

APPEAL NUMBER:

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

The decision under appeal is the Ministry of Social Development and Poverty Reduction's ("ministry") reconsideration decision dated April 12, 2019, in which the ministry found that the appellant was not eligible for designation as a Person with Disabilities ("PWD") under section 2 of the *Employment and Assistance for Persons with Disabilities Act* ("EAPWDA"). The ministry found that the appellant meets the age and duration requirements, but was not satisfied that:

- the appellant has a severe mental or physical impairment;
- the appellant's 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 restrictions caused by the impairment, the appellant requires an assistive device, the significant help or supervision of another person, or the services of an assistance animal to perform DLA.

The ministry also found that the appellant is not one of the prescribed classes of persons who may be eligible for PWD designation on the alternative grounds set out in section 2.1 of the *Employment and Assistance for Persons with Disabilities Regulation*. As there was no information or argument provided for PWD designation on alternative grounds, the panel considers that matter not to be at issue in this appeal.

### **PART D – RELEVANT LEGISLATION**

*Employment and Assistance for Persons with Disabilities Act* - EAPWDA - section 2

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

**PART E – SUMMARY OF FACTS**

The evidence and documentation before the minister at the reconsideration consisted of:

1. Information from the ministry's record of decision indicating that the PWD application was received by the ministry on January 16, 2019 and denied on February 14, 2019. On March 15, 2019, the ministry received the appellant's Request for Reconsideration ("RFR"). The appellant was granted an extension until April 12, 2019 to provide submissions and the ministry completed the review of the RFR on that date.
2. An RFR, with attached letter from the appellant dated March 8, 2019. In the letter, the appellant provides argument for the reconsideration and describes injuries and restrictions sustained as the result of an accident a few years ago. The appellant states that she was confined to a wheelchair for two years and although she is finally able to walk, she has a complete prosthesis in her left knee and immobility in her left foot. The appellant states that she takes medication for constant pain and at times she cannot get out of bed. The appellant requests an extension of three to four months to obtain her medical records from two other countries where she underwent surgical treatment.
3. The ministry's Decision Summary with attached letter dated February 14, 2019, indicating the appellant does not meet all of the criteria for PWD designation.
4. An RFR signed by the appellant on March 15, 2019, referencing her letter of March 8, 2019.
5. The appellant's PWD application comprised of:
  - the applicant information (self-report - "SR") dated December 27, 2018;
  - a Medical report ("MR") dated December 27, 2018, completed by a General Practitioner ("GP") who has seen the appellant 2 -10 times in the past 12 months; and
  - an Assessor Report ("AR") dated January 10, 2019, also completed by the GP who indicates he has known the appellant since July 2018 and based the assessment on an office interview with the appellant.

*Summary of relevant evidence from the application:*

*Diagnoses*

In the MR, the appellant is diagnosed with osteoarthritis of the left knee due to a previous fracture (onset 2015), peroneal nerve palsy secondary to drop foot and Achilles thickening - left foot (onset January 2014), and left ankle stiffness. Under *Health History*, the GP reports that the appellant had a complex fracture of the left knee (multi parts) in 2013 and subsequently had hardware removed from her knee. The GP states that the appellant had "left peroneal injury with drop foot which had left ankle Achilles z plasty and claw toe release." The appellant had total left knee arthroplasty (TKA) due to ongoing pain. The GP reports that the appellant has left ankle osteoarthritis and ongoing ankle pain when she walks.

*Functional skills*

Self-report

The appellant reports that she cannot move her left foot upwards or downwards and she cannot run or kneel. The appellant adds that she cannot wear shoes with heels as they cause her to fall. The appellant describes "permanent pains" in her ankle and knee area and reports that using her other leg for greater support causes exhaustion in that leg. The appellant states that walking "for a couple of hours" causes lower back pain as well.

Medical Report

Under section D, *Functional Skills*, the GP indicates the appellant can walk 4 or more blocks unaided on a flat surface and climb 5 or more steps unaided. The appellant has no limitations with lifting and no limitation with remaining seated. In addition, the appellant has no difficulties with communication (other than a lack of fluency in

English) and no significant deficits with cognitive and emotional function. Under *Additional Comments*, the GP writes that due to left ankle stiffness, the appellant experiences pain "mostly when physically active - more than 30 to 60 minutes walking."

