

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

The decision under appeal is the Ministry of Social Development and Poverty Reduction (ministry) reconsideration decision dated 1 October 2018, which determined that the appellant was not eligible for persons with disabilities designation (PWD) because she had not met all of the legislated criteria under section 2 the *Employment and Assistance for Persons with Disabilities Act*.

The ministry determined that the appellant had demonstrated that she has reached 18 years of age and that her impairment, in the opinion of a medical practitioner or nurse practitioner, is likely to continue for at least 2 years.

The ministry further determined that the appellant had not demonstrated that:

1. she has a severe mental or physical impairment;
2. her severe mental or physical impairment, in the opinion of a prescribed professional, directly and significantly restricts her ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and
3. as a result of direct and significant restrictions, she requires help to perform those activities.

### **PART D – RELEVANT LEGISLATION**

*Employment and Assistance for Persons with Disabilities Act* (EAPWDA) – section 2

*Employment and Assistance for Persons with Disabilities Regulation* (EAPWDR) – section 2

## PART E – SUMMARY OF FACTS

Evidence before the ministry at reconsideration consisted of the following:

### 1. The appellant's PWD Application

The Application contained:

- A Medical Report (MR) dated 16 June 2018, completed by a general practitioner (GP) who indicates he has known the appellant since 1995 and has seen her 11+ times in the past 12 months.
- An Assessor Report (AR) dated 24 June 2018, completed by a physiotherapist (PT), who indicates that she has known the appellant since September 2016 and has seen her 11+ times in the past 12 months
- A Self Report (SR) dated 13 June 2018, completed and signed by the appellant.

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

#### Diagnoses

In the MR, the GP provides the following diagnoses:

- Soft tissue injuries neck and back – onset September 2016.

#### Severity of mental impairment

MR:

The GP has ticked 'no' in response to whether there are difficulties with communication other than lack of fluency in English.

The GP does not tick 'yes', 'no' or 'unknown' to indicate whether the appellant has significant deficits with cognitive and emotional functioning, but has indicated the cause of emotional disturbance and has commented: *depressive symptoms and anxiety relating to her disability.*

AR:

The PT has responded to the question "What are the applicant's mental or physical impairments that impact his/her ability to manage Daily Living Activities?" as follows: *Chronic neck and back pain that persists despite long term and extensive treatments Creating changes to mental health – depression/anxiety.*

The PT indicates that the appellant's ability to communicate is good in all listed areas: speaking, reading, writing and hearing and comments: *Am aware of no challenges in these areas.*

The PT has not assessed the appellant's cognitive and emotional functioning in the AR.

SR:

The appellant states that she has reduced social interactions and struggles to fight off depression as a result of the pain she experiences.

#### Severity of physical impairment

MR:

Under Health History, the GP indicates that the appellant suffers from soft tissues injuries to her neck and back as a result of being rear-ended in her vehicle about two years ago. He states that she continues to be symptomatic despite treatment and is limited to light activities and duties. He reports that she cannot sit or stand for prolonged periods and cannot participate in recreational activities.

For functional skills, the GP indicates that the appellant can walk 2-4 blocks unaided, climb 5+ steps unaided, lift 5 to 15 pounds unaided and remain seated for less than 1 hour.

In Part F, Additional Comments the GP reports that the appellant suffers from chronic pain and significant impairment of DLA. He reports that her impairment is expected to continue on an ongoing basis and she is capable

of light activities. He reports that she is becoming secondarily depressed and socially isolated due to her condition.

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

AR:

The PT has responded to the question "What are the applicant's mental or physical impairments that impact his/her ability to manage Daily Living Activities?" as indicated previously: *Chronic neck and back pain that persists despite long term and extensive treatments Creating changes to mental health – depression/anxiety.* .

