage the DLA listed in section 2(1) of the EAPWDR. However, section 2(2)(b) of

the EAPWDA clearly sets out that the fundamental basis for the analysis of restrictions is the evidence from a prescribed professional - in this case, the physician.

*Appellant's position - Severe mental impairment*

The appellant argued that the pain from her condition causes her to never be free from pain which causes significant anxiety, affecting her sleep and relationships, causing her to be depressed. Her physician, acting as assessor, reported that she has major impacts with four aspects of cognitive and emotional functioning during flare-ups. In the PR, the physician reported significant deficits with memory, emotional disturbance and attention or sustained concentration.

*Ministry's position – Severe mental impairment*

In the Reconsideration Decision, the Ministry argued that the appellant does not have a severe mental impairment based on the information provided by the physician. The Ministry wrote that the Appellant is reported to have no impacts in 10 listed areas of cognitive and emotional functioning and does not describe the frequency or duration of flare-ups causing major impacts to the areas impacted. The Ministry argued that the cumulative impact to cognitive and emotional functioning during periods of flare-ups is not considered indicative of a severe impairment of mental functioning.

*Panel decision – Severe mental impairment*

The panel finds that the ministry reasonably determined the appellant does not have a severe mental impairment based on the information provided. Not only is there no diagnosis of a mental impairment, the physician did not indicate any impairment of social functioning or impact on immediate or extended social networks. Deficits in cognitive and emotional function are reported to be related to periods of urinary flare-ups. Similarly, major impacts to her cognitive and emotional functioning are reported to be during flare-ups. Based on this analysis, the panel finds that the ministry reasonably determined that a severe mental impairment under section 2(2) of the EAPWDA was not established.

*Appellant's position – Severe physical impairment*

In her Request for Reconsideration submission, the appellant argued that her impairment is severe and chronic

At the hearing, she argued that there is no guidance in the legislation as to what constitutes a severe impairment or the kind of information that would be required to establish that she has a severe impairment. . She stated as clarification of the PR that her flare ups occur 50% of the time. The Appellant argued that the totality of information provided must be considered. The Appellant provided self-reports which she argued are consistent with the information provided by her physician. The Appellant argued that she has frequent pain, urinary urgency and frequency of urination that impact her ability to manage DLA.

*Ministry's position - Severe physical impairment:*

The ministry argued in the Reconsideration Decision that a severe physical impairment has not been established because the appellant was reported as able to walk 4+ blocks unaided, climb 5+ steps, has no limitations in lifting or remaining seated, which are limited when she has urinary flare-ups. The ministry acknowledged that the appellant requires periodic assistance with these activities during flare-ups, the physician does not describe the frequency or duration of the flare-ups and does not describe the severity of impacts to lifting and remaining seated during flare-ups. The Ministry noted that the physician does not describe the frequency or duration of flare-ups causing the Appellant to take significantly longer than typical with DLA, making it difficult to establish both the frequency/duration of flare-ups and the severity of impacts to physical functioning during flare-ups.

### *Panel decision – Severe physical impairment*

The panel finds that the ministry reasonably determined a severe physical impairment has not been established on the basis of the information provided. As argued by the Ministry, the reported range of function in the PR and AR does not confirm that the Appellant's physical impairment is severe. The reported limitations to functioning are all related to having a flare-up, and the information contained in the physician's letter of May 26, 2017 is similar to information previously provided by the Appellant. The Appellant is reported to perform all functional skills unaided except when she is limited by urinary flare-ups, which are reported by the Appellant to be 50% of the time; however, the physician has not confirmed this independently, stating that the Appellant feels that she is in flare-up approximately 50% of the time. The panel notes that employability is not a criterion in determining eligibility for designation as a Person with Disabilities.

### ***Significant Restrictions in the ability to perform DLA***

#### *Appellant's position*

The Appellant argued that she requires assistance with DLA periodically for extended periods during flare-ups, which is approximately 50% of the time, taking significantly longer with some DLA and requiring periodic assistance with others during flare-ups of her condition, which are a direct result of her impairment. She argued that her symptoms differ in severity, but never fully resolve, and she must plan around access to washrooms, which limits her ability to leave her home, do shopping and perform other DLA. She stated that her symptoms are unpredictable, lasting from 3 or 4 days to 15.

#### *Ministry's position*

The ministry's position, as set out in the reconsideration decision, is that there is not enough evidence provided by the physician to confirm that a severe impairment significantly restricts DLA continuously or periodically for extended periods. In the reconsideration decision, the ministry noted the physician's assessment in the AR, in which most DLA which were reported as periodically restricted or requiring periodic assistance were related to flare-ups of the Appellant's condition. The Ministry noted that the physician did not describe the frequency or duration of the flare-ups or how much longer than typical the Appellant requires to perform restricted activities, making it difficult to establish the frequency and duration of restrictions.

### *Panel decision – Restrictions to DLA*

Subsection 2(2)(b)(i) of the EAPWDA requires the ministry to be satisfied that in the opinion of a prescribed professional an applicant's severe impairment directly and significantly restricts DLA either continuously or periodically for extended periods. In this case, the Appellant's physician is the prescribed professional. DLA are defined in section 2(1) of the EAPWDR and are also listed in the PR, with additional details in the AR. Therefore, a 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 a circumstance where the physician's evidence indicates that an applicant has periodic restrictions to her ability to perform DLA or requires significantly longer than typical to perform them, related to the occurrence of her flare-ups, it is appropriate for the Ministry to require evidence of the duration and frequency of the restriction in order to determine if the legislative criterion is met. In the PR, the physician indicated that the Appellant has limitations to her functional skills when she has urinary flare-ups. In the AR, he indicates that the Appellant requires periodic assistance with laundry, basic housekeeping, going to and from stores, carrying purchases home, food preparation and cooking, and that she takes significantly longer than typical with dressing, grooming, bathing, toileting and all aspects of transportation, with the comment that these are related to flare-ups. The Appellant is indicated to be otherwise independent with personal care and transportation, and the majority of DLA are indicated to be performed independently.

Considering the degree of independence reported and the lack of information regarding frequency and

duration of assistance needed, except for the physician's letter which reiterates the Appellant's self-report, the Panel finds that the Ministry reasonably determined that the evidence provided is insufficient to determine that the Appellant's ability to perform DLA is significantly restricted either continuously or periodically for extended periods as required by EAPWDR section 2(2)(b).

### ***Help to perform DLA***

#### *Appellant's position – Help with DLA*

The Appellant argued that she requires assistance performing DLA periodically for extended periods, requiring assistance with laundry, basic housekeeping, going to and from stores, carrying purchases home, preparing food and cooking, and that she takes longer than typical with dressing, grooming, bathing, toileting, getting in and out of a vehicle, using public transit and arranging transportation.

#### *Ministry's position – Help with DLA*

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

#### *Panel decision – Help with DLA*

The AR indicates that the Appellant does not require any prosthesis or aids for her impairment but that she requires assistance from family and friends. The AR also indicates that assistance is necessary, related to flare-ups, with tasks such as laundry, basic housework and shopping. The AR indicates that the appellant does not require the use of assistive devices and does not have an assistance animal.

Although the panel notes that the Appellant requires periodic help with some tasks, a finding that a severe impairment directly and significantly restricts a person's ability to manage his 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.

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. The appellant is not successful in her appeal.