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PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development (the ministry) reconsideration decision of November 23, 2012, which found that the appellant did not meet three of five statutory requirements of section 2 of the *Employment and Assistance for Persons With Disabilities Act* (EAPWDA) for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement and that in the opinion of a medical practitioner 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; or that
- as a result of those restrictions, the appellant requires the significant help or supervision of another person, an assistive device, or the services of an assistance animal.

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

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PART E – Summary of Facts

The information before the ministry at the time of reconsideration included the following:

- The appellant's application for designation as a PWD. The application included a physician's report (PR) completed and signed by the appellant's addiction physician on May 16, 2012, and an assessor's report (AR) completed and signed by a registered psychiatric nurse (the RPN) on August 13, 2012. The application also included a self-report signed by the appellant on April 28, 2012.

- The appellant's Request for Reconsideration, inclusive of the appellant's written submission to the ministry's reconsideration officer, dated November 23, 2012.

Admissibility of New Information

For purposes of the appeal hearing the appellant's advocate prepared a written submission, with three attachments consisting of advocate-prepared forms signed respectively by the appellant's psychiatrist, her hepatitis C physician, and a social worker. The panel has accepted the written submission as argument. The three advocate-prepared forms provide more detailed information with respect to the nature of the appellant's impairments, the restrictions they cause to the appellant's ability to manage DLA, and the help she receives to manage her DLA. The ministry stated no position on admissibility of the new information. The panel has admitted these forms into evidence as being in support of information and records that were before the ministry at the time of reconsideration, in accordance with s. 22(4) of the *Employment and Assistance Act.*

The ministry relied on its reconsideration decision and submitted no new information.

Physical Impairment

- The addiction physician diagnosed the appellant with heroin addiction, chronic hepatitis C, and chronic GI reflux. He also referred to hypertension, and the following self-reported conditions – weight loss, panic attacks, and anxiety.
- The addiction physician explained that the appellant had been his patient for 10 years, but for the last 9 months she was no longer his patient.
- With respect to duration of the appellant's impairments, the addiction physician wrote that the addiction and hepatitis were not expected to improve. He also indicated that the depression was not well controlled by medication.
- The addiction physician reported that he did not know the extent of the appellant's physical functional skills – that is, her ability to walk unaided on a level surface, climb stairs, lift, or remain seated.
- The addiction physician noted that the appellant is on medication that may increase fatigue and cause constipation.
- The RPN referred to gallstones and back pain as being impairments.
- The RPN indicated the appellant requires periodic assistance with most categories of mobility and physical ability – walking indoors and out, climbing stairs, and carrying/holding. Her observations were qualified by the comment "As reported by the client."
- The three advocate-prepared forms are all identical, except that the form completed by the social worker does not contain the statement that "These conditions will likely continue for at least 2 years." Each of these three forms refers to "...chronic Hep C, chronic GI efflux (*sic*),

heroin addiction, depression and anxiety with panic attacks, hypertension."

- The three advocate-prepared forms do contain information about functional skills, stating that the appellant: has trouble with walking due to depression, whole body pain, and lack of appetite; is unable to lift more than 8-10 kg "due to severe health condition"; can't stand for more than 10 minutes due to leg pain; is unable to climb stairs without handrail support.
- In her self-report, the appellant referred to depression, stomach problems, panic attacks, anxiety and hepatitis C.

Mental Impairment

- The addiction physician diagnosed the appellant with depression, saying that it aggravates her other health conditions and *vice versa.* He also noted that the appellant self-reported panic attacks and anxiety.
- He also noted significant deficits with cognitive and emotional function in the areas of emotional disturbance (*e.g depression, anxiety*), motivation, and impulse control, commenting that these are related to the addiction and depression.
- The addiction physician indicated the appellant is not restricted with respect to her ability to manage her finances, daily decision making, or interacting, relating and communicating with others.
- The RPN referred to "major depression", qualifying her statement by noting "according to the client."
- The RPN noted major impacts to 4 out of 14 categories of cognitive and emotional functioning, moderate impacts to 4 out of 14 categories, and minimal or no impacts to 6 out of 14 categories.
- There are two prescribed DLA that are specific to severe mental impairment: social functioning (*relating to, communicating or interacting with others effectively*) and decision making (*in relation to personal activities, care or finances.*) In terms of social functioning, the RPN reported the appellant as needing periodic or continuous support in all aspects except that she is independently able to secure assistance from others. She described the appellant as being marginally functioning with her immediate social network, and having very disrupted functioning with her extended social network due to isolating herself over fears that others are judging her.
- In her self-report the appellant wrote that she has a "very supportive family".
- The three advocate-prepared forms indicate that the appellant requires support to maintain her social network, working with a team in a hospital program.

