

**PART C – DECISION UNDER APPEAL**

The decision under appeal is the Ministry of Social Development and Poverty Reduction (ministry) reconsideration decision dated 9 August 2017, which determined that the appellant was not eligible for persons with disabilities designation (PWD) because she had not met all of the legislated criteria under section 2 the *Employment and Assistance for Persons with Disabilities Act*. The ministry determined that the appellant had demonstrated that she has reached 18 years of and her impairment, in the opinion of a medical practitioner, is likely to continue for at least 2 years. The ministry further determined that the appellant had not demonstrated that she has a severe mental or 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 direct and significant restrictions, she requires help to perform those activities.

**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**

Evidence before the ministry at reconsideration consisted of the following:

### **1. The appellant's PWD Application**

The Application contained:

- A Medical Report (MR) dated 25 April 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 25 April 2017, completed by the appellant's GP indicating that he has known the appellant for 14 years.
- A Self Report (SR) dated 04 April 2017, completed by the appellant with 2 additional handwritten pages entitled Addendum Disabling Condition.

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 specifies the following diagnoses as related to the appellant's impairment:

- Squamous cell cancer tongue – onset 2011
- Degenerative disc disease and osteoporosis (chronic pain) – onset 2011
- Chronic pancreatitis – onset 2011
- Chronic anemia – onset 2013
- Chronic alcoholism – onset 2011
- Depression – onset 2011

In the AR, the GP has not responded to the question "What are the applicant's mental or physical impairments that impact his/her ability to manage Daily Living Activities?"

#### Severity of mental impairment

MR:

The GP indicates that the appellant suffers from depression and chronic alcoholism.

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 emotional disturbances and impulse control with the comment: *Chronic depression on medication and cognitive therapy.*

AR:

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

The GP assesses the appellant's cognitive and emotional functioning as having no impact in the areas of, consciousness, insight and judgement, executive, motivation, motor activity, language, psychotic symptoms and other neuropsychological problems. The GP assesses minimal impacts on daily functioning in the areas of attention/concentration, memory and other emotional or mental problems. Moderate impacts on daily functioning are assessed in the areas of bodily functions, emotion and impulse control. The GP writes: *Depression, anxiety and substance misuse result in ongoing symptoms of mood changes.*

SR:

The appellant reports that she was molested as a child by a family friend and this caused grief and anxiety, self-esteem issues, lack of confidence and self-worth as well as unruly behaviour and eating disorders as a teenager. As well, she will need to have her teeth removed and insecurities about her appearance add to her depression. She explains that she turned to alcohol as a coping mechanism due to restrictions on her physical abilities. The appellant explained that her father's health condition has taken her on a mental roller coaster and she has to take care of her mother. She explains that she has been sober for 4 years and has quit smoking. She explained that she is seeing a counsellor because she's been having suicidal thoughts and thoughts of hopelessness and despair. As well, she explains that bladder incontinence is a source of embarrassment and prevents her from having the confidence to do certain things.

### Severity of physical impairment

MR:

Under Health History, the GP writes: *Multiple significant medical conditions contribute to this person's disability and reduced functional status. Conditions cumulative effect is to reduce functional status for activities of daily living. Reduced stamina, increased fatigue from chronic conditions. The conditions are chronic and will not improve with time.*

For functional skills, the GP indicates that the appellant can walk 2-4 blocks unaided, climb 2-5 steps unaided, lift under 2 kg. (under 5 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 walking indoors and outdoors, climbing stairs, standing, and carrying and holding. The GP indicates that the appellant requires periodic assistance from another person for lifting (*assistance for anything over 10 lbs.*) and provides the additional comment: *limited by reduced strength, stamina and chronic spinal pain.*

SR:

The appellant states that she suffers from osteoporosis of the back, curvature of the spine and collapsing vertebrae. She explains that her bones have shifted to the point where her ribs feel as though they are pressing against her lungs causing difficulty breathing. She explains that she has an inhaler, which helps minimally. She explains that she can lift up to 10 lbs. with difficulty. Standing and sitting in the same position also cause difficulty. Walking requires constant breaks. Her pain treatment program is beginning to lose effectiveness. She believes that eating disorders earlier in her life have a lot to do with her osteoporosis. She had cancer of the mouth 5 years ago resulting in removal of part of her tongue, which has caused problems with chewing and swallowing. Radiation treatment has taken a toll. She has had several car accidents causing numerous broken bones. She worries she will end up in a wheelchair before her time.

