

### **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 19 December 2017 that 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 set out in section 2 of the *Employment and Assistance for Persons with Disabilities Act*. Specifically, the ministry determined that the information provided did not establish that the appellant has a severe mental or physical impairment that in the opinion of a prescribed professional

(i) directly and significantly restricts her ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and,

(ii) as a result of those restrictions, she requires help to perform those activities.

The ministry determined that the appellant satisfied the other 2 criteria: she 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) – sections 2 and 2.1.

## **PART E – SUMMARY OF FACTS**

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

1. The appellant's PWD Designation Application dated 12 July 2017. The Application contained:
  - A Self Report (SR).
  - A Medical Report (MR) dated 05 September 2017, completed by a general practitioner (GP) who has known the appellant for 29 years and seen her 11 or more times in the past 12 months.
  - An Assessor Report (AR) dated 05 September 2017, completed by the same GP.
2. The appellant's Request for Reconsideration, dated 07 December 2017, to which is attached a submission by the appellant dated 06 December 2017 and a medical imaging report of a CT scan of the lumbar spine taken on 23 October 2017.

In the MR, the GP provides the following diagnoses related to the appellant's impairment:

- Depression/PTSD (onset 2013),
- Panic Disorder/GAD,
- Hypothyroidism,
- Low Back Pain (onset February 2017),
- Pain from left knee fibial plateau fracture (onset May 2016),
- Alcohol abuse in past.

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

### *Severity of impairment*

MR:

Under Health History, the GP writes:

"GAD 7 = 15 (severe anxiety – functional impact somewhat difficult) July 18/17

PHQ 9 = 14 mild depression. Not suicidal. July 18/17

Trial of NSRI initiated Aug 8/17. (Euthyroid on meds)

TSH = 1.47 May 12/17.

Current ETOL intake = 2-3 glasses of wine/wk.

Past hx abusive partner.

Significant emotional trauma through death of friend, mother and 2<sup>nd</sup> trimester loss of a twin at time of amniocentesis.

Recent work injury to back (mechanical back pain) in February 2017."

### *Physical impairment*

MR:

The GP gives the appellant's height and weight as relevant: ~160 cm. and 50 – 55 kg. .

Regarding functional skills, the GP reports that the appellant can walk 4+ blocks unaided on a

flat surface, can climb 5+ steps unaided, has no limitations in lifting and has no limitations in remaining seated.

The GP indicates that the appellant has not been prescribed any medication and/or treatments that interfere with her ability to perform DLA.

AR:

Respecting mobility and physical ability, the GP assesses the appellant as independent for all listed abilities: walking indoors, walking outdoors, climbing stairs, standing, lifting, and carrying and holding.

### *Mental impairment*

MR:

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

The GP indicates that the appellant has significant deficits with cognitive and emotional function, indicating that the appellant has significant deficits in the areas of emotional disturbance and attention or sustained concentration.

AR:

The GP describes the appellant's impairments as, "Mental health issues make it difficult to relate to, communicate and interact effectively."

The GP assesses the appellant's ability to communicate as good for speaking, reading, writing, and hearing.

The GP assesses the degree of impact of the appellant's mental impairment on daily functioning as follows:

- Major impact – none.
- Moderate impact – none.
- Minimal impact – emotion and attention/concentration.
- No impact – bodily functions, consciousness, impulse control, executive, memory, motivation, motor activity, language, psychotic symptoms, other neuropsychological problems, and other emotional or mental problems.

### Daily living activities

MR:

The GP indicates that the appellant's activity is not restricted for all of the listed DLA: personal self care, meal preparation, management of medications, basic housework, daily shopping, mobility inside the home, mobility outside the home, use of transportation, and management of finances. The GP did not indicate whether the appellant is restricted for social functioning.

AR:

The GP assesses the appellant as independent for all listed aspects of all listed DLA: personal care, basic housekeeping, shopping, meals, pay rent and bills, medications, and transportation.

With respect to social functioning, the GP assesses the appellant as independent in all listed areas: making appropriate social decisions, developing and maintaining relationships, interacting appropriately with others, dealing appropriately with unexpected demands, and securing assistance from others.

The GP indicates that the appellant has good functioning with both her immediate and her extended social networks.

### Help provided/required

MR:

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

AR:

The GP indicates that the appellant routinely uses a cane, noting, "sometimes uses x 6 mos," explaining, "Using cane if she has flare of low back pain. Frequency ~ once weekly."