DLA

- The addiction physician indicated that the appellant is independent with respect to 4 of the 10 prescribed DLA (*management of medications, management of finances, daily decision making, and social functioning.*)
- He indicated she needs periodic assistance with 4 out of 10 DLA (*personal self-care, meal preparation, basic housework, use of transportation*), and with one aspect – mobility inside the home - of another DLA (*moving about indoors and outdoors.*)
- The addiction physician indicated that the appellant requires continuous assistance with 1 DLA (*daily shopping*), and with one aspect – mobility outside the home – of another DLA (*moving about indoors and outdoors.*)
- With respect to periodicity, the addiction physician noted that as with any chronic disease the

appellant may feel stronger from time to time and be able to manage a little better.

- The RPN reported the appellant as being fully independent with 1 DLA (*managing medications*), and with most aspects of another 2 other DLA (*transportation* - while noting that the appellant avoids using public transportation because of anxiety and panic attacks, and *personal care* – while noting that the appellant takes longer than typical with some aspects.)
- The RPN reports the appellant as requiring continuous or periodic assistance with virtually all other aspects of all other DLA.
- The three advocate-prepared forms indicate the appellant requires continuous or periodic assistance with aspects of 9 DLA. There is no express indication of the appellant's ability to manage the 10th DLA (*decision making.*)
- In her self-report, the appellant wrote that some days she cannot function at all because of stomach issues. She sometimes requires the help of family and friends to do shopping and housekeeping. She indicated that she has little money to pay for transportation, that she tries to book all her appointments around her ability to get rides from other people, and that she has to try to save money for over-the-counter medications.

Help

- The addiction physician reported that the appellant requires no prostheses or aids for her impairments.
- In response to a question in the PR asking for specific information about assistance needed by the appellant, the addiction physician wrote "needs help [with] children, cleaning, cooking, transportation."
- The RPN reported the appellant requires help from family, health authority professionals, and community service agencies.
- The RPN did not indicate that any assistive devices are used, though she did indicate that glasses are required by the appellant but not currently being used. She also indicated that the appellant does not have an assistance animal.
- In her SR the appellant said she sometimes needs help from family and friends with respect to shopping and housekeeping, and from "people" with respect to transportation.
- The three advocate-prepared forms refer to help provided by the appellant's mother, sister, older daughter, "family", health care professionals and non-profit organizations.

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PART F – Reasons for Panel Decision

The issue on this appeal is whether the ministry's decision to deny the appellant 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. In particular, was the ministry reasonable in determining that the appellant does not have a severe physical or mental impairment, and that in the opinion of a prescribed professional the appellant's impairments do not directly and significantly restrict her from performing DLA either continuously or periodically for extended periods, and that as a result of those restrictions the appellant does not require help to perform DLA?

The relevant legislation is as follows:

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 section 2(1):

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 authorized under an enactment to practice the profession of

(a) medical practitioner,

(b) registered psychologist,

(c) registered nurse or registered psychiatric nurse,

(d) occupational therapist,

(e) physical therapist,

(f) social worker,

(g) chiropractor, or

(h) nurse practitioner.

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Severe Physical Impairment

The appellant's position, as expressed by her advocate, is that it is unreasonable for the ministry not to accept the medical information at face value as provided by the medical professionals. She argues that the information provided by the addiction physician and the RPN is "vital" and that it "should be paramount when determining the severity of the person's medical conditions" and the "restrictions" on DLA. The appellant argues that hepatitis C, drug addiction, reflux disease, depression, and anxiety with panic attacks are severe impairments that cause symptoms of chronic fatigue, lack of appetite and sleep, and constant constipation among others. These conditions and symptoms restrict the appellant's ability to manage DLA. The appellant argues that "severe impairment" must be interpreted in broad terms, and that the ministry erred in not considering all the evidence.

