

## **PART C – DECISION UNDER APPEAL**

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the Ministry) Reconsideration Decision dated August 13, 2018, which found that the Appellant does not meet two 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 meets the age requirement, that her impairment is likely to continue for at least two years, and that she has a severe mental impairment. However, the Ministry is not satisfied that the evidence establishes that:

- 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

## PART E – SUMMARY OF FACTS

The evidence before the Ministry at the time of the Reconsideration Decision included the PWD Application comprised of the applicant information and self report (SR) dated April 25, 2018, a medical report (MR) dated April 25, 2018, completed by a general practitioner (GP) who has known the Appellant since January 2018 and who has seen the Appellant 2 - 10 times since then, and an assessor report (AR), with an illegible completion date, also completed by the GP.

The evidence also included the following documents:

- 1) Request for Reconsideration (RFR), completed by the Appellant on July 20, 2018, requesting a 10 day extension to the 20 business day deadline for requests for reconsideration as she requires the additional time to find a legal advocate, obtain additional medical information and prepare a written submission;
- 2) Medical examination report (Report), dated January 9, 2018 and completed by a physician. The Report summarizes the results of a physical examination of the Appellant and indicates, in part, that *“given (the Appellant’s) history and exam she does not meet the 2010 (America College of Rheumatology) criteria for fibromyalgia”*; and,
- 3) Diagnostic Imaging Report (MRI Report), dated August 30, 2016 and completed out-of-province summarizing the findings of the diagnostic imaging, summarized as follows: *“small ... disc protrusion at L5-S1 without current convincing neural compression. Mild disc degeneration at L4-5 and mild facet degeneration at L4-5 and L5-S1”*.

### **Diagnoses**

In the MR, the GP diagnosed the Appellant with:

- Fibromyalgia with an illegible onset date;
- Degenerative disc disease with an onset in 2015; and
- Anxiety and Depression with an onset of 2017

In the “Decision Under Reconsideration” section on the first page of the Reconsideration Decision, the Ministry states that *“(the Appellant did) not have a severe physical or mental impairment”*. However, on the second page of the Reconsideration Decision, the Ministry indicates that the Appellant has a severe impairment, and in Section 3 of Appendix A of the Reconsideration Decision, the Ministry states that it *“is satisfied that the information provided establishes a severe mental impairment”*. Furthermore, the arguments presented by the Ministry in the “Mental Functioning” part of Appendix A Section 3 and the conclusion at the end of that section also support a finding of a severe mental impairment by the Ministry. Therefore, the Panel concludes that the finding in the “Decision Under Reconsideration” section of the Reconsideration Decision that the Appellant did not have a severe mental impairment was a clerical error and that the Ministry is in fact satisfied that the information establishes a severe mental impairment. There are no such inconsistencies in the Ministry’s discussion of severe physical impairment. Therefore, the Panel concludes that the Ministry has determined that the Appellant does not have a severe physical impairment.

### ***Physical Impairment***

In the MR and the AR, the GP reports that:

- In terms of health history that might have an impact on physical impairment, the Appellant has pain and fatigue from Fibromyalgia.
- In terms of functional skills, the Appellant can walk 4 or more blocks unaided on a flat surface, climb 5 or more steps unaided, lift 2 to 7 kg. (5 to 15 lbs.), and has no limitation in the length of time that she can remain seated.
- The Appellant is assessed as independent with all aspects of mobility and physical ability including walking indoors and walking outdoors, climbing stairs and standing, but requires periodic assistance from another person in lifting and carrying and holding (no explanation or comments are included).

In the SR, the Appellant wrote that:

- She experiences severe pain in her muscles, joints and bones from Fibromyalgia, and that mornings “*are horrible*”.
- Sometimes her legs “*don’t work*” and she falls and that her legs “*constantly feel like pins and needles*”.

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

In the MR and the AR, the GP reports that:

- The Appellant has been prescribed medication and/or treatments that interfere with her ability to perform DLA. However, the GP’s explanation of what medication and/or treatments affect her ability to perform DLA, how medication and/or treatments interfere with her ability to perform them, and the anticipated duration of the medication and/or treatments is illegible.
- In the MR, with respect to physical limitations, the Appellant is periodically restricted with the DLA of personal self-care, meal preparation and mobility inside and outside of the home. The GP also reports that the Appellant is not restricted with the DLA of management of medications, basic housework, daily shopping, use of transportation, or management of finances. The GP’s explanation of the above-noted periodic restrictions is illegible.
- In the AR, the Appellant is independent in completing the physical tasks associated with all of the listed DLA, except for going to and from stores and carrying purchases home, where the GP reports that the Appellant requires periodic assistance. No comments or explanations are provided regarding the periodic assistance required for going to and from stores and carrying purchases home.

The Appellant did not provide any information regarding restrictions in her ability to perform DLA in her SR.

