

## 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 15 June 2017, which denied the appellant person with disabilities (PWD) designation. The ministry determined that the appellant is not one of the prescribed classes of persons who may be eligible for PWD designation on alternative grounds. The ministry further determined that the appellant did not meet all of the criteria for PWD designation as set out in the *Employment and Assistance for Persons with Disabilities Act*, section 2.

Specifically, the ministry determined that the information provided did not establish that the appellant has a severe mental or severe physical impairment; that a severe mental or physical impairment, in the opinion of a prescribed professional, directly and significantly restricts her ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and that as a result of those restrictions, she requires help to perform those activities.

The ministry found that the information provided did establish that the appellant has reached 18 years of age and her impairment, in the opinion of a medical practitioner, is likely to continue for at least 2 years.

## PART D – Relevant Legislation

*Employment and Assistance for Persons with Disabilities Act* (EAPWDA) – section 2

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR) – section 2

## PART E – Summary of Facts

The ministry was not in attendance at the hearing. After confirming that the ministry was notified, the hearing proceeded in accordance with section 86(b) of the Employment and Assistance Regulation.

The evidence before the ministry at reconsideration consisted of the following:

1. The appellant's **PWD Application** comprised of:
  - A Medical Report (MR) dated January 2017, completed by the appellant's general practitioner (GP) who has known the appellant for 2.5 months and has seen her 2-10 times in the past 12 months.
  - An Assessor Report (AR) dated 18 January 2017, completed by the appellant's GP.
  - A Self Report (SR) dated 27 February 2017 completed by the appellant.
2. A **Request for Reconsideration** dated 18 May 2017, signed by the appellant, which stated: *need more time to get doctor's info and from other sources – doctor away.*
3. The following materials were included with the request for reconsideration:
  - 1-page letter from the GP stating that the appellant has diffuse osteoarthritis in her right wrist, low back neck and left ankle. The appellant has significant osteoporosis putting her at increased risk of fragility fractures. These conditions prevent her from working any sort of labour job. She also suffers from anxiety that precludes a sedentary job. The GP expresses the opinion that the appellant would be a candidate for permanent disability due to these conditions.
  - Diagnostic Imaging Report (Bone Density Scan) – 13 April 2017.
  - Diagnostic Imaging Report (left ankle radiology) – 22 March 2017.
  - Diagnostic Imaging Report (left ankle ultrasound) – 28 May 2015.
  - Diagnostic Imaging Report (cervical and thoracic spine radiology) – 6 January 2015.
  - 1-page letter from a physiotherapist dated 18 May 2017, detailing the appellant's abilities as they relate to possible employment.

The panel will first summarize the evidence from the PWD Application as it relates to the legislative criteria at issue in this appeal.

### **Diagnoses/General**

In the MR, the GP diagnoses the medical conditions related to the appellant's impairment as:

- Generalized anxiety – onset 2005
- Osteoarthritis – onset 2007
- Migraine with aura – onset 2005

The GP has provided the following additional comments in the MR: *[Appellant] has refused to take standard medication for anxiety as she has had numerous 'bad reactions' to a number of anti-depressant/anxiety medications. She has also refused to see our local psychiatrist because he is male. She cannot afford to travel the long distance to Kelowna or Calgary to see a female psychiatrist. I feel she would benefit from both a regular anti-anxiety med and a psychiatry visit. Due to [appellant's arthritis] issues she has trouble with lifting/labour tasks. She would benefit from a physio program but can't afford to see private Pt. \*Feb. 27/ 17 Now is seeing a local psychiatrist and working with mental health counsellor.*

In the AR, the GP describes the appellant's mental or physical impairments as: *[appellant] has memory and learning issues as well as diffuse joint pain that both prevent her from performing her ADLs.*

### **Severity of physical impairment**

MR:

Under Health History, the GP writes: *[appellant] suffers from quite severe anxiety, this prevents her from doing work that involves any levels of stress or performing complex tasks or decision making. In addition, she has osteoarthritis in her wrists, low back, knees and hips. This prevents her from doing manual labour type jobs.*

For functional skills, the GP indicates that the appellant cannot walk at all without her ankle brace, can climb 5+ steps unaided, lift under 2 kg. (under 5 lbs.) unaided, and remain seated 1-2 hours.

The GP indicates that the appellant has a right wrist brace and left ankle brace.

