

**PART C – DECISION UNDER APPEAL**

The decision under appeal is the Ministry of Social Development and Poverty Reduction (“the ministry”) reconsideration decision dated April 15, 2019, 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:

- the appellant's PWD Application comprised of:
  - a medical report ("MR") dated December 2, 2018 completed by the appellant's family physician ("the GP"), who has known the appellant for 19 years and who has seen the appellant 2-10 times in the past 12 months; and
  - an Assessor report ("AR") dated December 3, 2018 completed by the appellant's social worker ("the Assessor"), who has known the appellant for 2 years and who has seen the appellant 2-10 times in the past 12 months;
- the appellant's request for reconsideration submitted March 18 2019;
- December 15, 2014 imaging report (hands) noting the following result: no apparent soft tissue swelling or calcification, minimal interphalangeal periarticular erosions, suggesting early erosive arthropathy;
- February 10, 2016 imaging report (thumb and hands), seeking comparison with December 15, 2015 imaging report. Result: mild degenerative changes
- August 14, 2017 consultation letter from rheumatologist Dr. G, noting positive serum test for rheumatoid arthritis, bilateral carpal tunnel syndrome. Dr. G wondered if the appellant suffers from osteoarthritis (OA), which had an inflammatory phase now subsided. Dr. G noted the following report from the appellant:
  - denies any morning stiffness or swollen joints, and no other joint involvement
  - struggles to lift heavy plates [REDACTED]
- August 21, 2017 imaging report (hands) showing mild OA, no sign of rheumatoid arthritis;
- September 14, 2017 letter from Dr. G, summarized as follows:
  - no significant changes since last visit
  - [appellant] has restarted sulphur powder which has helped pain significantly
  - rheumatoid factor negative
  - Impression: OA in hands most likely, no signs of inflammation
  - Recommendation: Tylenol Arthritis twice daily, Advil on working days, keep working
- August 3, 2018 letter from medical geneticist Dr. GR, indicating that some, but not most, carriers of Hypophosphatasia (HPP) develop arthritic problems, some developing a rheumatic condition and that other mutations potentially can be contributing to muscle and bone pain in HPP carriers.
- October 24, 2018 letter from metabolic specialist Dr. S, noting that the appellant has a recessive form of HPP that does not manifest the disease, but may contribute to the appellant's risk of developing inflammatory arthritis. Dr. S also wrote that the appellant's HPP carrier status does not cause "brain fog".

### PWD Application Summary

#### Diagnosis

In the MR the GP noted that for the past 3 – 4 years the appellant has suffered from joint pain. The GP also indicated that the appellant feels she has some cognitive issues ("*eg., trying to communicate at work*").

In the AR the Assessor listed the following impairments: rheumatoid arthritis, joint pain, arthritis, HPP carrier, brain fog which impacts some of her cognitive functions.

#### Physical Impairment

In the MR the GP reported that the appellant can walk 1-2 blocks unaided on a flat surface ("*I have not observed this. The appellant reports less than 2 blocks walking ability*"), climb 2-5 steps unaided, lift 5-15 pounds and

remain seated for less than 1 hour (*"has to change positions for comfort"*). The appellant does not use an assistive device in the areas of bodily functions, attention/concentration.

In the AR the Assessor reported that the appellant:

- takes significantly longer to complete all areas of mobility and physical ability (*"ADLs take 3-4x longer due to her impairment, pain and stiffness"*);
- requires periodic assistance with lifting, carrying and holding (*"Takes longer if she does it. Periodic is 2-3x per week or as needed, 15-20 min duration"*).

### **Mental Impairment**

In the MR the GP noted that deficits with cognitive and emotional function are unknown (*"Cognitive difficulty not noted in office. Patient reports cognitive difficulty in memory, concentration, communication"*).

In the AR the Assessor noted that the appellant experiences major impacts to cognitive and emotional functioning in 3 areas:

- bodily functions (eg. eating problems, toileting problems, poor hygiene, sleep disturbance);
- attention/concentration (eg. distractible, unable to maintain concentration; poor short term memory);
- memory (eg. can learn new information and recall it, forgets over-learned facts).

The Assessor indicated that the appellant experiences no moderate impacts to cognitive and emotional functioning and is minimally impacted in motor activity (increased/decreased goal-oriented activity; coordination; lack of movement; agitation, ritualistic or repetitive actions; bizarre behaviours, extreme tension). No impacts to daily functioning are reported in the remaining 7 areas of cognitive and emotional functioning. The Assessor did not complete the Social Functioning section of Part C of the AR; the abbreviation "N/A" was written at the top of the page.

