

## 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 4 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 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; that 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 that 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 evidence before the ministry at reconsideration consisted of the following:

1. The appellant's **PWD Application** comprised of:
  - A Medical Report (MR) dated 30 November 2016, completed by the appellant's general practitioner (GP) who has known the appellant since age 19 and has seen her 2-10 times in the past 12 months.
  - An Assessor Report (AR) dated 30 November 2016, completed by the appellant's GP.
  - A Self Report (SR) dated 14 November 2016 completed by the appellant.
2. A **Request for Reconsideration** dated 15 April 2017, signed by the appellant. The following materials were included with the request for reconsideration:
  - A 1-page letter from the appellant in which she states that her condition has worsened in the past 4 months and there are more things she is unable to do for herself. The appellant explains her medical conditions and the effects she experiences. She states that she relies on help from her friends and sisters for dishwashing and hair washing, and she also receives assistance with meal preparation and light housekeeping. The appellant states that she has become very depressed and has been put on antidepressant medication. The appellant indicates that she is unable to hold down a job and that doctors are unable to figure out the cause of her condition.
  - Several dozen photographs depicting the appellant's skin condition.
  - A 2-page letter from the appellant's friend dated 14 April 2017, in which the friend describes the appellant as a very hard working person who suffers on a daily basis from her many health issues. The friend states that the appellant is unable to do normal daily tasks, including dishes, hair washing, and household cleaning because everything she touches or smells "sets her skin off." The friend explains that she provides assistance to the appellant "a couple to a few" times per week. The friend states that bouts of constant itchiness, which last from days to weeks at a time, prevent the appellant from sleeping for more than 2 hours at a time and make it impossible for her to hold a job.
  - A 1-page letter from the appellant's sister, dated 19 April 2017, which states that she has been providing assistance off and on for a few years and that the appellant's need for help has increased over the past year, particularly the last 4 months. The appellant's sister states that there are some things the appellant is unable to do for herself due to her medical condition. The sister indicates that she assists the appellant with washing her hair, laundry, vacuuming, dishes and anything else she needs help with.

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

### **Diagnoses**

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

- Ulcerative colitis – post-colectomy, ileostomy – onset 1992
- Inflammatory arthropathy – onset 1997
- Breast cancer – onset 2011
- Eczema – onset 1992

In the AR, the GP describes the appellant's mental or physical impairments as: *Ulcerative colitis with ileostomy, inflammatory arthropathy with pain in left hand and right knee, left arm lymphedema post-mastectomy, severe eczema, chronic fatigue and low mood.*

### **Severity of mental impairment**

MR:

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

The GP indicates that the appellant has significant deficits with cognitive and emotional functioning in the area of emotional disturbance and motivation with the comment: *Struggles with low mood, poor sleep, low energy.*

AR:

The GP indicates that the appellant's impairments include low mood.

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

The GP assess the appellant's cognitive and emotional functioning as having no impact in the areas of impulse control, insight and judgement, motor activity, language, psychotic symptoms, other neuropsychological problems and other emotional or mental problems. The GP assesses minimal impacts on daily functioning in the areas of attention/concentration, executive and memory. Moderate impacts on daily functioning are assessed for bodily functions, consciousness and emotion with major impacts assessed for motivation.

SR:

The appellant indicates that she doesn't go out too much and sometimes gets a little depressed. As well, the appellant states that her medication for itchiness make her tired.

### **Severity of physical impairment**

MR:

Under Health History, the GP writes: *ulcerative colitis was severe, had colectomy and ileostomy in 1992. Gets abdominal cramping, moderate to severe, often after eating, needs to rest curled up for 30-60 mins. Eczema has been severe, can't tolerate frequent hand washing or handling paper, has to wear cotton liners and gloves for housework.*

*Had bilateral mastectomy and implants for extreme risk breast cancer. Chronic lymphedema left (dominant) arm causing swelling and numbness. Compression sleeve causes worse skin itching.*

*Inflammatory arthropathy related to inflammatory bowel disease, currently left hand pain. Has had right knee arthritis – difficulty squatting.*

For functional skills, the GP indicates that the appellant can walk 4+ blocks unaided, climb 5+ steps unaided, lift 2 to 7 kg. (5 to 15 lbs.), and remain seated 1-2 hours.

