

## PART C – Decision under Appeal

The decision under appeal is the Ministry's Reconsideration Decision dated February 3, 2011, which held that the Appellant is not eligible for designation as a Person with Disabilities (PWD). The decision stated that the Appellant did not meet 3 of the 5 statutory requirements of Section 2 of the Employment and Assistance for Persons with Disabilities Act (EAPWDA) for designation as a PWD. The ministry found that the Appellant met the age requirement and that her impairment is likely to continue for at least 2 years. The ministry determined that:

- the information before the Ministry at reconsideration did not establish that the Appellant has a severe physical and/or mental impairment;
- the information before the Ministry at reconsideration did not establish that the Appellant's impairment in the opinion of a prescribed professional directly and significantly restricts her ability to perform daily living activities (DLAs) either continuously or periodically for extended periods; and,
- The information did not establish that to perform directly and significantly restricted DLA's the Appellant requires an assistive device, the significant help of another person 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

## PART E – Summary of Facts

Information before the Ministry at Reconsideration included:

- The Appellant's Persons with Disabilities Designation Application, stamped as received by the Ministry August 24, 2010.
- The Ministry's Persons with Disabilities Decision Summary, dated October 26, 2010.
- A copy of the Ministry's letter to the Appellant advising her of their decision, dated October 26, 2010.
- The Appellant's Request for Reconsideration, faxed December 3, 2010.
- A questionnaire completed by the Appellant's physician, dated December 1, 2010.

At the hearing the Appellant submitted a note signed by her physician, dated February 16, 2011, in which the physician has answered "yes" to two questions:

*In her letter dated November 24, 2010, your patient describes the impact of her impairments on her ability to perform daily livings [sic] including personal care, housekeeping, meal preparation, shopping, outdoor mobility and social functioning on a continuous basis and her need from [sic] ongoing help from other people (primarily her family). In your opinion, is your patient's account an accurate description of how her chronic, severe, disabling symptoms of pain, restricted movement, fatigue and depression significantly restrict her daily functioning and demonstrate a need for ongoing significant help?*

and

*As you have indicated in your letter of December 1, 2010, does your patient have a severe physical and/or mental impairment that directly and significantly restricts her ability to perform a wide range of daily living activities continuously so that she requires significant help from other people?*

The Ministry had no objection to the admission of this document. The Panel admitted the physician's note under Section 22(4)(b) of the Employment and Assistance Act as evidence in support of the information and records that were before the minister when the decision under appeal was made.

The Appellant stated that she is limited in the medications she can take due to side effects. She stated that her pain is constant, it interferes with sleep, she has constant headaches and her ability to perform DLA's is very limited. The Appellant stated that until very recently she received assistance from her sister, who has died. Her sister used to help her clean, cook and freeze meals and shop for her. Now she must do those things in small increments or ask friends to help.

In the original PWD application, the Appellant's physician reported that she is diagnosed with chronic soft tissue pain – right arm and neck and depression. The physician reported in the health history section that the pain is in the neck, arm, wrist and hand, that it leads to headaches and that the Appellant is restricted in a number of ADL's on an ongoing basis. With respect to functional skills, the physician reported that the Appellant can walk 4+ blocks, climb 5+ steps, lift under 5 pounds and has no limitation sitting. The physician reported significant deficits with cognitive and emotional function, specifying emotional disturbance, motivation, attention or sustained concentration and other, noting variable sleep, social isolation and lack of motivation. Acting as assessor, the physician reported that the Appellant takes significantly longer walking outdoors, climbing stairs, lifting and carrying and holding. With respect to cognitive and emotional functioning, the physician reported moderate impacts with bodily functions, emotion and motivation and minimal impact with attention/concentration. With respect to DLA's, the physician reported that the Appellant takes significantly longer with laundry, basic housekeeping, carrying purchases home, food preparation and cooking. All other aspects of DLA's are reported to be performed independently. All social functioning was reported as independent. With respect to assistance, the physician reported that the Appellant receives assistance from family with the note that she requires housekeeping support.