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

In the MR the GP noted that the appellant is periodically restricted with DLA in the following areas:

- personal self care (*"patient states she takes longer to dress re: pain with buttons"*)
- meal preparation (*"pain on chopping vegetables and meal prep"*)
- basic housework
- daily shopping (*"Carrying groceries- [she] reports she requires help to do this and go to store"*)
- mobility outside the home.

The GP also indicated that all areas of DLA except social functioning are continuously restricted, and added the following comments at the bottom of the DLA section of the MR: *"Patient complains of pain most joints, hands, elbows, feet, knees and hips, complains of general base pain"*.

In the AR the Assessor indicated that the appellant:

- is independent in feeding herself, regulating her diet, reading prices and labels, meal planning, safe storage of food, budgeting, paying rent and bills, filling prescriptions and safe handling and storage of medication;
- requires continuous assistance from another person or is unable to do laundry, basic housekeeping, go to and from stores, carry purchases home, prepare food and cook;
- takes significantly longer than typical with dressing, grooming, bathing, toileting, transfers in/out of bed and on/off chairs, making appropriate shopping choices (*"due to feeling brain fog and fatigue"*) paying for purchases, banking (*"mobility to and from takes longer"*), getting in and out of a vehicle (*"due to pain and stiffness, uses door or steering wheel"*), using public transit (*"if had to, would take longer to get to bus"*).

stops”).

The Assessor added the following comment at the end of the DLA section: “[DLA] take 3-4 x longer due to severe impairment, pain, stiffness and fatigue. Continuous assistance for food prep and cooking, ongoing basis from others. Daughter helps and family.”

#### **Assistance Required**

In the MR the GP commented: “Patient states needs help getting groceries, meal preparation, heavy housework, difficulty lifting and carrying.”

In the AR the GP noted that assistance with DLA is provided by family and friends.

#### **Additional Information Received after Reconsideration**

No additional information was received but the appellant’s advocate submitted a 4 -page typewritten argument in support of the appellant’s position.

**PART F – REASONS FOR PANEL DECISION**

The issue in this appeal is whether the ministry reasonably determined that the appellant was ineligible for designation as a PWD. The ministry determined that the appellant did not meet all of the required criteria for PWD designation set out in the *Employment and Assistance for Persons with Disabilities Act*, Section 2. Specifically, the ministry determined that the information provided did not establish that:

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

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 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.

**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.

### **Severe Physical Impairment**

The appellant argues that she suffers a severe physical impairment arising from persistent joint pain. Her advocate made two submissions supporting this position.

The ministry's position is that the information provided by the GP, the specialist physicians and the Assessor related to the appellant's functional skills are not indicative of 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. 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, including the evidence of the appellant. 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.

The only physical diagnosis reported by the GP in the MR is joint pain. The GP believes that the appellant suffers from OA, as noted in Part C-1: "*The initial diagnosis of rheumatoid arthritis was later thought to be mainly OA*". The GP's opinion is supported by her rheumatologist, Dr. G, in her August 14, 2017 consultation letter, which also noted that the appellant denied any morning stiffness or other joint involvement. As well the findings of the August 21, 2017 imaging report showed no sign of rheumatoid arthritis. One month later the September 14, 2017 letter from Dr. G noted that the rheumatoid factor was negative and the appellant likely has OA in both hands, with no sign of inflammation. D. G advised the appellant to take non-prescription pain relief medication and to keep working.

In Section D of the MR the GP reported that the appellant can walk 1 to 2 blocks and climb 5+ steps unaided and lift 5 to 15 pounds. These functional skills impairments indicate that the appellant has difficulty walking and lifting moderately heavy loads, but do not indicate that she is severely restricted from carrying out these functions. The GP also indicated that the appellant can't stay seated for an hour: ("*has to move/change positions for comfort*"). This assessment by the GP indicates that the appellant experiences discomfort while seated, but does not demonstrate that she is unable to sit due to a severe physical impairment.

There is considerable information submitted by the appellant related to her belief that she suffers from an adult-onset form of HPP, but the medical evidence does not confirm this. In the additional functional skills comments section the GP writes that she will refer the appellant to the genetics clinic for further testing. Medical geneticist Dr. GR wrote in her August 3, 2018 letter that some but not most HPP carriers may develop arthritic problems and that other genetic factors may contribute. Metabolic specialist Dr. S wrote that the appellant has a recessive form of HPP that does not manifest as the HPP disease but may contribute to the risk of developing inflammatory arthritis.

