

PART C – DECISION UNDER APPEAL

The decision under appeal is the ministry's reconsideration decision dated December 16, 2011 which held 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 and Section 2 of the Employment and Assistance for Persons with Disabilities Regulation 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 2 years. However, the ministry was not satisfied that the appellant has a severe physical or mental impairment or that 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. The ministry also found that a prescribed professional has not confirmed that, as a result of direct and significant restrictions, the appellant requires help or supervision of another person 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

The evidence before the Ministry at reconsideration consisted of:

- Request for Reconsideration dated 15 November 2011, without a self report (SR)
- Physician's report (PR) dated 11 July 2011,
- Assessor's report (AR) dated 12 August 2011,
- Application for PWD designation dated 12 August 2011, with SR

The PR was completed by the appellant's medical practitioner (MP) of 1 & 1/2 years who has seen the appellant 2-10 times in the past 12 months and diagnoses the appellant with a left humerus fracture (musculoskeletal system), with an onset date of December 2009. The MP reports that the appellant was operated on and that the fracture was repaired however, the appellant has since had very limited movement in her left shoulder. The MP indicates that the appellant is unable to adjust her shoulder more than 15-20 degrees and is weak in the left shoulder which limits her ability to perform any tasks using that limb. The MP responds No to: Has the applicant been prescribed any medication and/or treatments that interfere with her ability to perform DLA? The MP indicates that the appellant does not require any prosthesis or aids for her impairment. Regarding Degree and Course of Impairment, the MP reports that the appellant's impairment is likely to continue for two years and is likely to be permanent. The MP adds that despite physiotherapy, the appellant has not gained any extra strength or range of movement in her left shoulder.

Regarding Functional Skills, the MP reports that; the applicant can walk 4+ blocks unaided on a flat surface, she can climb 5+ steps unaided and that she has limitations for lifting notably, for the left shoulder under 5 lbs and for the right side between 5-15 lbs. She has no limitation to remain seated. The PR also indicates that there are no significant deficits with cognitive and emotional function.

Regarding DLA, in response to "Does the impairment directly restrict the person's ability to perform Daily Living Activities?" the MP responds Yes. The MP indicates that the following DLA are continuously restricted: personal self care, basic housework and daily shopping. The MP comments regarding the degree of restriction that the appellant is unable to lift things with her left upper limb due to weakness and limited range of motion in her left shoulder. The MP notes that the appellant requires assistance with her house cleaning and shopping and that she can dress which takes longer than usual, due to restriction in her upper left limb. Under additional comments the MP notes that the appellant struggles to perform any tasks that require the use of both arms.

The AR was completed by a physiotherapist (PT), a prescribed professional who has known the appellant since her post operation in early January 2010 and has seen her 11 or more times. The PP reports that the appellant had 8 visits for physiotherapy between January and March 24th, 2010 to target her loss in range of motion and reduced strength. The appellant was given an appropriate home exercise program to follow as due to her remote location, she had difficulty attending the outpatient's facility. It is noted that the appellant lives alone. The appellant's mental or physical impairments that impact her ability to manage DLA are indicated as reduced active and passive range of motion to levels below what is considered "FUNCTIONAL RANGES". The appellant's Ability to Communicate is reported as good in all areas. Regarding Mobility and Physical Ability; it is reported that the appellant is independent in the following categories: walking indoors, walking outdoors, climbing stairs and standing. Periodic assistance from another person is required when lifting and for carrying and holding with an explanation that that the appellant has less than moderate strength within her available range. Cognitive and Emotional Functioning are noted as "Not applicable".

Regarding DLA, only one aspect under Shopping, specifically; carrying purchases home was indicated as

requiring periodic assistance from another person if items were heavy or awkward. Additional explanations came under Personal Care with dressing and under Basic Housekeeping with laundry, where it was only noted with modifications. It was also noted under Basic Housekeeping, with basic housekeeping that pain and fatigue limit, moderately. Additional comments by the PP were that, due to reduced strength and range of motion of the appellant's shoulder, she may need to modify her movements or ask for assistance.

Regarding Social Functioning, the appellant was reported as independent in all areas. In response to how the mental impairment impacts the appellant's relationship with her immediate social network and her extended social network, the AR has noted good functioning in both categories. The AR indicates that assistance is provided by family and friends.

