

## PART C – Decision under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Social Innovation (the ministry) dated 9 May 2017, which denied the appellant designation as a person with disabilities (PWD). The ministry determined that the appellant did not meet all of the required criteria for PWD designation as set out in the *Employment and Assistance for Persons with Disabilities Act*, section 2.

Specifically, the ministry determined that the information provided did not establish that the appellant has a severe mental or severe physical impairment; a severe mental or physical 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 those restrictions, she requires help to perform those activities.

The ministry found that the information provided did establish that the appellant has reached 18 years of age and her impairment, in the opinion of a medical practitioner, is likely to continue for at least 2 years.

## 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 appellant was not in attendance at the hearing. After confirming that the appellant was notified, the hearing proceeded under Section 86(b) of the Employment and Assistance Regulation.

The evidence before the ministry at reconsideration consisted of the following:

1. The appellant's **PWD Application**. The Application contained:
  - A Medical Report (MR) dated 2 February 2017, completed by the appellant's general practitioner (GP) who has seen the appellant 2-10 or more times in the past 12 months.
  - An Assessor Report (AR) dated 2 February 2017, completed by the appellant's GP.
  - A Self Report (SR) dated 6 February 2017 completed by the appellant.
2. Medical Reports included with the appellant's PWD application:
  - X-ray report (lumbar spine) - November 30, 2016.
  - Bone Scan Report – October 22, 2013.
  - X-ray report (chest and knees) – October 2, 2013.
3. A **Request for Reconsideration** dated 20 April 2017, in which the appellant describes her medical history and current medical conditions, as well as her employment history and the difficulty she experienced in her prior employment.
4. A letter from the appellant's advocate to her GP requesting a letter of support for the appellant's reconsideration application.
5. A letter prepared by the appellant's advocate and signed by her GP dated April 20, 2017.
6. A 7-page reconsideration submission prepared by the appellant's advocate.

The panel will first summarize the evidence from the PWD Application as it relates to the PWD criteria at issue in this appeal.

### **Diagnoses**

In the MR, the GP diagnoses the medical conditions related to the appellant's impairment as:

- Chronic back pain
- Osteoarthritis

In the AR, the GP describes the appellant's mental or physical impairments as "the patient is limited in her ability to walk, lift, carry."

### **Severity of mental impairment**

MR:

The GP does not provide a mental health diagnosis on the "Diagnoses" section of the PWD application.

The GP indicates that the appellant has no difficulties with communication.

The GP indicates that the appellant had significant deficits with cognitive and emotional functioning in the areas of executive, emotional disturbance and attention with the comment: *The pain has resulted in secondary depression.*

AR:

The GP assesses the appellant's ability to communicate as good in all areas (speaking, reading, writing, and hearing).

The GP assess the appellant's cognitive and emotional functioning as having no impact in the areas of bodily functions, consciousness, impulse control, insight and judgement, memory, motor activity, language, psychotic symptoms and other neuropsychological problems. The GP assesses minimal impacts on daily functioning in the areas of emotion, executive, and motivation. Moderate impacts on daily functioning are assessed in attention/concentration. The GP writes: *Her chronic daily pain affects her mood and ability to concentrate and plan.*

The GP indicates that the appellant requires periodic assistance/support in all social functioning DLA and provides the comment: *The patient has socially isolated herself as a result of her chronic daily pain.* The GP indicates that the appellant has marginal functioning in her immediate and extended social networks and writes that the support/supervision required which would help maintain the appellant in the community is: *daily encouragement to participate in community activities including transportation.*

SR:

The appellant does not indicate that she suffers from a severe mental impairment or mental health condition. She describes chronic arthritis in her back and knees and a compressed vertebra in her upper back (see below).

### **Severity of physical impairment**

MR:

Under Health History, the GP writes: *The patient suffers from moderate to severe back and joint (knee) pain, which limits her ability to do any physical activity.*

For functional skills, the GP indicates that the appellant can walk 1-2 blocks unaided, climb 5+ steps unaided, lift 2 to 7 kg. (5 to 15 lbs.), and remain seated less than 1 hour.