AR:

The GP indicates the appellant's mobility and physical ability as independent for walking indoors, walking outdoors, climbing stairs and standing. The GP indicates that lifting and carrying and holding require periodic assistance from another person. The GP provides the comment: *Has arthritis in wrists and shoulders, unable to lift above head.*

SR:

The appellant describes suffering from: migraine aura, chronic headaches, difficulty sleeping, two deteriorating discs in her neck, arthritis in her shoulders, spinal twisting, rapid heartbeat, extreme hip pain irritable bowel syndrome, right wrist fractures three times, plantar fasciitis in her right foot, and arthritis in her left ankle. The appellant explains the difficulties she experiences as a result of these conditions.

### **Severity of mental impairment**

MR:

The GP indicates that the appellant has difficulties with communication and the cause of these difficulties is cognitive.

The GP indicates that the appellant has significant deficits with cognitive and emotional functioning in the areas of: executive; language; memory; emotional disturbance; impulse control; and attention, with the comment: *All above are due to anxiety.*

AR:

The GP indicates that the appellant's impairments include memory and learning issues.

The GP assesses the appellant's ability to communicate as good in the areas of speaking and hearing, and satisfactory in the areas of reading and writing.

The GP assess the appellant's cognitive and emotional functioning as having no impact in the areas of motor activity, language, psychotic symptoms and other emotional or mental problems. The GP assesses minimal impacts on daily functioning in the areas of consciousness and language. Moderate impacts on daily functioning are assessed for bodily functions, emotion, impulse control, insight and judgement, attention/concentration, memory, motivation and other neuropsychological problems with major impacts assessed for executive. The GP provides the comment: *as mentioned prior [appellant's] anxiety and mood lability impacts her ability to perform complex tasks and decision making.*

SR:

The appellant indicates that her disability includes: migraine aura, chronic headaches, emotional challenges, anxiety stress disorder, depression, struggles with comprehension and learning and difficulty sleeping. The appellant explains the difficulties she experiences as a result of these conditions.

### **Ability to perform DLA**

#### **General**

MR:

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

The GP has completed Part E – Daily Living Activities in the MR as well as Part C – Daily Living Activities in the AR. In the MR the GP has provided the following comments:

- In response to If Periodic, please explain: *If [appellant's] anxiety were better controlled I am certain her function and ADLs would improve.*
- In response to If Social Functioning is impacted, please explain: *[Appellant] suffers from agoraphobia from time to time when her anxiety is bad, this prevents her from normal social functioning.*
- In response to a prompt for additional details regarding the degree of restriction: *When [appellant's] anxiety is bad she is unable to leave her house.*
- In response to the assistance required for DLA: *She would benefit from assistance with shopping and meal prep as well as financial planning and organization. She would benefit from someone helping her to clean her home and do any heavy labour involved.*

In the AR, the GP has provided the following additional comments: *No concerns with safety issues. [Appellant] is able to perform her ADLs independently.*

***EAPWDR - Section 2(1)(a) DLA***

*Prepare own meals*

MR:

The GP indicates that the appellant is not restricted with meal preparation.

AR:

The GP indicates that the appellant is independent with the meals activity of safe storage of food, and requires periodic assistance from another person with meal planning, meal preparation and cooking. The GP comments: *[appellant] struggles with preparing meals due to her arthritis.*

*Manage personal finances*

MR:

The GP indicates that the appellant is periodically restricted with management of finances.

AR:

The GP indicates that the appellant requires periodic assistance with all pay rent and bills activities (banking, budgeting and pay rent and bills).

*Shop for personal needs*

MR:

The GP indicates that the appellant is not restricted with daily shopping.

AR:

The GP indicates that the appellant requires periodic assistance with all shopping activities, including: going to and from stores, reading prices and labels, making appropriate choices, paying for purchases and carrying purchases home.

*Use public or personal transportation facilities*

MR:

The GP indicates that the appellant is restricted with use of transportation.

AR:

The GP indicates that the appellant is independent in the transportation DLA of getting in and out of a vehicle, using public transit and using transit schedules and arranging transportation.

*Perform housework to maintain the person's place of residence*

MR:

The GP indicates that the appellant is continuously restricted with basic housework.

AR:

The GP indicates that the appellant is independent with laundry; she requires periodic assistance basic housework.

*Move about indoors and outdoors*

MR:

The GP indicates that the appellant is not restricted with mobility inside of the home and is continuously restricted with mobility outside of the home.