#### Assessor Report

Under section B-2, *Ability to Communicate*, the GP assesses the appellant's ability in all areas of communication as *Good* but reports that the appellant has a language barrier due to English as a second language.

Under section B-3, *Mobility and Physical Ability*, the GP marks the appellant as independent with 5 of the 6 listed skills: *Walking indoors, Walking Outdoors, Standing, Lifting, and Carrying/holding*. The GP provides a comment for *Climbing stairs*, "does not need help but in discomfort."

For section B-4, *Cognitive and Emotional Functioning*, the GP drew a line through the checklist, indicating no mental impairment or brain injury that restricts or impacts the appellant's functioning.

#### *Daily Living Activities*

#### Medical Report

The GP indicates Yes, the appellant has been prescribed medications or treatments that interfere with her ability to perform DLA. The GP comments that the medication "can be sedative."

The GP checks *Unknown* [comment, "on and off"] when asked if the impairment restricts the person's ability to perform DLA. Regarding specific DLA listed on the form, the GP checks that there are no restrictions with any of these DLA: *Personal self-care, Meal preparation, Management of medications, Basic housework, Daily shopping, Mobility inside and outside the home, Use of transportation, and Management of finances*. The GP does not provide any check mark for *Social functioning* to indicate whether there are any restrictions.

When asked to explain any periodic restrictions, the GP comments, "Patient has random pain and discomfort that when it comes is severe." The GP writes, "N/A" when asked to explain any restrictions to social functioning.

#### Assessor Report

In response to which impairments impact the applicant's ability to manage DLA, the GP writes, "lives with roommate independently." In section C of the AR, the GP indicates that the appellant is independent with all of the listed DLA: *Personal care, Basic housekeeping, Shopping, Meals, Pay Rent and Bills, Medications, Transportation, and Social Functioning* [comments, "no concern" and "no issue mentally"]. Under *Additional Information*, the GP states that on and off left ankle pain and stiffness is the appellant's main issue; "however, it does not restrict her IDL/ADL" (Activities of Daily Living).

#### *Need for help*

In the MR, the GP check marks *No*, the appellant does not require any prostheses or aids for her impairment. In the AR, section D - *Assistance Provided for Applicant*, the GP comments that the appellant does not need help with ADL/IDL. The GP writes "N/A" when asked what equipment or devices the applicant routinely uses to help compensate for her impairment. The GP checkmarks that the appellant does not have an assistance animal.

6. A medical imaging report dated July 30 2019 indicating the appellant had x-rays of her left tibia and fibula and left lower extremity (additional view). Findings indicate *bone mineralization is decreased...no fracture or destructive osseous changes. The ankle is unremarkable (no early degenerative changes or joint effusion). No osseous abnormality in relation to the remainder of the tibia/fibula. Prosthetic knee components are unremarkable.*

7. An email to the GP from the appellant dated August 3, 2019. The appellant states that she is providing a letter from her surgeon in another country ("Country B") and that her most recent surgery was a "change of prosthesis" in a third country ("Country C"). The appellant states that she had delivered the x-rays that were requested by the GP. The appellant states that she is waiting for the GP's opinion "because of the pain I am having."

8. An orthopedic summary from a physician in Country B dated January 27, 2015. The letter states that the appellant was first evaluated at the clinic in Country B on October 1, 2013. The physician describes the surgeries the appellant had in 2013 and 2014 to alleviate "foot drop", ankle rigidity, and "contractures of her toes" that caused her difficulty with walking. Despite these successful surgeries, the appellant presented with knee pain. Hardware removal was performed and the appellant was scheduled to undergo a total knee arthroplasty for continued pain and dysfunction related to her post-traumatic knee arthritis.

9. A medical imaging report dated July 13, 2019 indicating the appellant had an x-ray of her left knee. Findings indicate the appellant's previous total knee replacement with no evidence of loosening or failure. No gross joint effusion or acute osseous abnormality was demonstrated.

#### *Additional information*

The appellant filed a Notice of Appeal with a hand-written statement which the panel accepts as argument. Subsequent to the reconsideration decision, the appellant provided a submission (in two parts) requiring an admissibility determination in accordance with section 22(4) of the *Employment and Assistance Act*. The submission includes a medical report from the appellant's surgeon in Country C, dated April 11, 2019 with notarial certificates and a certified translation into English. The letter indicates the appellant was first treated at the clinic in January 2015 due to her left knee trauma and injury.

