

## PART C – Decision under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Social Innovation (the ministry) dated March 6, 2017, which held that the appellant did not meet 3 of the 5 statutory requirements of section 2 of the *Employment and Assistance for Persons with Disabilities Act* for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement and that a medical practitioner has confirmed that the appellant's impairment is likely to continue for at least 2 years.

However, the ministry was not satisfied that:

- the appellant has a severe physical or mental impairment;
- 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 those restrictions, in the opinion of a prescribed professional, the appellant requires an assistive device, the significant help or supervision of another person, 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

On November 1, 2016, the ministry received the appellant's PWD application comprised of: a Physician Report (PR) dated October 17, 2016, completed by the appellant's general practitioner of 8 years; an Assessor Report (AR) dated October 27, 2016, completed by a registered nurse (RN) who had met with the appellant once; and, the appellant's Self-report (SR), dated October 14, 2016.

The appellant's request for PWD designation was denied on January 23, 2017. On February 22, 2017, the ministry received the appellant's Request for Reconsideration and the following attachments:

- 1-page printout from the GP's office respecting two prescription medications.
- 2-page, February 8, 2017 questionnaire from the appellant's advocate, completed by the GP.
- Three, 1-page letters written by friends of the appellant, dated February 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> of 2017.

### Information Provided on Appeal and Admissibility

Section 22(4) of the *Employment and Assistance Act* (EAA) provides that panels may admit as evidence (i.e. take into account in making its decision) the information and records that were before the minister when the decision being appealed was made and "oral and written testimony in support of the information and records" before the minister when the decision being appealed was made – i.e. information that substantiates or corroborates the information that was before the minister at reconsideration. These limitations reflect the jurisdiction of the panel established under section 24 of the EAA – to determine whether the ministry's reconsideration decision is reasonably supported by the evidence or a reasonable application of the enactment in the circumstances of an appellant. That is, panels are limited to determining if the ministry's decision is reasonable and are not to assume the role of decision-makers of the first instance. Accordingly, panels cannot admit information that would place them in that role.

On March 10, 2017, the Tribunal received the appellant's Notice of Appeal (NOA). In her NOA and oral testimony at the hearing, the appellant either reiterated information she previously provided or clarified previous information. Accordingly, the panel determined these submissions are in support of the information before the ministry and are admissible in accordance with section 22(4) of the EAA.

At the hearing, the ministry relied on its reconsideration decision.

### Summary of relevant evidence

#### Diagnoses

In the PR, the GP diagnoses the appellant with comminuted fracture of the left radius (2012) and a right leg hamstring tear (2010). At reconsideration, the GP reports that the appellant had a syncopal episode at first in October 2014 and is on medical therapy to prevent a fast heart rate, noting that she has not been seen in clinic with ongoing heart symptoms.

## Physical Impairment

In the PR, the GP provides the following information.

- Persistent pain in left arm and right hamstring (and right posterior thigh) is made worse with repetitive use, including hand gripping, prolonged standing, walking and sitting.
- The appellant finds it hard to manage the pain caused by her current level of work.
- The appellant is able to: walk 1 to 2 blocks unaided; climb 2 to 5 steps unaided; lift under 5 lbs; and, remain seated for 1 to 2 hours.
- Pain due to the wrist fracture and partial hamstring tear has been persistent and slowly progressive. Pain symptoms are constant. Functioning impairment due to decreased use of left hand and decreased ability to stand, walk and sit.

At reconsideration, in the questionnaire, the GP provides the following information.

- Severe chronic pain and stiffness of left wrist after distal left radius fracture. Patient reports limited use of left hand.
- Severe pain with walking and standing due to right leg hamstring tear. Patient reports difficulty with prolonged walking and standing.

In the AR, the RN reports:

- Walking indoors is managed independently. Walking outdoors is described as “1-2 blocks.”
- Right hip is very painful. Left leg is a problem.

In her SR, the appellant describes her disability as relating to the conditions diagnosed by the GP as well as left hip deterioration (can't sleep on due to pain), allergies, high blood pressure, and tachycardia (has to be careful about exertion; heart condition will result in passing out due to restricted oxygen intake). If she over exerts her leg, it takes a day to rest. She cannot even walk 2 blocks due to the pain and swelling of her leg, which needs to be elevated continuously. Ice packs are used for the swelling. She mainly uses her right arm because her left hand does not close and her left wrist is weak. She needs assistance lifting anything over 15 lbs.