AR:

The GP indicates that the appellant is independent with walking indoors and outdoors, climbing stairs and standing.

*Perform personal hygiene and self-care*

MR:

The GP indicates that the appellant is not restricted with personal self-care.

AR:

The GP indicates that the appellant is independent with the personal care DLA of dressing, grooming, feeding self, and transfers in/out of bed and on/off chair. Regulating diet requires periodic assistance from another person.

*Manage personal medication*

MR:

The GP indicates that the appellant is not restricted with management of medications.

AR:

The GP indicates that the appellant is independent in all medications DLA, including: filling/refilling prescriptions, taking as directed and safe handling and storage.

### **Section 2(1)(b) DLA**

The following DLA are applicable to a person who has a severe mental impairment:

#### *Make decisions about personal activities, care or finances*

AR:

The GP indicates that the appellant requires periodic assistance with the shopping DLA: reading labels, making appropriate choices, and paying for purchases; the personal care DLA: regulating diet; and all activities for the pay rent and bills DLA.

The GP indicates that the appellant is independent with the meals DLA: safe storage of food; all activities for the medications DLA; and the transportation DLA: using transit schedules and arranging transportation.

#### *Relate to, communicate or interact with others effectively*

MR:

The GP indicates that the appellant has cognitive difficulties with communication and assesses social function as periodically restricted.

AR:

The GP assesses the appellant's ability to communicate as good for speaking and hearing, and satisfactory for reading and writing.

The GP indicates that the appellant requires periodic assistance with social functioning DLA in the following areas: appropriate social decisions (*doesn't always understand social situations*), able to develop and maintain relationships (*due to mood lability has a hard time maintaining relationships*), interacts appropriately with others (*due to mood lability has a hard time maintaining relationships*), able to deal appropriately with unexpected demands (*struggle with situational stress due to anxiety*), and able to secure assistance from others (*not always sure when to ask for help*).

The GP indicates that the appellant has marginal functioning in her immediate and extended social networks. In response to the prompt to explain/describe the degree and duration of support/supervision required the GP has provided the comment: *she would benefit from regular mental health visits with a counsellor and supports from a social worker.*

#### Help required

MR:

The GP indicates that the appellant requires an aid or prosthesis for her impairment specifically that the appellant has a right wrist brace and left ankle brace.

AR:

The GP indicates that the appellant receives assistance from family for DLA as well as splints - *Pt. uses a R wrist brace*. The equipment required but not currently being used is reported as *none*.

The GP indicates that the appellant does not receive assistance from assistance animals.

### **Notice of Appeal**

In her Notice of Appeal dated 23 June 2017, the appellant gives as Reasons for Appeal: *because I have medical conditions with too many restrictions that cause me to no longer be able to work any longer.*

### **The Hearing**

At the hearing the appellant explained that she has too many medical issues and her functioning is 'not great'. The appellant explained that she has problems with pain and headaches, which sometimes require her to go to hospital for medications, as well as pain in her right hip. The appellant explained that she used to use a cane for ankle support but had to quit using it due to pain in her wrist. She stated that she is supposed to get new braces for her ankle and wrist but cannot afford to do so. The appellant also described the difficulty she has experienced in the past with misdiagnosis and incorrect medications. The appellant stated that she is only allowed to exercise every second day and her physiotherapist has advised that she is not to lift more than 2-3 lbs. The appellant explained that her daughter helps her with groceries and her grandchildren do vacuuming and other chores once a week. The appellant explained that she is in no condition to work. She also expressed concerns about her ability to manage in the future as she has been told that her medical conditions will continue to worsen.

The appellant's representative explained that she has known the appellant for 20 years and has seen the appellant deteriorate from the hardworking outgoing person she used to be. The representative explained that the appellant has serious medical issues, some of which are not mentioned on the form, and is on many medications. She explained that since the application, the doctors are also looking at heart problems. The representative explained that when the appellant has a migraine aura 'attack' she shuts down as though she's had a stroke and often needs to spend 5-6 days in bed, she has difficulty understanding what's going on, and she may need to be taken to hospital. The representative explained that these attacks are scary for the appellant and contribute to her anxiety, causing her to be afraid to leave home. The representative stated that the appellant is also afraid of falling due to her osteoarthritis and osteoporosis, which cause her bones to break easily. The representative stated that the appellant doesn't have strong reading and comprehension skills and requires patient assistance to help her understand medical reports and other documents. The representative argued that the appellant would benefit from more stability in her life, additional physiotherapy as well as an increased income, which would allow her to have proper nutrition and strengthen her body. The representative argued that counselling and help with housework would also be helpful for the appellant.