The ministry's position, as expressed in its reconsideration decision, is that as there are no apparent functional skill limitations or information on frequency or duration of help required with mobility and physical abilities, the ministry was not satisfied that the information provided is evidence of a severe physical impairment.

Panel Decision

The diagnosis of a medical condition is not itself determinative of a severe impairment. One person with, say, diabetes may be significantly restricted from being able to manage DLA independently, while another person with diabetes may be entirely unrestricted. Accordingly, to assess the severity of an impairment one must consider the nature of the impairment and its impact on the appellant's ability to manage her DLA as evidenced by functional skill limitations, the restrictions to DLA, and the degree of independence in performing DLA. The ministry describes this approach well when it defines the word "impairment" in the PR form as being "*a loss or abnormality of psychological, anatomical or physiological structure or function causing a restriction in the ability to function independently, effectively, appropriately or for a reasonable duration.*" Of course, this definition is not set out in legislation and is not binding on the ministry, but in the panel's view it quite appropriately describes the legislative intent.

The legislation makes it clear that the determination of severity is at the discretion of the ministry – the ministry must be "satisfied" that the statutory criteria for granting PWD designation are fulfilled. In making its determination the ministry must consider all the relevant evidence, including that of the appellant. While the legislation is clear that the fundamental basis for the analysis is the evidence from prescribed professionals, in exercising its decision-making power the ministry cannot blindly defer to the opinion of the professionals with respect to whether the statutory requirements are met as that approach would amount to an improper fettering of discretion. The professional evidence has to be weighed and assessed like any other evidence.

In the instant case the evidence of the professionals is, as noted by the ministry, somewhat problematic. The addiction physician, who has known the appellant for at least 10 years, was not able to describe whether the appellant has any physical functional limitations. The RPN had no history with the appellant and relied on the PR as the only source of information from a medical practitioner, yet there are unexplained discrepancies between the information provided in the PR and AR. For example, the PR indicates that the appellant has no restrictions with social functioning, while the AR indicates the appellant has very disrupted functioning or marginal functioning in this area. The RPN qualified at least three pages of the information she provided in the AR as being "as reported by the client" or "according to the client", making the AR tantamount to a self-report. In the panel's view, by using those phrases the RPN was effectively saying that she was transcribing for the appellant rather than exercising her own professional judgment. The narrative accompanying several of the functional limitations noted by the RPN – problems with walking indoors and outdoors, climbing stairs, standing, and carrying/holding - indicates that those limitations arose because of medical conditions (gallstones, back ache) that were not identified or corroborated by the addiction physician or by the two medical practitioners who signed the advocate-prepared forms. Section 2 of the EAPWDA requires an impairment and its duration to be confirmed by a medical practitioner.

Even though the AR is substantially a self-report, there are significant discrepancies between it and the appellant's actual self-report. In her self-report the appellant wrote that she "sometimes" needs

the help of family and friends for shopping and housekeeping. In the AR the RPN indicated that the appellant needs continuous assistance to perform these DLA. The reason given in the AR for not using public transportation is anxiety and panic attacks. In the self-report the appellant wrote that she has to get rides to her appointments from other people, primarily because she does not have the funds to pay for transportation. She does not mention anxiety or panic attacks being a contributing factor.

The appellant, through her advocate, sought to fill some of the gaps in the professional evidence by having the three advocate-prepared forms signed by 2 medical practitioners and a social worker (all of whom are prescribed professionals.) This information was not before the ministry at the time of reconsideration but the panel has determined it meets the statutory test for admissibility so it can be considered on appeal. These advocate-prepared forms are themselves problematic, however. They consist of preprinted "professional opinions" with boxes that are checked off by the prescribed professional. Except for the one exception previously noted, they are all identical, and in contrast to the PR and AR forms included no narrative where the prescribed professionals have added any explanatory information or otherwise indicate that they have turned their mind to the preprinted "opinions". The appellant, through her advocate, has advised that she has been seeing the psychiatrist and the hepatitis C physician for "almost a year", which the panel assumes is the 9 month period during which the appellant was no longer the addiction physician's patient. In contrast to the PR and the AR, there is no information as to how often these professionals have seen the appellant and there is no information as to what role the social worker has played.

