

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (Ministry) Reconsideration Decision dated July 9, 2015, which held that the Appellant is not eligible for designation as a Person with Disabilities (PWD). The Ministry found that the Appellant did not meet three of the five criteria set out in Section 2(2) of the Employment and Assistance for Persons with Disabilities Act. 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 found that the information provided does not establish that the Appellant has a severe mental or physical impairment, that, in the opinion of a prescribed professional, significantly restricts her ability to perform daily living activities continuously or periodically for extended periods or that as a result of those restrictions she requires the significant help or supervision of another person to perform daily living activities .

## 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 (PWD) Application, stamped as received by the ministry March 19, 2015:
  - Self-Report: The Appellant did not complete Part B, Disabling Condition section of the PWD application form.
  - Physician Report: The physician reported that the Appellant is diagnosed with right thumb injury – 2008 surgery, right shoulder surgery 2011 work injury, left [illegible] fracture, lumbar [illegible] concussion Feb 1997 at work, insomnia and headaches, with the diagnostic codes for musculoskeletal system-other, arthritis and [illegible]. In the Health History section, the physician wrote chronic BP high, arthritis of shoulder and finger, concussion from work injury, thumb sliced in half with tendon and bone injury (work inj), left arm broken bone, right shoulder pain, surgery, chronic pain, work injury, ? left foot, sleep disorder, headaches chronic, chronic shoulder, arm, back pain, physically limited with daily tasks, needs help regularly. The physician ticked "yes" in the section asking of the applicant has been prescribed any medication and/or treatments that interfere with her ability to perform daily living activities and "yes" in the section asking if the applicant requires any prosthesis or aids for her impairment, with the comments "lifting device" and "carrying cart". The physician confirmed that the Appellant's impairment is likely to continue for two years or more, with the comment "Chronic condition present for many years. Unlikely to improve in 2 yrs. Poor response to treatment."
  - Functional skills: The physician reported that the Appellant can walk less than 1 block unaided on a flat surface, can climb no stairs, cannot lift and can remain seated less than 1 hour. . With respect to cognitive and emotional function, the physician reported that there are significant deficits with emotional disturbance and ticked the boxes for motivation, motor activity and attention or sustained concentration, with the comments "Blurred vision – can't read well" and "Chronic headaches + dizziness".
  - Additional comments: The physician wrote chronic pain in entire body, dizziness, headaches, difficulty holding objects, immobility of arm, numbness in hands and arm, mobility restrictions, thumb pain, right shoulder surgery, left [illegible], shoulder pain, Hx executive, headaches, ADL's and IADL's impacted, needs help.
  - Assessor Report: Assessor Report dated March 14, 2015: This section was completed by the Appellant's physician and contained the following information:
    - Mental or physical impairment: The assessor report was completed by the Appellant's physician, who reported that the Appellant's impairments that impact her ability to manage daily living activities (DLA's) are right thumb, concussion, right shoulder pain, left [illegible], insomnia, lumbar pain and headaches. In the section dealing with ability to communicate, the physician reported that the Appellant has satisfactory speaking, with the note "head/elbow/arm pain", poor reading and writing, with the note "blurred vision" and good hearing. In the section dealing with mobility and physical ability, the physician indicated that the Appellant is independent in standing, requires periodic assistance walking indoors and outdoors, requires continuous assistance lifting and carrying and holding and takes significantly longer climbing stairs. All of the activities are indicated by checkmark to take significantly longer than typical, with the notation "chronic arm pain, chronic back pain, right shoulder pain, ulnar pain". In the comments section, the physician wrote "needs to use carrying cart, chronic pain, difficulty with [illegible], can lift 5 lb, can climb 1 flight stairs". In the section dealing with cognitive and emotional functioning, the physician indicated no impact with bodily functions, consciousness, impulse control, insight and judgement, memory, language, psychotic symptoms, other neuropsychological problems and other emotional problems; moderate impact with emotion,

attention/concentration and motivation and major impact with executive and motor activity, with the comments “post-concussion syndrome, insomnia, headaches and poor concentration”.