In her reconsideration submission and NOA, the appellant reiterates that she suffers from severe impairments that cause severe chronic pain, and that she relies on friends for assistance and supervision on a daily basis.

At the hearing, the appellant described the hamstring tear, which was both on the right buttock and above the right knee. The appellant showed the swelling on her right leg, stating that her right leg was 8 cm bigger than her left leg. The appellant explained that her limp is not too bad in the morning but that the swelling will have doubled by evening. The appellant also demonstrated how she is unable to close her right knee or kneel with her right leg and how she sits to the side with her leg extended. She must be diligent when walking, as she could easily fall. She could make herself walk 1-2 blocks, but would be unable to do anything the next few days. She avoids stairs as it is too hard to go up the stairs, and must use always railings in case her leg goes out.

The appellant also demonstrated how her left hand will not bend or close, though she is able to open her fingers. She can lift a “fair amount of weight” with her right arm, but the limitations with her left wrist and hand make any lifting and carrying that requires two hands/arms difficult. Before grabbing hold of something, she tries to evaluate if and how she could hold something.

Due to her leg and wrist injuries, she has to think of everything she does and it takes “so long to do anything.” She has not been working since the end of 2016, as the business she has been working at closed. She explained that when she was working as a prep cook, she would work a 4-5 hour shift, 3-

4 days per week and that upon returning home after a shift, she had to do nothing in order to be able to go back to work. Her heart problems are under control if she takes her medication.

### Mental Impairment

The GP reports:

- Significant deficits with cognitive and emotional function in 2 of 12 specified areas – emotional disturbance and motor activity - described as mood symptoms relating to loss associated with her decreased mobility and ability.
- No cognitive, motor, sensory, or other difficulties with communication.
- Social functioning is continuously restricted (no description of the impact is provided where requested).

The RN reports:

- Ability to speak, read, write, and hear is good.
- Major impact on daily functioning in 4 of 14 listed areas – bodily functions, consciousness, emotion, and motor activity. A moderate impact on language. Minimal or no impact in all other areas. Right hip very painful. Left leg is a problem. Gets very depressed and goes to see grandchildren as her only medication for depression. Grade 11.
- All listed aspects of social functioning require continuous support/supervision described as “Family support her. She is no longer able to hike, ice skate.” Unable to even walk her dog. Activity severely declined after injuries. Very disrupted functioning with immediate and extended social networks.

At the hearing, the appellant confirmed that she has not been diagnosed with a mental condition, explaining that she does not talk with her GP about some things because he wants to give her pills. She does want not take pills to make her feel better than she really is as she is worried that she may get hurt. She feels trapped in a body that will not let her do what her mind wants to do.

### DLA

In the PR, the GP reports the appellant has pain with activities of daily living. No medications or treatments have been prescribed that interfere with the ability to perform DLA. Addressing specific DLA, the GP reports that the appellant is not restricted in the ability to perform self-care, management of medications, mobility inside the home, and management of finances. The GP reports that the appellant is continuously restricted with meal preparation, basic housework, daily shopping, mobility outside the home, use of transportation, and social functioning. Where asked to describe the degree of restriction, the GP comments “Patient has limited use of left hand due to pain. She has pain with prolonged walking, sitting & standing.”

At reconsideration, in the questionnaire, the advocate notes that the appellant states that she has difficulty asking for assistance and therefore things like personal hygiene and dressing take her significantly longer, and asks the GP to comment on the need for assistance with DLA. The GP responds that the patient reports limited use of her left hand due to pain and stiffness and difficulty with prolonged walking and standing. The GP comments that the appellant’s reported symptoms are consistent with her clinical findings and medical history of left radius fracture and right hamstring tear.

In the AR, the RN reports as follows:

### Move about indoor/outdoors

- Walking indoors is managed independently, and does not take significantly longer.
- Walking outdoors is limited to 1-2 blocks. Limping all the time.
- Climbing stairs, standing, lifting (under 5 lbs), and carrying and holding are very difficult.