The advocate-prepared forms do provide some information on functional limitations that was not provided in the PR. The appellant is limited to lifting and carrying 8 to10 kilograms. There is no limitation identified regarding the number of stairs the appellant can climb as long as there is a handrail for support. The panel notes that a handrail does not meet the statutory definition of an assistive device provided in s. 2 of the EAPWDR since it was not designed to enable a person to perform a DLA. Basic mobility is reported to be limited in part by "whole body pain", but the panel is unable to discern any link between any of the diagnosed impairments and this pain. The appellant is reported to be able to stand for only 10 minutes because of leg pain, but again there is no indication as to which – if any – of the diagnosed impairments is the cause of the leg pain. Given all of these short-comings, the panel is unable to give any significant weight to the three advocate-prepared forms. Where there is inconsistency in the evidence among the five prescribed professionals, the panel generally prefers the evidence of the addiction physician, who has known the appellant for 10 years and who has supported his evidence with his own descriptive narrative.

The appellant has argued that the ministry's assessment of severity should be based on unquestioning acceptance of the evidence provided by the qualified professionals. Besides that approach not being defensible, the evidence in this case contains a number of significant inconsistencies and does not identify any discernible links between the diagnoses, the causes and extent of restrictions to DLA, the duration of those restrictions, and the degree of independence in performing DLA.

Given the limited amount of weight that can be given to the evidence in the AR and the three advocate-prepared forms, the lack of evidence to demonstrate the links between the diagnoses, the functional limitations, the restrictions to DLA, and the appellant's degree of independence as detailed below, the panel finds that the ministry was reasonable in concluding that the evidence is insufficient

to demonstrate a severe physical impairment.

Severe Mental Impairment

The appellant did not advance an argument specific to severe mental impairment but did note that the term "severe" should be interpreted broadly, and argued that the appellant's depression, anxiety and panic attacks – in conjunction with the physical impairments - constitute severe impairments.

The ministry's position is that the information related to mental impairment was largely self-reported, and that there was a discrepancy between the reported cognitive and emotional deficits and impacts on daily function. The ministry was not satisfied that the information provided was evidence of a severe mental impairment.

Panel Decision

The evidence of the addiction physician indicates that while there are deficits in three areas of cognitive and emotional function, the depression is primarily an aggravating factor of the physical conditions. The depression does not seem to translate into significant impacts on the appellant's ability to manage her DLA. The addiction physician reports the two DLA that are specific to severe mental impairment – decision making and social functioning - as being unrestricted.

The RPN reports the appellant as socially very disrupted or marginally functional. This does not coincide with either the PR or with the appellant's self-report which indicates the appellant has extensive positive interactions with family and friends, and describes a very supportive family relationship.

Considered as a whole, the evidence indicates that the appellant's mental health condition is an aggravating factor in impacting the appellant's ability to manage DLA independently, but the panel finds that the ministry reasonably concluded that the evidence falls short of demonstrating that the appellant suffers from a severe mental impairment.

Restrictions to DLA

The appellant's position is that the medical evidence is sufficient to demonstrate that this legislated criterion is satisfied. She argues that it is reasonable to conclude that she is restricted from most of her DLA because they generally require normal sleep, normal appetite, and interest in life. The appellant argues that the ministry erred in referring to the lack of evidence of the degree and frequency of assistance as a ground for denial, and that the ministry should focus on the evidence before it rather than on what the application lacks.

The ministry's position is that as a severe impairment has not been established, and because there is no information to describe the degree and duration of support/supervision required by the appellant, the information from the prescribed professionals does not establish that impairment significantly restricts DLA either continuously or periodically for extended periods.

Panel Decision

The legislation requires that a severe impairment directly and significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods. The term "directly" means that there must be a causal link between the severe impairment and the restriction. The direct restriction must also be significant – it must be more than trifling and more than merely an inconvenience. Finally, there is a component related to time or duration. The direct and significant restriction may be either continuous or periodic. If it is periodic it must be for an extended time. Inherently, any analysis of periodicity must also include consideration of the frequency. All other things being equal, a restriction that only arises once a year is less likely to be significant than one which occurs several times a week. Accordingly, in circumstances where the evidence indicates that a restriction arises periodically, it is entirely appropriate for the ministry to require evidence of the duration and frequency of the restriction in order to be "satisfied" that this legislative criterion is met.

