

## **PART C – DECISION UNDER APPEAL**

The decision under appeal is the Ministry of Social Development and Poverty Reduction (“the ministry”) reconsideration decision dated August 9, 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 her 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*

## **PART E – SUMMARY OF FACTS**

### **Evidence before the Ministry at Reconsideration**

The evidence before the ministry at the time of the reconsideration decision included:

- original Persons With Disabilities (PWD) Application comprised of a medical report (MR) and an assessor report (AR) both dated April 3, 2018 and both completed by the appellant's family physician (the GP), who has known the appellant since May 2015 and who has seen the appellant 11 or more times in the past 12 months( initially submitted but not considered by the ministry at reconsideration);
- amended PWD application dated April 3, 2018 but submitted to the ministry on August 9, 2018;
- Appellant's Request for Reconsideration received by the ministry on August 9, 2018 in which was enclosed the appellant's self report (SR).

### **PWD Application**

#### **Diagnoses**

In the MR the GP noted that the appellant suffers from:

- severe osteoarthritis (OA), date of onset 2013;
- chronic obstructive pulmonary disorder (COPD), onset 2016;
- low limb chronic edema, onset 2002;
- obesity, onset unknown;
- generalized anxiety disorder, onset 2014;
- major depressive disorder, onset 2014.

#### **Physical Impairment**

In her SR the appellant noted that following her 2012 right knee replacement she favoured her left side and now experiences right side hip and sciatic pain, which requires her to use a cane. She is also experiencing similar pain in her left knee.

In the MR the GP noted that the appellant can walk 1-2 blocks unaided ("*uses cane*"), cannot climb stairs unaided ("*uses cane*"), is limited to lifting 2-7 kg and can remain seated for 1-2 hours. The GP added that the appellant has chronic physical and mental impairments, and that mobility and pain are issues for her. She comments: "*pain is daily [and] moderately severe – knees SI joint. Her COPD causes dyspnea (difficult or laboured breathing) and exercise intolerance*".

In the AR the GP indicated that the appellant's obesity and OA affect her mobility and physical functioning. She uses an assistive device and takes significantly longer than typical when walking indoors and outdoors and when climbing stairs. She requires periodic assistance from another person with lifting, carrying and holding. She is independent with standing but needs an assistive device. In Part E of the AR the GP comments: *[the appellant] has multiple chronic mental and physical impairments. This results in moderate restriction in mobility . . .* ".

#### **Mental Impairment**

In her SR the appellant noted that although she was diagnosed with depression and anxiety in 2014 she has been suffering from these mental illnesses since childhood, particularly since experiencing trauma at age 16. In 1982 she was hospitalized following a series of panic attacks. These illnesses have resulted in dramatic barriers to her cognitive and emotional well being.

In the MR the GP noted that due to anxiety and depression the appellant has difficulty maintaining social and occupational status. Her sensitivity to being isolated results in worsening depression. She experiences significant deficits in cognitive and emotional functioning in 5 out of 12 listed areas: executive ability, emotional disturbance, motivation, impulse control and attention or sustained concentration.

In the AR the GP indicated that the appellant experiences restrictions/impacts on the following listed areas of daily functioning:

- major impact upon emotion;
- moderate impacts upon bodily functions, impulse control, insight/judgement, executive abilities and motivation;
- minimal impacts upon consciousness, attention/concentration and memory;
- no impact upon motor activity, language, psychotic symptoms, other neuropsychological problems or other emotional/mental problems.

She requires periodic support with all 5 listed areas of social functioning: making appropriate social decisions, developing and maintaining relationships, interacting appropriately with others, dealing appropriately with unexpected demands and securing assistance with others. In the area of social functioning she has marginal functioning with both immediate and extended social networks.

### **Daily Living Activities (DLA)**

The appellant did not refer to ability to perform DLA in her SR.

In the AR the GP indicated that the appellant is:

- independent but takes significantly longer and uses an assistive device in bathing (shower bar), transferring in and out of bed and on and off chairs (bed rail), going to and from stores and reading prices/labels (cane);
- independent but takes significantly longer with dressing, grooming, toileting, laundry and all listed areas of transportation;
- requires periodic assistance from another person and takes significantly longer with housekeeping and carrying purchases home;
- independent in all other listed areas of DLA.

### **Assistance Required**

In her SR the appellant noted that due to left knee and hip pain and sciatica she requires the use of a cane.

In Section 2-B of the MR the GP reported that the appellant does not require prostheses or aids. Elsewhere in the MR the GP noted that the appellant uses a cane to assist with walking and climbing.

In the AR the GP indicated that the appellant indicated that the appellant receives assistance from family, friends and health professionals, and uses a cane, shower bar and bed rail. The GP also commented that the appellant would benefit from a walker.