None of the 4 physicians confirmed that the appellant has inflammatory arthritis, rheumatoid arthritis or HPP. The Assessor identified rheumatoid arthritis as one of the appellant's impairments, but does not support this position with medical evidence to rebut the finding of the 4 physicians. The information provided by the GP and by Dr. G describes the appellant as suffering from a less specific condition, namely "joint pain". In Part B-1 the GP noted: "*The patient feels she is also affected by HPP, hence her complaints of joint pain more severe than clinical exam or x-ray findings*". This statement and the recommendation made by Dr. G in September 2017 that the appellant "*keep working*" at her job which includes walking and carrying plates make it difficult to identify a severe physical impairment.

In Section A-3 of the AR the Assessor notes that the appellant takes significantly longer in all listed areas of physical and functional mobility, and comments: "*ADLs take 3-4x longer due to impairment and pain and stiffness*". Lifting, carrying and holding take longer if the appellant does it. The physicians' observations and conclusions relating to the severity of the appellant's physical impairment differ markedly from the findings of the Assessor. While the Assessor is a "prescribed professional" within the meaning of the legislation she has not provided a clinical foundation upon which to base her findings, and her assessment is based entirely on interviews with the patient. As a result, more weight must be given to the prescribed professionals whose opinions are based on clinical findings and diagnostic imaging results.

In conclusion, although it is clear from the information provided that the appellant's physical functioning and mobility is impaired due to the joint pain she experiences, the panel finds that ministry reasonably determined that the information provided does not establish a severe physical impairment.

### **Severe Mental Impairment**

The appellant argues that she suffers from a severe mental impairment as a result of a suspected cognitive issue.

The ministry's position is that there is insufficient information provided to establish that the appellant has a severe impairment in her mental functioning.

### Panel Decision

The GP did not provide a diagnosis of a mental disorder or cognitive impairment in the MR, and commented: "*Cognitive difficulty not noted in office*". The GP also indicated that significant deficits to cognitive and emotional

functioning are unknown. Metabolic specialist Dr S. stated in her October 24, 2018 letter that HPP carrier status does not cause brain fog.

The Assessor indicated that the appellant's mental impairment causes a major impact in the following 3 areas of daily functioning:

- attending to her bodily functions (eg., eating problems, toileting problems, poor hygiene, sleep disturbance)
- attention/concentration
- memory

The Assessor marked all other areas of cognitive and emotional functions as either "minimal" or "none".

Given the lack of diagnostic findings of a mental impairment and the limited degree of impact on cognitive and emotional functioning reported in the AR the panel finds that the ministry reasonably determined that the information does not establish that the appellant has a severe mental impairment.

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

The appellant argues that her ability to perform DLA is significantly restricted as a result of her severe impairment.

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 professionals 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 PR and the AR sections of the PWD application with the opportunity for the prescribed professional to check marked boxes and provide additional narrative.

In the MR the GP identified the following continuous restrictions to DLA: personal self care, meal preparation, basic housework, daily shopping and mobility outside the home. The GP added that it takes longer to dress, chop vegetables and prepare meals. Although the GP states that these 5 areas of DLA are continuously restricted her comment implies that the appellant is able to perform these DLA, albeit slowly and painfully.

The GP's assessment substantially correlates with the Assessor's assessment in the AR. The Assessor indicated that the appellant takes significantly longer than typical in most areas of personal care, banking and transportation. The Assessor also noted that the appellant requires continuous assistance from another person to do her laundry, basic housekeeping, going to and from stores, preparing food and cooking.

However, a finding of direct and significant restriction to perform DLA can only be made if a severe impairment has been established. Because this precondition of severe impairment was not met a finding of direct and significant restriction to DLA cannot be established. 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.



**Help in Performing DLA**

The appellant argues that she requires the significant help of other persons 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**

In her submission the appellant's advocate correctly pointed out that the legislation does not require that the appellant use an assistive device or the services of an assistance animal to meet this criterion. As a result the reconsideration officer's comment at the bottom of Page 11 of the reconsideration decision is not germane to the issue of help required: "*[The GP] indicates that you do not require any assistive devices to compensate for an impairment. [The Assessor] does not indicate that you require any assistive devices or an assistance to complete your DLA*".

In the MR the GP noted: "*Patient states needs help getting groceries, meal preparation, heavy housework, difficulty lifting and carrying*". The nature of help currently provided is not described. In the AR the Assessor noted that help required is provided by friends and family, but did not provide additional information to describe who is helping the appellant with DLA and to what extent. It is therefore difficult to determine whether the help required by another person or persons is significant.

The legislation requires the establishment of direct and significant restrictions with DLA as 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.

APPEAL NUMBER

**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)

2019/Jun/06

PRINT NAME

Janet Lingford

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019/Jun/06

PRINT NAME

Jean Lorenz

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019/Jun/06