### Personal care

- Dressing, toileting, feeding self, and transfers in/out of bed and on/off chair are managed independently.  
Grooming, and bathing are very difficult – difficult getting in and out of tub and washing her hair.
- Respecting regulating diet, the RN comments “what ever (sic) is available.”
- Toileting and transfers (in/out of bed and on/off chair) are managed independently.

### Basic Housekeeping

- Laundry is managed independently “very difficult.”
- Basic housekeeping - requires continuous assistance from family.

### Shopping

- Going to and from stores, reading prices and labels, making appropriate choices, and carrying purchases home require continuous assistance from another person (family member goes with the appellant once a month).
- Paying for purchases is managed independently.

### Meals

- Meal planning, food preparation, and cooking are managed independently (“frequently eats at work”).
- No information is provided respecting safe storage of food.

### Paying Rent and Bills

- All listed tasks – banking, budgeting, and pay rent and bills are managed independently.

### Medications

- All listed tasks are managed independently – filling/refilling prescriptions, taking as directed, and safe handling and storage.

### Transportation

- Getting in and out of a vehicle is managed independently.
- Using public transit (“too difficult”) and using transit schedules/arranging transportation require continuous assistance from another person.

### Social Functioning

- All listed aspects require continuous support/supervision – appropriate social decisions, able to develop and maintain relationships, interacts appropriately with others, able to secure assistance from others, and able to deal appropriately with unexpected demands.
- The support/supervision is described as family support and the GP describes a number of sports activities the appellant can no longer do and that “activity severely declined after injuries.”

In her SR, the appellant reports that housework is minimal as she must be careful about exertion (heart condition). She relies on her car to access services and attend appointments due to low

mobility. She rarely cooks due to limited stamina and limited ability to stand, which causes swelling and pain. Shopping is limited – tries to do it once a month because of physical requirements. Stairs take longer and are avoided as much as possible. She is unable to do yard work due to physical limitations. She only has one arm to do personal care, making washing her hair very difficult and has difficulty getting in and out of the tub because of right leg weakness. She needs assistance lifting anything over 15 lbs.

At reconsideration, the appellant reports that she relies on friends for assistance and supervision on a daily basis. In the February 8, 2017 letter, the appellant's neighbour reports that when the appellant has been physically unable to get around, she has helped with activities of daily living such as grocery shopping and running errands. The author of the February 9, 2017 letter writes that the appellant requires assistance with her daily living chores from the author and a few others, and that the author has helped mow the appellant's lawn, paint her fence and carry large boxes from the basement, among other things. The author of the February 10, 2017 letter reports attending the appellant's residence a minimum of 3 times a week to help with household chores including vacuuming, dusting, laundry, and dishes. At the hearing, the appellant stated that her friend does all of the housework 2-3 times a week, and that another friend does a lot of driving for the appellant when she is unable to drive due to her leg. Respecting laundry, the appellant stated that while she does have a side-held laundry basket she is able to hold onto, and that her step daughter usually does the laundry because of the stairs involved.

#### Need for Help

The GP reports that no prostheses or aids are required. The appellant requires help with housework and shopping due to decreased use of left hand and wrist. The RN reports that family and the appellant's roommate provide support and that a bar is required for the bathtub.

## PART F – Reasons for Panel Decision

### **Issue on Appeal**

The issue on appeal is whether the ministry's decision to deny the appellant designation as a PWD was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. In particular, was the ministry reasonable in determining that:

- a severe physical or mental impairment was not established;
- the appellant's DLA are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and
- as a result of those restrictions, in the opinion of a prescribed professional, the appellant does not require an assistive device, the significant help or supervision of another person, or the services of an assistance animal to perform DLA?

The appellant does not argue that she is eligible for PWD designation under section 2.1 of the EAPWDR and the ministry determined that she is not in any of the classes of persons set out in that section.

### **Relevant Legislation**

#### **EAPWDA**

**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 or nurse 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

### 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.

(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.

(3) The definition of "parent" in section 1 (1) applies for the purposes of the definition of "dependent child" in section 1 (1) of the Act.