### Ability to perform DLA

MR:

The GP indicates that the appellant has been prescribed medication that interferes with her ability to perform DLA as it will slow cognitive processing and the anticipated duration of this medication would likely be long term.

The GP indicates that the appellant is not restricted in relation to the following DLA: personal care, meal preparation, management of medications, mobility inside of the home, use of transportation and management of finances. The GP indicates that the appellant is restricted periodically with basic housework, daily shopping and social functioning. The GP also indicates that the appellant is restricted with mobility outside of the home but does not indicate whether this restriction is continuous or periodic.

The GP explains: *Periodic – chronic musculoskeletal pain and fatigue secondary to anemia reduce physical endurance and ability at performing some duties.*

In relation to Social Functioning impacts, the GP explains: *Depression – chronic relapsing cause reduced concentration, volition affecting ability to complete some tasks.*

In relation to the degree of restriction, the GP comments: *considered moderate restriction as tasks take longer to complete. Heavier workloads unable to manage.*

In relation to assistance needed, the GP comments: *assistance from family members in housework. Mobility and shopping reduced as conditions limit stamina/endurance and therefore these tasks take an inordinate amount of time to complete.*

AR:

The GP indicates that the appellant is independent in all listed personal care DLA; all listed shopping DLA; all meals DLA; all pay rent and bills DLA; all medications DLA; and all transportation DLA.

The GP indicates that the appellant requires periodic assistance for basic housekeeping DLA of laundry (*help with lifting*) and basic housekeeping.

The GP comments: *physical abilities limited by chronic spinal pain, reduced strength and stamina due to effects of anemia (chronic), pancreatitis and tongue cancer (radiation treatment) – all conditions reduce permanently her muscle mass and strength.*

#### 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; all meals DLA, including meal planning and safe storage; all pay rent and bills DLA; all medications DLA; and the transportation DLA of using transit schedules and arranging transportation.

#### *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).

In assessing social functioning DLA, the GP indicates that the appellant is independent with appropriate social decisions and is independently able to secure assistance from others. The GP also indicates that the appellant requires periodic assistance/support to develop and maintain relationships (*attends counselling*), interact appropriately with others, and deal appropriately with unexpected demands (*emotional state/psychiatric conditions impair social functioning*). The GP indicates that the appellant has good functioning in her immediate and extended social networks.

#### Help required

MR:

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

AR:

The GP indicates that the appellant receives assistance from family, friends and health authority professionals for DLA and provides the comment: *Ongoing mental health counselling.*

In response to the prompt to specify what help is required but there is none available, the GP writes: *Unable to drive due to medical conditions, so needs assistance with transportation.*

The GP indicates that the appellant uses a cane and provides the comment: *walking stick used periodically.*

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

## **2. Other documents:**

1. A handwritten letter from the appellant dated 29 April 2017, in which she states that her last application for PWD was lost in transit somehow and was deemed abandoned. She explained that it has been a rough year of family emergencies and health issues are beginning to surface that she needs to address. She will have a CT scan in May 2017.
2. Health authority information for patients about Iron Sucrose with a handwritten notation: *I had this done Mar. 1-30, 2017.*
3. A letter from a registered dietician (RD) dated 28 March 2017, stating that the appellant requires 3 bottles of high protein ensure per day.
4. A letter from the ministry dated 14 November 2016, stating that the appellant has been approved for Persons with Persistent Multiple Barriers (PPMB) designation and outlining her eligibility for benefits. On this letter is a handwritten notation stating: *Applied for Full Disability for the 3<sup>rd</sup> time.*
5. A letter from the RD dated 3 August 2016, stating that the appellant requires 3 bottles of high protein ensure per day.
6. A letter from the appellant's GP dated 19 August 2016, listing the appellant's diagnoses and stating that the appellant requires a special diet, of 4 bottles of high protein ensure per day, because of her medical conditions.

