



## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated September 15, 2015 which found that the appellant did not meet all of the 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 she has an impairment that is likely to continue for at least two years. However, the ministry was not satisfied that the evidence established 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:

1. The appellant's PWD Application comprised of:

- The Applicant Information and Self-report ("SR") prepared by the appellant and dated April 2, 2015; and
- The Physician Report ("PR") and Assessor Report ("AR"), both dated May 1, 2015 and prepared by the appellant's general practitioner ("GP") of over 10 months;
- A Neuropsychological/Learning Disabilities/Vocational Assessment concerning the appellant dated November 28, 2007 and prepared by a psychologist ("Assessment").

2. The appellant's Request for Reconsideration ("RFR") dated September 2, 2015 to which is attached written submissions signed by the appellant and also dated September 2, 2015 ("RFR Submissions").

### ***Diagnoses***

In the PR, the appellant is diagnosed by the GP as follows:

1. Developmental disability;
2. Cleft Palette – Speech loss;
3. Arthritis; and
4. Calcification – left shoulder

The GP has not provided the date of onset for any of the diagnoses set out above.

In the RFR Submissions, the appellant confirms the diagnoses of the GP and adds that she currently is also experiencing issues with her left elbow.

### ***Physical Impairment***

In the RFR Submissions, the appellant re-states the findings of the GP in the PR and AR. She writes that the GP reports that she can walk "2-4 blocks maximum" and that while walking stairs she has to use a handrail at all times. She writes that she is only able to lift "under 5 pounds", that she can sit less than one hour and that she is unable to stand for over 10-15 minutes. She further cites the GP's report that she suffers from a speech impediment, that she reads at a grade 4 level, that she writes at a grade 6 level and that she has difficulty hearing when there is a lot of background noise.

In the SR, the appellant writes that she was designated as a Person With Persistent Multiple Barriers ("PPMB") on July 1, 2012 and that her osteoarthritis in both wrists, hands and fingers causes her to frequently drop things. She lists her additional physical conditions as calcification in her left shoulder, pain in both elbows, soft tissue problems in her knees, ankles and neck which has left her with chronic pain. She adds that she was born with a cleft palette for which she had multiple surgeries and which left her with a speech impediment.

In the PR, the GP indicates that with respect to functional skills, the appellant can walk 2-4 blocks unaided on a flat surface but that she cannot climb any stairs unaided noting that she "uses handrail at all times." The GP indicates that the appellant is limited to lifting items that are under 5 lbs and that she can remain seated for less than 1 hour.

In the AR, the GP reports that the appellant lives alone and describes her as having poor ability to speak, read and write and satisfactory ability hearing. The GP adds that the appellant has a speech impairment insofar as others have difficulty understanding her speech, that she reads at a grade 4 level ("slow process") and that she writes at a grade 6 level ("slow process").

Continuing with the AR, the GP indicates that the appellant is independent walking indoors but requires periodic assistance walking outdoors and that she is unable to walk more than 3-4 blocks. The appellant is described by the GP as using an assistive device to climb stairs (“has to use handrail at all times”) and requiring periodic assistance from another person while standing (“unable over 10-15 minutes”). Finally, the GP indicates that the appellant requires continuous assistance from another person with lifting, carrying and holding and is unable with items over 4lbs.

In the Assessment, the psychologist sets out the appellant’s medical history including a cyst under her kneecap for which she received surgery at age 15, a 1991 motor vehicle accident causing whiplash and ongoing difficulties lifting, a pulled tendon in her right wrist and that she was born with a cleft palate which causes speech difficulties.

### ***Mental Impairment***

In the RFR Submissions, the appellant refers to the findings of the GP in the PR and AR. She notes that her cognitive and emotional functioning impacts her daily functioning in terms of sleep disturbance (“moderate impact”), consciousness (“minimal impact”), attention/concentration (“moderate impact”), memory (“minimal impact”), motor activity (“minimal impact”), language (“moderate impact”) and learning disabilities (“major impact”).

In the SR, the appellant refers to the Assessment noting that it refers to her processing speed as borderline which affects both her physical and mental process of information. She refers to the finding in the Assessment of the grade equivalent for her reading fluency (4.1), writing fluency (6.1) and math fluency (5.7). The appellant further refers to the finding in the Assessment of her low processing speed in writing, reading and math as a severe learning disability.

In the PR, the GP notes the following significant deficits with the appellant’s cognitive and emotional function: consciousness, language, memory (short-term), perceptual psychomotor, motor activity, attention or sustained concentration and learning disabilities.

In the AR, the GP notes the various impacts of the appellant’s mental impairment on her functioning as follows (GP’s comments follow each in parentheses): major impact on other neuropsychological problems (learning disabilities with reading, writing and math), moderate impact on bodily functions (sleep disturbance with the appellant sleeping on average 4-6 hours per night), attention/concentration (poor short term memory and ease of distraction) and language (slow processing, has to read things over and over to comprehend what she is doing).

