

## 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 June 15, 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, duration, and severe mental impairment requirements but was not satisfied that:

- the evidence establishes that the appellant has a severe physical 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, 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 March 13, 2017 the ministry received the appellant's PWD application comprised of a Medical Report (MR) and an Assessor Report (AR) completed by the appellant's General Practitioner (the "Physician") on February 28, 2017, and the appellant's Self-report (SR) dated February 14, 2017. The appellant also provided the following:

- Clinical Outpatient Reports dated September 5 & 26, 2013
- Orthopedic Clinic Report dated October 31, 2013
- Operative Report dated January 3, 2014
- Orthopedic Clinic Report dated January 20, 2014
- Diagnostic Imaging Report CR Right Elbow August 11, 2016
- Diagnostic Imaging Report RF O.R. Upper Ext Fluoro C-Arm Rt August 12, 2016
- Patient Discharge Plan August 12, 2016
- Diagnostic Imaging Report CR Elbow Rt August 31, 2016
- Letter from the Physician dated February 27, 2017
- Prescription receipts dated February 28, 2017 with MedAdvisor Med Notes
- Letter from her neurologist (the "Neurologist") dated February 22, 2017
- Laboratory requisition dated May 16, 2017
- Chest xray and laboratory requisitions dated May 23, 2017

The appellant's request for PWD designation was denied on April 25, 2017. On May 2, 2017 the appellant submitted her completed Request for Reconsideration (RFR).

On June 28, 2017, the tribunal received the appellant's Notice of Appeal.

### Summary of relevant evidence

#### Diagnoses

In the MR, the Physician diagnoses the appellant with post concussion syndrome, anxiety/depression, brain injury and right elbow injury, date of onset August 2016.

#### Physical Impairment

The Orthopedic Clinic Report dated October 31, 2013 indicates that the appellant had open reduction internal fixation of her left clavicle in August 2013, films demonstrated that the fracture was in an acceptable position and plans were made to remove the plate in 1 to 2 months' time. The Operative Report dated January 3, 2014 indicates that the appellant had hardware in her left clavicle removed. The Orthopedic Clinic Report dated January 20, 2014 indicates that the appellant was doing well after having hardware removed from her left clavicle two weeks earlier.

The Diagnostic Imaging Reports of August 12, 2016 indicates the appellant had right elbow surgery.

In his letter dated February 22, 2017 the Neurologist states that the appellant was struck by a vehicle while riding her bicycle resulting in loss of consciousness and a fractured elbow. She underwent surgical repair to her right elbow, was off work for 6 weeks then attempted a graduated return to work but was unsuccessful. The Neurologist states that the appellant's major symptom is persisting headache in the right temple and above her right eye and into her right cheek with some photophobia. The Neurologist indicates that the appellant has not yet tried any treatment or preventative medications. The Neurologist states that the appellant has a concussive injury based on the pattern of symptoms described with some residual symptoms. He gave her a headache diary and

recommended a topical medication and other medications. He also noted that the appellant had some asymmetry of her visual acuity and recommended an ophthalmological review.

In her letter dated February 27, 2017 the Physician states that the appellant has a medical condition, which would benefit from regular use of a recreation center for at least the next 6 months.

In the Health History portion of the MR, the Physician indicates that the appellant has daily face pain, headache, sleep disturbance, balance concerns, increased headache with light sensitivity and fatigue with difficulty with concentration and focus and chronic pain/symptoms affecting her mood.

In the MR for Functional Skills, the Physician indicates that the appellant's ability to walk unaided on a flat surface is unknown, that she can climb 5+ steps unaided, can lift 5 to 15 pounds and that her ability to remain seated is unknown.

In the AR the Physician indicates that the appellant is independent with all mobility and physical ability tasks but explains that with standing she is off balance at times. Under Additional Information the Physician indicates that the appellant has chronic pain and that repeat surgery may be required for her elbow and she is awaiting a surgical opinion.

In the SR, the appellant indicates that as a result of a bicycle accident in August 2016 she sustained a right elbow fracture, concussion/facial adhesions with nerve damage and extensive swelling and bruising to the right side of her face, equilibrium/balance problems and suffers from periodic falling, constant visual strain right side, sleep disturbance, pressure in the right side of her head, sensitivity to touch, headaches, loss of hearing, shortness of breath, and was forced to quit her job.