The GP indicates that the appellant does not require any aids or prostheses.

AR:

The GP indicates the appellant's mobility and physical ability as independent for standing. The GP indicates that the appellant requires periodic assistance from another person for walking indoors, walking outdoors, climbing stairs, lifting and carrying and holding, with the comment: *Pain limits her ability to walk, lift and carry.*

SR:

The appellant writes: *I have chronic arthritis in my back and knees. It gets so bad that it makes it hard to walk for a long period or even to stand sometimes it hurts to do so. Also, I've had and still have a compressed vertebra in my upper back. With the chronic pain from the arthritis it affects me worse in the cold and makes it very difficult to walk for a long period of time or for long distance and I can't even sit for long before my back will start to hurt.*

## **Ability to perform DLA**

### **General**

MR:

The GP indicates that the appellant has not been prescribed medication that interferes with her ability to perform DLA.

The GP indicates that the appellant has no difficulties with communication.

AR:

The GP indicates that the appellant has no difficulties with communications and in the AR, assesses her ability to communicate as good for speaking, reading, writing, and hearing.

The GP indicates that the appellant is independent in: the personal care DLA of dressing grooming, bathing, toileting, feeding self, and regulating diet; the shopping DLA of reading prices and labels, making appropriate choices, and paying for purchases; all meals DLA; the pay rent and bills DLA of banking and pay rent and bills; all medications DLA; and the transportation DLA of using transit schedules and arranging transportation.

The GP indicates that the appellant requires periodic assistance for: the personal care DLA of transfers in/out of bed and on/off chair (*pain will limit her mobility*); basic housekeeping DLA of laundry and basic housekeeping (*pain limits her ability to do any physical activity*); the shopping DLA of going to and from stores and carrying purchases home; the pay rent and bills DLA of budgeting; and the transportation DLA of getting in and out of a vehicle.

The GP comments: *the patient requires daily assistance for housework, carrying groceries, laundry – anything that requires physical activity. The GP further comments: the patient's pain make it difficult getting in and out of a vehicle and walking to/from public transit. Help with private transportation is required.*

### **Section 2(1)(a) DLA**

*Prepare own meals*

AR:

The GP indicates that the appellant is independent in all meals activities.

*Manage personal finances*

AR:

The GP indicates that the appellant is independent in the personal finances activities of banking, and paying rent and bills. The GP indicates that the appellant requires periodic assistance with budgeting.

*Shop for personal needs*

AR:

The GP indicates that the appellant is independent in the shopping DLA of reading prices and labels, making appropriate choices and requires periodic assistance with the shopping DLA of going to and from stores and carrying purchases home.

*Use public or personal transportation facilities*

AR:

The GP indicates that the appellant is independent in the transportation DLA of using transit

schedules and arranging transportation and requires periodic assistance using transit and getting in and out of a vehicle.

*Perform housework to maintain the person's place of residence*

AR:

The GP indicates that the appellant requires periodic assistance with laundry and basic housework; with the comment: *Pain limits her ability to do any physical activity.*

*Move about indoors and outdoors*

MR:

The GP indicates that the appellant can walk 1-2 blocks unaided on a flat surface and can climb 5+ steps unaided.

AR:

The GP indicates that the appellant is independent with standing and requires periodic assistance with walking indoors and outdoors, climbing stairs, lifting, and carrying and holding. The GP comments: *Pain limits her ability to walk, lift and carry.*

*Perform personal hygiene and self-care*

AR:

The GP indicates that the appellant is independent with the personal care DLA of dressing grooming, bathing, toileting, feeding self, and regulating diet and requires periodic assistance with transfers in/out of bed and on/off chair. The GP comments: *pain will limit her mobility.*

*Manage personal medication*

AR:

The GP indicates that the appellant is independent in all medications DLA.

