

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated April 7, 2017, which found that the appellant did not meet three of the five statutory requirements of Section 2 of the Employment and Assistance for Persons with Disabilities Act for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement and that her impairment is likely to continue for at least two years. However, the ministry was not satisfied that the evidence establishes that:

- the appellant has a severe physical or mental impairment;
- the appellant's daily living activities (DLA) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and,
- as a result of these restrictions, the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

## PART D – Relevant Legislation

*Employment and Assistance for Persons with Disabilities Act* (EAPWDA), Section 2

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR), Section 2

## PART E – Summary of Facts

### Information before the ministry at reconsideration:

- A PWD application dated December 1, 2016 comprised of a Physician Report (PR) dated December 15, 2016 completed by the appellant's physician (GP) who has known her for 10 years and seen her 2-10 times in the past 10 months and an Assessor Report (AR) dated December 13, 2016, completed by a Registered Nurse (RN) who has known the appellant for 15 years.
- A Request For Reconsideration dated March 23, 2017 which included a 2 page letter from the appellant.

### Diagnoses

In the PR, the GP diagnosed the appellant with Right Shoulder Adhesive Capsulitis (onset 1999), COPD (onset unspecified), Right Hemicolectomy for Intestinal Blockage and Bowel Leak (onset 2000) and Pancreatitis/Diverticulitis (onset 2013).

### Mental Impairment

In the PR, the GP reported that the appellant has no difficulties with communication and she has no significant deficits in her cognitive and emotional functioning.

In the AR, it is noted that the appellant has a good ability to communicate with speaking, reading, writing and hearing.

The sections of the AR regarding impacts to cognitive and emotional functioning have been left blank by the RN.

### Physical Impairment

In the PR, the GP reported that:

- In terms of health history, the appellant has a right shoulder injury from a MVA in 1999 which has become worse over time. Although she had surgery in 2003, she is right handed and disabled by it. The GP describes issues relating to the appellant's bowels, which led to surgery and reports that she suffers from abdominal pain and bowel disturbance.
- In terms of functional skills, the physician indicated that the appellant can walk 4+ blocks unaided on a flat surface, can climb 5+ steps unaided, limited in lifting to 2 to 7 kg (5 to 15 lbs.) and remain seated less than 1 hour.

In the AR the RN reported that:

- The appellant independently manages walking indoors and outdoors, climbing stairs and standing. Continuous assistance from another person is required for lifting and carrying and holding; due to a shoulder injury, she can only lift minimally and has decreased range of motion.

In her Self-Report and her Request For Reconsideration, the appellant wrote that:

- She is right handed and her right shoulder that is injured has very limited mobility; she cannot hold onto anything or move it.
- Writing causes her fingers to tighten up.

- She can walk a ways very slowly and climb stairs slowly, resting at the top to catch her breath.
- If she tries to lift too much or pack something with her right arm, she has days of not being able to use it at all. Repetitive movements irritate it as well and her hand swells, then she can't use her fingers.
- Any physical activity takes a lot of planning time.

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

The appellant has not been prescribed medications and/or treatments that interfere with her ability to perform DLA.

In the PR, the GP indicates that the appellant's impairment directly and continuously restricts her ability to perform DLA in the area of basic housework. The PR indicates that the appellant is not restricted with personal self care, meal preparation, management of medications, daily shopping, mobility inside and outside the home, use of transportation, management of finances and social functioning.

In the AR, the appellant is independently able to perform every task of most listed DLA, specifically:

- Under Shopping, the appellant is independent with going to and from stores, reading prices and labels, making appropriate choices, paying for purchases and carrying purchases home.
- Under Meals, the appellant is independent with meal planning, food preparation, cooking and safe storage of food.
- Under Pay Rent and Bills, while the appellant is independent with banking, budgeting and pay rent and bills.
- Under Medications, the appellant is independent for filling/refilling prescriptions, taking as directed and safe handling and storage.
- Under Personal Care DLA, the appellant is independent with dressing, grooming, feeding self and regulating diet; though, the appellant takes significantly longer than typical with bathing (due to shoulder strength and range of motion), toileting (due to numerous bowel movements) and with transfers in/out of bed and on/off of chair (due to shoulder and COPD).
- Under Basic Housekeeping DLA, the appellant takes significantly longer than typical with basic housekeeping (difficult to do with limited use of arm) and is independent with laundry noting small loads.
- Under Transportation DLA, the appellant is independent with getting in and out of a vehicle and noted that no public transportation is available.
- Under Social Functioning, the appellant is independent in all aspects, specifically: to make appropriate social decisions, develop and maintain relationships, interact appropriately with others, deal appropriately with unexpected demands (as long as not physical lifting or moving), and able to secure assistance from others which was not indicated.
- The appellant's functioning in her immediate and extended social networks was not indicated.