The letter describes surgical interventions and the physician notes that the appellant is requesting a consultation for "pain in left knee, limitation on her every day activities." The appellant was diagnosed with left knee stage IV osteoarthritis and multiple ligament instability and a total knee arthroplasty of the appellant's left knee was performed in January 2015. Assessments undertaken four years after the surgery indicate the left knee "is stable and has complete motion." The physician reports that the appellant has residual pain and is "currently and continuously treated with pain medication" and she might need further surgery at some point in her life.

#### *Admissibility of Appendix A evidence*

The panel finds that the report from the physician in Country C provides additional details and background information on the appellant's medical conditions and surgical interventions that are the subject of the reconsideration decision. The ministry did not raise any objections to the submission and the panel admits it under section 22(4) of the *Employment and Assistance Act* as evidence in support of the information and records that were before the minister when the decision being appealed was made.

#### *Oral testimony*

The appellant attended the hearing with an interpreter for her native language. The panel accepts the appellant's testimony as argument in support of her position at the reconsideration.

The ministry relied on the reconsideration decision and did not submit any new evidence.

**PART F – REASONS FOR PANEL DECISION**

The issue on appeal is whether the ministry's decision that found the appellant ineligible for PWD designation is reasonably supported by the evidence or is a reasonable application of the legislation in the circumstances of the appellant. Was the ministry reasonable in finding that the following eligibility criteria in section 2 of the EAPWDA were not met?

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

The ministry based the reconsideration decision on the following 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.

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

**EAPWDR**

**Definitions for Act**

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

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

**(i)** prepare own meals;

**(ii)** manage personal finances;

**(iii)** shop for personal needs;

**(iv)** use public or personal transportation facilities;

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

**(vi)** move about indoors and outdoors;

**(vii)** perform personal hygiene and self-care;

**(viii)** manage personal medication, and

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

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

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

**Analysis*****Severe mental or physical impairment***

To be eligible for the PWD designation, the legislation requires several criteria to be met including the minister being satisfied that the applicant has a severe mental or physical impairment. "Severe" is not defined in the legislation but the diagnosis of a serious medical condition does not in itself establish a severe impairment of mental or physical functioning.

***Mental impairment***

To assess the severity of a mental impairment, the ministry must consider the extent of any impact on daily functioning as evidenced by limitations/restrictions with mental functions; restrictions with DLA requiring mental/social functioning; and whether significant help is required to manage DLA.

***Arguments and panel's decision – mental impairment***

The appellant is not arguing that she has a mental impairment and there is no evidence of a mental impairment in the MR and AR. The GP comments, "no issue mentally." The panel therefore finds that the ministry's determination that the appellant does not have a mental impairment was reasonably supported by the evidence.

***Physical impairment***

To assess whether the applicant has a severe physical impairment, the ministry considers the degree of restrictions to physical functioning, restrictions to DLA involving movement, and whether the applicant requires significant help or any assistive devices to manage DLA.

***Arguments - physical impairment***

The ministry argues the appellant does not have a severe physical impairment because according to the information in the MR and AR, she is able perform her physical functions independently. The ministry notes the appellant's self-reported "severe" limitations with mobility and acknowledges the GP's reports that state the appellant experiences ankle pain and stiffness with walking, and discomfort with climbing stairs. The ministry argues that the GP's assessments do not confirm a severe physical impairment.

The appellant argues that it is obvious she has a severe physical impairment because she has constant pain that limits her activities. The appellant argues that her physical functioning depends on taking pain medication and she usually stays home because she is not able to go out and function unless she takes her medication. The appellant argues that everyone can see she has a disability when she walks and that the x-ray reports and letters from her surgeons confirm she had multiple surgeries and has a prosthetic knee.

The appellant states that she does not understand why the GP said she does not use a prosthetic for her impairment when her prosthetic knee is clearly visible in the x-ray. The appellant reports that the GP had her x-rays and the report from her physician in Country B when he filled out the PWD forms and she has since given him the report from her physician in Country C. The appellant explains that due to her English language barrier she had communication difficulties with the GP but she went to twelve different doctors in Canada and the GP was the only one who would take her case.

***Evidence for physical impairment***

The evidence in the MR is that the appellant is able to walk 5 or more blocks and climb 5 or more steps unaided, indicating the least degree of restriction on the rating scale. In addition, the appellant has no limitations with lifting or remaining seated. The GP writes that the appellant experiences ankle pain "mostly when physically active - more than 30 - 60 minutes of walking. The GP indicates that the appellant has periodic restrictions due to "random pain and discomfort that when it comes is severe." In her self-reports and oral testimony, the appellant

acknowledges she can walk up to two hours but then she experiences back pain as well as the “permanent” pain in her ankle and knee.

