

## PART C – Decision under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Poverty Reduction (the ministry) dated 24 July 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 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 appellant did not attend the hearing. After confirming that the appellant was notified, the hearing proceeded under section 86(b) of the *Employment and Assistance Regulation*.

The information and records before the ministry at reconsideration consisted of the following:

1. The appellant's **PWD Designation Application** comprised of:

- A Medical Report (MR) dated 1 May 2017, completed by the appellant's general practitioner (GP) who has known the appellant for 1 year and has seen her 2-10 times in the past 12 months.
- An Assessor Report (AR) dated 1 May 2017, completed by the appellant's GP.
- A Self Report (SR) dated 1 May 2017 completed by the appellant.

2. **Request for Reconsideration** dated 10 July 2017, signed by the appellant. Under Reasons, the appellant refers to a one-page typed letter dated 20 June 2017, from a social worker who states that she has been asked by the appellant to provide the letter. The social worker states that the appellant has reported chronic, daily pain in her lower back and knee, which requires her to rest 15 minutes after 10 minutes of standing. The appellant suffers from COPD and uses a puffer about 10 times per day. The appellant states that she struggles with daily chores and tasks due to low energy and fatigue. The appellant reports difficulty picking up objects on a daily basis due to numbness in her hands. The appellant states she is in chronic pain despite pain medications and puffers. The social worker also reported observing a limp in the appellant's walk and the appearance of pain when the appellant reached into her purse. The appellant also reported to the social worker that she does have, and use, a knee brace but finds it uncomfortable.

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:

- COPD (chronic obstructive pulmonary disease) – onset May 2015
- Arthritis – onset July 2016

### **Severity of mental impairment**

MR:

The GP does not provide a mental health diagnosis, reports that there are no difficulties with communication and indicates that there are no significant deficits with cognitive and emotional function.

AR:

The GP has not completed the assessment of cognitive and emotional functioning or the social functioning section of the Daily Living Activities in the AR. The GP assesses the appellant's ability to communicate as good in all areas, including: speaking, reading, writing and hearing.

SR:

The appellant does not indicate that she has a mental impairment.

## **Severity of physical impairment**

MR:

Under Health History, the GP indicates that the appellant has *severe COPD and has very poor exercise tolerance and mobility due to exertional dyspnea. Mobility suffers as such. As well, bilateral OA (osteoarthritis) knees hampers mobility requiring significant time to travel short distances.*

For functional skills, the GP indicates that the appellant is able to walk less than 1 block unaided, climb 2-5 steps unaided, and remain seated without limitation. The GP indicates no lifting.

The GP indicates that the appellant does not require aids or prostheses for her impairment.

The GP provides the additional comment: *[Appellant] has severe COPD and as such has great difficulty in ADLs requiring exertion. Her mobility is poor due to COPD and exertional dyspnea. As well, severe OA leads to [increased] pain and worsening mobility.*

AR:

In relation to mobility and physical ability, the GP assesses the appellant as taking significantly longer with walking indoors and walking outdoors, climbing stairs, standing, lifting and carrying and holding. The GP comments: *SOB [shortness of breath] due to COPD, limits exertion due to dyspnea. [increased] pain due to bilat. knee OA. takes ++ time to do any physical activity.*

The GP provides the additional comment: *[Appellant] has severe COPD and OA @ knees and as such mobility and ADLs much more time than usual due to exertional dyspnea and pain due to knees.*

SR:

The appellant describes her physical impairment as:

- *Waiting for knee replacement surgery – no knee cartilage – high levels of pain when walking*
- *COPD*

She describes constant pain in her knees, which makes standing/walking for long periods impossible. She takes longer to prepare meals and wash dishes because she requires a break every 15 minutes or so. She states that she requires someone to be in the house when she gets in/out of the bathtub as she has previously fallen. Climbing stairs requires stops for resting. She describes difficulties when she drops, spills or reaches for items in lower cabinets. The appellant describes being unable to continue to engage in outdoor/recreational activities and dog walking. She describes having difficulty with scent in stores as this can cause coughing. The appellant also describes difficulty with housework due to COPD and knee pain.

## **Ability to perform DLA**

### **General**

MR:

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

AR:

The GP provides the following general comments in relation to DLA: *due to her COPD (severe) and bilateral knee OA, [she] has very poor physical ability due to dyspnea and knee pain. As such, takes much longer to do simple tasks due to SOB and pain.*

### ***Daily Living Activities***

#### *Prepare own meals*

AR:

The GP indicates that the appellant is independent with the meals activities of meal planning, food preparation, cooking and safe storage of food.

#### *Manage personal finances*

AR:

The GP indicates that the appellant is independent all pay rent and bills activities, including banking, budgeting, and paying rent and bills.

#### *Shop for personal needs*

AR:

The GP indicates that the appellant is independent the shopping activities of going to and from stores, reading prices and labels, making appropriate choices and paying for purchases and indicates that she takes significantly longer carrying purchases home.

#### *Use public or personal transportation facilities*

AR:

The GP indicates that the appellant is independent using public transit and using transit schedules and arranging transportation and takes significantly longer getting in and out of a vehicle.

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

AR:

The GP indicates that the appellant takes significantly longer with laundry and basic housekeeping.

#### *Move about indoors and outdoors*

MR:

The GP indicates that the appellant is able to walk less than 1 block unaided on a flat surface and can climb 2-5 to climb stairs unaided.