- Daily living activities (DLA's): The physician reported that nine aspects of personal care, feeding self, regulate diet, making appropriate choices, paying for purchases, safe storage of food, banking, budgeting, paying rent and bills, filling/refilling prescriptions, taking as directed and safe handling and storage are performed independently, with the comments “can’t stand for long” and “difficulty ambulating”. Six of the aspects of DLA's which are marked as independent are also marked as taking significantly longer than typical: safe storage of food, banking, with the comment “difficulty paying bills”, budgeting, with the comment “forgets to pay”, pay rent and bills, filling/refilling prescriptions, with the comment “difficulty going to pharmacy” and safe handling and storage, with the comment “difficulty with remembering to take meds”. The physician reported that periodic assistance is needed with four aspects of DLA's: dressing, with the comment “has to sit due to back pain”, reading prices and labels, food preparation, with the comment “difficulty preparing meals” and taking medications as directed, with the comment “difficulty with remembering to take meds”. The physician reported a requirement for continuous assistance with 14 aspects of DLA's: grooming, with the comment “shoulder and arm pain”, bathing, with the comment “difficulty [illegible]”, toileting, with the comment “can’t sit for long”, transfers in and out of bed, with the comment “difficulty ambulating”, transfers on and off of chair, laundry, with the comment “difficulty due to arm and shoulder pain”, basic housekeeping, with the comment “has to get help”, going to and from store, with the comment “difficulty carrying bag, lifting, [illegible], carrying”, carrying purchases home, meal planning, with the comment “difficulty cooking”, cooking, with the comment “difficulty standing for long”, getting in and out of a vehicle, with the comment “difficulty getting into bus”, using public transit, with the comment “difficulty finding bus routes and schedules and using transit schedules and arranging transportation, with the comment “difficulty with waits and checking status”. . In the section for additional comments, the physician wrote “needs help daily with personal care, toileting, housekeeping and laundry. Needs help with shopping, needs help with daily activities, needs help with [illegible]”, needs help daily with preparing meals and cooking, needs help to be driven to bank/[illegible], needs help dealing with transportation”.
- Social functioning: The physician indicated that four of the five aspects of social functioning, appropriate social decisions, able to develop and maintain relationships, interacts appropriately with others and able to secure assistance from others require periodic assistance and one, able to deal appropriately with unexpected demands, as requiring continuous assistance, with the comments “post-concussion syndrome, anxiety, social phobia and difficulty connecting with others”. The impacts of the Appellant's mental impairment on her relationship with her immediate social network is described as marginal, with the comment “non-trusting”, with her extended social networks as marginal, with the comment “non-trusting”. In the section for comments about help required, the physician wrote “physiotherapy/counselling/PSW” In the section for additional comments, he wrote “risk of falling and dropping objects”.
- Assistance provided for applicant: The physician indicated that assistance is provided by family, with the comments “laundry, transportation, physiotherapy and chiropractor” in the section asking if help is required but there is none available, describe what is necessary. In the section dealing with assistive devices, the physician ticked lifting device, splints, braces, toileting aids and bath aids, with the comment “chair” beside bathing aids and “chair/stool for bath, elbow/[illegible] brace”. The physician indicated that the Appellant does not have an assistance animal. In the section for additional information, the physician wrote “tendon injury right thumb, right shoulder surgery, left ulnar [illegible] and surgery, [illegible], post-concussion – headaches, insomnia, chronic sleep disorder, chronic headaches, difficulty with physical and mental functions”.

- The Ministry's PWD Designation Denial Decision Summary dated May 7, 2015.
- The Ministry's letter to the Appellant dated May 7, 2015, advising her of their decision.
- The Appellant's Request for Reconsideration dated May 22, 2015, with attachment.

At the hearing the Appellant submitted a two page fact sheet titled "Post-Concussion Syndrome", printed from a website. The Ministry did not object to the admission of this document. The Panel admitted it as argument.

At the hearing, the Appellant asked to have an observer present as a trainee for the advocate's office. The Ministry had no objection to the observer being present.

