

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated March 24, 2014 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

The evidence before the ministry at the time of the reconsideration decision included the Person With Disabilities (PWD) Application comprised of the applicant information and self-report dated October 21, 2013, a physician report (PR) and an assessor report (AR) both dated October 22, 2013 and completed by a general practitioner who has known the appellant for 2 years.

The evidence also included her Request for Reconsideration dated March 11, 2014 to which was attached a handwritten letter from the appellant.

### ***Diagnoses***

In the PR, the appellant was diagnosed by the medical practitioner with right shoulder developmental dysplasia with occasional tilted and contracting humeral head- outlet obstruction with impingement syndrome, with an onset at birth. There was no diagnosis indicated in the PR for a mental disorder.

### ***Physical Impairment***

In the PR, the appellant's physician reported that:

- In terms of health history, the appellant has "weakness right arm, restricted movement right shoulder; not able to use right arm very much; not able to lift."
- The appellant does not require any prosthesis or aid for her impairment.
- In terms of functional skills, the appellant is able to walk 4 or more blocks unaided on a flat surface, climb 5 or more steps unaided, is not able to lift, and she has no limitation with remaining seated.
- In the additional comments, the appellant has a congenital abnormality of the right shoulder joint, she has muscle wasting, decreased range of motion of the shoulder, she has pain in the right arm and numbness of the right arm; she has very minimal use of her right arm.

In the AR, the appellant's physician indicated that:

- The appellant is assessed as independent with walking indoors and outdoors, climbing stairs, and standing. She requires continuous assistance from another person with lifting and carrying and holding.
- The section of the AR relating to assistance provided through the use of assistive devices is not completed.

In her self-report, the appellant wrote that:

- Since she was born, she has had problems with her arm, especially in school.
- Her grip is not strong enough with her right arm and things slip from her hand. She cannot hold heavy objects or pick up heavy objects.
- She cannot lift her arm normally but only at a certain height or level and when she moves her arm too much she feels the pain.

In her letter with her Request for Reconsideration, the appellant wrote that:

- Because of the limitation of her right arm, she is limited with jobs that require lifting up her arm
- For lifting a heavy box, she cannot lift it up with her left arm, but would have to use both arms.

### ***Mental Impairment***

In the PR, the appellant's physician reported that:

- The appellant has no difficulties with communication.

- There are no significant deficits with the appellant's cognitive and emotional function.

In the AR, the physician indicated that:

- The appellant has a good ability to communicate in all areas, including speaking, reading, writing and hearing.
- The section of the AR describing impacts to cognitive and emotional functioning is not completed.
- The section of the AR assessing support/supervision required with aspects of social functioning is not completed.

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

In the PR, the physician indicated that:

- The appellant has been prescribed medication that interferes with her daily living activities in the form of pain medication.

In the AR, the physician reported that:

- The appellant is independent with moving about indoors and outdoors.
- The appellant is independent in 7 of 8 tasks of the DLA personal care, including grooming, bathing, toileting, feeding self, regulating diet, transfers in/out of bed and transfers on/off chair. She requires periodic assistance from another person with dressing and it takes her significantly longer than typical. No other comments are provided.
- The appellant requires continuous assistance from another person with doing her laundry and basic housekeeping.
- The appellant is independent in performing 4 of 5 tasks of the DLA shopping, including going to and from stores, reading prices and labels, making appropriate choices, and paying for purchases. The appellant requires continuous assistance with carrying purchases home.
- The appellant is independent with 2 of 4 tasks of the DLA meals, namely meal planning and safe storage of food, and requires periodic assistance from another person with food preparation and cooking. No other comments are provided.
- The appellant is independent with all 3 tasks of the DLA paying rent and bills: banking, budgeting, and paying rent and bills.
- The appellant is independent in performing all 3 tasks of managing her medications: filling/refilling prescriptions, taking as directed and safe handling and storage.
- The appellant is independent with all 3 tasks of managing transportation: getting in and out of a vehicle, using public transit and using transit schedules and arranging transportation.

In her self-report, the appellant wrote that:

- She cannot do her bed normally, she has to make it slowly and carefully and try not to move her arm too much because it hurts.
- When her child was born, she could never give her a bath because she was afraid she could drop her and she had to have help from her mother.

