

### **PART C – DECISION UNDER APPEAL**

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the ministry) reconsideration decision dated April 5, 2018, which found that the appellant did not meet three of the five statutory requirements of Section 2 of the *Employment and Assistance for Persons with Disabilities Act* for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement and that the appellant's impairment is likely to continue for at least two years. However, the ministry was not satisfied that the evidence establishes that:

- the appellant has a severe physical or mental impairment;
- the appellant's daily living activities (DLA) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and,
- as a result of these restrictions, the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

### **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

With the consent of the parties, the hearing was conducted in writing pursuant to Section 22(3)(b) of the *Employment and Assistance Act*.

### **Information before the ministry at reconsideration**

A PWD application comprised of the appellant's Self-Report (SR) dated November 27, 2017, a Medical Report (MR) and an Assessor Report (AR) both dated December 10, 2017 and completed by the appellant's general practitioner (GP) who has seen known the appellant for 4+ years and seen her 2-10 times in the past 12 months.

A Diagnostic Imaging Report of a "MRI / L/SPINE" examination dated September 16, 2016 for back pain which summarizes the findings as follows:

"IMPRESSION" - mild to moderate degenerative changes, multilevel mild to moderate central canal stenosis and multilevel mild to moderate neural foraminal stenosis.

The appellant's Request for Reconsideration (RFR) dated March 6, 2018 in which she requested an extension to her reconsideration request.

The ministry granted an extension until April 5, 2018 noting that no additional information was received at the time of the reconsideration decision.

### **Diagnoses**

In the MR, the appellant's GP identified the following diagnoses giving rise to the appellant's impairment; Degenerative Disc Disease – lumbar spine, onset of 2013, Moderate Spinal Stenosis, onset unspecified and Gout, onset unspecified. The GP writes: "These conditions worse since fall at work 2013."

In the AR where asked to describe the appellant's mental or physical impairments that impact her ability to manage daily living activities, the GP wrote pins and needles, weakness and pain in legs.

### **Physical Impairment**

In the MR, when asked if the appellant requires any prostheses or aids for her impairment, the GP reported a "walking stick". For functional skills, the GP reports that the appellant is able to walk less than 1 block unaided, climb 2-5 steps unaided, lift 5-15 lbs and remain seated 1 to 2 hours. In terms of health history, the GP indicates that the appellant walks with a cane permanently and that her back range of movement is limited.

In the AR, the GP describes the appellant as independent while walking indoors and taking significantly longer than typical for walking outdoors (has to use a cane, limited to 1 block), climbing stairs, standing, lifting (limited to 15 lbs) and carrying and holding. The GP writes that the appellant gets fatigued and pain increases with activity.

In her Self-Report, the appellant writes that she has continuous pain in her back and shooting pains in her hip when walking any distance. Her legs go numb, she has pain in her knees and shooting pains in her neck and shoulders and she cannot even walk around the block.

### **Mental Impairment**

In the MR, the GP indicates the appellant has no difficulties with communication, and does not have any significant deficits with cognitive and emotional function.

In the AR, the GP again notes the appellant's good ability to communicate. With respect to cognitive and emotional functioning, the GP notes no or minimal impacts for bodily functions, consciousness, impulse control, insight and judgement, attention, executive, memory, motivation, motor activity, language, psychotic symptoms, other neuropsychological problems, and other emotional or mental problems. A moderate impact is noted only for emotion with a note that the appellant is concerned about making a living and that her condition will get worse. The appellant is noted to have good function with her immediate and extended social networks.

In her Self-Report, the appellant states that she has headaches all the time.

## Daily Living Activities

In the MR, the GP reports that the appellant has been prescribed medication that interferes with her ability to perform DLA noting that Gabapentin may cause drowsiness.

The GP reports that the appellant is independent with all aspects of DLA under:

- Personal care; dressing, grooming, bathing, toileting, feeding self, regulating diet, transfers in/out of bed and transfers on/off chair.
- Pay Rent and Bills; banking, budgeting and pay rent and bills.
- Medications; filling/refilling prescriptions, taking as directed and safe handling and storage.
- Transportation; getting in and out of a vehicle, using public transit and using transit schedules and arranging transportation.
- Social Functioning; appropriate social decisions, able to develop and maintain relationships, interacts appropriately with others, able to deal appropriately with unexpected demands and able to secure assistance from others.
- 

Some DLA restrictions are noted as follows:

- Under Basic Housekeeping, laundry and basic housekeeping are noted to take significantly longer than typical (weakness and pain in back, limited ranges of movement).
- Under Shopping, continuous assistance from another person or unable is indicated under carrying purchases home (needs something or someone to carry purchases) while independent in the other aspects of going to and from stores, reading prices and labels, making appropriate choices and paying for purchases.
- Under Meals, periodic assistance from another person is indicated for aspects of food preparation and cooking (difficult to get around with cane, legs go numb), while meal planning and safe storage of food are noted as independent.