### **Evidence submitted at the Hearing**

The appellant stated that she had to quit work in January 2018 because she was physically incapable of doing the job, primarily because she was unable to walk as much as the job required. Her job also caused stress and anxiety. She believes that she could manage a part-time job without the stress of dealing with the public. The appellant also believes she may suffer from gout due to edema and foot pain but her GP did not pursue this concern.

Her depression deepened with the loss of several members of her family between 2013 and 2016. In January of 2018 she had a mental and physical breakdown but was not admitted to hospital, and her GP did not refer her to a psychiatrist or counsellor. She was evicted from her residence and now resides in a women's transition home.

She has been assessed by a nurse and social worker in connection with her application to an assisted living facility. Currently she receives support from her sister and from the women at the transition home.

**Admissibility of Evidence**

The panel considered the admissibility of the appellant's oral evidence and determined that all of it was admissible under EAA Section 22 (4) (b) as evidence in support of the information that was before the ministry at reconsideration because it provided additional detail to her physical and mental impairments and augmented the information that was already before the ministry at reconsideration.

## PART F – REASONS FOR PANEL DECISION

The issue in this appeal is whether the ministry decision of August 9, 2018 that determined 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) 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 her 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.

Relevant legislation:

### EAPWDA:

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 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 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.

### EAPWDR:

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.

**PANEL NOTE:**

On Page 2 of Appendix A of the reconsideration decision the ministry wrote: “. . . the Reconsideration Officer has summarized and assessed **the amended PWD application only** (referring to it simply as your ‘PWD application’). “ In other words, the original PWD application was not considered when making the reconsideration decision. However, in the second last paragraph under the heading “Physical Functioning” the Reconsideration Officer referred to the differences in severity described in the original versus the amended application and made a finding that the GP failed to account for the differences. Similarly, on the second page of the section entitled “Daily Living Activities” the Reconsideration Officer noted the difference in restrictions described in the original versus the amended application, and again found that the GP failed to account for them.

The panel finds that the Reconsideration Officer erred in considering the original PWD application in its reconsideration decision after specifically excluding it in his/her opening comments. However, this error is not fatal to the reconsideration decision as a whole. The panel will therefore continue in its analysis of the reasonableness of the ministry’s reconsideration decision.

**1. Severe Physical Impairment**

The appellant argues that she suffers from several chronic physical conditions that severely restrict her physical functioning, namely OA, COPD, edema and obesity.

The ministry’s position is that the physical impairments described by the appellant and her GP are insufficient to establish a severe physical impairment.

Panel Decision

A diagnosis of a serious medical condition does not in itself determine PWD eligibility. Under the legislation, eligibility for PWD hinges on an “impairment” and its severity. “Impairment” is more than a diagnosed medical condition. In the context of this legislation an impairment is a medical condition that results in restrictions to a person’s ability to function independently, appropriately, effectively or for a reasonable duration.

To assess the severity of impairment one must consider the nature of the impairment and the extent of its impact on daily functioning, as evidenced by functional skill limitations and the degree to which the ability to perform DLA is restricted. The legislation makes it clear that the determination of severity is at the discretion of the minister, taking into account all of the evidence. However, the legislation is also clear that the fundamental basis for the analysis is the evidence from a medical practitioner or a “prescribed professional” – in this case, the appellant’s GP. The legislation requires that for PWD designation, the minister must be satisfied that the person has a severe mental or physical impairment.

In her SR the appellant wrote that she experiences left knee and hip pain and sciatica.

In the MR the GP indicated that the appellant can walk 1-2 blocks unaided (“uses cane”), can’t climb any steps unaided (“uses cane”), is limited to lifting 2-7 kg and can remain seated for 1-2 hours. The GP describes her mobility impairment as “moderate”. Although she suffers from COPD there is no information provided to indicate that she uses an inhaled medication or supplementary oxygen. The GP described the appellant’s OA as severe, but she is able to move about and carry out all of her daily activities with the use of a cane.

In the AR the GP reported that the appellant takes longer than typical with walking indoors/outdoors and climbing stairs, but did not describe how much longer. The GP also noted that the appellant requires periodic assistance with lifting and carrying but did not indicate that the appellant is unable to carry out these functions. In the MR the GP also noted that the appellant can lift 2-7 kg. Although the appellant stated that at times she is not motivated to get out of bed or shower there is insufficient evidence to indicate she is unable to do so.

The panel accepts that the appellant’s abilities to walk and climb stairs are impaired by OA pain, COPD, leg edema and obesity and take longer to accomplish. However, based on the functional skills assessments provided by the GP, the GP’s description of moderate impairment and the appellant’s own assessment of her functional mobility the panel finds that the ministry reasonably determined that a severe physical impairment was not established.

## **2. Severe Mental Impairment**

The appellant argues that she suffers from anxiety and depression that severely impair her cognitive and emotional functioning.

The ministry’s position is that the information provided does not establish a severe mental impairment.

### Panel Decision

In her SR the appellant stated that her anxiety and panic attacks date back to adolescence and resulted in an admission to hospital in 1982. In January 2018 she had a breakdown and attended at the hospital’s emergency department. Following this event her GP increased her psychiatric medication.