### DLA

In the MR, the Physician initially indicated that it was unknown whether the appellant's impairment directly restricts her ability to perform DLA, but then crossed off that box and changed her response to indicate that the appellant's impairment does directly restrict her ability to perform DLA. The Physician indicates that the appellant's use of transportation and social functioning are continuously restricted but her DLA of personal self care, meal preparation, management of medications, basic housework, daily shopping, mobility inside the home, mobility outside the home and management of finances are not restricted.

The Physician indicates that the appellant has not been prescribed any medications that interfere with her ability to perform DLA.

In the AR the Physician indicates that the appellant is independent with all aspects of DLA except that she requires periodic support/supervision with developing and maintaining relationships and dealing appropriately with unexpected demands. The Physician indicates that the appellant has marginal functioning with respect to her immediate and extended social networks. The Physician comments that the appellant is withdrawn and that she had to quit her job and stays home so as not to have to interact.

The Physician indicates that the appellant's ability to communicate is good except speaking which is satisfactory, explaining that the appellant has word finding difficulty with anxiety.

In the SR, the appellant indicates that she has difficulty concentrating on daily tasks, is unable to follow through with tasks and has short-term memory loss and is forgetful. She states that she experiences headache, visual strain and sharp pains when on the computer, watching television,

reading or texting. She states that she has lack of ambition and shortness of breath, loss of social interest and abilities and progressive desire to withdraw from social influence and expectations. She also has a lack of appetite.

### Need for Help

In the MR, the Physician indicates that the appellant requires a right elbow brace. In the AR, the Physician indicates that the appellant has withdrawn from social situations, has difficulty dealing with unexpected demands and problem solving. The Physician indicates that the appellant receives help from family and friends and uses an elbow brace. The appellant does not have an Assistance Animal.

### **Additional information provided**

In her Notice of Appeal dated June 22, 2017, the appellant states that as the Physician informed her that she is eligible and in need of disability support she will provide the Physician's reports to support her request at appeal.

Prior to the appeal, the appellant provided the Physician's revised AR updated July 10, 2017 (the "Revised AR") in which the Physician made various changes to the AR and initialed the changes. The Physician indicates that the appellant's ability to communicate with reading and hearing is poor and that her ability to write is satisfactory, explaining that she has difficulty remembering what she reads and is easily distracted. For mobility and physical ability the Physician indicates that the appellant requires periodic assistance from another person and takes significantly longer than typical with walking outdoors, explaining that the appellant is slower and frequently breaks. The Physician indicates that the appellant requires continuous assistance with lifting (5 lbs) and carrying and holding.

With respect to DLA, the Physician indicates that for personal care the appellant requires periodic assistance with dressing, grooming and toileting, takes significantly longer than typical with dressing and grooming and uses an assistive device with toileting. The Physician indicates that the appellant requires continuous assistance from another person and takes significantly longer than typical with transfers (in/out of bed), laundry, and basic housekeeping. For additional comments the Physician indicates that the appellant requires assistance from a friend when available, otherwise she takes significantly longer or unable altogether.

With respect to Social Functioning, the Physician indicates that the appellant requires periodic support/supervision with making appropriate social decisions, developing and maintaining relationships, interacting appropriately with others, dealing appropriately with unexpected demands and securing assistance from others. The Physician indicates that the appellant is easily overwhelmed, isolates, is intolerant of others, has increased anxiety and needs direction from others.

Under Additional Information the Physician indicates that the appellant has had progression of her impairment especially depression affecting her mood, memory and concentration.

At the hearing the appellant stated that five years ago she lost her husband, father and brother all in the space of one month and she withdrew and became socially isolated. She feels that she has never recovered emotionally from those losses. Since the accident last year she lives with chronic pain and depression and has difficulty with focusing on communications and memory. The appellant states that she is not able to do all her physical tasks and take care of her house and that her right elbow is in constant pain causing trouble with dressing, lifting, bathing and laundry. She is unable to

vacuum and has to use shower bars for bathing. She states that her right arm gives way and drops, or she has difficulty extending her right arm, and she has now become more dependent on her non-dominant left arm but it is very difficult to perform many tasks with her left arm. She states that she has experienced weight loss, muscle fatigue and continues to have perception and equilibrium problems. The appellant states that she does not feel comfortable to go out on her own and is very concerned/paranoid about having another accident.