In the AR, the GP indicates the appellant is independent with all aspects of physical mobility: *Walking* (indoors and outdoors), *Standing*, *Lifting*, and *Carrying/holding*. The GP comments that despite discomfort, the appellant does not need help with climbing stairs.

The recent medical report (April 2019) submitted by the appellant on appeal confirms the appellant’s self-reported pain, limitations with walking, and continuous need for pain medication. The report does not detail how far the appellant can walk despite pain. The physician suggests that the appellant may need a further surgery in the future to resolve her pain.

#### *Panel’s decision - physical impairment*

Considering the information in its entirety, the panel finds that the ministry reasonably determined the information provided does not confirm a severe impairment of physical functioning. Despite the appellant’s reports of “constant pain”, the GP indicates the appellant is independent with all of the physical functions listed in the forms. The GP confirms that the appellant has ongoing pain in her ankle when she walks and periodic restrictions due to “random pain” that is severe but his evidence is that the appellant experiences pain mostly with extended activity, “30 - 60 minutes walking.” The appellant’s report of pain after “walking for a couple of hours” supports the GP’s assessment.

In addition, the information in the MR and AR and additional medical record submitted on appeal indicate that the appellant’s pain is currently managed by medication although the GP reports that the medication can be sedating. The reports from the appellant’s recent x-rays (leg and knee) that were ordered by the GP suggest no serious abnormalities [“the ankle is unremarkable... prosthetic knee components are unremarkable...(knee) alignment appears appropriate”].

The appellant argues that her experience of constant pain as well as her “obvious” limp and prosthetic knee should be accepted as evidence of a severe physical impairment, but pain and a history of surgeries are insufficient on their own to confirm a severe impairment of physical functioning. In order to be satisfied that the legislative requirement for a severe impairment is met, the ministry requires medical evidence of severe limitations with physical functioning (in the areas of walking, climbing stairs, etc.). The medical reports acknowledge the appellant’s experience with significant pain but do not describe any severe limitations with walking or other physical functions. The panel therefore finds that the ministry reasonably concluded a severe physical impairment under section 2(2) of the EAPWDA was not established on the evidence.

#### ***Restrictions in the ability to perform daily living activities***

Subsection 2(2)(b)(i) of the EAPWDA requires the ministry to be satisfied that, in the opinion of a prescribed professional, a severe impairment directly and significantly restricts a person’s ability to perform DLA either continuously, or periodically for extended periods. In this case, the prescribed professionals are the GP as well as the physicians that provided the supplementary medical reports.

The term “directly” means there must be a causal link between the severe impairment and the restriction to DLA. The direct restriction must also be significant. Finally, there is a component related to time or duration: the direct and significant restriction may be either continuous or periodic. If periodic, the restriction must be for extended periods.

Inherently, an analysis of periodic restrictions must also include how frequently the activity is restricted. All other things being equal, a restriction that arises once a year is less likely to be significant than one that occurs several times a week. Accordingly, in circumstances where the evidence indicates that a restriction arises periodically, it is appropriate for the ministry to require evidence on the duration and frequency of the restriction in order to be satisfied that this criterion is met.

DLA are defined in section 2(1) of the EAPWDR and are also listed in the MR, with additional details in the AR. Therefore, a practitioner completing these forms has the opportunity to indicate which, if any, DLA are significantly

restricted by the applicant's impairments either continuously or periodically for extended periods, and to provide additional narrative. DLA, as defined in the legislation, does not include the ability to work.

### *Arguments - DLA*

The ministry argues there is not enough evidence from the appellant's medical practitioners to confirm that DLA are significantly restricted because the GP indicates the appellant can independently perform all of the DLA listed in the MR and AR despite pain and discomfort and the sedating effects of the appellant's medication.

At the hearing, the appellant acknowledged that she can do the DLA listed on the AR form, but stated that she cannot go out unless she takes pain medication, and so she avoids going out. The appellant submits that when she does go out, she faces a lengthy recovery period afterward.