### **Self Report**

In her SR, the appellant lists her disabilities as anxiety disorder, ADHD, thyroidism, hypoglycaemia, back injury February 2017, pain from tibial plateau fracture of the left knee accident May 2016, PTSD diagnosed in 2009 caused by spousal abuse, and depression caused by spousal abuse 2007 – 2016.

In describing how her disability affects her life and her ability to take care of herself, the appellant writes that:

- With her anxiety and ADHD, she feels she cannot sit still and becomes exhausted mid-day, trying to get things done and forgets to eat.
- It is difficult to focus sometimes when her anxiety is triggered; her fear of fright or flight will always be with her due to past spousal abuse.
- Basic housekeeping – vacuuming – is hard because of her back and knee injuries and she doesn't vacuum or do laundry as much as she should because of the strain on her back.
- Managing finances is difficult and overwhelming on income assistance of \$610 per month; she worries and stresses about paying her rent and bills.
- She finds it difficult to gather the courage to ask for help; because of past spousal abuse, she tends to anticipate rejection and animosity from others
- She has to write everything down so she does not forget appointments and other important things to do.
- She had to endure the healing from the deaths of several important people in her life; these deaths have affected her life dearly.

## **Request for Reconsideration.**

In her submission, the appellant refers to a CT scan taken on 20 to October 2017, after being on a waitlist for eight months. She writes that this shows she has a chronic disc injury from a workplace accident on 08 February 2017. As a result she has to live in extreme pain on a daily basis due to this work injury

She writes that she also has rheumatoid arthritis (RA) in her fingers. She wakes up each day with stiffness, numbness, swelling and pain in her hands and fingers and her knuckles are stiff in the middle finger of her right hand – she has to force it open using her left hand. As she is right-handed, it is difficult to do everyday things with that hand. She notices that each day it is getting more difficult and the finger joint is getting deformed. The RA is starting to quickly spread to her other fingers and to her left hand as well. This has been confirmed by her GP; all she can do is keep her fingers warm and not do any heavy lifting with her fingers

She writes that, in trying to stay off income assistance, she started a new job in September 2017. The work made her fingers worse. She describes her humiliation at being dismissed without cause from the job in December 2017, just shy of her three-month probation.

She describes her frustration with her dealings with the ministry in applying for PWD designation, compared to the faster response from Service Canada in applying for Medical EI.

The medical imaging report prepared by the radiologist summarizes the findings as follows:

### **“IMPRESSION:**

1. Facet arthropathy with grade 2 anterior spondylolisthesis of L4-5 is associated with mild spinal canal and left foraminal narrowing.
2. Shallow broad-based left paracentral disc protrusion L5-S1.”

## **Notice of Appeal**

The appellant’s Notice of Appeal is dated 29 December 2017. Under Reasons for Appeal, the appellant writes:

“I have attached a copy of a Catscan done Oct/2017 which I waited 8 months for to prove my inability to work.”

In addition to the medical imaging report, the Impression from which is quoted above, the appellant also attached a Service Canada “Medical Certificate for Employment Insurance Sickness Benefits” dated 27 December 2017, completed by another physician. Under Comments, the physician writes, “Terminated work Dec1, 2017 -- Lumbar disc disease – Chronic back pain – Off work indefinitely.”

## **The hearing**

With the consent of the appellant, a ministry worker attended the hearing as an observer.

At the hearing, the appellant stated that, since the application was completed four months ago, her condition has become worse, particularly her back pain and arthritis in her hand. Even her

knee, which had supposedly healed, still bothers her a lot. With her ADHD, she can't sit still and always has to move around.

The appellant explained that she was with her GP when the latter filled out the application form, taking extra time to complete the form carefully. The appellant stated that, with the worsening of her condition, she believed that the form would show quite different results.

The appellant described how she tries to live her life as independently as possible. While she can't manage the heavy weight of the vacuum cleaner, she uses a broom to sweep out a small dwelling. She is able to drive to the food bank on a regular basis and goes to a supermarket about once a month for staples. In answer to a question, she explained that she often uses a cane or a cedar stick when walking, although recently she was able to walk about four blocks without them, though not without a great deal of pain.

She stated that she and her son are very close, with both of them having ADHD. She does some cooking for her son and he helps her out with household projects such as recently installing a safety chain for her and moving out some furniture. She takes her laundry to his home, where she uses his washer and dryer.