Under additional comments it was noted by the RN that shopping can only be done in small amounts and takes numerous trips to unpack car with smaller bags.

In her Self-Report and her Request For Reconsideration, the appellant wrote that her friends help her get firewood, her neighbors do her snow removal and lawn mowing and there are days when the appellant cannot lift a cup of coffee or lift her arm to brush her hair.

## **Help Required**

The GP does not respond to the question of what assistance does the patient need with DLA?

In the section of the AR relating to assistance provided through the use of assistive devices, the RN identified bathing aids, grab- bars.

The RN indicates that the appellant does not have an assistance animal.

## **Notice of Appeal**

In her Notice of Appeal dated April 21, 2017, the appellant states that she has days when she cannot leave the house and has people who come to help her do jobs that she cannot do housework. She has to be close to a washroom at all times and able to run when she has to use the washroom. She cannot do repetitive or other movements and doesn't know when her arm will give out and everything drops to the ground.

## **Hearing**

The appellant testified that it was awful for her to not be in control of her bowels and always be dropping things. She indicates that she feels degraded and as much as she tries to be independent there are things that she cannot do herself and needs the help of others. The appellant indicates that she can wash dishes but can't wash floors. She can mop up but a friend does her vacuuming. She can use a push mower but a neighbor removes her snow. In response to a question, the appellant suggested that the reason that the GP and RN indicate that she is mostly independent with daily living activities is because they know how it is within her nature to be independent. The appellant indicated that she has suffered with her bowels since her last surgery and that her shoulder injury has gotten worse with time.

The ministry began by referring to the legislation and stating that the requirement is to have the prescribed professional's opinion rather than the appellant's or the ministry's opinion. The ministry representative explained that while the GP diagnosed the appellant's medical conditions, there were few details provided regarding how the appellant's impairment restricts her ability to perform DLA other than indicating the requirement for continuous assistance with basic housekeeping. The ministry therefore stood by its position at reconsideration.

## **Admissibility of Additional Information**

The panel considered the information in the Notice of Appeal and the oral testimony on behalf of the appellant as corroborating the previous information from the appellant in her Request for Reconsideration regarding the impacts of her medical conditions, which was before the ministry at reconsideration. Therefore, the panel admitted this additional information as being in support of information and records that were before the ministry at the time of the reconsideration, in accordance with Section 22(4)(b) of the Employment and Assistance Act.

## PART F – Reasons for Panel Decision

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

### Relevant Legislation

#### **The following Section of the EAPWDA applies to this appeal:**

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 is in a prescribed class of persons or 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 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.

#### **The following Section of the EAPWDR applies to this appeal:**

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.

## **Severe Mental Impairment**

### **Ministry Position**

The ministry's position is that based on the assessments provided by the GP and RN in the PWD application and the appellant's self reports, a severe impairment of the appellant's mental functioning has not been established. It was noted that there are no difficulties with communication and the GP reports that the appellant does not have deficits with cognitive and emotional functioning and is not restricted with social functioning. The RN reports that the appellant has a good ability with all listed communication and does not indicate that she has any impacts to cognitive and emotional functioning. Further the RN indicates that the appellant is independent to make appropriate social decisions, to develop and maintain relationships, to interact appropriately with others and deal appropriately with unexpected demands. No impacts to functioning with both immediate and extended social networks, no support/supervision was described to help the appellant maintain in the community and no indication of safety issues with regards to social functioning were noted by the RN. Therefore, the ministry determined that the appellant does not have a severe mental impairment.

### **Appellant's Position**

The appellant did not present a position for a severe mental impairment.

### **Panel Decision**

A diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a severe impairment. While the legislation does not define "impairment", the ministry's PR and AR forms define "impairment" as a "loss or abnormality of psychological, anatomical or physiological structure or functioning causing a restriction in the ability to function independently, effectively, appropriately or for a reasonable duration." While this is not a legislative definition, and is therefore not binding on the panel, in the panel's opinion, it reflects the legislative intent and provides an appropriate analytical framework for assessing the degree of impairment resulting from a medical condition.