In the questionnaire completed by the physician dated December 1, 2010 which was submitted with the Appellant's Request for Reconsideration, the physician responded "yes" to the question "When the impact of your patient's medical conditions are considered, does she have a severe physical impairment?", with a comment that the Appellant has a severe physical impairment related to severe chronic pain that she experiences in her neck, shoulder, arm, wrist, hand. In response to the question "Does depression further restrict her daily functioning?", the physician wrote "Yes, she is experiencing low mood, reduced motivation and social isolation." In response to the question "Does it take your patient significantly longer to perform many DLA's – or does she put tasks off – as a direct result of her health limitations?", the physician wrote "yes". In response to the question "Does she have to take regular rest breaks during the day?", the physician wrote "yes". In response to the question "Is her level of activity significantly reduced due to her impairment?", the physician wrote "Yes". In response to the question "How often is she significantly restricted in performing DLA's by one or more of her medical conditions?", the physician wrote "On a daily basis." In response to the question "Overall, does her impairment significantly restrict her ability to perform a range of DLA's continuously (Or periodically for extended periods)?", the physician wrote "Yes, due to her physical impairment, she has difficulty with grooming, showering, requires assistance from others with shopping, meal preparation as well as housekeeping as she is unable to do these activities for herself. In response to the question "As a result of her health restrictions, can you confirm that your patient requires significant help with DLA's?", the physician wrote "Yes, as noted above, patient needs assistance with certain activities. If help is not available, she has to take frequent breaks or avoid the activity altogether."

With respect to the Appellant's physical impairment the Panel's findings of fact are:

- The Appellant is diagnosed with chronic soft tissue pain – right arm and neck and depression;
- The Appellant stated that her pain is constant;
- The Appellant's physician reported in the original PWD application that the Appellant can walk 4+ blocks, climb 5+ steps, lift under 5 pounds and has no limitation sitting;
- Acting as assessor, the physician reported that the Appellant takes significantly longer walking outdoors, climbing stairs, lifting and carrying and holding;
- The Appellant's physician stated that the Appellant has a severe physical impairment related to severe chronic pain that she experiences in her neck, shoulder, arm, wrist and hand.

With respect to a mental impairment, the Panel's findings of fact are:

- The Appellant's physician reported significant deficits with cognitive and emotional function, specifying emotional disturbance, motivation, attention or sustained concentration and other, noting variable sleep, social isolation and lack of motivation.
- The physician reported moderate impacts with bodily functions, emotion and motivation and minimal impact with attention/concentration.

With respect to the Appellant's DLA restrictions, the Panel's findings of fact are:

- The Appellant's physician, acting as Assessor, reported that the Appellant takes significantly longer walking outdoors, climbing stairs, lifting and carrying and holding;
- In the questionnaire submitted at Reconsideration, the physician reported that the Appellant has difficulty with grooming, showering, requires assistance from others with shopping, meal preparation as well as housekeeping as she is unable to do these activities for herself, and that she is restricted on a daily basis.

With respect to the Appellant's requirement for help to perform DLA's, the panel's findings of fact are:

- The physician reported that the Appellant requires assistance from others with shopping, meal preparation as well as housekeeping as she is unable to do these activities for herself.

## PART F – Reasons for Panel Decision

The issue in this appeal is the reasonableness of the Ministry's decision to deny the Appellant's application for designation as a Person with Disabilities (PWD). The ministry determined that:

- the information before the Ministry at reconsideration did not establish that the Appellant has a severe physical and/or mental impairment;
- the information before the Ministry at reconsideration did not establish that the Appellant's impairment in the opinion of a prescribed professional directly and significantly restricts her ability to perform daily living activities (DLAs) either continuously or periodically for extended periods; and,
- The information did not establish that to perform directly and significantly restricted DLA's the Appellant requires an assistive device, the significant help of another person or the services of an assistance animal.