The ministry stood by its position at reconsideration.

#### **Admissibility of additional information**

The panel finds that the information provided by the appellant in the Notice of Appeal and in her testimony at the hearing, is in support of the information and records before the ministry at reconsideration. The EI Medical Certificate tends to substantiate the GP's diagnosis of low back pain and the results of the CY scan. The appellant's testimony tends to corroborate the information provided by the appellant in her reconsideration submission or by the GP in the MR and AR regarding the assessments by the GP that the appellant is largely independent in her ability to perform DLA. The panel therefore admits this information as evidence pursuant to 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 physical or mental impairment that, in the opinion of a prescribed professional,

(i) directly and significantly restricts her ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and,

(ii) as a result of those restrictions, she requires help to perform those activities.

The ministry determined that the appellant satisfied the other 2 criteria: she 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.

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.

(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.

## Analysis

### Severity of impairment

The legislation is clear that the determination of severity of impairment is at the discretion of the minister, taking into account all of the evidence. The legislation requires that for PWD designation, the minister must be "satisfied" that the person has a severe mental or physical impairment. For the minister to be "satisfied" that the person's impairment is severe, the panel considers it reasonable for the ministry to expect that the information provided by the independent and professional medical practitioner and prescribed professional (in this case the GP) completing the application provides the minister with a comprehensive overview of the nature and extent of the impacts of the person's medical conditions on daily functioning. It is therefore reasonable for the minister to expect that the MR and the AR include explanations, descriptions or examples in the spaces provided.



The diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a severe impairment. To assess the severity of impairment, the ministry must consider the nature of the impairment and the extent of its impact on daily functioning as evidenced by limitations/restrictions of physical functioning, mental functioning, ability to perform DLA, and help required with DLA.

### *Severity of physical impairment*

The appellant argues that her back pain, confirmed by the results of the CT scan of the lumbar spine, and her consequent inability to work, as evidenced by an EI medical certificate completed by a physician, demonstrated that she has severe physical impairment.

In the reconsideration decision, the ministry determined that, although the appellant describes in her SR of being in “extreme pain on a daily basis,” the information provided by her GP in her assessments of the appellant’s basic physical functioning and ability to manage activities requiring mobility and physical ability does not establish the presence of severe physical impairment.

In reaching this decision, the ministry noted that the GP indicates that the appellant does not require any prostheses or aids for her impairment. In assessing her basic physical functional skills in the MR, the GP indicates that the appellant is able to walk 4+ blocks unaided on a flat surface, climb 5+ steps unaided, and has no limitations with lifting or how long she can remain seated. The ministry also noted that in the AR the GP indicates that the appellant is independent with all activities requiring mobility and physical ability – walking indoors and outdoors, climbing stairs, lifting and carrying and holding.

The ministry also noted that in the appellant's SR and reconsideration submission she indicates that she has rheumatoid arthritis, ADHD and hypoglycaemia. However these medical conditions have not been confirmed by the GP. Therefore, the ministry relied on the diagnoses provided by the GP in the MR. As discussed above, the legislation requires that the minister be “satisfied” that the person's impairment is severe. Accordingly, the panel finds that the ministry was reasonable in relying on the independent and professional opinion of the GP providing the diagnoses, and who certified that the MR “contains my findings and considered opinion at this time.”

The ministry also noted that while the CT scan indicates what is causing the appellant’s back pain, no medical information has been provided to interpret this report or to indicate how these medical conditions impact her basic functioning and mobility. While the EI Medical Certificate submitted on appeal notes “lumbar disc disease – chronic low back pain” and “off work indefinitely,” this certificate does not provide any further information on the appellant’s ability to perform the prescribed DLA that would cast light on the severity of the her physical impairment.

The panel notes that for the purposes of determining eligibility for PWD designation, an applicant's employability or ability to work is not taken into consideration. As the focus of the legislation in section 2(b) of the EAPWDA is on whether an impairment “directly and significantly restricts the person's ability to perform daily living activities ...”, and as employability or ability to

work is not listed in section 2(1) of the EAPWDR as a DLA, the panel finds that ministry was reasonable in not taking into account any reported employability restrictions.

Based on the GPs assessments of the appellant's functional skills and the degree of independence with her mobility and physical abilities, the panel finds that the ministry was reasonable in determining that a severe physical impairment has not been established.