7. A letter from the appellant's GP dated 26 October 2016, stating that the appellant has a number of disabling medical conditions and will be unable to complete her PWD application by the 4 November deadline. A one month extension is recommended.
8. A letter from the appellant's GP dated 24 June 2016, stating that the appellant requires dental care because she has a history of cancer of the tongue and has been treated with radiation therapy.
9. A letter from the ministry dated 8 July 2016, indicating that information is required from the appellant in order for the appellant to continue to receive her diet supplement. On this letter is a handwritten notation signed by the appellant stating: *I receive \$40 per month – a 6 pack of ensure costs 12.00. I require at least 3-4 ensure to maintain my present weight which is low at 100 lbs.*
10. A letter from the appellant's GP dated 22 December 2016, stating that the appellant has a number of disabling medical conditions and will be unable to complete her PWD application by the 30 December deadline. A two-week extension is recommended.

### **3. Request for Reconsideration**

In the Request for Reconsideration dated 20 June 2017, the appellant stated: *Please I am requesting an extension of time for this reconsideration. I need time to go through this decision closely because I know the doctor was vague and not very supportive but everything was done in a rush under pressure. At the time I just had surgery, take care of elderly mother, father is dying I've spent 75% of my time in hospital the last year. I need to slow down and pay attention, I need a little time please.*

*\* Please note: I did not receive my package to do this reconsideration until June 27 after my mouth surgery, teeth all extracted and scar removal of tongue.*

Additional information before the panel on appeal consisted of the following:

#### **Notice of Appeal**

In the Notice of Appeal dated 15 August 2017, the appellant wrote as reasons for appeal that it has been a turmoil in her life for the past couple of years and she's had no time to take care of herself. She will explain further and send pictures of her frail body, [the GP] doesn't see it as a problem. She is still waiting to have an appointment with independent living and has another letter for proof that she is definitely in need of assistance.

#### **Appeal Submissions**

The appellant did not provide an appeal submission.

The ministry relied on the reconsideration decision.

#### **Admissibility**

As neither party provided an appeal submission, the only information for which admissibility must be considered by the panel is the information provided in the Notice of Appeal. The panel finds that the information provided in the Notice of Appeal is admissible in accordance with section 22 (4)(b) of the *Employment and Assistance Act* because it provides some reiteration and explanation in support of information and records before the ministry at reconsideration. The appellant also states in the Notice of Appeal that she will provide photographs and an additional letter to support her position; however, the panel notes that this information has not been provided.

## 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 PWD designation 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:

### Persons with disabilities

**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.

(4) The minister may rescind a designation under subsection (2).

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.

#### Severity of physical impairment

In the reconsideration decision, the ministry determined that it was not satisfied that this criterion had been met. In making this determination, the ministry considered the functional skills assessment by the GP noting that the appellant is able to walk 2-4 blocks unaided, climb 2-5 steps unaided, is limited to lifting under 2 kg and can remain seated for less than 1 hour. The ministry noted that the GP's assessment did not include information to specify how much less than 1 hour the appellant could remain seated. As well, the ministry noted the conflicting assessments in the MR (under 2 kg) and AR (requires assistance lifting anything over 10 lbs.) with respect to the appellant's lifting ability. The ministry noted that the appellant is assessed by the GP as independent in all physical ability and mobility areas, except for lifting over 10 lbs. The ministry also considered the GP's comment that the appellant is limited by reduced strength, stamina and chronic spinal pain. The ministry's conclusion on this criterion was that a severe impairment of the appellant's physical functioning was not established.

The panel finds that the ministry's determination was reasonable. The panel notes that the assessments of the appellant's functional capacity and mobility and physical ability assessments reflect an ability to function independently in most areas with some conflict in the assessments of lifting capacity. Furthermore, the panel notes that the information provided by the appellant in the SR indicates that the appellant is able to lift up to 10 lbs. and she has difficulty with standing or sitting in the same position. She indicates that walking with constant breaks provides some back-pain relief. The panel finds that the information provided in the assessments reflects an individual with a number of serious medical diagnoses who is, for the most part, able to function independently. The panel notes that the appellant has argued that she cannot survive because she can no longer be employed successfully and has added expenses. However, the panel notes 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 finds that the ministry's determination that a severe physical impairment has not been established is reasonable.