### ***Need for Help***

In the MR, the GP indicates that the Appellant does not require any prostheses or aids for her impairment. Where asked to explain what assistance the Appellant requires in performing DLA, the GP’s

comments are illegible. In the AR, the GP indicates that the Appellant receives assistance from her sister-in-law in performing some social functions, but no assistance is specified for any physical activities. The GP does state that she requires help from her family and community service agencies for some unspecified DLA. No comments or explanations are provided.

In the section of the AR relating to assistance provided through the use of assistive devices, the GP indicates that none of the listed assistive devices are applicable to the Appellant and that she does not have an assistance animal.

The Appellant has not provided any information regarding help required to perform DLA in her SR.

### ***Additional Information Submitted after Reconsideration***

In her Notice of Appeal (NOA) dated August 20, 2018, the Appellant states that she had been diagnosed with Fibromyalgia, and that:

- Fibromyalgia is debilitating and definitely affects her day-to-day living: symptoms can vary on an hourly or minute-to-minute basis, and on the days when she requires help she needs someone to drive her as she lives 50 km out of town;
- On good days she is able to walk 4 blocks, lift 5–15 lbs. and sit without restriction, but this is not consistent;
- She has days when she is so sore and stiff she can barely get out of bed;
- She is unable to drive due to “fibro fog”; and,
- Her cognitive functions are severely impaired by both the Fibromyalgia and the medications she has been prescribed.

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

Section 22(4) of the *Employment and Assistance Act* (EAA) provides that panels may admit as evidence the information and records that were before the Ministry when the decision being appealed was made and “oral and written testimony in support of the information and records” before the Ministry when the decision being appealed was made, i.e. information that substantiates or corroborates the information that was before the Ministry at reconsideration. These limitations reflect the jurisdiction of a panel established under section 24 of the EAA: to determine whether the Ministry’s reconsideration decision is reasonably supported by the evidence or a reasonable application of the enactment in the circumstances of an appellant. That is, panels are limited to determining if the Ministry’s decision is reasonable and are not to assume the role of decision-makers of the first instance.

Neither the Appellant nor the Ministry submitted any additional evidence prior to the hearing.

The Panel considered the information in the NOA concerning her need to be driven to appointments due to “fibro fog” to be new written testimony that is not in support of the information and records which were before the Ministry when the decision being appealed was made. Accordingly, the Panel did not admit this evidence, pursuant to Section 22(4) of the EAA. The other evidence in the NOA was admitted as being in support of the information and records before the Ministry when the decision being appealed was made.

## **PART F – REASONS FOR PANEL DECISION**

The issue on appeal is whether the Ministry's reconsideration decision, which found that the Appellant is not eligible for designation as a PWD, was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the Appellant. The Ministry found that the evidence establishes that the Appellant has a severe mental impairment that, in the opinion of a prescribed professional, is likely to continue for at least 2 years, but that her DLA are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods. Also, the Ministry found that, as a result of those restrictions, it could not be determined that the Appellant requires significant help or the supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

The criteria for being designated as a PWD are set out in Section 2 of the EAPWDA as follows:

### **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 EAPWDR provides as follows:

**Definitions for Act**

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 ...

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### **Severity of Impairment**

A diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a “severe” impairment. Section 2(2) of the EAPWDA requires that in determining whether a person may be designated as a PWD the Ministry must be satisfied that the individual has a severe physical or mental impairment. An “impairment” is a medical condition which results in restrictions to a person’s ability to function independently or effectively. With respect to assessing the severity of an impairment, Section 2(2)(b)(i) of the EAPWDR requires that a mental or physical impairment *directly and significantly* restrict the person's ability to perform DLA either *continuously*, or *periodically for extended periods*. Therefore, to assess the severity of an impairment, the Ministry must consider both the nature of the impairment and the extent to which it impacts daily functioning as evidenced by functional skill limitations and the degree to which the ability to perform DLA is restricted. In making its determination the Ministry must consider all the relevant evidence, including that of the Appellant. However, the legislation is clear that the fundamental basis for the analysis is the evidence from a prescribed professional – in this case the Appellant’s GP.

### **Physical Functioning**

In its Reconsideration Decision, the Ministry was not satisfied that the information provided establishes a severe physical impairment. The Ministry argues that a severe impairment of the Appellant’s physical functioning has not been established because the GP has not described the frequency and/or duration of the episodes of impairment. The Ministry’s position is that when impairments are periodic or episodic rather than continuous, the nature, frequency and duration of those periodic impairments is crucial in assessing the severity of the impairment.

#### *Panel Decision*

The Panel notes that the GP has indicated that, where they exist, the Appellant’s episodes of impairment are periodic rather than continuous. The Panel finds that the Ministry was reasonable in determining that in order to assess whether the periodic impairments were for extended periods it would need to know how often and for how long the episodes occur.