The panel notes that the appellant has not been identified with a mental impairment or brain injury by a prescribed professional. The panel also notes that for DLA that are specific to a mental impairment under Section 2(1)(b) of the EAPWDR, such as making decisions about personal activities, care or finances and relating to, communicating or interacting with others, the reports do not mention any restrictions in terms of decision making and social functioning.

Thus, the panel finds the ministry reasonably determined that the information provided did not establish that the appellant has a severe mental impairment.

## **Severe Physical Impairment**

### **Ministry's position**

The ministry's position is that based on the assessments provided by the GP and RN in the PWD application and the appellant's self reports, the ministry acknowledges that while the appellant is limited with regards to the functioning of her right shoulder; a severe impairment of the appellant's physical functioning has not been established. The ministry notes that the physician's assessments of the appellant's abilities with walking unaided, climbing steps and lifting are not considered indicative of a severe impairment of physical functioning. The GP does not describe how much less than 1 hour that the appellant can remain seated. The ministry also notes that the RN indicates that the appellant requires continuous assistance from another person with lifting and carrying/ holding, and the GP indicated that the appellant can lift 2 to 7 kg. (5 to 15 lbs.). The ministry determines that the ability to lift 2 to 7 kg is considered sufficient ability to lift a variety of household and shopping items. The ministry notes that the RN indicates that the appellant is independent with the majority of listed areas of mobility and physical functioning. Therefore, the ministry determined that the appellant does not have a severe physical impairment.

### **Appellant's Position**

The appellant's position is that she is right handed and her right shoulder that is injured has very limited mobility and she cannot hold onto anything or move it. She can walk a ways very slowly and climb stairs slowly, resting at the top to catch her breath. If she tries to lift too much or pack something with her right arm, she has days of not being able to use it at all. Repetitive movements irritate it and her hand swells, then she can't use her fingers. The appellant indicated that any physical activity takes a lot of planning time.

### **Panel Decision**

A diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a "severe" impairment. "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, the ministry must consider both the nature of the impairment and the extent of its impact on daily functioning as evidenced by functional skill limitations and the degree to which the ability to perform DLA is restricted. 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 a prescribed professional – in this case both the appellant's GP and the RN.

In the PR, the GP diagnosed the appellant with Right Shoulder Adhesive Capsulitis (onset 1999), COPD (onset unspecified), Right Hemicolectomy for Intestinal Blockage and Bowel Leak (onset 2000) and Pancreatitis/Diverticulitis (onset 2013).

For functional skills, the GP reported that the appellant can walk 1 to 2 blocks unaided, climb 2 to 5 steps unaided, lift 2 to 7 kg . and remain seated less than 1 hour. In her Request for Reconsideration, the appellant wrote that she is right handed and her right shoulder that is injured has very limited mobility and she cannot hold onto anything or move it. In her Notice of Appeal, the appellant wrote that repetitive movements irritate her shoulder and her hand swells, and then she

can't use her fingers. The appellant indicated that any physical activity takes a lot of planning time.

The panel recognizes that the appellant faces challenges but the impacts of her physical impairments are not clear or consistent between her physician and her registered nurse. The appellant's description of her pain and limitations is considerably different than that reported by the physician and the RN making it more difficult to determine the extent of the appellant's impairment or restrictions.

For instance, the panel notes that the physician did not report any limitation to the appellant's functional skills in the PR. In the AR, the RN reported that the appellant needs continuous assistance with lifting and carrying/ holding, with a note that due to her shoulder injury she can only lift minimally and has a decreased range of motion. In the PR, the GP indicated that the appellant does not require any prostheses or aid for her impairment and, in the section of the AR relating to assistance provided through the use of assistive devices, the RN identified bathing aids, specifically, grab-bars in the bathroom.

As the ministry notes, the information provided by the GP respecting the impact on the appellant's physical functioning is not considered indicative of a severe impairment of functioning. In the PR, the physical functional skills assessment indicates a level of independent functioning, which the ministry has reasonably viewed as not reflecting a severe impairment.

Given the GP's report of a level of physical functioning without the assistance of another person or an assistive device, and a lack of evidence of the extent of the appellant's physical functioning, the panel finds that the ministry reasonably determined that there is not sufficient evidence to establish that the appellant has a severe physical impairment under Section 2(2) of the EAPWDA.

## **Direct and Significant Restrictions in the Ability to Perform DLA**

### **Ministry Position**

The ministry's position is that based on the assessments provided by the GP and RN in the PWD application and the appellant's self reports, the ministry finds 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. The GP reports that the appellant is continuously restricted in her ability to do basic housework and independent with the majority of listed areas of DLA.