The appellant states that from the time the MR and AR were completed until the Revised AR, a period of 5 months, she has experienced more pain and weakness and her depression has increased. The appellant takes over the counter pain medications and her anti-depressant medication has been increased. She states that her mother used to come and visit and help but she is elderly and does not drive any more so she cannot help her. She states she receives help from a friend approximately five times a week for a few hours at a time.

At the hearing the appellant's support person/friend indicated that the appellant has very high anxiety, is forgetful, becomes flustered very easily, and has difficulty explaining how she feels and what goes on in her brain.

### **Admissibility of New Information**

The ministry did not attend the hearing.

The panel has admitted the appellant's oral testimony and the friend's oral testimony regarding the appellant's impairment, ability to function, and impact to DLA regarding the appellant's condition at the time the PWD application was submitted, as it tends to corroborate the information and records that were before the ministry at the time of reconsideration, in accordance with section 22(4) of the *Employment and Assistance Act*. The panel has not admitted the appellant's oral testimony, the friend's oral testimony and the information in the Revised AR regarding the changes to the appellant's condition since the PWD application was submitted as it provides considerably different information regarding the appellant's condition and ability to function and changes to the appellant's condition since the PWD application was submitted. As this new information does not corroborate the information before the ministry at the time of reconsideration and the ministry did not have the opportunity to review this information, it takes the panel away from reviewing the reasonableness of the ministry's reconsideration decision. As the ministry did not have the opportunity to review this new information, the appellant may wish to put this information before the ministry in the future.

The panel has accepted the information in the Notice of Appeal as argument.

## 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 when concluding it was not satisfied that

- a severe physical impairment was established;
- 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 help, as it is defined in the legislation, to perform DLA?

### **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**

### **Severe Physical Impairment**

The legislation provides that the determination of severity of an impairment is at the discretion of the minister, taking into account all of the evidence including that of the appellant. However, the legislation is also clear that the fundamental basis for the analysis is the evidence from a prescribed professional respecting the nature of the impairment and its impact on daily functioning. While the legislation does not define "impairment", the MR and AR 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.

When considering the evidence provided respecting the severity of impairment, the ministry must exercise its decision-making discretion reasonably by weighing and assessing all of the relevant evidence and cannot simply defer to the opinion of a prescribed professional as that would be an improper fettering of its decision-making authority.

The appellant argues that she has a severe physical impairment due to her ongoing chronic pain in her right elbow resulting from injuries in a bicycle accident. The appellant's position is that her chronic right elbow pain and weakness make it extremely difficult for her to lift or carry items with her right arm, dress, shower, bathe, and she reports that her right arm is weak and gives out. The appellant also states that she has persistent headaches and balance/equilibrium problems and that the combination of her physical symptoms demonstrates that she has a severe physical impairment.

The ministry's position is that it is difficult to establish a severe impairment of physical functioning based on the assessment from the Physician. In particular the ministry states that the Physician does not describe the severity of impacts to balance and does not state that the impacts to balance limit the appellant's mobility or physical ability. The ministry's position is that the Physician's assessment of the appellant's functional skills in the MR is not indicative of a severe impairment. The ministry also notes that in the AR the Physician indicates that the appellant is independent with all listed areas of mobility and physical mobility, indicating that with respect to standing the appellant is off balance at times.



The MR indicates that the appellant has a right elbow injury, brain injury and post concussion syndrome and in the Health History portion of the MR, the Physician indicates that the appellant has daily face pain, headache, sleep disturbance, balance concerns, fatigue and chronic pain symptoms. However, with respect to functional skills, the Physician indicates that the appellant's ability to walk unaided on a flat surface and length of time she can remain seated is unknown, that she can climb 5+ steps unaided and that she can lift 5 to 15 pounds. In the AR, the Physician indicates that the appellant is independent with all aspects of mobility and physical ability, explaining that with standing she is off balance at times. However, the Physician does not indicate how often or for what duration the appellant has balance problems. In addition, the Physician does not indicate how the appellant's right elbow injury and/or chronic pain impact her mobility and physical ability, only noting that chronic pain affects her mood.