In the Assessment, the psychologist provides detailed findings of the appellant’s functional status following a number of tests being administered. The psychologist found that overall, while the appellant’s intellectual abilities were in the average range, the speed at which she completes most tasks is low and that this low processing speed has a substantial impact on her academic performance. In light of this low processing speed in reading, writing and math, the psychologist characterized it as a severe learning disability. The psychologist similarly found no indications from any source of mental health difficulties although the appellant demonstrated low self-confidence and low assertiveness.

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

In the AR, the GP reports that the appellant’s ability to manage DLA is impacted by the following:

1. Osteoarthritis (fingers, wrists, both hands);
2. Chronic pain;

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3. Elbow pain;
  4. Calcification left shoulder;
  5. Soft tissue damage (knees, ankles and neck);
  6. Speech impairment; and
  7. Learning disabilities (reading, writing, math).

For the tasks of DLA relating to personal care, the appellant is noted as able to independently groom, bathe, toilet, feed herself, regulate her diet and transfer in and out of bed but that she takes significantly longer than typical and she has to sit to dress and use chair arms to transfer on and off of a chair with both of these tasks taking twice as long as typical.

For tasks of basic housekeeping, the appellant is described as requiring continuous assistance with laundry and basic housekeeping. The GP comments that the appellant's mother does her laundry as she is unable to carry a laundry basket and that she is unable to bend to clean the bathtub and has difficulty doing any cleaning that requires bending and kneeling.

For tasks of shopping, the GP describes the appellant as independent making appropriate choices and paying for purchases but that she requires continuous assistance from another person or is unable to go to and from stores ("goes shopping with mom") and carry purchases home ("unable over 4lbs"). Further, the appellant is noted to take significantly longer and use an assistive device for reading prices and labels with the GP commenting that the appellant's slow processing takes an inordinate amount of time to read with glasses.

For tasks relating to meals, the appellant is noted as independent in meal planning, cooking and safe storage of food but requires continuous assistance with food preparation.

The appellant is described by the GP as independent with all tasks of paying rent and bills (banking, budgeting, paying rent and bills), medications (filling/refilling prescriptions, taking as directed and safe handling and storage) and transportation (getting in and out of a vehicle, using public transit and using transit schedules and arranging transportation).

With respect to social functioning, the GP has indicated that the appellant is independent interacting appropriately with others but requires continuous support from her parents when making appropriate social decisions ("lives in town where she doesn't know anyone but family. Doesn't go out to socialize"), developing and maintaining relationships ("sticks to people she already knows"), dealing appropriately with unexpected demand ("overwhelmed") and securing assistance from others ("depends who it is – has difficulties asking others for help"). The GP notes that the appellant's mental impairment has caused her to have marginal functioning with her immediate social network but that she has good functioning with her extended social network.

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

In the PR, the GP did not indicate that the appellant requires an assistive device. In the AR, the GP indicates that the appellant receives help from family, specifically her parents and that she uses pliers to help open some containers. The GP also notes that the appellant needs but does not have hand and wrist braces. The GP indicates in the AR that the appellant does not require assistance through the use of assistive devices or assistance animals.

### **Evidence On Appeal**

#### ***Appellant's Evidence At Hearing***

At the hearing, the appellant reviewed her physical limitations. She described herself as experiencing arthritis

which causes difficulty grasping items as she has limited strength in her hands and wrists. She described using pliers to open certain types of canned goods. The appellant stated that she has arthritis in her left elbow, calcification in her left shoulder, soft tissue “issues” in her neck following a motor vehicle accident in 1990, soft tissue problems in her knees and an injury to her right wrist for which she feels she should wear a brace but that she can’t afford it. Functionally, the appellant says that she requires a handrail when climbing stairs as she feels her knees will “give out”, that she finds it hard to sit for extended periods due to a previous injury to her tailbone and that she manages her chronic pain with non-prescription pain medication. She added that if she walks for too long her knee and ankle hurt and she has to sit and rest. The appellant described being born with a cleft palate which required surgery and which has left her with a speech impediment. With respect to DLA, the appellant stated that her mother helps her with shopping which takes her twice as long to accomplish due to her slow processing. She indicated that the grade equivalent for her reading fluency is 4.1, for writing fluency is 6 and for math fluency is 5.

In response to questions, the appellant stated that when she goes shopping, her mother comes with her and that she often brings her leftovers so she does not have to cook. She added that she has difficulty bending over and with her wrist injury she has trouble with housework. The appellant stated that she obtained a university degree in 2008 but that it took her approximately 10 years to do so given the academic accommodations she was provided. Subsequent to obtaining her degree, she did further technical training and attempted to take another course prior to her financial assistance coming to an end. The appellant clarified that the date of onset for both her arthritis and calcification were in approximately 2011 or 2012.