In the Application for PWD designation, the appellant describes her disability as a broken shoulder which restricts her from picking up or lifting anything. She can not wear a brassiere which is embarrassing in public and cannot do any computer work as her shoulder does not allow her to hold her arm in any position for any length of time. The appellant's left arm doesn't want to move and gets very tired. The appellant finds her stress tolerance is limited due to pain and she can become quite agitated, angry and frustrated. She needs more assistance in the winter than summer because she can no longer chop her own wood and finds that walking outside is very stressful. This causes her much agitation and depression. She sometimes finds the pain unrelenting so she takes a lot of ibuprofen.

At the hearing, the appellant's advocate provided the following evidence:

1. New Application for PWD designation dated 09 December 2011, with a SR.

In the SR, the applicant relates that approximately 2 years ago, she suffered a serious shoulder injury after showering. She states that she requires continuous assistance with daily living activities which take a considerable longer amount of time. Also, her depression impairs her strength and motivation to concentrate on minor tasks. As a result, she is required to have friends and neighbors provide assistance with getting firewood, lifting, shopping, driving and physical tasks. They also check in on her daily. The appellant states her mobility is so low that she requires help and support to cross the street and finds the winter months more debilitating, as she cannot drive or walk outside in poor weather conditions. Additionally, the appellant states that she is isolated and has depressive symptoms, which have hindered her ability to find employment. Despite successfully attending 3 separate work incentive programs, her location, physical problems and increased depressive symptoms affect her ability for self sufficiency and meaningful employment.

2. Updated Physician's report dated 14 December 2011.

The PR was completed by the appellant's same medical practitioner of 1 & 1/2 years who has seen the appellant 2-10 times in the past 12 months and diagnoses the appellant with a left humerus fracture, depression and anxiety. The MP reports that the appellant was operated and that the fracture was repaired however, the appellant has since had very limited movement in her left shoulder and suffers from constant pain. The MP indicates that the appellant is unable to adjust her shoulder more than 15-20 degrees and is weak in the left shoulder which limits her ability to perform any tasks using that limb. In addition, the MP indicates that the appellant has been suffering from depression and anxiety. She lacks motivation to do anything and needs reminding of most tasks and also lacks concentration.

The MP responds No to: Has the applicant been prescribed any medication and/or treatments that interfere

with her ability to perform DLA? The MP indicates that the appellant does not require any prosthesis or aids for her impairment. Regarding Degree and Course of Impairment, the MP reports that the appellant's impairment is likely to continue for two years and is unlikely to get better given the lack of improvement after two years. The MP adds that the physiotherapy treatment was of no help and that the appellant's depression and anxiety may improve with time.

Regarding Functional Skills, the MP reports no change from the original report. However, the MP has now indicated that the appellant has significant deficits with cognitive and emotional function specifically; executive, emotional disturbance and attention or sustained concentration. The MP notes that due to depression and anxiety, the appellant struggles with memory (recalling info), lacks concentration and gets confused when given [illegible].

In response to "Does the impairment directly restrict the person's ability to perform Daily Living Activities?" the MP responds Yes. The MP indicates that the following DLA are continuously restricted: personal self care, meal preparation, basic housework, daily shopping and management of finances. The MP comments that regarding the degree of restriction due to the difficulty with her left shoulder; the appellant struggles to shop and perform basic housework. Also, the appellant's poor concentration and motivation means that she needs reminding for self care, cooking and finance. The MP notes that the appellant requires assistance with finance, house cleaning, preparing meals and shopping, on a continuous basis. The MP adds that the appellant struggles with tasks that need the use of both limbs. The MP states that the appellant's depression and anxiety is compounding her disability. The MP adds that he believes that if the appellant is able to retrain for a sedentary job, her depression may improve. The MP indicates that a major cause of the appellant's depression is the feeling of frustration of not being able to work and also financial stress.

The appellant's advocate stated that the appellant who used to be a waitress and do housecleaning is now only able to do computer work however; she is without a computer and internet access. Also, as the appellant owns her own home and has good support locally, she is not interested in relocating.

In response to several questions by the panel: the appellant testified that she was right handed; that when dressing she doesn't wear clothes with buttons and slips on her clothes; that her mobility in the home is okay however while out doors, she is afraid of falling and when asked what type of assistance she requires for preparing meals, the appellant indicated that she would need help for example, to reach for a pot.