The PT indicates that the appellant takes significantly longer than typical with all areas of mobility and physical ability, including: walking indoors (*stairs + indoor malls rest every 3 blocks distances. Not indoors around home*) , walking outdoors (*3 blocks rest, climbing stairs (requires rest every 8-10 steps)*), standing (*limited 15-20 min*), lifting (*limited to 15-20 lbs*) and carrying and holding (*light loads -groceries, laundry done in increased number of smaller loads*). The PT comments: *pain limited in all the above.*

In Part E, Additional Information, the PT indicates that the appellant continues to experience neck and back pain despite various treatments. The PT reports that the pain interferes with the appellant's daily living, social circumstances and family dynamics and her system responds consistently with a sensitized nervous system in a chronic pain state.

SR:

The appellant indicates that she is dealing with chronic pain that has affected all aspects of her life. She reports that she is unable to work, recreate and function socially as she did prior to being rear-ended. She reports difficulty with DLA and needs to rest the next day after a completing tasks on her own.

Ability to perform DLA

MR:

The GP indicates that the appellant has not been prescribed medication that interferes with her ability to perform DLA.

The GP indicates that the appellant's impairment restricts her ability to perform DLA. The GP goes on to indicate that the appellant is restricted continuously with meal preparation, basic housework, daily shopping, mobility outside of the home and social functioning.

In explaining impacts to social functioning, the GP comments: *tending to withdraw and not interact with others due to chronic pain.*

In explaining the degree of restriction, the GP comments: *capable of light activities only.*

In relation to assistance needed with DLA, the GP comments: *would benefit from another person helping with any heavier activities, such as housework, carrying groceries, and for activities requiring prolonged standing such as meal preparation.*

AR:

The PT indicates that the appellant is independent in all personal care tasks, with the following commentary:

- *Experiences pain w/ bending to dress*
- *For doing hair w/ arms avoids braiding hair*
- *Reports reaching to wipe as very impactful challenge but does not necessarily take longer, however sometimes showers following bowel movements.*

The PT reports that the appellant takes significantly longer than typical with all basic housekeeping tasks, commenting:

- *Manages w/ small loads*
- *Requires pacing*

The PT indicates that the appellant is independent most shopping activities (going to and from stores, reading prices and labels, making appropriate choices and paying for purchases) and takes significantly longer with the task of carrying purchase home (*manages by carrying small amounts*).

The PT indicates that the appellant is independent with meals tasks of meal planning and safe storage and takes significantly longer with food preparation and cooking (*Limited to 15-20 minute intervals*).

THE PT indicates that the appellant is independent with all pay rent and bills tasks, medications tasks and all transportation activities.

The PT provides additional commentary indicating that the appellant is able to complete housekeeping, grocery and laundry but does so by pacing and modifying the length of time,

#### Section 2(1)(b) of the EAPWDR

The following DLA are applicable to a person who has a severe mental impairment:

##### *Make decisions about personal activities, care or finances*

MR:

The GP indicates that the appellant is periodically restricted in her ability to manage meal preparation and daily shopping and is independent with personal self care, finances, medications and transportation.

AR:

The PT indicates that the appellant is independent with decision making DLA tasks.

##### *Relate to, communicate or interact with others effectively*

MR:

The GP indicates that the appellant has no difficulties with communication and is continuously restricted with social functioning.

AR:

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

The PT has not assessed social function.

##### Help required

MR:

The GP indicates that the appellant does not require any aids or prostheses.

AR:

The PT indicates that the appellant receives assistance from friends (*minimal help*).

The PT does not indicate whether the appellant receives assistance through the use of assistive devices.

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

## **2. Request for Reconsideration**

The appellant submitted a signed Request for Reconsideration dated 21 September 2018, indicating that she is in need and her impairments are not short term.

## **3. Appended documents**

Included with the Request for Reconsideration application are:

- A medical legal report dated 30 March 2018, prepared by the appellant's GP

- An independent medical assessment dated 4 July 2018, prepared by Physical Medicine and Rehabilitation medical doctor (MD).