The RN indicates that the appellant is unrestricted in her ability to perform all listed areas of DLA, including shopping (can only buy small amounts and takes numerous trips to unpack car with smaller bags), meals, paying rent/bills, medications/getting in and out of vehicles and using public transit (no public transit available). Additionally, the RN indicates that the appellant takes longer than typical with bathing (due to decreased shoulder range of motion takes longer to get in and out), toileting (uncontrolled numerous expected "B.M.'s"), transferring in/out of bed (takes longer to get in/ out due to shoulder and COPD) and transferring on/off chairs. The appellant is indicated as independent with the remaining areas of personal care. The appellant takes significantly longer than typical with basic housekeeping (difficult to do with limited use of arm) and independent with laundry (small loads).

The ministry notes that the RN does not describe how much longer than typical the appellant takes with bathing, toileting, transferring in/out of bed, transferring on/off chairs and basic housekeeping. The ministry also notes that the appellant's physician does not indicate that she is restricted with personal self-care. The RN indicates that the appellant is independent with the majority of listed areas

of DLA. Therefore, it is difficult to establish significant restrictions to DLA based on the assessments.

Therefore, the ministry determined that the legislative criteria have not been met.

### **Appellant's Position**

The appellant's position is that she relies on her friends and neighbors to help her do tasks that she cannot do such as get firewood, remove her snow, vacuum and mow her lawn. The appellant states that there are days when she cannot lift a cup of coffee or lift her arm to brush her hair.

### **Panel Decision**

Section 2(2) (b) of the EAPWDA requires that the ministry be satisfied that a prescribed professional has provided an opinion that an applicant's severe impairment directly and significantly restricts 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, the prescribed professionals completing these forms have the opportunity to indicate which, if any, DLA are significantly restricted by the appellant's impairments either continuously or periodically for extended periods. Also, there is a component related to time or duration. The direct and significant restriction may be either continuous or periodic. Accordingly, in circumstances where the evidence indicates that a restriction arises periodically, it is appropriate for the ministry to require evidence of the duration and frequency of the restriction in order to be "satisfied" that this legislative criterion is met.

The panel finds that there are inconsistencies between the information provided in the PR and the AR. For example, the PR indicates that the appellant is only continuously restricted with basic housework, while the AR indicates that the appellant takes significantly longer than typical with basic housekeeping and is independent with laundry of small loads. Additionally, the RN reports that the appellant takes longer than typical with bathing, toileting, transferring in/out of bed and transferring on/off chairs.

The panel acknowledges that the appellant has limitations due to her medical conditions and while the panel takes into consideration the appellant's testimony, the legislation specifically requires that the ministry be satisfied that a prescribed professional has provided an opinion that an applicant's severe impairment directly and significantly restricts her DLA, continuously or periodically for extended periods.

Considering the absence of information from the prescribed professionals, of the need for significant assistance with DLA, including a lack of evidence to establish the need for continuous assistance from another person with some other tasks of DLA besides "basic housekeeping", the panel finds that the ministry reasonably concluded that there is not enough evidence from the prescribed professional to establish that the appellant's impairment significantly restricts her ability to manage her DLA either continuously or periodically for extended periods, thereby not satisfying the legislative criterion of Section 2(2)(b)(i) of the EAPWDA.

## **Help to Perform DLA**

### **Ministry Position**

The ministry's position is that as it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required from other persons.

### **Appellant's Position**

The appellant's position is that she relies on her friends and neighbors to help her.

### **Panel Decision**

Section 2(2) (b) (ii) of the EAPWDA requires that, as a result of direct and significant restrictions in the ability to perform DLA, a person requires help to perform those activities. Help is defined in subsection (3) as the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform a DLA.

While the panel acknowledges that an assistive device, specifically a grab- bar in the bathroom is used by the appellant, there were no other details about the type of assistance required by the appellant.

The panel finds that the ministry reasonably determined that as direct and significant restrictions in the appellant's ability to perform DLA have not been established, it cannot be determined that the appellant requires help to perform DLA as a result of those restrictions, as defined by Section 2(3)(b) of the EAPWDA.

### **Conclusion**

Having reviewed and considered all of the evidence and relevant legislation, the panel finds that the ministry's reconsideration decision, which determined that the appellant was not eligible for PWD designation under Section 2 of the EAPWDA, was reasonably supported by the evidence and therefore confirms the decision. The appellant's appeal, therefore, is not successful.