In her letter with her Request for Reconsideration, the appellant wrote that:

- There are many things that cannot be done with one arm or hand.

### ***Need for Help***

The physician reported in the AR that the help required for DLA is provided by the appellant's family

and friends, with a note that the appellant has less help from her mother now as her mother has a chronic health condition. The section of the report indicating assistance provided through the use of assistive devices is not completed.

In her Notice of Appeal dated March 27, 2014, the appellant wrote:

- She disagrees with the ministry's reconsideration decision because she has an impairment that is never going to get better.
- She is only asking for help because this was done in a public hospital and they only gave her physiotherapy because she was not going to get better, not even with an operation.
- She considers it is something that she should have over all these years of not having a normal life.
- She cannot do certain jobs like a normal person. She could work but there are minimum jobs she can do.

At the hearing, the appellant and her advocate, the appellant's father, stated:

- They decided not to sue the hospital for the problems caused to the appellant's shoulder, but they just need a little help. The appellant was treated in another city and the specialist said the problem will not get better, even with surgery.
- The damage to the appellant's shoulder and arm is evident since it really hurts her. She cannot do things like a normal person.
- The appellant's mother passed away a short while ago and now the appellant receives very little help. She is left on her own to do things.
- The appellant cannot hold or grab something with two hands. When her child was born, the appellant's mother had to help dress the child and give her a bath. The appellant held her child with her left arm but she was afraid that she would slip from her hands. Her child is school-age now.
- Her left arm is the one that is working.
- She cannot carry heavy grocery bags that require two arms. Both her father and her child help her but she does not like to rely on her young child too much.
- She is able to prepare food but she does it with pain. She is the only one who can do it and she needs to do it. For peeling foods, she has to rest after a while because her right arm gets sore and swollen. Instead of taking one hour to make dinner, for example, it will take her 2 hours, or twice as long, because of the rests she takes.
- She is fine with her personal care. She can dress herself since she can use her left arm.
- She has tried different pain medications but found they were either ineffective or caused side effects so she takes one milder medication as prescribed, or every 4 to 6 hours, but she finds it is only effective to relieve the pain for a short time.
- The appellant recently consulted with a specialist and was referred to a surgeon and the surgeon said that she cannot have the operation now because it would likely do more damage.

The ministry relied on its reconsideration decision.

The ministry did not raise an objection to the admissibility of the information in the appellant's Notice of Appeal or her oral testimony. The panel admitted the information as it provided more detail relating to the impact of the appellant's previously diagnosed medical conditions and is in support of information before the ministry on reconsideration, pursuant to Section 22(4) of the *Employment and Assistance Act*.

## PART F – Reasons for Panel Decision

The issue on the appeal is whether the ministry's reconsideration decision, which found that the appellant is not eligible for designation as a person with disabilities (PWD), was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. The ministry found that the appellant does not have a severe mental or physical impairment and that her daily living activities (DLA) are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods and that, as a result of those restrictions, it could not be determined that 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.

The criteria for being designated as a person with disabilities (PWD) are set out in Section 2 of the EAPWDA as follows:

### Persons with disabilities

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).

Section 2(1)(a) of the EAPWDR defines DLA for a person who has a severe physical or mental impairment as follows:

### 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.

### **Severe Physical Impairment**

The appellant's position is that a severe physical impairment is established by the evidence of her pain and weakness due to right shoulder developmental dysplasia.

The ministry's position is that there is not enough information from the general practitioner to confirm that the appellant has a severe physical impairment. The ministry argued that, in terms of functional assessment, the general practitioner indicated that the appellant can walk 4 or more blocks and climb 5 or more stairs, she cannot lift with her right hand however no information is provided on how much she can lift with her left hand, and she has no limitation with remaining seated. The ministry argued that the physician indicated that the appellant requires continuous assistance with lifting and carrying and holding and she is independent in the remainder of her mobility and physical abilities. The ministry argued that the impacts described by the physician are more in keeping with a moderate degree of impairment. The ministry pointed out that while the appellant wrote that her job opportunities are limited if they require any lifting, the application is not intended to assess employability and it is not an eligible criterion for designation as a PWD.