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

**Notice of Appeal**

In the Notice of Appeal dated 5 October 2018, the appellant stated that her physician feels she is severely disabled. The appellant restated much of the information in her SR and reiterated that her injuries are not healing, and she will not be able to find employment.

**Appeal Submissions**

The appellant and her advocate argued that the ministry's decision is unreasonable. The appellant read a statement that is substantially similar to her SR and Notice of Appeal statements. She argued that her life has been changed forever as have the lives of her children because she is unable to do many of the things she used to do.

The ministry relied on the reconsideration decision.

**Admissibility**

The panel finds that the information provided in the appellant's Notice of Appeal consists of argument and reiteration and expansion of information previously provided in the SR. Furthermore, the appellant submitted a written copy of the statements she made at the hearing, which also consists of argument and reiteration and expansion of information previously provided in the SR and Notice of Appeal. The panel finds both documents are admissible in accordance with section 22 (4)(b) of the *Employment and Assistance Act* as they consist of a combination of argument and information in support of the information and records before the ministry at reconsideration. In making this determination, the panel notes that the ministry representative stated that the ministry had no objection to the admission of the appellant's hearing document.

## PART F – REASONS FOR PANEL DECISION

The issue in this appeal is whether the ministry's reconsideration decision that determined that the appellant did not meet three of the five statutory requirements of Section 2 of the *EAPWDA* for PWD designation is reasonably supported by the evidence or is a reasonable application of the legislation in the circumstances of the appellant. Specifically, the ministry determined that the information provided did not establish that:

- the appellant has a severe mental or physical impairment;
- the appellant's severe mental or physical impairment, in the opinion of a prescribed professional, directly and significantly restricts her ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and
- as a result of those restrictions, she requires significant help or supervision of another person to perform those activities.

The following section of the *EAPWDA* applies to this appeal:

### Persons with disabilities

2 (1) In this section:

**"assistive device"** means a device designed to enable a person to perform a daily living activity that, because of a severe mental or physical impairment, the person is unable to perform;

**"daily living activity"** has the prescribed meaning;

**"prescribed professional"** has the prescribed meaning.

(2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act if the minister is satisfied that the person is in a prescribed class of persons or that the person has a severe mental or physical impairment that

(a) in the opinion of a medical practitioner or nurse practitioner is likely to continue for at least 2 years, and

(b) in the opinion of a prescribed professional

(i) directly and significantly restricts the person's ability to perform daily living activities either

(A) continuously, or

(B) periodically for extended periods, and

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

(3) For the purposes of subsection (2),

(a) a person who has a severe mental impairment includes a person with a mental disorder, and

(b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires

(i) an assistive device,

(ii) the significant help or supervision of another person, or

(iii) the services of an assistance animal.

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

The following section of the *EAPWDR* applies to this appeal:

2 (1) For the purposes of the Act and this regulation, **"daily living activities"**,

(a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following activities:

(i) prepare own meals;

(ii) manage personal finances;

(iii) shop for personal needs;

(iv) use public or personal transportation facilities;

(v) perform housework to maintain the person's place of residence in acceptable sanitary condition;

(vi) move about indoors and outdoors;

(vii) perform personal hygiene and self care;

(viii) manage personal medication, and

(b) in relation to a person who has a severe mental impairment, includes the following activities:

(i) make decisions about personal activities, care or finances;

(ii) relate to, communicate or interact with others effectively.

(2) For the purposes of the Act, "**prescribed professional**" means a person who is

(a) authorized under an enactment to practise the profession of

- (i) medical practitioner,
- (ii) registered psychologist,
- (iii) registered nurse or registered psychiatric nurse,
- (iv) occupational therapist,
- (v) physical therapist,
- (vi) social worker,
- (vii) chiropractor, or
- (viii) nurse practitioner, or

(b) acting in the course of the person's employment as a school psychologist by

- (i) an authority, as that term is defined in section 1 (1) of the *Independent School Act*, or
- (ii) a board or a francophone education authority, as those terms are defined in section 1 (1) of the *School Act*,

if qualifications in psychology are a condition of such employment.