The GP indicates that the appellant does require aids or prostheses and explains: *ileostomy supplies.*

AR:

The GP indicates the appellant's mobility and physical ability as independent for walking indoors, walking outdoors, climbing stairs and standing. The GP indicates that lifting and carrying and holding require periodic assistance from another person and take significantly longer (*needs assistance to lift >15 lbs.*). The GP provides the comment: *Related to bilateral mastectomies, lymphedema in left (dominant) arm and severe hand eczema.*

SR:

The appellant describes suffering from: ulcerative colitis causing severe abdominal cramping and periodic joint inflammation; severe eczema causing itchy bleeding blisters that become raw open wounds; lymphedema in her left arm which swells and becomes numb; weak bladder that causes her to go to the bathroom every 1.5 hours during the night. She explains that the eczema makes it hard to do things (discussed below).

### **Ability to perform DLA**

#### **General**

MR:

The GP indicates that the appellant has been prescribed medications that interfere with her ability to perform DLA, specifically antihistamines for skin itching that cause sedation and fatigue, the anticipated duration of which is chronic/long term.

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

*Prepare own meals*

AR:

The GP indicates that the appellant is independent with the meals activity of safe storage of food, and requires periodic assistance from another person with meal planning, meal preparation and cooking, with the comment: *sister or friend help with food prep and cooking.* The GP has also provided the additional comment: *Friend and sister prepare about 50% of meals.*

*Manage personal finances*

AR:

The GP indicates that the appellant is independent in all pay rent and bills activities.

*Shop for personal needs*

AR:

The GP indicates that the appellant is independent in the following shopping activities: reading prices and labels, making appropriate choices and paying for purchases. The GP indicates that the appellant requires periodic assistance going to and from stores (*sister helps with shopping*) and carrying purchases home (*needs help with lifting and carrying greater than 15 lbs.*)

*Use public or personal transportation facilities*

AR:

The GP indicates that the appellant is independent in the transportation DLA of getting in and out of a vehicle and provides the comment *doesn't use* in relation to using public transit and using transit schedules and arranging transportation.

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

AR:

The GP indicates that the appellant is independent with laundry; she requires continuous assistance and takes significantly longer with basic housework (*needs help to clean bathroom*).

*Move about indoors and outdoors*

MR:

The GP indicates that the appellant can walk 4+ blocks unaided on a flat surface and can climb 5+ steps unaided.

AR:

The GP indicates that the appellant is independent with walking indoors and outdoors, climbing stairs and standing.

*Perform personal hygiene and self-care*

AR:

The GP indicates that the appellant is independent with the personal care DLA of dressing, grooming, feeding self, and regulating diet and transfers in/out of bed and on/off chair. Bathing requires continuous assistance from another person and takes significantly longer (*help with hair washing*) and toileting takes significantly longer (*ileostomy care*).

*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 the shopping DLA: reading labels, making appropriate choices, and paying for purchases; the meals DLA: safe storage of food; and all activities for the pay rent and bills and medications DLA. An assessment of the appellant's abilities in relation to the transportation DLA: using transit schedules and arranging transportation is not provided, as the GP indicates that the appellant *doesn't use*.

*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 for speaking, reading, writing and hearing.

The GP indicates that the appellant is independent with social functioning DLA in the following areas: appropriate social decisions, interacts appropriately with others, able to deal appropriately with unexpected demands, and able to secure assistance from others. The GP indicates that the appellant has marginal functioning in her immediate (*doesn't feel comfortable socializing with new people*) and extended social networks (*doesn't feel comfortable interacting with strangers*). The GP indicates that the appellant requires periodic assistance with the social functioning DLA in the area of developing and maintaining relationships. In response to the prompt to explain/describe the

degree and duration of support/supervision required the GP has provided the comment: *low mood, lack of motivation and interest.*

#### Help required

MR:

The GP indicates that the appellant requires an aid or prosthesis for her impairment, specifically ileostomy supplies.

AR:

The GP indicates that the appellant receives assistance from family and friends for DLA, with the comment: *help with bathing, housekeeping, shopping and meal preparation.*

The GP indicates that the appellant receives assistance from assistive devices (*has an ileostomy*) and does not receive assistance from assistance animals.

#### **Notice of Appeal**

In her Notice of Appeal dated 17 May 2017, the appellant gives as Reasons for Appeal: *I don't agree with the decision.*

#### **Appeal submissions**

The hearing proceeded by way of written hearing.