The PR indicates that the appellant is essentially unrestricted in 4 of 10 DLA - *management of medications, management of finances, daily decision making,* and *social functioning.* This information is substantially corroborated by the appellant's self-report in which she describes managing her funds with respect to rent, food, transportation and over-the-counter medications. She also reports having a supportive network of family and friends.

Regarding the direct link between the appellant's medical conditions and the restrictions to any DLA, the PR indicates generally that they "have her functioning poorly at best." There is nothing to indicate, for example, how the appellant's medical conditions directly and significantly restrict her from *shopping.* The AR provides more detail, indicating that the appellant can independently read prices and labels, but that she needs continuous assistance in getting to and from stores, making appropriate choices, paying for purchases, and carrying purchases home. The PR and self-report indicated that the appellant has no restrictions with respect to decision making and that she manages her finances, so it is unclear what causes her inability to make appropriate purchasing decisions or to pay for purchases. The panel must assume that the appellant requires help carrying purchases only when they exceed the lifting capacity of up to 10 kg referred to in the advocate-prepared forms. There is no indication that the appellant is not able to use a wheeled shopping cart to transport purchases out to the vehicle or into the home.

With respect to the DLA of *moving about indoors and outdoors*, the PR indicates that the appellant is either continuously or periodically restricted. There is no discernible indication as to how any of the appellant's diagnosed impairments directly restrict her mobility. The AR indicates that the restrictions to mobility are caused by gallstones and back pain, neither of which is confirmed by any of the medical practitioners.

Regarding the remaining 4 DLA – *personal self-care, meal preparation, basic housework, and use of transportation* – the PR indicates that these restrictions are periodic. There is no indication of frequency or duration of these restrictions other than that the appellant feels stronger from time to time and may be able to manage better at some times than others.

With respect to *personal self-care* the AR provides more detail and indicates that the appellant is independent in all but one aspect of self-care, though she takes significantly longer than typical with some aspects due to lack of motivation. The only aspect of self-care where assistance is indicated is

with respect to regulating her diet. There is no indication of why the appellant is incapable of regulating her diet when her decision-making ability is otherwise not restricted.

Regarding *meal preparation* and *basic housework*, the AR's evidence that the appellant requires continuous assistance with these DLA conflicts with the PR's evidence that the restrictions are periodic and with the appellant's own evidence that she sometimes requires assistance with housekeeping. There is no evidence as to how the appellant's impairments directly result in her not being able to perform at least the lighter aspects of either DLA. The advocate-prepared forms indicate that the appellant will, in fact, prepare "simple quick foods if no one is around but will not prepare a cooked meal herself."

Finally, with respect to the DLA of *using public or personal transportation facilities*, the appellant's self-report indicates that the primary restriction faced by the appellant is a lack of funds to be able to pay for transportation. Otherwise, the appellant appears to have little trouble arranging transportation with other persons. The appellant made no reference to panic attacks or anxiety restricting this DLA.

Viewed as a whole, the evidence paints a picture of the appellant as having restrictions to many DLA, but in most cases there is no discernible direct link confirmed by the prescribed professionals between her medical conditions and these restrictions, there is conflicting evidence as to whether many of the restrictions are continuous or periodic, and there is insufficient evidence with respect to the duration or extent of the periodic restrictions. Based on this analysis, the panel finds that the ministry reasonably determined that the evidence does not establish that the appellant's impairment's significantly restrict DLA either continuously or periodically for extended periods.

Help with DLA

The appellant's position is that as a result of her restrictions the appellant requires significant help for most DLA.

The ministry's position is that as it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required from other persons.

Panel Decision

The evidence indicates that the appellant receives assistance from others with some aspects of some DLA. In the panel's view there is simply insufficient evidence to show that the appellant relies upon "the significant help or supervision of another person." The appellant does not use assistive devices or an assistance animal.

The panel finds that the ministry reasonably concluded that as it has not been established that DLA are significantly restricted, it could not be determined that the appellant requires help with DLA as defined by s. 2(3)(b) of the EAPWDA.

Conclusion

The panel acknowledges that the appellant is suffering from medical conditions that affect her ability to function. However, having reviewed and considered all of the evidence and the relevant

legislation, the panel finds that the ministry's decision declaring the appellant ineligible for PWD designation is reasonably supported by the evidence and is a reasonable application of the legislation in the circumstances of the appellant, and therefore confirms the ministry's decision.