The panel admitted the appellant's oral testimony as well as the above listed 2 documents as evidence under section 22(4) of the Employment and Assistance Act as they were found to be in support of the information and records before the ministry at reconsideration provided by the appellant respecting her physical impairment and depression and agitation.

The ministry did not object to the admission of the new evidence.

No additional evidence was provided by the ministry at the hearing.

PART F – REASONS FOR PANEL DECISION

The issue under appeal is whether the ministry reasonably concluded that the appellant is not eligible for designation as a PWD because she does not have a severe physical or mental impairment that in the opinion of a prescribed professional directly and significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods, necessitating help or supervision of another person to perform DLA. The ministry found that she met the age requirement and that her impairment was likely to continue for at least two years.

The criteria for being designated as a person with disabilities (PWD) are set out in section 2 of the EAPWDA. The minister may designate a person as a PWD when the following requirements are met. Pursuant to section 2(2) the applicant must have reached the age of 18 and the minister must be satisfied that the person has a severe mental or physical impairment. Under section 2(2)(a) the impairment must be likely, in the opinion of a medical practitioner, to continue for at least 2 years. Section 2(2)(b) (i) requires that the impairment, in the opinion of a prescribed professional, directly and significantly restricts the person's ability to perform daily living activities (DLA) either continuously or periodically for extended periods. Section 2(2)(b)(ii) states that as a result of those restrictions the person must require help to perform DLA. Section 2(3)(b) of the EAPWDA states that a person requires help in relation to a DLA if the person requires an assistive device, the significant help or supervision of another person, or the services of an assistance animal.

Section 2(1)(a) of the EAPWDR defines DLA for a person who has a severe physical or mental impairment as preparing own meals, managing personal finances, shopping for personal needs, using public or personal transportation, performing housework to keep one's residence in acceptable sanitary condition, moving about indoors and outdoors, performing personal hygiene and self care and managing personal medication. Section 2(1) (b) adds two additional activities for a person with a severe mental impairment: making decisions about personal activities, care or finances; and, relating to, communicating or interacting with others effectively.

Regarding the existence of a severe physical impairment, the appellant's position is that the MP has diagnosed her with a left humerus fracture that was surgically repaired however, the appellant has since had very limited movement in her left shoulder and suffers from constant pain. The appellant argues that her DLA are restricted by not being able to use her left shoulder which limits her mobility.

The ministry's position is that in the opinion of a prescribed professional; the appellant's functional skill limitations are not significantly restricted aside from lifting with the left upper limb and therefore, the appellant's information does not establish a severe impairment.

Regarding Functional Skills, the MP reports that; the applicant can walk 4+ blocks unaided on a flat surface, she can climb 5+ steps unaided and that she has limitations for lifting notably; the left shoulder under 5 lbs and the right side between 5-15 lbs. She has no limitation to remain seated. The PT reports under Mobility and Physical Ability that the appellant is independent in the following categories: walking indoors, walking out doors, climbing stairs and standing. Periodic assistance from another person is required when lifting and for carrying and holding with an explanation that that the appellant has less than moderate strength within her available range.

Upon reviewing the PR respecting Functional Skills as well as the AR report under Mobility and Physical Ability; the panel finds that this evidence is consistent in relation to the appellant's restricted use of her upper left shoulder. The MP comments that the appellant has limited range and weakness in her shoulder that limits her ability to perform any tasks using the left limb. With consideration for the fact that the appellant is right handed, the panel finds that; although the appellant has restrictions within her range of movement with her left

upper limb, the severity of the impairment is not supported in the PR and the AR or in the narrative of the appellant's physical functioning. Therefore, the panel finds that the ministry did reasonably determine that a severe physical impairment was not established under section 2(2) of the EAPWDA.

Regarding the existence of a severe mental impairment, the ministry's position is that there is no evidence provided by the MP to confirm any severe mental impairment.

The appellant's position is that she has increasing depressive symptoms which, together with her physical problems and isolation, seriously thwart her ability to be self-sufficient and have meaningful employment.