The ministry did not attend the hearing.

**Admissibility of new information**

The panel finds that the information provided by the appellant in the Notice of Appeal and by the appellant and her representative at the hearing is consistent with and, therefore, in support of the information and records before the ministry at reconsideration. In particular, the information provided by the appellant and her representative at the hearing provided some elaboration of the appellant's medical conditions and the resultant impacts. The panel therefore admits this information in accordance with section 22(4) of the *Employment and Assistance Act*.

## PART F – Reasons for Panel Decision

The issue in this appeal is whether the ministry's reconsideration decision that determined that the appellant did not meet three of the five statutory requirements of Section 2 of the *EAPWDA* for designation as a person with disabilities (PWD) is reasonably supported by the evidence or is a reasonable application of the legislation in the circumstances of the appellant. Specifically, the ministry determined that the information provided did not establish that:

- the appellant has a severe mental or severe physical impairment;
- the appellant's severe mental or physical impairment, in the opinion of a prescribed professional, directly and significantly restricts her ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and
- as a result of those restrictions, she requires help to perform those activities.

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.

### **Severity of impairment**

The legislation requires that for PWD designation, the minister must be satisfied that the person has a severe mental or physical impairment. The legislation makes it clear that the determination of severity is at the discretion of the minister, considering all of the evidence, including that of the appellant. The diagnosis of a serious medical condition or the identification of mental or physical deficits does not in itself determine the severity of impairment. An impairment is a loss or abnormality of psychological, anatomical or physiological functioning causing restriction in the ability to function independently, appropriately, effectively or for a reasonable duration.

#### Severity of physical impairment

In the reconsideration decision, the ministry found that the evidence provided did not establish the presence of a severe physical impairment. The ministry noted that the use of simple assistive devices such as ankle and wrist braces does not establish the presence of a severe impairment. In reaching its conclusion, the ministry considered the functional skills assessment provided by the GP in the MR, as well as the mobility and physical ability assessment in the AR and the letter provided by the physiotherapist. The ministry argued that these assessments are reflective of a moderate, rather than severe physical impairment. The ministry acknowledged that the appellant has some restrictions due to osteoarthritis and osteoporosis, as well as being restricted with heavy lifting and cannot lift above her head, but found that this did not establish the presence of a severe physical impairment.

The panel finds that the ministry's determination that a severe physical impairment has not been established was reasonable. The panel notes that the assessments provided indicate that the appellant can walk 4+ blocks with her ankle brace, climb 5+ steps unaided, and remain seated 1-2 hours. The appellant is independent with all aspects of mobility and physical ability, except for lifting and carrying and holding. The panel notes that the information provided in the letters from the GP and physiotherapist, as well as by the appellant and her representative discuss the appellant's inability to work. However, as noted by the ministry, employability is not a consideration for eligibility for PWD designation because employability is not a criterion in section 2(2) of the EAPWDA, nor is it listed among the prescribed daily living activities in section 2 of the EAPWDR. The panel notes that the appellant experiences some difficulties with physical function, as acknowledged by the ministry, but finds that the ministry's determination that a severe physical impairment has not been established is reasonable.

#### Severity of mental impairment

In the reconsideration decision, the ministry found that the information provided did not establish that the appellant has a severe impairment of her mental functioning. The ministry noted that the appellant's communication skills were assessed as good and satisfactory. The ministry also noted that, in the MR, the GP indicated deficits in a number of areas of cognitive and emotional function, which were reported as *due to anxiety*. The ministry acknowledged that the appellant experiences some deficits, but argued that the assessment of cognitive and emotional functioning in the AR does not indicate a severe mental impairment as the impacts on daily functioning are assessed moderate, minimal or no impact, except for one major impact indicated for executive functions. The ministry also considered the GP's assessment of the appellant's social functioning, noting that the appellant has marginal functioning in immediate and extended social networks and requires periodic assistance with all social functioning DLA and that are no safety concerns noted. The ministry argued that it is difficult to assess the appellant's overall functioning and the severity of her impairment in the absence of information about the how often the appellant's anxiety is bad, how often she experiences agoraphobic symptoms and how often or for how long she requires periodic assistance. The ministry also noted that the GP indicated that the appellant's functioning would improve if her anxiety were better controlled, and has provided an update that the appellant is working with a psychiatrist and counsellor but has not provided information about whether the appellant's impairment is improving. The ministry argued that it is unknown whether the information provided in the PWD application is still accurate.