**Section 2(1)(b) DLA**

The following DLA are applicable to a person who has a severe mental impairment:

*Make decisions about personal activities, care or finances*

AR:

The GP indicates that the appellant is independent with shopping DLA of readings labels, making appropriate choices, and paying for purchases; the all meals DLA, including meal planning and safe storage; the pay rent and bills DLA of banking and pay rent and bills; all medications DLA; and the transportation DLA of using transit schedules and arranging transportation.

The GP indicates that the appellant requires periodic assistance with the pay rent and bills DLA of budgeting.

*Relate to, communicate or interact with others effectively*

MR:

The GP indicates that the appellant has no difficulties with communication.

AR:

The GP assesses the appellant's ability to communicate as good in all areas (speaking, reading, writing, and hearing).

The GP indicates that the appellant requires periodic assistance in all social functioning DLA (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) and has marginal functioning in her immediate and extended social networks. The GP comments: *The patient has socially isolated herself as a result of her chronic daily pain.*

The GP writes that the support/supervision required which would help maintain the appellant in the community is: *daily encouragement to participate in community activities including transportation.*

#### Help required

MR:

The GP indicates that the appellant does not require an aid or prosthesis for her impairment.

AR:

The GP writes: *The patient's pain makes it difficult getting in/out of a vehicle and walking to/from public transit. Help with private transport is required.*

The GP indicates that the appellant receives assistance from family for DLA. In response to the prompt to specify what help is required but there is none available, the GP writes: *help with household chores, shopping and transportation to medical appointments/grocery.*

The GP indicates that the appellant does not receive assistance from assistive devices or assistance animals.

#### **Notice of Appeal**

In her Notice of Appeal dated 18 May 2017, the appellant gives as Reasons for Appeal: *I disagree because I cannot work regularly anymore and I cannot get anything that's easier on my body. I cannot lift more than 5 lbs.*

#### **The hearing**

The appellant did not attend the hearing.

The ministry relied on its reconsideration decision.

#### **Admissibility of new information**

The panel finds that the information provided by the appellant in her Notice of Appeal is in support of the information and records before the ministry at reconsideration. The panel therefore admits this information in accordance with section 22(4) of the *Employment and Assistance Act*.

## PART F – Reasons for Panel Decision

The issue in this appeal is whether the ministry decision that determined that the appellant did not meet three of the five statutory requirements of Section 2 of the *EAPWDA* for designation as a person with disabilities (PWD) is reasonably supported by the evidence or is a reasonable application of the legislation in the circumstances of the appellant. Specifically, the ministry determined that the information provided did not establish that:

- the appellant has a severe mental or severe physical impairment;
- that the appellant's severe mental or physical 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 those restrictions, she requires help to perform those activities.

The following section of the *EAPWDA* applies to this appeal:

2 (1) In this section:

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

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

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

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

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

(b) in the opinion of a prescribed professional

(i) directly and significantly restricts the person's 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 following section of the *EAPWDR* applies to this appeal:

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.

(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.

### **Severity of impairment**

The legislation requires that for PWD designation, the minister must be “satisfied” that the person has a severe mental or physical impairment. The legislation makes it clear that the determination of severity is at the discretion of the minister, considering all the evidence, including that of the appellant. Diagnosis of a serious medical condition or the identification of mental or physical deficits does not in itself determine severity of impairment. An impairment is a medical condition that results in restrictions to a person’s ability to function independently, appropriately, effectively or for a reasonable duration. To assess the severity of impairment one must consider the nature of the impairment and the degree of impact on daily functioning.

#### *Severity of mental impairment*

In the reconsideration decision, the ministry found that the information provided did not establish that the appellant has a severe mental impairment of her mental functioning. The ministry noted that the GP provided a diagnosis of depression in the letter provided at reconsideration and had indicated in the MR that pain had resulted in secondary depression. In its analysis of the evidence, the ministry noted that, in the assessment of significant deficits with cognitive and emotional function, the GP noted deficits in the areas of emotional disturbance, attention or sustained concentration and executive. The ministry noted that the appellant’s ability to communicate was assessed as good in all areas. The ministry considered that there were no major impact areas noted, moderate impact in attention concentration, and minor or no impacts for all other areas of cognitive and emotional functioning in the AR. The ministry found that this assessment did not establish a severe mental impairment.