***Ministry’s Evidence At Hearing***

At the hearing, the ministry noted that in both the PR and the AR, the GP did not provide adequate comments or additional information to support the PWD application and meet the legislative requirements for the PWD designation. The ministry acknowledged that the appellant has limitations but that looked at as a whole, the evidence does not support a finding that the appellant has met the legislative requirements.

In response to questions, the ministry stated that it is necessary to look at the significance of the appellant’s impairment and the associated limitations. The ministry referred to the Assessment and argued that in some ways, the evidence of the GP contradicted that of the psychologist. The ministry stated that a diagnosed severe learning disability does not in and of itself constitute a severe mental impairment.

The appellant writes in her Notice of Appeal dated September 25, 2015 that in some areas, she does have significant difficulties both mentally and physically.

## 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) under section 2 of the *EAPWDA*, 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 met the age requirement and that she has an impairment that 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.

The criteria for being designated as a 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.

### **Severity of impairment**

Section 2(2)(a) of the *EAPWDA* provides that when addressing the issue of a severe physical or mental impairment in the context of a person applying for a PWD designation, that person must be found to have a severe physical or mental impairment that, in the opinion of a medical practitioner, is likely to continue for at least 2 years.

A diagnosis of a serious medical condition or conditions does not in itself determine PWD eligibility or establish a severe impairment. An "impairment" is a medical condition that results in restrictions to a person's ability to function independently or effectively.

To assess the severity of an impairment one must consider the nature of the impairment and the extent of its impact on daily functioning. In making its determination, the ministry must consider all the relevant evidence, including that of the appellant. However, the legislation is clear that the fundamental basis for the analysis is the evidence from prescribed professionals – in this case, the GP and the psychologist.

### **Severity of mental impairment**

The appellant argues that she has a severe mental impairment evidenced by a severe learning disability which includes slow intellectual processing which affects her reading, writing and math fluency.

The ministry's position is that while the appellant experiences limitations to her cognitive and emotional functioning due to slower than average intellectual processing speeds, the evidence as a whole does not support a finding that the appellant has a severe mental impairment.

### *Panel Decision*

In the PR, the appellant has been diagnosed by her GP with a developmental disability. The GP further indicates that the appellant experiences significant deficits with cognitive and emotional function including consciousness, language, short term memory, perceptual psychomotor, motor activity, attention or sustained concentration and learning disabilities. In the AR, the GP comments again on the impact of the appellant's mental impairment on her functioning. The GP describes the appellant's learning disabilities as a major impact with specific reference to the appellant's reading, writing and math. Further, the GP notes a moderate impact on bodily functions (specific reference to sleep disturbance with an average of 4-6 hours of sleep per night),

attention/concentration (specific reference to poor short term memory and “easily distractible) and language (specific reference to comprehension problems due to slow processing). The GP notes a minimal impact on the appellant’s consciousness, memory and motor activity with no impact on emotion, impulse control, insight and judgement, motivation, psychotic symptoms and other emotional or mental problems.

Turning to the Assessment, the psychologist in his summary diagnoses the appellant with a severe learning disability based largely on the appellant’s low processing speed which is reflected in her intelligence testing results. In one intelligence test, the appellant’s verbal comprehension was classified as “high average”, her perceptual organization and working memory were “average” and her processing speed was “borderline.” In another test, the appellant’s reading, writing and math fluency was found to be at the equivalent 4.1, 6.1 and 5.7 grades respectively. However, these results must be viewed in the context of the test as a whole which shows the appellant’s aggregate scores higher overall. For example, the appellant’s grade equivalent for basic reading skills was 12.8 and for reading comprehension was 17.0. For writing skills, the appellant’s grade equivalent for broad written language was 11.1, for basic writing skills was 13.1 and for written expression was 7.4. Finally, the appellant’s grade equivalent for each of broad math, math calculation skills and math reasoning was 17.0. With these scores as a background, the panel notes the appellant’s evidence that she obtained a university degree in 2008 albeit over a period of 10 years during which she received academic accommodation.

The panel notes that section 2(1)(b) of the *EAPWDR* prescribes two DLA that are specific to mental impairment – making decisions about personal activities, care or finances (decision making), and relating to, communicating or interacting with others effectively (social functioning). The GP’s evidence in the AR indicates that the appellant is not significantly restricted with respect to decision making in that she independently manages all of the decision making aspects of the DLA of personal care as well as management of medications and finances. The appellant is noted as being independent with the management of her personal medication and management of personal finances (banking, budgeting and paying rent and bills).