The Panel notes that, when asked to indicate the severity of the Appellant’s physical impairments in the MR, the GP reported that the Appellant had “pain” and “fatigue” from Fibromyalgia, but did not indicate the severity of the pain or the extent of the fatigue, or provide any further details. The Panel further notes that, in terms of functional skills, the GP has indicated that the Appellant can walk more than 4 blocks on a flat surface and climb more than 5 steps unaided, is not limited in the length of time she can remain seated, and can lift 2 to 7 kg. In addition, the Panel finds that the Ministry reasonably concluded that the GP did not describe the frequency and/or duration of the episodes of impairment.

The Panel finds that the Ministry’s determination that there is not sufficient evidence to establish that the Appellant has a severe physical impairment which directly and significantly restricts the Appellant's ability to perform DLA either *continuously* or *periodically for extended periods* pursuant to Section 2(2) of the EAPWDA, was reasonably supported by the evidence before the Ministry at reconsideration.

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

As indicated above, the Appellant did not provide any information regarding restrictions in her ability to perform DLA.

In its Reconsideration Decision, the Ministry notes discrepancies between the assessments made by the GP in the MR and the AR. For example, the Ministry notes that although the GP indicates in the MR that the Appellant has periodic restrictions to personal self-care and meal preparation, in the AR the GP indicates that the Appellant is independent with all listed tasks associated with personal care and meals.

#### *Panel Decision*

Section 2(2)(b) of the EAPWDA requires that the Ministry be satisfied that a prescribed professional has provided an opinion that an applicant's severe impairment *directly* and *significantly* restricts his or her DLA, continuously or periodically for extended periods. In this case, the GP is the prescribed professional. DLA are defined in Section 2(1) of the EAPWDR and are also listed in the MR and, with additional details, in the AR. Therefore, the prescribed professionals completing these forms have the opportunity to indicate which, if any, DLA are significantly restricted by the Appellant's impairments either continuously or periodically for extended periods, and to further elaborate so that the nature and extent of the restrictions to DLA are clear.

Prescribed professionals are further encouraged to elaborate on the nature and extent of the limitations or restrictions in the instructions provided in those sections of the forms. For example, in Part C of the AR the assessor is instructed to identify whether assistance is required in each case with respect to the full range of DLA, and if the applicant is not independent, to describe the type and amount of assistance required. The additional commentary provided by the GP in this section of the MR is illegible or incomplete. There is no additional information identifying the nature or extent of restrictions on other DLA identified as being subject to periodic restrictions, such as personal self-care or meal preparation.

Furthermore, the Panel notes that the GP reported in the MR that the Appellant is periodically restricted in performing personal self-care and meal preparation, while the extent, duration and frequency of the period restrictions is either not explained or the explanation is illegible. In the AR, on the other hand, the GP assessed the Appellant as independently able to perform all physical DLA.

The Panel finds that the Ministry reasonably concluded that the evidence is both inconsistent and insufficient to show that the Appellant's overall ability to perform her DLA is significantly restricted either continuously or periodically for extended periods, pursuant to Section 2(2)(b)(i) of the EAPWDA.



### **Help with DLA**

As indicated above, the Appellant did not provide any information regarding help required to perform DLA. In the AR, the GP has indicated that the Appellant receives assistance from her sister-in-law in interacting appropriately with others and dealing appropriately with unexpected demands, but the GP indicates that he/she is unsure of the nature of the support or supervision required. In addition, no assistance is specified for any physical activities. The GP does state that the Appellant requires help from her family and a community service agency for some DLA, but the DLA for which she requires assistance is not specified.

In its Reconsideration Decision, the Ministry states that it cannot be determined that significant help is required because it has not been established that DLA are significantly restricted.

### *Panel Decision*

The Panel notes that 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.

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 because all the requirements of Section 2 of the EAPWDA were not met, was reasonably supported by the evidence and was a reasonable application of the EAPWDA in the circumstances of the Appellant. The Panel confirms the Ministry's Reconsideration Decision. The Appellant's appeal, therefore, is not successful.

**PART G – ORDER**

THE PANEL DECISION IS: (Check one)       UNANIMOUS       BY MAJORITY

THE PANEL       CONFIRMS THE MINISTRY DECISION       RESCINDS THE MINISTRY DECISION

If the ministry decision is rescinded, is the panel decision referred back to the Minister  
for a decision as to amount?       Yes       No

**LEGISLATIVE AUTHORITY FOR THE DECISION:**

*Employment and Assistance Act*

Section 24(1)(a)  or Section 24(1)(b)

and

Section 24(2)(a)  or Section 24(2)(b)

**PART H – SIGNATURES**

PRINT NAME

Simon Clews

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2018/09/24

PRINT NAME

Stephanie Korour

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2018/09/24

PRINT NAME

Roy Wares

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2018/09/25