## **Alternative grounds for designation under section 2 of Act**

**2.1** The following classes of persons are prescribed for the purposes of section 2 (2) [*persons with disabilities*] of the Act:

- (a) a person who is enrolled in Plan P (Palliative Care) under the Drug Plans Regulation, B.C. Reg. 73/2015;
- (b) a person who has at any time been determined to be eligible to be the subject of payments made through the Ministry of Children and Family Development's At Home Program;
- (c) a person who has at any time been determined by Community Living British Columbia to be eligible to receive community living support under the [Community Living Authority Act](#);
- (d) a person whose family has at any time been determined by Community Living British Columbia to be eligible to receive community living support under the [Community Living Authority Act](#) to assist that family in caring for the person;
- (e) a person who is considered to be disabled under section 42 (2) of the [Canada Pension Plan](#) (Canada).

## **Panel Decision**

### **Mental Impairment**

The appellant's position is that she experiences frustration due to the inability to do the things she used to prior to the pain and decreased physical functioning arising from her injuries, and the GP reports mood symptoms and cognitive and emotional deficits relating to decreased mobility. However, the appellant does not argue that she has a severe mental impairment and confirms that she has not been diagnosed with a mental impairment.

The ministry's position is that the GP has not diagnosed mental condition or brain injury and questions why the RN reports a major impact on daily cognitive and emotional functioning in 4 of 14 listed areas given the absence of a mental health diagnosis by the GP.

The panel finds that as the GP has not diagnosed a mental health condition, it is unclear why the RN identifies major impacts on daily functioning in four areas of cognitive and emotional functioning. Additionally, the panel notes that while the GP reports that social functioning is continuously restricted, and the RN reports the need for continuous supervision/support with all listed aspects, the GP provides no response where asked to explain how social functioning is impacted, and the RN simply notes that the appellant receives support from family and describes a number of sporting activities in which the appellant can no longer participate. Neither the GP nor the RN correlate the reported difficulties with social functioning to a mental health condition or any difficulties with communication. Furthermore, the RN's information that the appellant has extremely disrupted functioning with immediate and extended social networks is not supported by the appellant's oral and written submissions or the letters from the appellant's friends. For these reasons, the panel finds that the ministry reasonably determined that the information does not establish a severe mental impairment.

### **Physical Impairment**

The appellant's position is that the persistent severe pain and restricted mobility caused by her wrist and hamstring injuries, as confirmed by the GP's information, constitutes a severe physical impairment.

The ministry acknowledges that the appellant has chronic pain in her left wrist and right hamstring but takes the position that, as the appellant is independent in most areas of daily living, only requiring help primarily with some of her housework and shopping, the information is not indicative of a severe physical impairment. The ministry also finds that the appellant choosing to eat at work instead of preparing meals is not sufficient to demonstrate a severe physical impairment in the ability to prepare meals and feed herself.

The appellant is diagnosed with left wrist fracture and right leg hamstring tear. While the GP references treatment for a fast heart rate and both the appellant and the RN identify tachycardia, which the appellant reports is controlled when she takes her medication, left leg problems, and other medical conditions as impacting her physical functioning, none of these conditions are included by the GP as diagnoses relating to the appellant's impairment.

When describing the impact on functioning caused by the right leg pain, both the GP and the appellant report problems with "prolonged" standing, walking and sitting. This is consistent with the functional skills assessment of the GP and RN who both report no limitations with walking indoors but a limit of 1 to 2 blocks outdoors, though the appellant stated this was "large estimate" of the distance she could walk. The GP also reports that the appellant was finding it difficult to manage the pain caused by her level of work (at the time the PR was completed) and the appellant confirmed that when she was working, she had to do nothing afterward to be able to go back to work. Neither the GP nor the RN reports the need for an assistive device for walking. Both the GP and the RN report that the appellant can independently manage 2-5 steps, and the RN reports that climbing stairs, standing, lifting, and carrying/holding are very difficult. As the ministry notes, the GP and the RN report that lifting is limited to weights under 5 lbs., whereas the appellant reports being able to manage up to 15 lbs., which the appellant clarified at the hearing as being with her dominant right hand. The appellant, GP and RN all confirm that the appellant has limited use of her left wrist and hand, and the appellant describes the impact this has holding and carrying requiring two hands.

