

PART C – Decision under Appeal

The decision under appeal is the reconsideration decision dated November 30, 2015 made by the Ministry of Social Development and Social Innovation (the ministry) which determined that the appellant did not meet 3 of the 5 statutory requirements of section 2 of the *Employment and Assistance for Persons with Disabilities Act* (EAPWDA) for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement and that her impairment was likely to continue for at least 2 years. However, the ministry was not satisfied that:

- the appellant had a severe mental or physical impairment,
- that the appellant's mental or physical impairment, in the opinion of a prescribed professional, directly and significantly restricted daily living activities (DLA) either continuously or periodically for extended periods, and
- that as a result of those restrictions, in the opinion of a prescribed professional, the appellant required help to perform DLA.

PART D – Relevant Legislation

The relevant legislation is section 2 of the EAPWDA and section 2 of the *Employment and Assistance for Persons with Disabilities Regulation* (EAPWDR).

## PART E – Summary of Facts

The evidence before the ministry at the time of the reconsideration decision consisted of:

- (1) a physician's report (PR) dated August 4, 2015, completed by a physician who had been the appellant's physician for 1 month and had seen the appellant 2 to 10 times in the past 12 months,
- (2) an assessor's report (AR) dated July 27, 2015, completed by a Registered Nurse who was seeing the appellant for the first time,
- (3) a hand written statement from the appellant dated November 19, 2015 that was submitted at reconsideration (RS), and
- (4) a *Medical Report – Employability* form (MR) dated May 6, 2015, completed by the appellant's physician.

The appellant did not complete a self-assessment.

The PR indicates that the appellant has been diagnosed with right AC joint arthropathy. She has a severe limitation of range of motion and strength in her right shoulder for which she takes medication which makes her drowsy. The report states that the condition is likely to continue for more than 2 years but indicates that her functional skills are relatively unimpaired as she is able to walk 4+ blocks, climb 5+ stairs and remain seated indefinitely, although she cannot lift with her right arm. Cognitively, the report states that the appellant has no language difficulties but does have deficits in her cognitive and emotional function in that she is "stressed from being physically limited". In terms of impacts on her DLAs the report indicates that the appellant is restricted continuously in meal preparation, and periodically in basic housework and daily shopping due to her inability to lift with her right arm, or lift with her right arm without pain. Under Additional Comments, the appellant's physician writes: "She was a [patient of] her family doctor until he retired ... I have reviewed her chart + assisted her once before today, based on that information her [right] shoulder pain [is] very limiting [as] per report."

The AR indicates that the appellant suffers from "[right] AC joint arthropacy; chronic pain". It describes her communication abilities as "satisfactory" (rather than "good" or "poor"). The assessor did not complete the section regarding mobility and physical ability correctly, but does indicate that she can walk, climb stairs and stand without restriction, although her lifting and carrying require periodic assistance. In the comments section here the assessor writes: "Mobility and physical ability is significantly impaired due to right shoulder problems. Requires assistance with lifting and carrying. Chronic pain. Takes pain meds on a regular basis." In Section 4 *Cognitive and Emotional Functioning*, the assessor has checked "minimal impact" (rather than "no impact", "moderate impact" or "major impact"), notes that *Emotion* is indicated as major impact and comments: "Client reported having low mood several days per week. Denies any other problems." In regards to DLAs the assessor indicates that the appellant is independent in all DLAs except dressing, grooming, bathing, laundry, basic housekeeping, food preparation, cooking and carrying purchases home all of which take 2x longer than typical and/or require periodic assistance. Finally, the AR indicates that the appellant is generally independent in her social functioning but requires periodic support to develop and maintain relationships and deal appropriately with unexpected demands while having good functioning in regards to her immediate social network but marginal functioning in extended social networks.

In her RS the appellant writes: "... I am disabled. I have been ordered not to work by my doctor also



by my surgeon also by the specialist. I need help for everything including cooking, cleaning ... I'm in constant pain unable to do anything, getting anxiety. I feel helpless and I'm starving. Even hand writing this letter causes me pain and feeling ... excessively depressed."

## PART F – Reasons for Panel Decision

The issue under appeal is whether the ministry's determination that the appellant has not met all of the eligibility criteria of section 2 of the EAPWDA for designation as a PWD was either a reasonable application of the legislation or reasonably supported by the evidence. The ministry was not satisfied that:

- the appellant had a severe mental or physical impairment,
- the appellant's mental or physical impairment, in the opinion of a prescribed professional, directly and significantly restricted DLAs either continuously or periodically for extended periods, and
- as a result of those restrictions, in the opinion of a prescribed professional, the appellant required help to perform DLAs.

The ministry determined that the age requirement and that her impairment was likely to continue for at least 2 years had been met.

The criteria for being designated as a person with disabilities are set out in s. 2 of the EAPWDA and s. 2 of the EAPWDR. Section 2 of the EAPWDA states:

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;

"**health professional**" repealed

"**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 of the EAPWDR provides further clarification:

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 did not attend the hearing. The panel confirmed that the appellant had been served notice of the hearing in accordance with section 86(b) of the *Employment and Assistance Regulation*.

In her notice of appeal the appellant writes: " I have a doc note saying I can't work so I don't know what else you want me to do. It is getting so hard to life [sic] anymore. Because of this now I have high pressure."