#### **Appellant Submission**

The appellant's submission consisted of a two-page letter dated 8 June 2017 signed by the appellant and a 1-page diagram with several notations entitled "PAIN". In her submission, the appellant describes her medical conditions and their impacts. The appellant explains that she is unable to hold down a job but would give anything to have a normal body and be able to work. The appellant states that she is getting worse and needs help. The appellant also states that she is totally at a loss and asks that the Tribunal to please tell her what to do.

#### **Ministry Submission**

The ministry indicated its submission would be the reconsideration summary.

The ministry also provided a written submission dated June 20, 2017, which argued that although the appellant had mentioned her restrictions with employment, the PWD application is not intended to assess employability or vocational abilities. The ministry argued that a medical barrier to engaging in employment is not a legislated criterion for severity. The ministry further argued that while the appellant describes her medical conditions and how they impact her abilities, a medical practitioner has not verified this information making it difficult to determine the severity of her impairments and significance of her restrictions.

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

The panel finds that the information provided by the appellant in the Notice of Appeal and Appeal Submission is consistent with and, therefore, in support of the information and records before the ministry at reconsideration. In particular, she elaborates on the SR, which was part of the ministry's record at reconsideration, by providing greater detail about her medical history; her symptoms and their impacts on her daily function; as well as the help that she receives. The panel finds that the information provided by the ministry in its Appeal Submission consists of argument and elaboration of the material in the reconsideration summary. 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's reconsideration 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;
- 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 of the evidence, including that of the appellant. The diagnosis of a serious medical condition or the identification of mental or physical deficits does not in itself determine the severity of an impairment. An impairment is a loss or abnormality of psychological, anatomical or physiological functioning causing restriction in the ability to function independently, appropriately, effectively or for a reasonable duration.

### 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. The ministry first noted that there was no mental health diagnosis provided by the GP in the PWD application and argued that a diagnosis would be expected if the appellant had a mental health condition that was considered severe. The ministry then considered the GP's indication of significant deficits with cognitive and emotional functioning in the areas of emotional disturbance and motivation in the MR and the GP's indication that all areas of cognitive and emotional functioning were noted as having no impact, minimal impact or moderate impact, except motivation. The ministry noted that the GP had provided no comments in this section regarding the identified impacts. The ministry noted that the GP indicated the appellant is independent in almost every category and experiences marginal but not very disrupted function in her immediate and extended social networks. The ministry concluded that, although the GP indicates that the appellant is not comfortable socializing with new people this does not indicate a severe impairment. The ministry further noted that there is no mention in the application of a referral to a mental health specialist, arguing that this would be expected if the appellant experiences a severe mental health condition.

The panel finds that the ministry's determination that a severe mental impairment has not been established was reasonable. The panel notes one major impact on cognitive and emotional functioning assessed by the GP, as well as some moderate and minor impacts, but finds that the impacts assessed are not connected to an identified mental impairment or brain injury. As well, the panel notes that there are no safety concerns noted by the GP in the MR or AR and, while the GP provides comment about the appellant's discomfort with new people, she assesses the appellant as independent with most aspects of social functioning. The panel notes that the appellant has indicated that she suffers from depression and had been prescribed medication; however, a medical practitioner has not confirmed this diagnosis. The panel finds that the ministry reasonably concluded that the information provided does not establish a severe mental impairment and that this criterion was not met.

### Severity of physical impairment

In the reconsideration decision, the ministry found that the evidence provided did not sufficiently describe or portray a severe physical impairment. In making this determination, the ministry noted that a majority of the information provided relates to the medical condition of eczema. The ministry considered that the GP reported the eczema as severe, with the appellant unable to tolerate frequent hand washing or handling paper. The ministry considered the GP's indication that the antihistamines cause the appellant to experience sedation and fatigue but concluded that there was no explanation as to the frequency and duration of these side effects. The ministry considered the information in the photos as well as the submissions provided by the appellant, the appellant's sister and her friend. The ministry argued that while eczema is a serious dermal medical condition, it does not in itself establish a severe physical impairment. The ministry considered the assessment by the GP that the appellant can do housework wearing gloves with cotton liners and she is independent in tasks requiring the use of her hands with restrictions due to her inability to lift more than 15 lbs. – a restriction that the ministry does not consider to be a significant. The ministry further noted that the GP indicated the appellant requires continuous assistance and takes significantly longer with basic housework, which the ministry concluded suggests the appellant is capable of performing this task. The ministry acknowledged that the appellant requires help to wash her hair but argued that it was not satisfied that this confirms a severe impairment. The ministry concludes that it is unclear why the appellant's restriction is limited to cleaning the bathroom and not clear whether it would be impossible for the appellant to wash her hair with waterproof gloves.