In her Self-Report, the appellant wrote that she cannot do any housework, gets help from family and friends to help with chores and "feeding meals".

## Assistance Required

The MR states the appellant uses a "walking stick" in response to; Does the applicant require any prostheses or aids for her impairment. The GP notes under the degree and course of impairment that the appellant "cannot afford physio, chiro therapies which may help a little".

The AR notes that help is provided by family and friends noting "with purchases, carry 15 lbs, cleaning, cooking". Under assistance provided through the use of assistive devices, a cane is indicated as an appropriate item.

## Notice of Appeal

In her Notice of Appeal dated April 15, 2018, the appellant writes that she disagrees with the reconsideration decision "because it is stated that [her] doctor filled out the form wrong". The appellant adds that her doctor, chiropractor and other doctors that she cannot work. She states that she cannot do anything about this and it has been going on for 4 years and is not changing.

## Upon Appeal the appellant submitted the following documents;

- A letter written by the appellant on May 1, 2018, in which she states that her GP filled out the form wrong in some places. She reports that she is unable to walk ½ block without having sharp pains running up her back and legs, she is unable to stand or sit no longer than 30 minutes after which there is continuous pain. She has headaches all the time. She gets off balance when she stands so she had her apartment rearranged so she can hold onto furniture, so she doesn't fall. She indicates that she gets assistance from family and friends periodically to help with household chores. She needs help periodically. She uses a bath aid in her shower (chair) because she is afraid of falling. She uses a cane for walking to balance herself. She cannot lift anything of 5lbs. She is unable to work almost since her fall on December 31, 2013.
- A Diagnostic Imaging Report of a "RAD / HIPS BIL" examination dated November 14, 2016 for Hips - pain and difficulty walking. "IMPRESSION" Minimal left hip joint osteoarthritis. Normal right hip.

- A partial duplicate of the Diagnostic Imaging Report (2 of 3 pages) of a “MRI / L/SPINE” examination dated September 16, 2016 for back pain. (Complete copy included with appeal record.)
- A Diagnostic Imaging Report of a “RAD / SHOULDER RT” examination dated February 24, 2015 for Right Shoulder - pain. Comment: “There is mild degenerative change of the AC joint. Glenohumeral joint is unremarkable with no significant OA. No fracture is seen. There is no rotator cuff calcific tendonitis.”

The ministry stood by the reconsideration decision.

#### **Admissibility of Additional Information**

The panel finds that the information provided by the appellant in her letter dated May 1, 2018 as well as in the Diagnostic Imaging Reports dated November 14, 2016 and February 24, 2015 received prior to the hearing are in support of the information and records that were before the ministry at reconsideration, as this information corroborates the information provided by the appellant in her PWD application. 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 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 is reasonably supported by the evidence or is a reasonable application of the legislation in the circumstances of the appellant.

The ministry found that the appellant met the age requirement and that the appellant's impairment is likely to continue for at least two years.

However, the ministry was not satisfied that the evidence establishes that:

- the appellant has a severe physical or mental impairment;
- the appellant's DLA are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and,
- as a result of these restrictions, the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

### **The following Sections of the EAPWDA apply 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 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.

### **Severe Impairment**

In the reconsideration decision, the ministry was not satisfied that the information provided is evidence of a severe physical or mental impairment. Determining a severe physical or mental impairment requires weighing the evidence provided against the nature of the impairment and its reported functional skill limitations. A diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a severe impairment. "Impairment" is a medical condition that results in restrictions to a person's ability to function independently or effectively for a reasonable duration. 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.

**NOTE:** While the appellant notes in her NOA and letter dated May 1, 2018, that she disagrees with the reconsideration decision because it is stated that her doctor filled out the form wrong in some places, the panel found no evidence in the appeal record to substantiate this argument and no additional information from the GP was provided.

### **Severity of Physical Impairment**

The appellant argues that her continuous back pain and weakness in legs confirmed by the results of the Diagnostic Imaging Reports and her consequent inability to work, as indicated by her physician chiropractor and other doctors demonstrated that she has severe physical impairment. The appellant submits that her condition is getting worse and she can only sit or stand no longer than 30 minutes and is unable to lift anything over 5 lbs.

The ministry argues that that while the GP does not describe how much longer than typical the appellant takes with areas of mobility and physical ability namely; walking outdoors, climbing stairs, standing, lifting and carrying/holding; the ability to lift 15 lbs is considered sufficient ability to lift a variety of household and shopping items. Also the ability to climb 2-5 steps unaided and remain seated for 1-2 hours is not considered indicative of a severe impairment of physical functioning.

The ministry acknowledged that based on the assessments provided by the GP, the Diagnostic Imaging Report that was included with the PWD application and the appellant's self-report, although the appellant is limited with regards to her ability to walk without a cane, a severe impairment of her physical functioning has not been determined.