### *Evidence from prescribed professionals*

In the MR, the GP confirms that the appellant is prescribed medications that interfere with her ability to perform DLA because the medications can have a sedative effect. In the MR (as noted by the ministry) the GP provides some inconsistent information on DLA. The GP indicates that it is *unknown* if the appellant's impairment restricts DLA (comment, "on and off"), and he reports that the appellant experiences "random pain and discomfort" that is severe when it comes. At the same time, the GP marks all of the DLA in the MR as not restricted.

The absence of any restrictions is consistent with the GP's information in the AR. In that report, the GP marks all of the listed DLA as *independent* (comment, "no concern"). In the AR as well, the GP writes that the appellant's on and off ankle pain and stiffness "does not restrict her IDL/ADL" and he comments that the appellant does not need help with "ADL/IDL."

The supplementary medical reports provided for the reconsideration and appeal do not contain any assessment of the appellant's ability to perform DLA. The physician in Country C reports that the appellant requested a consultation due to pain and "limitations on her everyday activities" but there is no information on restrictions to specific DLA.

### *Panel's decision - restrictions to Daily Living Activities*

Considering the information as a whole, the panel finds that the ministry reasonably determined there is insufficient information from prescribed professionals to establish that DLA are significantly restricted either continuously, or periodically for extended periods as required by the legislation. The GP assesses the appellant as independent with all of her DLA and despite experiencing pain with walking, the information in the PWD application establishes that the appellant can walk for up to an hour despite her reliance on pain medication. Given that the appellant's physical functions are not reported to be significantly restricted, it was reasonable for the ministry to conclude that the information from prescribed professionals did not establish that DLA are significantly restricted either continuously, or periodically for extended periods. Based on the information from prescribed professionals, for both physical functioning and DLA, the panel finds that the ministry reasonably determined the criteria in subsection 2(2)(b)(i) of the EAPWDA were not met.

### *Help to perform daily living activities*

Subsection 2(2)(b)(ii) of the EAPWDA requires that, as a result of direct and significant restrictions in the ability to perform DLA, a person requires help to perform those activities. Help is defined in subsection (3) as the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform DLA. The ministry's position is that because it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required.

The information in the MR and AR indicates the appellant lives independently (with her roommate) and does not use aids for her impairment, or assistive devices or an assistance animal to perform DLA. However, the panel accepts the appellant's evidence that she has a prosthetic knee as her knee replacement surgery is clearly referenced in the supplementary medical reports.



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*Panel's decision - help with Daily Living Activities*

Under the legislation, confirmation of direct and significant restrictions to DLA is a precondition for needing help to perform DLA. As the panel found that the ministry reasonably determined that significant restrictions to DLA were not established by the information provided, the panel also finds that the ministry reasonably concluded that the criteria for help under subsection 2(2)(b)(ii) of the EAPWDA are not met.

*Conclusion*

The panel finds that the ministry's reconsideration decision that found the appellant ineligible for PWD designation was reasonably supported by the evidence. The legislation requires all of the criteria to be met. Based on the functional skills and DLA assessments by prescribed professionals, and considering the evidence in its entirety, the panel finds that the ministry's reconsideration is reasonable as only two of the legislative requirements were met. The panel confirms the ministry's decision. The appellant is not successful on appeal.

<b>PART G – ORDER</b>	
THE PANEL DECISION IS: (Check one) <input checked="" type="checkbox"/> UNANIMOUS <input type="checkbox"/> BY MAJORITY	
THE PANEL <input checked="" type="checkbox"/> CONFIRMS THE MINISTRY DECISION <input type="checkbox"/> 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? <input type="checkbox"/> Yes <input type="checkbox"/> No	
<b>LEGISLATIVE AUTHORITY FOR THE DECISION:</b>	
<i>Employment and Assistance Act</i>	
Section 24(1)(a) <input checked="" type="checkbox"/> or Section 24(1)(b) <input type="checkbox"/>	
and	
Section 24(2)(a) <input checked="" type="checkbox"/> or Section 24(2)(b) <input type="checkbox"/>	

<b>PART H – SIGNATURES</b>	
PRINT NAME Margaret Koren	
SIGNATURE OF CHAIR	DATE (YEAR/MONTH/DAY) 2019-07-26

PRINT NAME Nancy Eidsvik	
SIGNATURE OF MEMBER	DATE (YEAR/MONTH/DAY) 2019-07-26
PRINT NAME Susan Ferguson	
SIGNATURE OF MEMBER	DATE (YEAR/MONTH/DAY) 2019-07-26