The panel finds that the ministry's determination that a severe physical impairment has not been established was reasonable. The panel notes that the GP's assessment indicated that the appellant can walk 4+ blocks unaided, climb 5+ steps unaided, lift 2 to 7 kg. (5 to 15 lbs.), and remain seated 1-2 hours; and the appellant is independent with all aspects of mobility and physical ability, with a lifting and carrying and holding restriction of 15 lbs. The panel notes that the information provided by the appellant and her friend indicate that the appellant is unable to hold down a job. However, as noted by the ministry, 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 appellant experiences some difficulties with physical function, as acknowledged by the ministry, but finds that the ministry's determination that a severe physical impairment has not been established 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. The legislative language makes it clear that a prescribed professional's evidence is fundamental to the analysis of restrictions with DLA. 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. Regarding the degree of the restriction, section 2(2)(b)(i) of the EAPWDA requires activities to be directly and significantly restricted either continuously or periodically for extended periods. 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 impairment significantly restricts her ability to perform DLA continuously or periodically for extended periods. The ministry provided the same analysis in relation to DLA as it has provided in relation to physical impairment, considering the GP's assessment that the appellant can do housework wearing gloves with cotton liners and that she is independent in tasks requiring the use of her hands but experiences some restrictions relating to an inability to lift more than 15 lbs. – a restriction that the ministry does not consider to be a significant. The ministry noted that the GP indicated the appellant requires continuous assistance and takes significantly longer with basic housework, which the ministry concluded suggests the appellant is capable of performing this task. The ministry acknowledged that the appellant requires help to wash her hair but was not satisfied that this confirms a severe impairment. The ministry concludes that it is unclear why the appellant's restriction is limited to cleaning the bathroom and not clear whether it would be impossible for the appellant to wash her hair with waterproof gloves. The ministry noted that the appellant receives some assistance with DLA but argued that the evidence suggests that it is in the nature of the duty of family members to help each other when in need and does not establish that such help is required as a result of the impairment.

The panel finds that the ministry's determination that the information provided does not establish that a severe impairment significantly restricts the appellant's ability to perform DLA continuously or periodically for extended periods was reasonable. While the GP has assessed the appellant as requiring continuous assistance and taking significantly longer in some DLA (bathing and basic housekeeping), she has not responded to the prompt in the AR to "describe how much longer". Similarly, the panel notes that while the GP has assessed the appellant as taking significantly longer with toileting, she has not responded to the prompt to "describe how much longer"; and with regard to requiring periodic assistance with going to and from stores (*sister helps with shopping*) and carrying purchases home (*needs help with lifting and carrying > 15 lbs.*), the GP's comments do not provide sufficient explanation/description in response to the prompt to "include a description of the degree and duration of support/supervision required". Without sufficient detail from the GP to confirm that DLA are directly and significantly restricted either continuously or periodically for extended periods, the panel finds that the ministry reasonably determined that these legislative criteria were not met. The panel acknowledges that the appellant's Appeal Submission and the letters provided by the appellant's sister and friend speak more extensively to the appellant's difficulties with DLA and, in many instances, contradict the assessments provided by the GP. The panel finds, however, that the legislation requires that direct and significant restrictions in DLA must be "in the opinion of a medical practitioner". 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 direct and significant restrictions in the ability to perform DLA either continuously or periodically for extended periods, a person must also require help to perform those activities. The confirmation by a prescribed professional of direct and significant restrictions with DLA under section 2(2)(b)(i), is a precondition for 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 argued that, as it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required. While the information in the PWD application, reconsideration submission and appeal materials indicate that the appellant benefits from assistance provided by friends and family as well as ileostomy supplies, the panel finds that 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.

Finally, the panel finds that it does not have jurisdiction to respond to the portion of the appellant's Appeal Submission requesting advice from the Tribunal: *If you don't agree PLEASE tell me what to do*. The panel's authority is limited to deciding whether the ministry's reconsideration decision was reasonable in accordance with section 24 of the *Employment and Assistance Act*.

### **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.