The Appellant stated that her appeal is based on three reasons: the reconsideration decision was based on a wrong finding of fact, the Ministry changed the reasons for denial from the original denial to the reconsideration decision and the Ministry ignored the evidence on the application form. With respect to the original decision by the Ministry, the Appellant stated that the Ministry ignored half of her diagnosis. In assessing ambulation, the Ministry regarded "less than" and "up to" as having the same meaning, when they do not. The Appellant argued that the Ministry should have included post-concussion syndrome as a medical condition. The Appellant argued that the Ministry could have contacted the Appellant's physician for additional information if they were unable to assess her condition based on the information before them. The Appellant questioned why the application form includes questions about how much longer an activity takes. The Appellant asked why a question about how long an activity takes is asked if the answer makes no difference. The Appellant questioned why the Ministry commented on the limited contact of the Appellant with her physician, but asks for recent experience with an applicant on the application form. The Appellant stated that there is no mention of assistive devices in the Ministry's decision.

With respect to a physical impairment, the Appellant referred to the application form, in which almost all DLA's are reported to take significantly longer, with the majority requiring continuous assistance. The Appellant stated that the Ministry ignored the diagnosis of post-concussion syndrome. In response to questions from the Panel, the Appellant stated that her ability to perform DLA's is affected by headaches, body pain and insomnia. She stated that she fell at work in 1997 and cannot sleep since because of headaches. She stated that she had surgery on her arm in 2008 and shoulder surgery in 2011 and cannot move her arm much. She stated that anxiety affects her ability to do some things.

With respect to a mental impairment, the Appellant stated that the symptoms listed are not separate and distinct, but are a cluster related to post-concussion syndrome, including anxiety and depression. In the section dealing with social functioning, the Ministry did not make a connection with post-concussion syndrome.

The Ministry responded by stating the legislative requirements for designation as a person with disabilities, noting that employability is not one of them. The Ministry referred to the reconsideration decision, which found that the Appellant met 2 of the 5 legislative requirements, stating that the Appellant has limitations, but not a severe physical or mental impairment. The Ministry noted that no additional information, such as medical reports, was provided with the Appellant's request for reconsideration, therefore the Ministry had only the information provided on the application form. The Ministry reviewed the reconsideration decision and stated that they concluded that the Appellant's condition does not reflect a severe physical or mental impairment. In response to questions from the Panel, the Ministry stated that the omission of the list of assistive devices from the decision may have been an error.

## PART F – Reasons for Panel Decision

The issue in this appeal is the reasonableness of the Ministry of Social Development and Social Innovation (Ministry) Reconsideration Decision, which held that the Appellant is not eligible for designation as a Person with Disabilities (PWD). The Ministry found that the Appellant did not meet three of the five criteria set out in Section 2(2) of the Employment and Assistance for Persons with Disabilities Act. 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 found that the information provided does not establish that the Appellant has a severe mental or physical impairment, that her impairment significantly restricts her ability to perform daily living activities continuously or periodically for extended periods or that as a result of those restrictions she requires the significant help or supervision of another person to perform daily living activities .

### Legislation

EAPWDA

### 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).

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

(a) authorized under an enactment to practise the profession of

- (i) medical practitioner,
- (ii) registered psychologist,
- (iii) registered nurse or registered psychiatric nurse,
- (iv) occupational therapist,
- (v) physical therapist,
- (vi) social worker,
- (vii) chiropractor, or
- (viii) nurse practitioner, or

(b) acting in the course of the person's employment as a school psychologist by

- (i) an authority, as that term is defined in section 1 (1) of the *Independent School Act*, or
- (ii) a board or a francophone education authority, as those terms are defined in section 1 (1) of the *School Act*,

if qualifications in psychology are a condition of such employment.

The Appellant's position is that she meets the requirements for designation as a PWD and that the Ministry did not consider all of the evidence in reaching their conclusion. The Appellant asked if it is reasonable to deny an application on one set of facts, then at reconsideration deny on another set of facts, as they argue the Ministry did in this application. The Appellant argued that the Ministry could have contacted the Appellant's physician if they were unsure, but they did not. With respect to the Appellant not having completed the self-reporting section of the application form, the Appellant stated that this was left blank on the advice of her advocate.