The Neurologist indicates that the appellant has persisting headaches but he does not provide any information on how this impacts the appellant's functioning. The Neurologist indicates that the appellant reports that her equilibrium is distorted at times, and she might have some occasional spinning sensation but there is no further information on how often this occurs, how often the distortion lasts or the impact to her function as a result.

The other medical documentation, while providing information regarding the appellant's elbow surgery and clavicle fracture, does not provide further information about the appellant's level of functioning with mobility or physical ability.

The evidence and information provided indicates that the appellant's level of functioning is mainly independent and not at the most restricted end of the rating scale in the MR. The panel therefore finds that the ministry reasonably determined that a severe physical impairment has not been established.

#### Restrictions in the ability to perform DLA

Section 2(2)(b)(i) of the EAPWDA requires that the minister be satisfied that in the opinion of a prescribed professional, a severe mental or physical impairment directly and significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods. While other evidence may be considered for clarification or support, the ministry's determination as to whether or not it is satisfied that the legislative criteria are met, is dependent upon the evidence from prescribed professionals. The term "directly" means that there must be a causal link between the severe impairment and the restriction. The direct restriction must also be significant. Finally, there is a component related to time or duration – the direct and significant restriction may be either continuous or periodic. If periodic, it must be for extended periods. Inherently, any analysis of periodicity must also include consideration of how frequently the activity is restricted. All other things being equal, a restriction that only arises once a year is less likely to be significant than one that occurs several times a week. 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.

DLA are defined in section 2(1) of the EAPWDR and are listed in both the MR 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.

The appellant states that she has a severe physical and severe mental impairment that makes personal care, dressing, toileting, housekeeping and cooking difficult as her arm is weak, in constant

pain and gives out. She has muscle fatigue and equilibrium problems, which impact her DLA. The appellant states that her depression, anxiety, lack of focus, memory, and communication problems make DLA hard and she has lost the motivation to socialize. The appellant states that she does not feel comfortable to go out on her own and is very concerned/paranoid about having another accident. The appellant's position is that the initial information provided in the MR and the AR was not correct and that her condition is much worse.

The ministry's position is that the information provided by the Physician is not sufficient to establish significant restrictions to DLA. The ministry notes that in the MR, the appellant is not restricted with respect to DLA of personal self care, meal preparation, management of medications, basic housework, daily shopping, mobility inside the home, mobility outside the home or management of finances. While the MR indicates that the appellant is continuously restricted with use of transportation, the AR indicates that the appellant is independent with all listed areas of transportation. The ministry's position is 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.

While the MR indicates that the appellant requires continuous assistance with use of transportation and social functioning, the AR contradicts that information as the Physician indicates that the appellant is independent with all aspects of transportation. The AR indicates that the appellant is independent with all aspects of DLA except developing and maintaining relationships and dealing appropriately with unexpected demands, with which she needs periodic support/supervision. However the Physician does not provide any information to explain the degree and duration of support/supervision required. The Physician indicates that the appellant has marginal functioning with respect to her immediate and extended social networks, commenting that she is withdrawn and indicating that she had to quit her job. However, employability is not a criterion for PWD designation.

Based on the above analysis, and in particular the information in the AR which indicates that the appellant is independent with almost all aspects of DLA except developing and maintaining relationships and dealing appropriately with unexpected demands, the panel finds that the ministry has reasonably determined that the independence with which the prescribed professionals report that the appellant manages her DLA does not 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

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 appellant's position is that she requires help with DLA because of her severe physical and mental impairment.

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

The Physician indicates that the appellant requires the use of an elbow brace and is provided assistance by family and friends. In the AR when asked to describe the support/supervision required which would help to maintain the appellant in her community, the Physician writes "withdrawn from

social situation, hard to deal with unexpected demands, and problem solve”. This description indicates that the appellant has difficulties with some aspects of social functioning but does not provide information about the support/supervision that is required.

Given that confirmation of direct and significant restrictions with DLA is a precondition of the need for help criterion and 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 is a reasonable application of the applicable enactment, and therefore confirms the decision. The appellant is not successful on appeal. As noted above, the appellant may wish to put the new information not admitted as evidence at this appeal before the ministry in the future.