### ***Panel Decision***

The diagnosis of a medical condition is not itself determinative of a severe impairment. To assess the severity of an impairment one must consider the nature of the impairment and its impact on the appellant's ability to manage her DLA as evidenced by functional skill limitations, the restrictions to DLA, and the degree of independence in performing DLA. The ministry describes this approach when it defines the word "impairment" in the physician report as being "a loss or abnormality of psychological, anatomical or physiological structure or function causing a restriction in the ability to function independently, effectively, appropriately or for a reasonable duration." This definition is not set out in legislation and is not binding on the panel, but in the panel's view it quite appropriately describes the legislative intent.

The legislation clearly provides that the determination of severity of impairment is at the discretion of the minister, taking into account all of the evidence including that of the appellant. However, the legislation is also clear that the fundamental basis for the analysis is the evidence from a prescribed professional respecting the nature of the impairment and its impact on daily functioning.

The medical practitioner, a physician who has known the appellant for a period of 2 years, diagnosed the appellant with right shoulder developmental dysplasia with occasional tilted and contracting humeral head-outlet obstruction with impingement syndrome. The physician reported that the

appellant has "...weakness right arm, restricted movement right shoulder; not able to use right arm very much; not able to lift." In the additional comments, the physician wrote further that the appellant has a congenital abnormality of the right shoulder joint, she has muscle wasting, decreased range of motion of the shoulder, she has pain in the right arm and numbness of the right arm; she has very minimal use of her right arm. The appellant stated at the hearing that the damage is to her right shoulder and arm and her left arm is the one that is working. In terms of functional skills, the appellant is assessed by her physician as able to walk 4 or more blocks unaided on a flat surface, climb 5 or more steps unaided, do no lifting, and no limitation with remaining seated. In the AR, the appellant's physician assessed the appellant as independent with walking indoors and outdoors, climbing stairs, and standing and as requiring continuous assistance from another person with lifting and carrying and holding. In her self-report included with the PWD application, the appellant wrote that her grip is not strong enough with her right arm, that things slip from her hand and she cannot hold heavy objects or pick up heavy objects. At the hearing, the appellant stated that she could hold her child as a baby with her left arm but she was afraid that she might slip and that the appellant's mother helped her at that time.

In her letter with her Request for Reconsideration, the appellant wrote that because of the limitation of her right arm, she is limited with jobs that require lifting up her arm. For an impairment to be a "severe impairment," section 2 of the EAPWDA requires that the ministry must be satisfied that the evidence demonstrates restrictions to a specified degree in certain specified areas of daily functioning. The legislation reads that for PWD designation, the minister must be satisfied that "the person has a severe mental or physical impairment that ....directly and significantly restricts the person's ability to perform [prescribed] daily living activities and as a result of those restrictions, the person requires help [an assistive device, the significant help or supervision of another person, or the services of an assistance animal to perform those activities.]" As ability to search for, accept or continue in employment is not listed as one of prescribed DLA, the panel finds that the ministry reasonably held that employability is not a factor in assessing eligibility for PWD designation.

The appellant wrote in her Notice of Appeal she is only asking for help because this was done in a public hospital and they only gave her physiotherapy because she was not going to get better. The appellant's father stated at the hearing that they decided not to sue the hospital for the damage to the appellant's shoulder and that they just need a little help. However, the ministry's assessment on a PWD application does not involve an evaluation of the cause for the medical condition or injury and is based on the evidence available of the appellant's current physical functioning. The panel finds that the ministry reasonably concluded that the evidence of the appellant's physician demonstrates that the appellant is currently independent with her mobility and all her physical abilities except for lifting and carrying and holding. Both the physician and the appellant indicated that the restrictions to lifting relate the appellant's right arm and for heavier weights that require the use of two arms. The panel, therefore, finds that the ministry reasonably determined that there is not sufficient evidence to establish that the appellant has a severe physical impairment under section 2(2) of the EAPWDA.

### **Severe Mental Impairment**

The appellant did not maintain a position that she has a severe mental impairment.

The ministry's position is that the physician does not provide any evidence to confirm a severe mental impairment. The ministry argued that the physician reported the appellant has no significant deficits with her cognitive and emotional function. The ministry argued that the physician indicated the

appellant has no difficulties with communication and she is good in speaking, reading, writing and hearing.