### **Severity of impairment**

The legislation requires that for PWD designation, the minister must be "satisfied" that the person has a severe mental or physical impairment. The legislation makes it clear that the determination of severity is at the discretion of the minister, considering all the evidence, including that of the appellant. Diagnosis of a serious medical condition or the identification of mental or physical deficits does not in itself determine severity of impairment.

#### Severity of physical impairment

In the reconsideration decision, the ministry determined that a severe impairment of physical functioning had not been established. In making this determination, the ministry noted that the GP has indicated that the appellant does not require aids or prosthesis. The ministry also considered the functional skills assessment by the GP and mobility and physical ability assessments provided by the PT. The ministry concluded that while the appellant does experience some restrictions, the assessments provided along with the SR were reflective of a moderate rather than severe impairment.

The panel finds that the ministry's determination was reasonable. The appellant argued that the ministry's error was to assess the impairment as moderate rather than severe. The panel notes the appellant's argument that there is no definition of moderate in the legislation and that the appellant's statements are reflective of a severe impairment. The appellant argued that while she can complete the things she needs to get done, she often pays a price in terms of the pain she suffers the following day. As a result, she argues, she is forced to carefully plan every aspect of her life. The panel notes that the assessments of the appellant's functional capacity and mobility and physical ability in the MR, AR and the SR indicate that the appellant is able to function independently, albeit with pain and some limitation with her ability to remain seated or standing. The panel also notes that the commentary provided by the GP suggests that the appellant is able to function independently but suffers from pain with prolonged sitting or standing. The PT's commentary also supports the appellant's ability to function independently, with some tasks being broken down into shorter loads or spells of activity. As well, the panel finds that the MD's report indicates that the appellant is capable of light to moderate intensity domestic, recreations and work activities. The panel finds that all of these assessments reflect the appellant's ability to maintain a significant level of activity. The panel further notes that the appellant has also discussed her inability to work. However, the panel notes that employability or vocational ability is not a criterion for PWD designation nor is it a DLA set out in the regulation. The panel finds that the information provided in the appellant's materials does not establish a severe physical impairment. As such, the panel finds that the ministry's determination, that a severe physical impairment has not been established, is reasonably supported by the evidence.

#### Severity of mental impairment

In the reconsideration decision, the ministry determined that the information provided does not establish a severe mental impairment. The ministry noted that the GP's assessments in the MR do not reflect a mental health diagnosis but do indicate that the appellant is becoming secondarily depressed and does have a deficit with cognitive and emotional functioning in the area of emotional disturbance. The ministry also noted that, in the AR,

the PT has not provided an assessment of impacts to cognitive and emotional functioning. The ministry noted that the GP and PT indicate no difficulties with communication. The ministry considered the GP's indication in the MR that the appellant is restricted with social function and that the PT has not completed this portion of the AR. Finally, the ministry noted that the MD did not provide an opinion as to a mental impairment. The ministry concluded that the information provided had not established a severe impairment of mental functioning.

The panel finds that the ministry's determination that a severe mental impairment has not been established was reasonable. The panel notes that absence of a mental health diagnosis and scarcity of information in the PWD application and appellant's other documents relating to a mental impairment. At the hearing, the appellant did not argue that the ministry had erred in its conclusions with respect to the presence of a mental impairment. The panel finds that assessments in the MR and AR do not reflect significant restrictions in the appellant's ability to function effectively or independently as a result of a mental health condition, nor does the information provided by the appellant or the MD. The panel notes that the GP has indicated that the appellant is restricted with social function, but finds that the information provided does not indicate that this restriction establishes a severe impairment. The panel notes the GP's and PT's assessments relating to decision-making and communicating indicate that the appellant is independent in all areas. The panel finds that the ministry's determination, that a severe mental impairment has not been established, is reasonably supported by the evidence.