The ministry went on to consider that the GP had indicated the appellant’s need for periodic assistance with all areas of social functioning. The ministry considered the comment provided by the GP (*the patient has socially isolated herself as a result of her chronic daily pain*) in response to the request for information about the degree and duration of support required. The ministry also considered the GP’s assessment of marginal functioning in social networks and the accompanying comment (*daily encouragement to participate in community activities including transportation*). The ministry found that the assessments of the level of assistance required were not supported by the GP’s assessment of the impacts the appellant’s cognitive and emotional functioning have on her daily functioning. The ministry also noted that information describing the nature of the support or supervision as well as how often it was required had not been provided.

The panel considers it appropriate that in the reconsideration decision the ministry acknowledged that the appellant experiences challenges due to depression and anxiety but finds that the information provided does not establish a severe impairment of mental functioning. The panel concludes that the



ministry reasonably determined that the assessment of impacts to the appellant's cognitive and emotional functioning did not establish a severe impairment. The panel notes that despite the GP's indication that periodic assistance is required for social functioning, other than indicating that the appellant requires encouragement to participate in community activities, there is an absence of information in relation to the degree and duration of support the appellant requires. The panel further notes that the appellant's communication abilities are assessed as good and there are no safety concerns noted by the GP in the MR or AR. The panel finds that the ministry reasonably concluded that the information provided did not establish a severe mental impairment. The panel finds that the ministry's determination that this criterion has not been met is reasonable.

#### *Severity of physical impairment*

In the reconsideration decision, the ministry found that it was not satisfied that the information provided established the presence of a severe physical impairment. The ministry noted that the GP had assessed the appellant as being able to walk 1-2 blocks unaided, climb 5+ steps unaided, lift 5-15 lbs. and remain seated for less than an hour. The panel notes that, in her notice of appeal, the appellant specifies that she is limited to lifting 5 lbs. The ministry considered the GP's report that the appellant requires periodic assistance from another person for walking indoors and outdoors, climbing stairs, standing, lifting and carrying and holding, and independent with standing, and noted that the comment: *Pain limits her ability to walk, lift and carry*. The ministry found that the discrepancies in these assessments were problematic because the basic physical functioning assessment found in the MR did not correlate with the ability and physical mobility assessments provided by the GP in the AR. The ministry went on to consider the GP's letter provided at reconsideration but determined that it did not provide additional information about basic physical ability or mobility and physical ability activities.

The panel considers that, in the reconsideration decision, the ministry acknowledged that there are some limitations and restrictions in the appellant's physical functioning due to chronic back pain and osteoarthritis but ultimately concluded that the information provided in the assessments of physical functioning and the appellant's ability to manage activities requiring mobility and physical ability did not establish a severe physical impairment. The panel notes that in the SR the appellant described pain and difficulty she experiences with walking for long distances or for a long time, as well as difficulty with sitting for long. The panel further notes that in her request for reconsideration the appellant described difficulties she experienced in meeting her deadlines when working and recovering from work. As well, the appellant argued in her notice of appeal that she cannot return to work at her previous job, cannot get anything that is easier on her body. The panel finds that employability is not a consideration for eligibility for PWD designation because employability is not a criterion in section 2(2) of the EAPWDA, nor is it listed among the prescribed daily living activities in section 2 of the EAPWDR.

The panel notes that the GP indicated that the appellant experiences some restrictions but finds that the ministry reasonably concluded that the information provided in relation to functional skills, and mobility and physical ability does not correlate and the GP's letter provided at reconsideration did not provide clarification. The panel further notes that the GP has not provided information in the mobility and physical ability assessment to describe the assistance the appellant requires. The panel finds that the ministry reasonably concluded that the information provided did not establish a severe physical impairment. The panel finds that the ministry's determination that this criterion has not been met is reasonable.

