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PART C – DECISION UNDER APPEAL

(State the reconsideration decision)

The decision under appeal is the ministry's reconsideration decision dated December 24 2009 which held that the appellant does not meet the legislative criteria for designation as a person with a disability.

Section 2 of the Employment and Assistance for Persons with Disability Act (EAPWDA) and section 2 of the Employment and Assistance for Persons with Disability Regulation (EAPWDR) list five criteria that must be met in order for a person to be considered a Person with a Disability (PWD). In the reconsideration decision the ministry found that the appellant met two of the five. The ministry found that she met the age criteria and that her condition is likely to continue for at least two years. The ministry found that there was insufficient evidence to establish that her impairment is severe or that her impairment directly and significantly impacts her Daily Living Activities (DLAs). The ministry also did not find that her impairment requires an assistive device, help or supervision of another person, or the services of an assistance animal.

PART D – RELEVANT LEGISLATION

(State the relevant Legislation considered)

Employment and Assistance for Persons with Disability Act (EAPWDA), section 2
Employment and Assistance for Persons with Disability Regulation (EAPWDR), section 2

PART E – SUMMARY OF FACTS

Please set out the facts as determined by the panel, based on the evidence at the hearing. Please note that subsection 22(4) of the Employment and Assistance Act states that, in a hearing referred to in subsection (3), a panel may admit as evidence only:

- (a) the information and records that were before the minister when the decision was being made, and
- (b) oral or written testimony in support of the information and records referred to in paragraph (a).

The evidence before the ministry at the time of the reconsideration was:

- The appellant's self report in which she describes her impairments and the effects they have on her DLAs. She writes that her hearing loss makes it hard for her to communicate. She writes that she has no resources for transportation and that her arthritis becomes very painful when she has to walk to get to where she needs to go. When she does walk to places she is sore for 48 hours and she needs to take four different types of medication to treat her arthritis. She adds that she uses a handrail when using stairs, she uses furniture to support herself when walking in her home, and that she uses her daughter's stroller for support when walking outdoors. She writes that she is able to do 45 minutes of housework before resting, she uses the counter to support herself when preparing meals, it takes her 2-3 times longer to complete her shopping and her bathing, and she often forgets to fill her prescriptions.
- A physician's report dated August 18 2009, completed by the appellant's physician that she has known for 3+ years. In the report the physician diagnoses her with deafness in her right ear and rheumatoid arthritis which he considers chronic and will last her lifetime. He writes that she can walk 4+ blocks, needs a handrail for stairs, can not lift anything, and can remain seated for less than 1 hour. He sees no effect on her cognitive or emotional function but writes that due to her pain she takes significantly longer to do chores.
- An Assessor's report dated August 18 2009 completed by the same physician that goes into further detail about her condition and its effects on her DLAs. The report states that for walking she uses something to support herself and she needs a handrail to climb stairs. She is unable to lift or carry and she needs physical support to get out of the bath, get out of bed, get up from a chair, and bringing things home from the store. She is independent in doing laundry, feeding herself, toileting, personal grooming and reading. She functions independently socially but that she receives support from friends and family to assist with shopping and carrying. The physician notes no assistive devices that are regularly used by the appellant. In his notes he adds that the appellant has very poor coping skills in dealing with her arthritis and that she has very few personal resources (physical and emotional) to draw on to cope.
- The original ministry decision dated November 16 2009 in which the ministry states that there is no evidence that her hearing impairment affects her DLAs nor any information about remedial treatments available. The ministry goes on to write that the items used by appellant as assistive devices, as listed in the Assessor's Report (furniture, stroller, counters), are not considered assistive devices for purposes of eligibility. The decision also reads that the information provided does not suggest that her impairment significantly restricts her DLAs and that the reports do not include how much more time she requires to complete her DLAs.
- A letter prepared by the appellant's advocate which asked the physician to concur with several statements about the appellant's impairment and the effects they have on her. In the letter the physician agrees that the appellant needs to wear a knee brace all day and she would be unable to complete her DLAs without it. He disagrees with the statement that the appellant can not lift anything and he writes that she "can lift 20-30 lbs occasionally and she can lift her child." He writes that her hearing loss is severe and that her arthritis is moderate.

[REDACTED]

At the hearing the appellant stated that when she was living on reserve she was designated as a PWD and was receiving disability assistance but once she moved off reserve she needed to re-apply for PWD status. This new evidence was accepted by the panel pursuant to the Employment and Assistance Act 22 (4) (b). She told the panel that since the time of her application she has been fitted with another knee brace and now wears two braces during the day to help her walk. She described the pain that she suffers from in her hips, hands, and ankle caused by her arthritis and that she was taking Tylenol 3, Advil, and Plaquenil. She noted that the pain medication does not completely remove the pain and that she is working with her doctor to try new medications that are more effective.

The appellant described the effects that her condition has on her DLAs. She claimed that she is unable to use the stairs in her building and that she requires the assistance of someone else to take out her garbage and do the laundry since she does not have a washing machine in her suite and must use the public machine in the basement. She is planning on having a grab-bar installed in her bathtub as soon as she receives the permission from her landlord to make it easier to get in and out of the tub. When she shops for groceries she often takes a taxi home and the driver will help carry her purchases to the door of her apartment since she can not carry them on her own. Her three year old daughter is now able to get in and out of her stroller as well as the bathtub on her own. Her daughter also assists in washing the dishes and cleaning up after herself around the home. The appellant says she is in bi-weekly contact with her doctor to treat her condition. She said that she has difficulty preparing meals for her and her daughter. She buys meals that are easy to prepare or heat-and-serve meals since she can not stand in the kitchen to cook or to stand while washing dishes.