While the evidence of the GP and the psychologist is that the appellant faces varying degrees of mental impairment largely flowing from her slow intellectual processing, the evidence of the GP is that appellant is independent in all aspects of her DLA that require the ability to plan, organize and execute and the evidence of the psychologist is that while the appellant scores low in the reading, writing and math fluency and has low processing, her aggregate scores are for the most part at or near university level grade equivalents. While the evidence is clear that the appellant suffers from a learning disability, section 2(2) of the *EAPWDA* requires that the minister be satisfied that the person have a severe mental or physical impairment. Given the evidence that was available at reconsideration concerning the extent to which the appellant is independent in areas where her mental impairment could be expected to impact her daily functioning including her education, the panel concludes that the ministry’s determination that there is not sufficient evidence to establish that the appellant has a severe mental impairment under section 2(2) of the *EAPWDA* was reasonable.

### **Severity of physical impairment**

The appellant’s position is that her physical functioning is consistent with a severe physical impairment.

The ministry takes the position that the appellant’s physical conditions do not constitute a severe physical impairment.

### *Panel Decision*

In the PR, the GP describes the appellant as suffering from a cleft palate with associated speech loss, arthritis and calcification of her left shoulder. The GP indicates that with respect to functional skills, the appellant can walk 2-4 blocks unaided but that she cannot climb stairs without a handrail. The appellant is described by the



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GP as being able to lift items that are under 5 lbs in weight and remain seated for less than 1 hour.

In the AR, the GP reports that the appellant lives alone and that while her hearing is satisfactory, her speaking, reading and writing are poor due to her cleft palate and slow intellectual processing. The GP indicates that the appellant is independent walking indoors, that she requires periodic assistance with walking outdoors and standing and continuous assistance with lifting, carrying and holding.

While the evidence from the GP indicates that the appellant's functional capacity is diminished as a result of her physical condition, the GP has not provided sufficient additional comments as to the significance of the appellant's physical condition so support a finding that the associated impairment is severe in nature. The panel finds that on review of the entire body of evidence, the ministry was reasonable in its determination that the evidence did not support a finding that she suffers from a severe physical impairment as provided by section 2(2) of the *EAPWDA*.

### **Restrictions in the ability to perform DLA**

The appellant's position is that she is unable to perform many of her DLA due to her mental and physical impairment.

The ministry's position is that it has not been established by the evidence of a prescribed professional that the appellant's ability to perform DLA has been directly and significantly restricted by her physical or mental impairments either continuously or periodically for extended periods as required by section 2(2) of the *EAPWDA*. The ministry argues further that where it is indicated that that the appellant takes twice as long to complete a task of DLA, that does not equal a significant restriction and that further, the use of handrails and chair arms do not constitute "assistive devices" as contemplated under the *EAPWDA*.

### *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 or her DLA, continuously or periodically for extended periods.

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 DLA, if any, are significantly restricted by the appellant's impairments, either continuously or periodically for extended periods. Employability is not a listed criterion in the legislation and as such is not a consideration in the determination of whether an applicant's DLA are restricted by a severe impairment.

The appellant's GP has described her as requiring continuous assistance with laundry and basic housekeeping as well as going to and from the store and carrying purchases home. In contrast however, the GP indicates in the AR that for tasks of personal care, the appellant is independent with grooming, bathing, toileting, feeding herself, regulating her diet and transferring in and out of bed. Further, while shopping the appellant is noted as independent making appropriate choices and paying for purchases. The GP has found the appellant to be independent in all tasks of DLA relating to paying rent and bills, medications and transportation as well as meals other than food preparation for which she requires continuous assistance although no comments are provided as to who provides the assistance or how.

With respect to social functioning, while the GP notes that the appellant requires continuous support and/or supervision in her ability to make appropriate social decisions, develop and maintain relationships, dealing appropriately with unexpected demands and securing assistance from others, the appellant is also described as independent when interacting appropriately with others and as having good functioning with extended social networks compared against marginal functioning with her immediate social network.

On balance, considering the appellant's ability to perform DLA as a whole, the panel finds that the ministry reasonably concluded that the evidence is insufficient to demonstrate that the appellant's DLA are significantly restricted either continuously or periodically for extended periods as provided under section 2(2)(b) of the *EAPWDA*.

### **Help with DLA**

The appellant's position is that she requires assistance with DLA due to her physical and mental impairments.

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.

### *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. Section 2(3) of the *EAPWDA* provides that a person requires help in relation to a DLA if, in order to perform it, the person requires an assistive device, the significant help or supervision of another person, or the services of an assistance animal. In other words, it is a pre-condition to a person requiring help that there be a finding that a severe impairment directly and significantly restricts a person's ability to manage his or her DLA either continuously or periodically for an extended period.

Given the panel's finding that the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established, the panel further finds that the ministry's conclusion that 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*, was reasonable.

### **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 under section 2 of the *EAPWDA* was a reasonable application of the applicable enactment in the circumstances of the appellant, and therefore confirms the decision.