### **Direct and significant restrictions in the ability to perform DLA**

The legislation – section 2(2)(b)(i) of the EAPWDA – requires the minister to assess direct and significant restrictions of DLA in consideration of the opinion of a prescribed professional, in this case the appellant's GP. This does not mean that other evidence should not be considered, but the legislative language makes it clear that a prescribed professional's evidence is fundamental to the ministry's determination as to whether it is "satisfied." At issue is the degree of restriction in the appellant's ability to perform the DLA listed in section 2(1)(a) and (b) of the EAPWDR applicable to a person with a severe mental or physical impairment. The panel notes that, according to the legislation, the direct and significant restriction in the ability to perform DLA must be a result of a severe impairment, a criterion not established in this appeal.

In the reconsideration decision, the ministry found that the information provided did not establish that the appellant's ability to manage DLA is significantly restricted either continuously or periodically for extended periods of time and that as a result she requires significant assistance from others to complete them. The ministry noted that, in relation to DLA assessed as requiring periodic assistance in the AR, there was no information provided about the type and frequency of assistance required. The panel notes the necessity of information specifying the type and frequency and/or nature and extent of any assistance needed to determine whether DLA are significantly restricted periodically for extended periods. The ministry went on to consider the GP's letter provided at reconsideration and noted that there were some changes in the GP's assessment of some DLA. The ministry found that, in light of the physical functioning assessments in the MR, it was unclear why basic housework and daily shopping would require continuous assistance. The ministry determined that periodic assistance was more reflective of the appellant's ability to manage in those areas. However, the ministry went on to note that information about the nature and frequency of assistance was not provided. As well, the ministry found that there was no information provided to explain the difference in assessment of DLA between the AR and the GP's letter. The ministry explained that it was uncertain which of the assessments more accurately reflected the appellant's abilities and stated that it was unclear if the assessments in the letter were a medical re-assessment or a self-report. The ministry determined that it would rely more heavily on the information in the PWD application.

The panel finds that the GP has indicated in the PWD application that the appellant requires periodic assistance with some DLA. However, the panel notes that the GP has not provided sufficient information in relation to the degree and duration of this assistance to establish that there are significant restrictions for extended periods in the appellant's ability to perform these DLA. The panel notes that the GP's letter provided at reconsideration does not include any information or evidence to explain the differences in DLA assessment between the letter and the PWD application. The panel finds the ministry's conclusion that it is difficult to determine which more accurately reflects the appellant's abilities to be reasonable. The panel finds that the ministry was reasonable in concluding that there is not enough evidence to establish that DLA were restricted continuously or periodically for extended periods. As such, the panel concludes that the ministry's determination that this criterion was not met is reasonable.

### **Help required**

Section 2(2)(b)(ii) of the EAPWDA requires that, as a result of being directly and significantly restricted in the ability to perform DLA either continuously or periodically for extended periods, a person must also require help to perform those activities. The establishment of direct and significant restrictions under section 2(2)(b)(i) is a precondition of meeting the need for help criterion. Help is defined in subsection (3) as the requirement for an assistive device, significant help or supervision of another person, or the services of an assistance animal in order to perform a DLA.

In the reconsideration decision, the ministry found that, as it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required. While the AR indicates that the appellant benefits from help from friends, the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established. As such, the panel finds that the ministry reasonably concluded that under section 2(2)(b)(ii) of the EAPWDA it cannot be determined that the appellant requires help to perform DLA.

**Conclusion**

The panel finds that the ministry's reconsideration decision, which determined that the appellant was not eligible for PWD designation, was a reasonable application of the legislation in the appellant's circumstances and was reasonably supported by the evidence. The panel therefore confirms the ministry's decision. The appellant is not successful on appeal.