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

The legislation specifies that the minister assess direct and significant restrictions in the ability to perform DLA in consideration of the opinion of a prescribed professional, in this case the GP and PT. This does not mean that other evidence should not be considered, but it is clear that a prescribed professional's evidence is fundamental. At issue in this assessment is the degree of restriction in the appellant's ability to perform the DLA listed in section 2(1)(a) and (b) of the EAPWDR. The panel notes that, according to the legislation, the direct and significant restriction in the ability to perform DLA must be due to a severe mental or physical impairment.

The ministry was not satisfied that the appellant has a severe impairment that, in the opinion of a prescribed professional, directly and significantly restricts her ability to perform DLA. In reaching this conclusion, the ministry noted that the GP's assessment indicates that the appellant has not been prescribed medication that interferes with her ability to perform DLA. The ministry further considered that the GP has indicated that the appellant is restricted with meal preparation, basic housework daily shopping and mobility outside of the home. The ministry noted that the PT indicated that the appellant is independent in all DLA but takes significantly longer than typical to manage several tasks. The ministry noted that the PT has not indicated how much longer the appellant requires to manage DLA. The ministry concluded that restrictions to the appellant's ability to perform DLA are moderate rather than significant restrictions and the information from the GP and PT do not establish that a severe impairment significantly restricts the appellant's ability to perform DLA continuously or periodically for extended periods.

The panel finds that the ministry's determination that the assessments provided do not establish that a severe impairment significantly restricts the appellant's ability to perform DLA continuously or periodically for extended periods was reasonable. The panel notes that the legislation specifies that direct and significant restrictions to DLA must be in the opinion of a prescribed professional. The panel notes that the GP has indicated in the MR that the appellant is restricted with some DLA; however, the PT assesses the appellant as being independent but requiring additional time for these activities. Further, the appellant's own information is that she is largely independent with respect to DLA. The panel finds that, in relation to the only areas where some restriction is assessed in the assessments indicate that the restriction means that the appellant takes longer to complete these tasks; however, information as to how much longer has not been provided. As such, the panel finds that there is insufficient detail provided to establish whether the appellant's taking longer meets the threshold set out in the legislation of "significant restrictions continuously or periodically for extended periods". The panel concludes that the ministry's determination that the evidence is not sufficient to show that the appellant's overall ability to perform her DLA is significantly restricted either continuously or periodically for extended periods is reasonable.

#### **Help required**

The legislation requires that, as a result of being directly and significantly restricted in the ability to perform DLA either continuously or periodically for extended periods, a person must also require help to perform those activities. The establishment of direct and significant restrictions under section 2(2)(b)(i) is a precondition of meeting the need



for help criterion. Help is defined in subsection (3) as the requirement for an assistive device, significant help or supervision of another person, or the services of an assistance animal in order to perform a DLA.

In the reconsideration decision, the ministry determined that as it had not been established that the appellant's ability to perform DLA were significantly restricted, it cannot be determined that significant help is required. While the information provided demonstrates that the appellant does receive some assistance from family and friends and relies on a handrail to climb stairs, the panel has concluded that the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established. As such, the panel finds that the ministry reasonably concluded that under section 2(2)(b)(ii) of the EAPWDA it cannot be determined that the appellant requires help to perform DLA.

**Conclusion**

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

[Redacted]

**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 Jennifer Smith	
SIGNATURE OF CHAIR	DATE (YEAR/MONTH/DAY) 2018/11/16

PRINT NAME Keith Lacroix	
SIGNATURE OF MEMBER	DATE (YEAR/MONTH/DAY) 2018/11/16

PRINT NAME Carman Thompson	
SIGNATURE OF MEMBER	DATE (YEAR/MONTH/DAY) 2018/11/16