### **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.

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

### **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 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.

The Appellant's position is that she has a severe physical impairment which directly and significantly restricts her ability to perform DLA's, and as a result, she requires assistance to perform them. The Appellant argued that her chronic pain affects her range of motion and limits her ability to perform a number of DLA's. The Appellant argued that her physician has confirmed that her impairment is severe and that she requires significant help with DLA's which was, until recently, provided by her late sister. As a result, the Appellant argued that she meets the criteria for designation as a PWD.

The Ministry's position is that the information provided both in the original application and in the additional information supplied at Reconsideration does not establish that the Appellant has a severe mental or physical impairment that significantly restricts her ability to perform DLA's either continuously or periodically for extended periods. In the Reconsideration Decision, the Ministry stated that the information provided does not demonstrate that the Appellant's ability to manage DLA's is severely restricted.

With respect to a severe physical impairment, the Panel notes that the Appellant's physician has described her chronic pain and her impairment as severe, noting that her pain has restricted her daily living activities. The physician reported that the Appellant can walk 4+ blocks, climb 5+ steps. Lift under 5 pounds and has no limitation sitting. Acting as assessor, the physician reported that the Appellant takes significantly longer walking outdoors, climbing stairs, lifting and carrying and holding. In the note admitted at the hearing, the physician confirms the Appellant's self report of chronic, severe pain and restricted movement. The report in the original application for PWD designation has been supplemented twice by the Appellant's physician, with

greater detail. Although the Appellant's original PWD application does not indicate significant restrictions to the Appellant's functional skills, the subsequent statement completed by her physician six months after the original PWD application reports severe chronic pain in her neck, shoulder, arm, wrist and hand that causes restrictions to her ability to perform DLA's on a daily basis, including being unable to shop, cook or perform housework. The physician confirmed her earlier report in the document admitted by the Panel at the hearing, and the Panel notes the detailed description of her limitations given orally by the Appellant at the hearing. The Panel finds that the Ministry's determination that the Appellant does not have a severe physical impairment was not reasonable.

With respect to a severe mental impairment, the Panel notes that the Appellant's physician has indicated significant deficits with cognitive and emotional functioning, specifying emotional disturbance, motivation, attention or sustained concentration and other, noting variable sleep, social isolation and lack of motivation, however only moderate and minimal impacts to cognitive and emotional functioning were reported. The Panel finds that the Ministry's determination that the Appellant does not have a severe mental impairment was reasonable.

With respect to the Appellant's ability to perform daily living activities, the Appellant's physician reported in the initial application for PWD designation that the Appellant takes significantly longer with laundry, basic housekeeping, carrying purchases home, food preparation and cooking, performing all other aspects of DLA's independently. In the questionnaire submitted with the Request for Reconsideration, the physician wrote that due to her physical impairment, the Appellant has difficulty with grooming, showering, requires assistance from others with shopping, meal preparation as well as housekeeping as she is unable to do these activities for herself, and that she is restricted on a daily basis. Considering that the physician reported in her subsequent report that the Appellant's restrictions are directly related to her severe chronic pain and that the Appellant is unable as a result to perform the listed activities for herself, the Panel gave greater weight to the physician's additional information than to the original PWD application. The Panel finds that the Ministry's determination that the Appellant's impairment does not significantly restrict her ability to perform DLA's either continuously or periodically for extended periods was not reasonable.

With respect to the Appellant's requirement for help to perform DLA's, the Appellant's physician reported in the initial application that the Appellant receives assistance from family and that she requires housekeeping support. In the questionnaire submitted at Reconsideration, the physician wrote that the Appellant needs assistance with certain activities, which she confirmed in the note admitted at the hearing. As a result of this additional information, the Panel finds that the Ministry's determination that the information does not establish that the Appellant requires significant help from other persons was not reasonable.

The Panel finds that the Ministry's decision to deny the Appellant's application for PWD designation was not reasonably supported by the evidence. The Panel rescinds the Ministry's decision. Therefore, the ministry's decision is overturned in favour of the appellant.