The updated PR does diagnose the appellant with depression and anxiety and indicates that the appellant has significant deficits with cognitive and emotional function specifically; executive, emotional disturbance and attention or sustained concentration. The MP notes that due to depression and anxiety, the appellant struggles with memory, lacks concentration and gets confused when given [illegible]. The AR notes that the appellant's Cognitive and Emotional Functioning are "Not applicable". Additionally, in terms of Social Functioning, the appellant is rated as independent in all areas and also described as having good functioning in both her immediate social network and her extended social networks.

With the diagnosis of depression and anxiety, the physician notes poor concentration and motivation and problems with memory but also adds that the appellant's depression and anxiety may improve with time. The appellant's evidence is that her stress tolerance is limited, due to pain and she can become quite agitated, angry and frustrated. She needs more assistance in the winter than summer because she can no longer chop her own wood and finds that walking outside is very stressful. This causes her much agitation and depression. The panel recognizes the apparent frustration of the appellant as reported in the evidence however; the panel finds that a prescribed professional has not confirmed restrictions on the appellant's functioning, due to her depression and anxiety, that establish that a severe mental impairment exists. Therefore, the panel finds that the ministry reasonably determined that a severe mental impairment has not been established under section 2(2) of the EAPWDA.

Regarding the degree of restriction that the appellant's impairment has on her ability to perform DLA; the ministry's position is that the information does not establish that in the opinion of a PP the impairment directly and significantly restricts DLA continuously or periodically for extended periods.

The appellant's position is that she requires more assistance in the winter than summer and that she is restricted from picking up or lifting anything. Also, her depression impairs her strength and motivation to concentrate on minor tasks. As a result, she is required to have friends and neighbors provide assistance with getting firewood, lifting, shopping, driving and physical tasks. They also check in on her daily.

Regarding DLA, in response to "Does the impairment directly restrict the person's ability to perform Daily Living Activities?" the MP responds Yes. The MP indicates that the following DLA are continuously restricted: personal self care, meal preparation, basic housework, daily shopping and management of finances. The MP comments that regarding the degree of restriction due to the difficulty with her left shoulder; the appellant struggles to shop and perform basic housework. Also, the appellant's poor concentration and motivation means that she needs reminding for self care, cooking and finance. The MP notes that the appellant requires assistance with finance, house cleaning, preparing meals and shopping, on a continuous basis. The MP adds that the appellant struggles with tasks that need the use of both limbs.

The AR reports that only one aspect of DLA under Shopping, specifically; carrying purchases home was indicated as requiring periodic assistance from another person if items were heavy or awkward. Additional

explanations came under Personal Care with dressing and under Basic Housekeeping with laundry where it was only noted with modifications. It was also noted under Basic Housekeeping, with basic housekeeping that pain and fatigue limit moderately. Additional comments by the PT were that due to reduced strength and range of motion of the appellant's shoulder, she may need to modify her movements or ask for assistance.

The panel notes that the legislation requires that a PP be of the opinion that an applicant's DLA are directly and significantly restricted either continuously or periodically for extended periods. With consideration for both the PR and the AR as well as the appellant's testimony; the panel finds that although the appellant is identified by her physician as having continuous restrictions in her ability to perform 5 DLA and a periodic restriction in 1 DLA due to the impairment of her non-dominant left arm/shoulder, given that the physician also reports that despite these restrictions the appellant independently manages all aspects of all DLA with the exception of requiring periodic assistance for 1 aspect of shopping, carrying purchases home, the panel finds that the ministry reasonably viewed they are not significantly restrictive in the performance of the appellant's daily living activities. Therefore, the panel finds that the ministry reasonably determined that, in the opinion of a prescribed professional, a direct and significant restriction in the appellant's ability to perform DLA either continuously or periodically for extended periods was not established under 2(2)(b)(i) of the EAPWDA

Regarding the need for help with DLA; the panel notes that the appellant struggles to perform any tasks that require the use of both arms and admits to receiving assistance from friends and neighbors with getting firewood, lifting, shopping, driving and other physical tasks. However, the legislation specifies that help in relation to perform DLA; refers to assistance required by the appellant of an assistance device, the significant help of another person or the services of an assistance animal. Therefore, the panel finds that, as a direct and significant restriction with DLA has not been established that the ministry reasonably determined that a direct and significant restriction with DLA has not been established under Section 2(2)(b)(ii) of the EAPWDA.

In applying the legislation to the facts of the case, the panel finds that the ministry's decision is reasonably supported by the evidence and thus confirms the reconsideration decision.