AR:

The GP indicates that the appellant takes significantly longer walking indoors and outdoors, climbing stairs and standing.

#### *Perform personal hygiene and self-care*

AR:

The GP indicates that the appellant takes significantly longer with dressing, grooming, bathing, transfers in/out of bed and on/off chair and is independent with toileting, feeding self and regulating diet.

#### *Manage personal medication*

AR:

The GP indicates that the appellant is independent in all aspects of this DLA.

#### *Social Functioning*

AR:

The GP indicated *n/a* regarding support/supervision required for social functioning.

Help required

MR:

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

AR:

The GP indicates that the appellant receives assistance from family and friends.

The GP does not indicate that the appellant receives assistance from assistive devices, but provides the comment: *family/friend support*.

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

**Notice of Appeal**

In her Notice of Appeal dated 28 July 2017, the appellant gives as Reasons for Appeal: *Disagree with decision*.

**At the Hearing**

The ministry relied on the reconsideration decision.

**Admissibility**

The panel finds that there is no information before it that would require an admissibility determination 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 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 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. Impairment is defined in the PWD application as 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. While this is not a legislative definition, and is therefore not binding on the panel, in the panel's opinion it reflects the legislative intent and provides an appropriate analytical framework for assessing the degree of impairment resulting from a medical condition.

#### 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 observed that no mental health condition had been identified and there were no significant deficits with cognitive and emotional functioning noted. As well, the ministry noted that the appellant's entire PWD application solely relates to her physical impairments and she does not mention any mental impairment in her self-report. Noting the absence of any information or argument relating to a mental impairment, the panel finds that the ministry's determination that a severe mental impairment has not been established was reasonable.

#### Severity of physical impairment

In the reconsideration decision, the ministry was not satisfied that the information provided was evidence of a severe physical impairment. The ministry considered the GP's assessments of functional skills and mobility and physical ability in the MR and AR, noting that he indicates that the appellant does not require assistive aids or devices. The ministry argued that if the appellant's impairment were severe it would be expected that she would benefit from even a basic aid such as a cane or a walker with a seat to help her achieve further distances. The ministry further argued that the use of grab bars in the bathroom/shower would be expected to alleviate knee pain and a breathing device would be expected if the appellant's COPD were severe. The ministry noted the absence of test results related to the appellant's COPD. The ministry also noted the GP's assessment that the appellant takes significantly longer with many activities but does not provide an assessment of how much longer is required. The ministry argued that it would be expected that the appellant would benefit from the use of a scooter and it would be expected that she would require assistance on a periodic or continuous basis with at least one area of DLAs if her impairment were

severe. The ministry also considered the one-page letter from the social worker (SW) that was submitted at reconsideration, noting that this letter contains little assessment and it appears to be based on the SW's reporting of the appellant's self-reports to her. The ministry, also noting the lack of information about how many visits and how long the SW has known the appellant, stated that this letter had been given little weight. The ministry acknowledged that the appellant does have some restrictions but was not satisfied that the combination of functional skills, mobility and physical abilities exhibits a severe impairment.

The panel notes that the GP has used the word severe a number of times in the PWD application as a descriptor of the appellant's medical conditions; however, as noted by the ministry, the assessments provided by the GP do not portray impacts on functioning that are reflective of a severe impairment. The panel notes, as did the ministry, the absence of a need for assistive devices or assistance from other persons in the assessments provided by the GP in the AR. Despite the functional skills limitations reported by the GP, given the definition of impairment cited above, the panel considers the ministry's reliance on help required, either in terms of the need for assistive devices or from other persons, as an appropriate indicator of severity of impairment. The panel also notes that the assessments indicate that some mobility activities and DLA take significantly longer than usual, but the assessments do not provide information to "describe how much longer" as instructed in the PWD designation application form. Accordingly, the panel finds that the ministry reasonably concluded that the information provided does not establish a physical impairment and that this criterion was not met.

#### **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 legislation is clear that a prescribed professional's opinion 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 noted the GP's assessment that the appellant does not require continuous or periodic assistance for any DLA. The ministry noted that the GP has indicated that the appellant takes significantly longer with some activities, and argued that if tasks took a substantial amount of time to complete (4 or 5 times longer) it would be expected that she would require periodic or continuous assistance. The ministry acknowledged that the appellant experiences certain limitations but determined that the information provided does not establish that an impairment significantly restricts her ability to perform DLA continuously or periodically for extended periods.

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. The GP has, in the AR, assessed the appellant as independent in most DLA. The panel notes that the GP has indicated that some activities take significantly longer, but has not indicated that continuous or periodic assistance is required. The panel notes that the information provided by the appellant in her self-report does speak to the appellant's ability to manage DLA and provides a somewhat more nuanced picture of her abilities. The panel notes that the appellant describes herself as an individual who struggles with performing some DLA. The panel finds, however, that the legislation requires that direct and significant restrictions in DLA must be "in the opinion of a prescribed professional". 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 this legislative criterion was not met.

### **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 to 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 DLA.

In the reconsideration decision, the ministry concluded that, as it has not been established that DLA are significantly restricted, it cannot be determined that significant help from other persons is required and no assistive devices are required. The panel has concluded (above) that the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established. As a result, the panel also finds that the ministry reasonably concluded that under section 2(2)(b)(ii) of the EAPWDA that 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.