The legislation requires that the minister be "satisfied" that the person's impairment is severe. The panel therefore finds that the ministry was reasonable in relying on the independent and professional opinion of the GP who has known the appellant for more than 4 years.

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. While the panel acknowledges that the appellant's back pain and weakness in her legs can restrict her physical mobility, the panel concludes that the ministry was reasonable to determine that the GP's assessment of current physical functioning does not reflect a severe physical impairment. Therefore, the panel finds that the ministry was reasonable in its determination that the evidence does not establish a finding that the appellant suffers from a severe physical impairment pursuant to Section 2(2) of the EAPWDA.

## **Severity of Mental Impairment**

The appellant does not argue that she has a severe mental impairment although she does mention having headaches all the time.

The ministry noted that the GP's assessment indicates that the appellant has no difficulties with communication and notes her level of ability with speaking, reading, writing and hearing are good. The ministry considered that in the MR the GP indicated no significant deficits with cognitive and emotional functioning and in the AR the GP assesses no major impacts, one moderate impact in the area of emotion and one minimal impact in the area of motivation and that their cumulative impact to cognitive and emotional functioning is not considered indicative of a severe impairment of mental functioning. The ministry also noted that the appellant is independent with all listed areas of social functioning and has good functioning with both her immediate and extended social networks.

The ministry determined that based on the information provided the appellant does not have a severe mental impairment.

The panel finds that the ministry reasonably determined that the assessment provided by the prescribed professional did not establish a severe mental impairment pursuant to Section 2(2) of the EAPWDA.

## **Restrictions in the Ability to Perform DLA**

The appellant argues that she cannot do any housework and that she gets help from family and friends to help with chores and "feeding meals". She also states that she gets assistance from family and friends periodically to help with household chores.

The ministry notes that the appellant has been prescribed medication that interferes with her ability to perform DLA stating: "Gabapentin may cause drowsiness" / "Permanent" and that the GP reports the appellant to walk with a cane and needs someone to carry things. While the GP indicates that the appellant takes significantly longer than typical with laundry and basic housekeeping, it is not described as to how much longer than typical the appellant takes with these areas of DLA. Furthermore, the GP does not describe the frequency or duration of periodic assistance from another person that is required with food preparation and cooking. The ministry also noted that the GP reports that the appellant is independent with the majority of listed areas of DLA.

Based on the assessments provided by the GP, the Diagnostic Imaging Report and the appellant's self-report, the ministry found that there was not enough evidence to confirm that the appellant has a severe impairment that, significantly restricts her ability to perform daily living activities 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 the result of a severe impairment, a criterion not established in this appeal. The legislation under Section 2(2)(b)(i) of the EAPWDA requires the minister to assess severity considering the opinion of a prescribed professional, in this case the GP as to direct and significant restrictions. 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."

As the appellant is reported as independently managing most tasks of DLA without any reported limitation other than lifting anything more than 15 lbs and as it is unclear as to the nature of periodic assistance required for aspects of food preparation, cooking as well as for other unspecified chores, the panel finds it difficult to assess whether the appellant's condition directly and significantly restricts her ability.

While the panel acknowledges that the appellant has back pain and limited ranges of movement, without more information from a medical professional on the frequency, duration, and nature of help required, 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.

The panel finds that the ministry reasonably determined that there is insufficient evidence from the prescribed professional to show that the appellant's overall ability to perform her DLA is significantly restricted either continuously or periodically for extended periods. Therefore, the panel finds that that the legislation pursuant to Section 2(2)(b)(i) of the EAPWDA was not established by the evidence.

### **Help Required**

The appellant argues that she has rearranged her furniture in her apartment so she can hold on to it so she doesn't fall. She uses a bath aid in her shower (chair) because she is afraid of falling. She uses a cane for walking to balance herself. The appellant 's GP has also stated that she uses a "walking stick" and that help is provided by family and friends noting "with purchases, carry 15 lbs, cleaning, cooking".

The ministry has determined that as it has not been established that DLA are significantly restricted continuously or periodically for extended periods, it therefore cannot be determined that significant help is required from other persons.

Section 2(2) (b) (ii) of the EAPWDA requires that, as a result of direct and significant restrictions in the ability to perform DLA, a person requires help to perform those activities. 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.

Based on the evidence, the panel finds that the ministry reasonably determined that as direct and significant restrictions in the appellant's ability to perform DLA have not been established, it cannot be determined that the appellant requires help to perform DLA as a result of those restrictions, as defined by Section 2(3)(b) of the EAPWDA.

### **Conclusion**

The panel finds that the ministry's reconsideration decision, which determined that the appellant was not eligible for PWD designation under Section 2 of the EAPWDA, was reasonably supported by the evidence and that this was a reasonable application of the legislation, therefore confirms the decision. The appellant's appeal, therefore, is not successful.