#### *Severity of mental impairment*

In the reconsideration decision, the ministry to acknowledge that the appellant may experience deficits to her cognitive and emotional functioning as a result of her health conditions; however the ministry found that the information provided does not establish a severe impairment of her mental functioning.

In making this determination, the ministry noted that the GP provides diagnoses of depression/PTSD and panic disorder/generalized anxiety disorder. The GP indicates that the appellant has significant deficits with cognitive and emotional functioning in the areas of emotional disturbance and attention or sustained concentration. In completing an assessment of impacts to her cognitive and emotional functioning, the GP indicates that the appellant's mental impairment in the areas of emotion and attention/concentration has a minimal on her daily functioning and that all other areas are noted to have no impact on daily functioning. As the two indicated areas have only a minimal impact, the ministry did not consider this to be indicative of a severe impairment of the appellant's mental functioning.

The ministry also noted that in the AR, the GP indicates that the appellant is independent with all activities related to social functioning (making appropriate decisions, etc.) and describes the appellant's functioning is good with her immediate and extended social networks.

The panel notes that in the AR the GP describes the appellant's impairments as, "Mental health issues make it difficult to relate to, communicate and interact effectively." However, there is little information that would provide a clear picture as to the degree of these difficulties, and how often, how long and under what circumstances they occur. Without such information, it would be difficult for the ministry to determine the severity of the impacts of the appellant's diagnosed mental health conditions on daily functioning.

Given the minimal impacts on daily functioning reported by the GP, and the degree of independence the GP assessed for social functioning, the panel finds that the ministry reasonably determined that a severe mental impairment has not been established.

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

The panel notes that, according to the legislation, the direct and significant restriction in the ability to perform DLA must be the result of a severe impairment, a criterion not established in this appeal. The legislation – section 2(2)(b)(i) of the EAPWDA – requires the minister to assess direct and significant restrictions to DLA in consideration of the opinion of a prescribed professional, in this case the GP. This does not mean that other evidence should not be factored in as required to provide explanation of the professional evidence, but the legislative

language is clear that a prescribed professional's evidence is fundamental to the ministry's determination whether it is "satisfied." And for the minister to be "satisfied," it is reasonable for the ministry to expect that a prescribed professional provides a clear picture of the extent to which the ability to perform DLA is restricted, as assessed in terms of the nature and duration of help required, in order for the ministry to determine whether the restrictions are "significant."

In the reconsideration decision, the ministry stated that, considering the appellant's medical history, it is reasonable to expect that the appellant might encounter some restrictions to her ability to manage DLA. However, based on the information provided by the GP, the ministry determined that there is not enough evidence to confirm that the appellant's impairment significantly restricts her ability to perform DLA either continuously or periodically for extended periods.

In reaching this conclusion, the ministry noted that in the MR, the GP indicates that the appellant does not have any restrictions to her ability to manage DLA. The ministry further noted that in the AR the GP indicates that the appellant is able to manage all her DLA (personal care, basic housekeeping, etc.) without assistance. The ministry commented that, although the appellant describes being unable to vacuum or do laundry as often as she should because of back pain, she has not provided any information to describe how often she is unable to perform these activities or describe the assistance she requires to complete them. In addition her medical practitioner indicates that she does not have restrictions to her ability to manage these activities, making it difficult to determine significant restrictions in her overall level of functioning. The panel notes that, given the opportunity at the hearing, the appellant stated she was able to manage cleaning her home by sweeping with a broom and that she regularly took her laundry to her son's home to use his appliances.

Given that a severe impairment has not been established, and considering the above analysis and the overall level of independence reported by the GP for all DLA, the panel finds that the ministry was reasonable in determining that the information provided did not confirm that the appellant has a severe impairment that significantly restricts her ability to perform DLA continuously or periodically for extended periods, and that this legislative criterion has therefore not been met.

#### Help required

In the reconsideration decision, the ministry held that, as it has not been established that DLA are significantly restricted, it cannot be determined that significant help is 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. That is, 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, the significant help or supervision of another person, or the services of an assistance animal in order to perform a DLA.

While the appellant benefits from the help of her son for household projects and the GP reports that the appellant uses a crutch about once a week, since the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established, 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 reasonably supported by the evidence. The panel therefore confirms the ministry's decision. The appellant is thus not successful on appeal.