The panel finds that information establishes that the appellant's severe chronic pain impairs her physical functioning on an ongoing basis, particularly with any prolonged activities. However, the physical functional skills assessed by the GP and the mobility and physical abilities assessed by the RN indicate that the appellant remains independent in these areas. And, as the ministry notes, this independence corresponds with the information that the appellant is primarily independent in most areas of daily living. In conclusion, the panel finds that the ministry has reasonably viewed the level of independent physical functioning as not establishing a severe physical impairment.

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

The appellant argues that her ability to perform DLA is significantly restricted due to the severe pain and limited use of her left wrist and hand and due to severe pain and swelling of her right leg, resulting in the need for daily assistance and supervision from friends and family. She also reports that her activities are limited because exertion can cause her to pass out from lack of oxygen.

The ministry acknowledges that due to chronic pain with her hamstring and wrist, and limited use of her left wrist, the appellant would require assistance in some areas. However, although the GP identified continuous restrictions and the RN described many restrictions as "very difficult" and taking significantly longer, no assistive devices are reported, and continuous assistance is not required with any activities, except housework, shopping and social functioning. The ministry finds it unclear why the appellant would require assistance from a neighbor 3 times a week when the appellant reports

being able to lift up to 15 lbs., walk 1-2 blocks unaided, and climb 2-5 steps unaided; functional abilities that the ministry argues should enable the appellant to manage most of her basic household chores. The ministry also questions why the RN reports the need for continuous assistance with social functioning when the only identified mental impairment was with mood due to ongoing physical pain and restrictions.

The legislative requirement respecting DLA set out in section 2(2)(b) of the EAPWDA is that the minister be satisfied that as a result of a severe physical or mental impairment a person is, in the opinion of a prescribed professional, directly and significantly restricted in the ability to perform DLA either continuously or periodically for extended periods. Consequently, while other evidence may be considered for clarification or support, the ministry's determination as to whether or not it is satisfied, is dependent upon the evidence from prescribed professionals. DLA are defined in section 2(1) of the EAPWDR and are listed in both the PR and the AR sections of the PWD application with the opportunity for the prescribed professional to check marked boxes and provide additional narrative. DLA, as defined in the legislation, do not include the ability to work.

While the GP identifies continuous restrictions in the appellant's ability to manage many physical DLA tasks, and the RN describes them as being very difficult, as the ministry notes, the appellant is reported as independently managing most of these tasks. Additionally, the panel finds that the ministry has reasonably viewed the appellant's physical functional skills, including her walking, lifting, and carrying abilities as sufficient to manage most household chores. Similarly, the panel notes that the appellant reports being able to attend to errands, which should reasonably include shopping, using her car, on days when the appellant is able to drive. As she is able to independently get herself to and from stores, and is able to lift lighter loads, the panel also finds the need for continuous assistance with shopping to be unclear. Further, the appellant explained at the hearing, that she was capable of reading prices and labels and making appropriate shopping choices and does not know why the RN reported the need for continuous assistance with these shopping tasks. The panel notes that the RN's description of the support/supervision required with social functioning does not relate the need for this support to emotional or cognitive functioning. Rather, the RN describes a number of sporting activities in which the appellant is no longer able to participate, which does not establish a causal connection between a mental impairment and the ability to manage social functioning.

Based on the above analysis, the panel finds that the information establishes that the appellant's physical impairments directly restrict her ability to manage a number of physical DLA continuously, but that the ministry has reasonably concluded that the appellant's overall level of independent physical functioning does not establish that these continuous restrictions are significant. The panel also finds that the ministry has reasonably determined that the evidence does not establish direct and significant restrictions that are periodic in nature and for extended periods.

Therefore, the panel finds that the ministry has reasonably determined that there is not enough evidence to confirm that the appellant has a severe impairment that significantly restricts her ability to perform DLA continuously or periodically for extended periods.

#### Help to perform DLA

The appellant reports that she needs daily assistance from other people to manage her DLA.

The ministry's position is that because it has not been established that DLA are significantly restricted, it cannot be determined that help is required.

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 DLA.

The establishment of direct and significant restrictions with DLA are a precondition of the need for help criterion. As the panel found that the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established, the panel also finds that the ministry reasonably concluded that it cannot be determined that the appellant requires help to perform DLA as required by section 2(2)(b)(ii) of the EAPWDA.

### Conclusion

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 a reasonable application of the applicable enactment, and therefore confirms the decision. The appellant is not successful on appeal.