The ministry's position is as follows:

- (1) There is a problem with the AR because the assessor indicates that his assessment is based on a review of the PR, but the AR is dated July 27, before the date of the PR which is dated August 4, so this cannot be the case. As well, this was the first time that the assessor had met the appellant. Based on these two issues, the value of the AR is "problematic".
- (2) The appellant's insistence that she should qualify for PWD because she has received medical advice that she cannot work is not relevant as there is no employability qualification in the PWD application.
- (3) Similarly, the *Medical Report – Employability* submitted by the appellant is not relevant to an application for PWD designation.
- (4) **PHYSICAL FUNCTIONING:** The extent of the appellant's disability is restriction in the use of her



right arm due to issues with her right shoulder. The PR indicates that the appellant's mobility is not impacted and her functioning is impacted only in that she has restrictions lifting and carrying with her right arm. Her left arm functioning is not restricted. The AR report in this regard is problematic: while the assessor indicates, similar to the PR, that the appellant can walk 4+ blocks, climb 5+ stairs and requires only periodic assistance lifting and carrying, he goes on to state that the appellant's "mobility and physical ability is significantly impaired due to right shoulder problems". This statement is inconsistent with the assessor's specific findings. Also, it is not clear how the appellant's mobility is "significantly impaired" because of a shoulder issue. Neither the PR nor the AR establish that the appellant is suffering from a severe impairment to her physical functioning.

- (5) MENTAL FUNCTIONING: The PR indicates that the appellant's deficits with cognitive and emotional functioning are "stressed from being physically limited". The AR indicates that the appellant has relatively good mental and social functioning with issues stated as: "Client reported having low mood several days a week," and marginal functioning with extended social networks. Periods of depression and some impact on extended social networks do not establish a severe impairment to the appellant's mental functioning.
- (6) DLAs: The PR and AR indicate that the appellant suffers some restrictions in relation to meal preparation, basic housework and shopping for which she requires periodic assistance and takes 2x as long to complete due to her right shoulder condition. However, she is independent in the vast majority of DLAs, taking 2x as long to complete a DLA is not indicative of a significant restriction and there is no indication that the appellant has any issues with her left arm. Based on this information it is difficult to establish that the appellant suffers from significant restrictions to her DLAs.
- (7) HELP TO PERFORM DLAs: The legislative requirement is that the appellant require help as a direct result of the restrictions on performing DLAs caused by a severe physical or mental impairment. As it has been found that the DLAs are not significantly restricted, it cannot be established that significant help is required.

The panel agrees with the ministry's position that there is an issue with the AR having been completed before the PR. However, as the two assessments are not materially inconsistent and the ministry's decision clearly takes the AR into consideration, the panel concludes that this issue is not material to its consideration of the reasonableness of the ministry's decision.

The panel agrees with the ministry's position that employability is not a factor in determining eligibility for PWD designation. This is based on the legislated requirements which nowhere require or authorize the minister to consider the employability of a PWD applicant.

### **Severe Physical Impairment**

The reports and statements before the ministry indicate that the appellant suffers from an issue with her right shoulder that means her lifting and carrying with that arm are restricted. There is likely ongoing pain associated with this condition, but it is unclear how serious this pain is or what, if any, impact it has on the appellant's physical functioning. Also, the panel agrees with the ministry that there are material inconsistencies in the AR which make it even more difficult to determine what impact her condition and the associated pain has on her physical functioning. The reports, taken together, establish that the impacts to the appellant's physical functioning are limited to lifting and carrying with her right arm. The panel considers that the ministry's determination that the appellant does not suffer from a severe impairment to her physical functioning was reasonable.

### **Severe Mental Impairment**

The PR report states that the appellant's significant deficits with cognitive and emotional function amount to "stressed from being physically limited". The AR states: "Client reported having low mood several times per week." The panel notes that the AR also indicates "minimal impact" (rather than "no impact") on all the cognitive and emotional functioning impacts listed in the AR including, for instance, "Psychotic symptoms". As there is absolutely no indication whatsoever that the appellant is suffering from psychotic symptoms at all, it is unclear why the assessor indicated an impact in this (and all other) items in this section. Although the ministry did not address this issue directly in its reconsideration decision the panel considers that little or no weight should be given to this section of the AR. According to the reports, then, the appellant suffers mentally from stress and occasional low mood. The panel considers that the ministry's determination that the appellant does not suffer from a severe impairment to the her mental functioning was reasonable.

### **Daily Living Activities**

The PR and AR indicate that the appellant suffers some restrictions in relation to meal preparation, basic housework and shopping for which she requires periodic assistance and takes 2x as long to complete due to her right shoulder condition. However, she is independent in the vast majority of DLAs, taking 2x as long to complete a DLA is not indicative of a significant restriction and there is no indication that the appellant has any issues with her left arm. The panel finds that, based on both reports indicating that the appellant is independent in almost all DLAs, the ministry was reasonable to find that the appellant's impairments do not directly and significantly impact her ability to carry out DLAs either continuously or periodically for extended periods.

### **Help is Required to Perform DLAs**

The legislative requirement is that the appellant require help as a direct result of the restrictions on performing DLAs caused by a severe physical or mental impairment. As the panel has found that the ministry was reasonable in finding that the appellant does not suffer from a severe physical or mental impairment that significantly restricts her ability to carry out DLAs, this criterion is not applicable.

### **Conclusion**

The panel finds that the ministry's decisions that:

1. the appellant does not have a severe physical or mental impairment;
  2. the appellant's impairment does not directly and significantly restricts DLAs, and
  3. the appellant does not require assistance with DLAs
- were reasonable.

Accordingly, the panel concludes that the ministry's decision that the appellant does not qualify for PWD was reasonable based on the evidence before it, and confirms the ministry's decision.