In Section 2-B of the AR the GP wrote that the appellant “has difficulty maintaining social and occupational status”, but does not describe the degree of difficulty experienced. She was described as “sensitive to being isolated which results in worsening depression” but the degree of depression and the severity of impact on the appellant’s functioning is not clarified.

In the AR the GP indicated that the appellant has significant deficits to cognitive and emotional functioning in only 1 or the 14 listed areas, namely emotion. She is moderately impacted in 5 areas: bodily functions, impulse control, insight/judgement, executive and motivation, and minimally impacted in areas of consciousness, attention/concentration and memory. She is not impacted in the remaining 5 areas. The GP did not provide details of the restrictions where asked to do so in Section B-4. The GP also indicated that the appellant requires periodic supervision/support in all listed areas of social functioning but did not describe the degree and duration of support required. The appellant’s mental impairment is noted to cause marginal functioning in both immediate and extended social networks, which is not indicative of an inability to participate, communicate or fulfill basic needs. There is no evidence that the appellant has been referred to a psychiatrist or other mental health specialist, which would be expected in the case of a severe mental impairment. This is consistent with the

GP's note in Section 3-E: "[she] has multiple chronic mental and physical impairments. This results in moderate restriction in mobility and emotional functioning".

Overall the description of limitations to cognitive and emotional functioning assessed by the GP and described by the appellant in her SR and oral evidence are indicative of a moderate impairment. The panel therefore finds that the ministry reasonably concluded that the information provided does not establish a severe mental impairment.

### **3. Restrictions in Ability to Perform DLA**

The appellant argues that her ability to perform DLA is significantly restricted as a result of her severe physical and mental conditions.

The ministry's position is that a severe impairment has not been established that directly and significantly restricts the appellant's ability to perform DLA, and that the information submitted by the prescribed professional is not sufficient to establish that the appellant's DLA are directly and significantly restricted either continuously or for extended periods.

#### Panel Decision

The legislative requirement respecting DLA set out in section 2(2)(b) of the EAPWDA is that the minister be satisfied that as a result of a severe physical or mental impairment a person is, in the opinion of a prescribed professional, directly and significantly restricted in the ability to perform DLA either continuously or periodically for extended periods. While other evidence may be considered, the ministry's determination as to whether or not it is satisfied is dependent upon the evidence from prescribed professionals. DLA are defined in section 2(1) of the EAPWDR and are listed in both the MR and the AR sections of the PWD application with the opportunity for the prescribed professional to check marked boxes and provide additional narrative.

The GP reported that the appellant has not been prescribed medications that interfere with her ability to perform DLA. In the AR she indicated that the appellant is independent but takes significantly longer and uses an assistive device in bathing (shower bar), transferring in and out of bed and on and off chairs (bed rail), going to and from stores and reading prices/labels (cane); independent but takes significantly longer with dressing, grooming, toileting, laundry and all listed areas of transportation; independent but requires periodic assistance from another person and takes significantly longer with housekeeping and carrying purchases home. She is described as independent in all other listed areas of DLA, including meals (planning preparation, cooking, food storage), paying rent and bills, and procuring, taking and handling medications.

Although the appellant takes significantly longer to perform several of her DLA the GP does not provide information to describe *how much longer* it takes to perform the tasks although specifically asked to do so in Section 3-C of the AR, and does not describe the frequency or duration of periodic support/supervision required with all listed areas of social functioning.

A severe impairment was not established in the appellant's circumstances. Because this precondition was not met and because there is insufficient information provided by the GP to establish that the appellant's impairments result in significant restrictions to her ability to perform DLA either continuously or periodically for extended periods the panel finds that the ministry reasonably determined that the information fails to establish that the appellant suffers from a severe impairment that in the opinion of a prescribed professional directly and significantly restricts DLA continuously or periodically for extended periods.

### **4. Help in Performing DLA**

The appellant argues that she requires assistive devices and the significant help of other people to perform DLA.

The ministry's position is that because the information did not establish that the appellant's DLA are significantly restricted it cannot be determined that an assistive device or significant help is required.



### Panel Decision

Both the AR and the MR clearly establish that the appellant requires assistive devices in order to perform DLA, including a cane, bed rail and shower bar. She also receives help from family, friends and health care professionals.

However, the establishment of direct and significant restrictions with DLA is a precondition of the need for help criterion. Because the panel found that the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established, the panel also finds that the ministry reasonably concluded that it cannot be determined that the appellant requires help to perform DLA as required by section 2(2)(b)(ii) of the EAPWDA.

### **CONCLUSION**

Having reviewed and considered all of the evidence and relevant legislation, 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, and confirms the decision. The appellant is not successful on appeal.

**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

Joan Bubbs

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2018/Sep/18

PRINT NAME

Jeanne Byron

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2018/Sep/18

PRINT NAME

Mel Donhauser

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2018/Sep/18