*Panel Decision*

The general practitioner did not diagnose a mental health condition in the PR and reported that the appellant has no significant deficits to her cognitive and emotional function. The appellant is assessed as having a good ability to communicate in all areas and the sections of the AR describing impacts to cognitive and emotional functioning and social functioning were not completed by the physician. Given the absence of both a mental disorder diagnosis and evidence of impacts to mental and social functioning, the panel finds that the ministry reasonably determined that a severe mental impairment was not established under section 2(2) of the EAPWDA.

**Restrictions in the ability to perform DLA**

The appellant's position is that her physical impairment directly and significantly restricts her ability to perform DLA on an ongoing basis to the extent that she requires the significant assistance of another person.

The ministry's position is that it acknowledges that the appellant has limitations regarding her right arm; however, considering all of the information provided by the physician the ministry does not have enough evidence to confirm that her impairments directly and significantly restrict her ability to perform DLA either continuously or periodically for extended periods.

*Panel Decision*

Section 2(2)(b) of the EAPWDA requires that a prescribed professional provide an opinion that an applicant's severe impairment directly and significantly restricts his DLA, continuously or periodically for extended periods. In this case, the appellant's physician is the prescribed professional. DLA are defined in section 2(1) of the EAPWDR and are also listed in the PR and, with additional details, in the AR. Therefore, a prescribed professional completing these forms has the opportunity to indicate which, if any, DLA are significantly restricted by the appellant's impairments either continuously or periodically for extended periods.

In the appellant's circumstances, her physician reported in the AR that the appellant performs a majority of her DLA independently with no assistance, including moving about indoors and outdoors, paying rent and bills, managing her medications and transportation. While the physician reported that periodic assistance is required with 1 of 8 tasks of personal care, namely dressing, and with 2 of 4 tasks of meals (food preparation and cooking), the panel finds that the physician has not provided further detail to support a finding by the ministry that this assistance is required for extended periods of time. At the hearing, the appellant stated that she is fine with her personal care and that she can dress herself since she can use her left arm. The appellant also stated that she is able to prepare food but she does it with pain, she has to rest after a while because her right arm gets sore and swollen, and it will take her twice as long.

The physician reported that the appellant requires continuous assistance with the basic housekeeping DLA, including doing laundry, and with 1 of 5 tasks of shopping, namely carrying purchases home. The physician has not provided further comment with respect to the appellant's need for assistance and the appellant wrote in her self-report that her grip is not strong enough with her right arm and things slip from her hand so she cannot hold heavy objects or pick up heavy



objects. At the hearing, the appellant stated that her left arm is working and her restrictions relate to lifting heavier items requiring two arms, such as heavy grocery bags for which her father and child assist her. Although the physician reported in the PR that the appellant has been prescribed medication that interferes with her DLA, the appellant explained at the hearing that she stopped taking the heavier pain medication because she found it caused adverse side effects and she is currently only taking a milder medication with no adverse effects. Overall, the panel finds that the ministry reasonably concluded that there is not enough evidence from the prescribed professional to establish that the appellant's impairment significantly restricts her ability to manage DLA either continuously or periodically for extended periods, thereby not satisfying the legislative criterion of section 2(2)(b)(i) of the EAPWDA.

### **Help to perform DLA**

The appellant's position is that she requires the significant assistance of another person to perform DLA, which had been primarily provided by her late mother.

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 ministry stated that the appellant does not require an assistive device or the services of an assistance animal.

### **Panel Decision**

Section 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 a DLA.

The evidence of the physician, as a prescribed professional, is that the help required with DLA is provided by the appellant's family, and the appellant stated at the hearing that this help had been provided by her mother who recently passed away and that now she is left to do things on her own. The physician reported that the appellant does not require or use an assistive device. While the panel finds that the evidence of the prescribed professional establishes that the appellant obtains some assistance from her family, which is currently provided by her father and young child, the panel also finds that the ministry reasonably determined that, as direct and significant restrictions in the appellant's ability to perform DLA have not been established, it cannot be determined that the appellant requires help to perform DLA as a result of those restrictions, as defined by section 2(3)(b) 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 therefore confirms the decision.