The Ministry's position is that the Appellant's application for PWD designation does not meet the legislative criteria because it does not provide sufficient information to establish that a severe impairment significantly restricts daily living activities continuously or periodically for extended periods.

Severe physical impairment:

With respect to a severe physical impairment, the Panel notes the use of the word “chronic” throughout the Appellant’s application for PWD designation. The Panel also notes that in the section dealing with functional skills, the physician reported that the Appellant can climb no stairs and cannot lift; however, in the section dealing with mental or physical impairment in the assessor’s report, the physician reports that the Appellant can lift 5 pounds and can climb one flight of stairs, but reports that the Appellant requires continuous assistance with these activities. In the section dealing with mobility and physical ability, the Appellant is reported to be independent in two, standing and lifting, to require periodic assistance with two, walking indoors and outdoors, and to require continuous assistance with two, lifting and carrying and holding, and all are reported to take significantly longer than typical. In the section of the form dealing with DLA’s, the Appellant is reported to require continuous assistance with half of the listed aspects of DLA’s, however there is no detail about the type and amount of assistance required. The Panel finds that the Ministry reasonably determined that the information provided does not establish that the Appellant has a severe physical impairment.

Severe mental impairment:

With respect to a severe mental impairment, although the physician noted significant deficits with cognitive and emotional function, the Panel notes that there is no diagnosis of a mental impairment. The Appellant’s physician reported two major impacts with executive and motor activity, however motivation and attention or sustained concentration, which were listed as significant deficits in the section dealing with functional skills are reported to be of moderate impact in the assessor section of the application form. The five aspects of social functioning listed are reported to require periodic support or supervision, with the exception of dealing with unexpected demands, which is reported to require continuous support or supervision. The Panel finds that the Ministry was reasonable in concluding that there is insufficient evidence to establish that the Appellant has a severe mental impairment.

Restrictions in ability to perform DLA’s

The ministry found that the Appellant’s physician, acting as assessor, indicated that she requires periodic or continuous assistance with most aspects of daily living activities, however the inconsistency noted above and the lack of detail about the type and amount of assistance required cause difficulty in determining that the Appellant’s ability to perform DLA’s is significantly restricted. The Appellant’s mobility and physical ability assessment appears to be inconsistent with a requirement for continuous assistance with half of her daily living activities. The Appellant is reported to require continuous assistance with grooming, bathing and transferring in and out of bed and on and off a chair, however the mobility and functional ability assessment indicates that she is independent standing and lifting and requires periodic assistance walking indoors and outdoors. The indication that she takes significantly longer with these activities is not supported by any details about the nature or amount of assistance required. The Appellant is reported to be independent in six aspects of DLA’s which are also reported as taking significantly longer than typical. With respect to social functioning, the assessor reported that periodic support is required in all but one aspect, the ability to deal appropriately with unexpected demands, noting “anxiety [illegible]”. In describing how the mental impairment impacts the Appellant’s relationships, the physician reported marginal functioning, noting “non-trusting”. In the section dealing with the support/supervision required, the physician wrote “physiotherapy/counselling/PSW” and in the space for additional comments, wrote “risk of falling and dropping objects”, none of which speaks to a need for significant help or supervision as specified in s.2(3)(b), EAPWDA. The panel finds that the ministry reasonably determined that the information from a prescribed professional does not establish that her impairment significantly restricts daily living activities either continuously or periodically for extended periods as required under section 2(2)(b)(i) of the EAPWDR.

Need for assistance

The Panel notes that the Appellant's physician indicated that she requires assistive devices, namely lifting device, splints, braces, toileting aids and bathing aids, however as it has not been established that the Appellant is significantly restricted in performing daily living activities, the requirement of s.2(b)(ii) of the EAPWDA has not been met.

Panel decision:

In conclusion, the Panel confirms the Ministry's reconsideration decision, which found that the appellant is not eligible for designation as a person with disabilities, as being reasonably supported by the evidence.