At the hearing the ministry stated that the decision to deny her PWD designation was based on the appellant's level of independence and was not based on the amount of time it takes her to complete her DLAs. While she is slower in completing her DLAs, that fact that she is able to perform most of her duties on her own was the reason that the ministry decided against her request for PWD.

The ministry asked the appellant about her PWD designation while she was living on reserve. He asked if she had included the documents from her previous PWD application in her recent PWD application to the ministry. She replied that she had not included any information about her past PWD with her application. The ministry stated that it would have been helpful if she had provided this information and he commented that the ministry should have requested her previous PWD documents when she applied.

PART F – REASONS FOR PANEL DECISION

The issue in this case is whether the ministry was reasonable in its decision to deny the appellant PWD designation. To be considered a person with a disability the legislation requires a person to meet five criteria. These are detailed in EAPWDA Section 2 (2).

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 (B.C. Reg. 196/2007)

(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).

For the purposes of the legislation above, Daily Living Activities are described in section 2 of the EAPWDR as follows:

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:

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- (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

The Appellant argues that her condition is severe and it directly and significantly affects her DLAs either continuously or periodically for extended periods of time. She maintains that she requires the assistance of both an assistive device as well as the assistance of another person. In her case she uses the assistance of family, friends and her daughter.

It is the ministry's position that the appellant meets the age requirement of the legislation and that her condition is likely to last more than two years. However the ministry argues that her condition is not severe and does not meet the requirements set out in the legislation. The ministry maintains that she is able to perform her DLAs independently and without the aid of an assistive device.

As the ministry is satisfied that the appellant meets two of the five requirements of the legislation the panel will address the three that the ministry found that the appellant did not meet.

With respect to the reasonableness of the ministry's decision of the requirement of having a severe physical or mental impairment being met the panel finds the following. In the Physician's Report the physician writes that she suffers joint pain that limits her abilities. The appellant stated that she is on four medications to treat the pain which includes Tylenol 3. In the Assessor's Report he writes that she is unable to lift or carry anything and can sit for only one hour. He adds that she has poor coping skills. The panel accepts that the level of physical impairment is severe. The panel was convinced by the information provided by the physician in his two reports along with the testimony of the appellant. In the hearing she described the high level of pain that she suffers from and how this pain affects her ability to perform her DLAs. In concluding that her impairment is severe the panel considered the statement of the physician that her coping skills are poor and that he feels that "she functions at the edge of society" as further evidence that her condition is severe. The panel accepts that the adjective "severe" is relative and it is appropriate to consider the persons ability to manage and cope with their disability when making a judgement as to its severity.

With respect to the reasonableness of the ministry's decision that the appellant's condition does not directly and significantly restrict her ability to perform her DLAs, the panel finds the following. In the Physician's Report the physician writes that the appellant is unable to lift anything at all. The panel

did note an inconsistency with this statement in the letter written by the appellant's advocate where the physician noted that the appellant is able to lift her child. To clarify this inconsistency the panel asked the appellant about her ability to lift and she stated that she is now unable to lift her child. She explained that her child is now able to get in and out of the bathtub and the stroller on her own. In the Assessor's Report the physician states that the appellant requires significantly more time to perform many of her DLAs. The appellant provided details about these restrictions at the hearing by describing the difficulty she has walking, performing household chores, and caring for herself and her child. The panel considered the comments of the ministry made at the hearing that the appellant may need more time to perform her DLAs but since she is able to complete many of them independently then she does not meet the criteria in the legislation. The panel finds that the appellant does have significant restrictions on her DLAs caused by her condition. While her condition may not preclude or completely prevent her from completing her DLAs, when considering the limitations and pain caused by her condition the panel finds that there is sufficient evidence of a significant restriction.

With respect to the reasonableness of the ministry's decision of whether the criteria of the appellant requiring the use of an assistive device or the significant help of another person to perform her DLAs the panel finds the following. In the Assessor's Report the physician indicates that an assistive device is required for many of her DLAs including walking, climbing stairs, standing, bathing, carrying, food preparation, and getting in and out of vehicle. The physician also reports that she receives assistance from family and friends to maintain herself in the community. She receives help from others to do laundry, shop, and carry items. The appellant told the panel that she is planning on installing a grab bar in her bathroom as soon as her landlord gives her permission. The physician writes that the appellant uses her child's stroller as a walker. The panel asked the appellant about her need for assistance walking and she said that soon her child will be too old for the stroller and she will need to buy a walker. Since her child still requires a stroller the appellant is unable to use a walker since she could not push both devices at the same time. The appellant told the panel that she now uses two knee braces for support and her physician commented that she would be unable to complete her DLAs without a brace. The panel finds that there is sufficient evidence to conclude that in order for her to perform some of her DLAs she requires the aid of an assistive device or the assistance of another person.

The panel finds that the ministry's decision was not reasonably supported by the evidence and therefore rescinds the decision.