#### 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 noted that the GP's assessment indicates that the appellant has no difficulties with communication. The ministry considered that in the MR the GP indicated deficits in the areas of emotional disturbance and impulse control and in the AR the GP assesses moderate impacts in these areas and moderate impacts to bodily functions. The ministry also considered that no major impacts to cognitive and emotional functioning were assessed along with minimal impacts to memory, attention/concentration and other mental/emotional problems, and no impacts in the remaining eight areas. The ministry also took note of the GP's assessment of periodic restrictions with social functioning and the comment: *Depression – chronic relapsing cause reduced concentration, volition affecting ability to complete some tasks*. The ministry concluded that the cumulative impacts to cognitive and emotional functioning did not indicate a severe mental impairment. As well, the ministry considered the GP's assessment of the appellant's social functioning abilities. In this consideration, the ministry noted that the GP has indicated that the appellant requires periodic assistance with some areas of social functioning (develop/maintain relationships, interacting appropriately with others and dealing appropriately with unexpected demands) and is independent in other social functioning areas (making appropriate social decisions and being able to secure assistance from others). The ministry noted that in relation to the areas where periodic assistance is required, the assessment does not include information as to the frequency or duration of support required. As well, the ministry noted that the appellant is assessed as having good functioning in her immediate and extended social networks. The ministry also considered that the GP did not provide information in relation to the presence of any safety issues or support/supervision required to maintain the appellant in the community. The ministry concluded that the information provided in the GP's assessments, SR and medical documents did not establish a severe impairment in mental functioning.

The panel finds that the ministry's determination that a severe mental impairment has not been established was reasonable. The panel notes the absence of communication difficulties, safety concerns and a need for support or supervision to maintain the appellant in her community. The panel finds that the GP's assessments indicate some moderate impacts, but no major impacts to the appellant's ability to function. As well, the panel notes the absence of information relating to the frequency or duration of restrictions experienced by the appellant. The panel notes that the assessments relating to decision-making indicate that the appellant is independent in these areas. 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.

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

The legislation specifies that the minister assess direct and significant restrictions in the ability to perform DLA in consideration of the opinion of a prescribed professional. This does not mean that other evidence should not be considered, but it is clear that a prescribed professional's evidence is fundamental. At issue in this assessment 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 ministry was not satisfied that the appellant has a severe impairment that, in the opinion of a prescribed professional, directly and significantly restricts her ability to perform DLA. In reaching this conclusion, the ministry noted that the appellant has been prescribed medication that impacts her ability to perform DLA (*will slow cognitive processing*) and that the need for this medication is expected to be long term. The ministry considered the GP's assessment that the appellant is periodically restricted with basic housework and daily shopping as well as mobility outside of the home. The ministry noted that the GP's comments that pain and fatigue due to the appellant's medical conditions reduce her stamina and endurance and impact her ability to perform some duties and tasks, with some tasks taking an inordinate amount of time to complete. The ministry argued that the information provided did not establish the frequency of periodic restrictions or how much longer than typical the appellant took to complete tasks. As well, the ministry considered inconsistencies in the information provided by the GP in the MR, where the appellant is assessed as having restrictions with daily shopping, and AR, where the appellant is assessed as independent in all tasks relating to daily shopping. The ministry also took note of the GP's comment that the appellant's degree of restriction in relation to DLA is moderate. The ministry argued that the GP has assessed the appellant as independent with the majority of DLA.

The panel finds that the ministry's determination that the assessments provided by the GP do not establish that a severe impairment significantly restricts the appellant's ability to perform DLA continuously or periodically for extended periods was reasonable. The panel notes, as did the ministry that the appellant is assessed as primarily independent. As well, the panel finds that, in relation to the areas where some periodic restriction is assessed, the GP has not provided sufficient information in relation to the nature, degree and duration of the assistance required by the appellant to establish that there are significant restrictions for extended periods in the appellant's ability to perform DLA. As such, the panel concludes that the ministry's determination that this on criterion was reasonable.

### **Help required**

The legislation 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 determined that as it had not been established that appellant's ability to perform DLA were significantly restricted, it cannot be determined that significant help is required. While the information provided demonstrates that the appellant does receive assistance from other people as well as the use of a cane, 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.

### **Conclusion**

The panel finds that the ministry's reconsideration decision, determining that the appellant had not met all of the legislated criteria for PWD designation, was a reasonable application of the legislation in the circumstances of the appellant and reasonably supported by the evidence. The panel confirms the ministry's reconsideration decision. The appellant is not successful on appeal.