The panel finds that the ministry's determination that a severe mental impairment has not been established was reasonable. The panel finds the ministry's position that it is difficult to assess the severity of the appellant's impairment with the information provided to be reasonable. The panel notes one major impact on cognitive and emotional functioning assessed by the GP, as well as some moderate and minor impacts. As well, the panel notes that there are no safety concerns noted by the GP in the MR or AR and the GP indicates that the appellant is independent with DLA. The panel finds that the ministry reasonably concluded that the information provided does not establish a severe mental impairment and that this criterion was not met.

#### **Direct and significant restrictions in the ability to perform DLA**

The legislation – section 2(2)(b)(i) of the EAPWDA – requires the minister to assess direct and significant restrictions of DLA in consideration of the opinion of a prescribed professional, in this case the appellant's GP. At issue is the degree of restriction in the appellant's ability to perform the DLA listed in section 2(1)(a) and (b) of the EAPWDR. Regarding the degree of the restriction, section 2(2)(b)(i) of the EAPWDA requires activities to be directly and significantly restricted either continuously or periodically for extended periods. The panel notes that, according to the legislation, the direct and significant restriction in the ability to perform DLA must be a result of a severe impairment a criterion not established in this appeal.

In the reconsideration decision, the ministry found, based on the information provided by the appellant's medical practitioner, that there was not enough evidence to confirm that the appellant's impairment significantly restricts her ability to perform DLA continuously or periodically for extended periods. The ministry noted that the appellant has not been prescribed medications that interfere with her ability to perform DLA. The ministry noted that the GP has completed both part E of the MR and part C in the AR and has considered both assessments in its decision. The ministry argued that the assessments in the MR does not correlate with the assessments provided in the AR, noting that in the MR the GP indicates that the appellant is continuously restricted with transportation, but in the AR the GP indicates that she is independent. Similarly, the GP indicates that the appellant is unrestricted with meal preparation and daily shopping in the MR, but indicates in the AR that the appellant requires periodic assistance with these DLA. The ministry argues that these inconsistencies make it difficult to assess the appellant's functioning in these areas. The ministry further argues that it is unable to determine that the appellant's restrictions are significant and periodic for extended periods because the GP has not described the assistance required or provided an indication of the frequency of assistance required in relation to the DLA that are assessed as requiring periodic assistance.

The panel finds that the ministry's determination that the information provided does not establish that a severe impairment significantly restricts the appellant's ability to perform DLA continuously or periodically for extended periods was reasonable. The panel notes that there are a number of inconsistencies in the assessments and comments provided by the GP in the PWD application in relation to the appellant's ability to perform DLA. As well, the panel notes that the letters provided by the GP and physiotherapist do not provide assessment of the appellant's abilities in relation to DLA. The panel finds that the GP has not provided sufficient information in relation to the degree and duration of the assistance required by the appellant to establish that there are significant restrictions for extended periods in the appellant's ability to perform DLA. Without sufficient detail from the GP or other prescribed professional to confirm that DLA are directly and significantly restricted either continuously or periodically for extended periods, the panel finds that the ministry reasonably determined that these legislative criteria were not met. As such, the panel concludes that the ministry's determination that this criterion was not met is reasonable.

#### **Help 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 either continuously or periodically for extended periods, a person must also require help to perform those activities. The confirmation by a prescribed professional of direct and significant restrictions with DLA under section 2(2)(b)(i), is a precondition for meeting the need for help criterion. Help is defined in subsection (3) as the requirement for an assistive device, significant help or supervision of another person, or the services of an assistance animal in order to perform a DLA.

In the reconsideration decision, the ministry argued that, as it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required from another person or assistive device. The ministry again noted that the use of simple assistive devices such as ankle and wrist braces does not establish the presence of a severe impairment. While the information provided by the appellant and her GP indicates that she does benefit from assistance provided her family, the panel finds that the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established. As such, the panel finds that the ministry reasonably concluded that under section 2(2)(b)(ii) of the EAPWDA it cannot be determined that the appellant requires help to perform DLA.

**CONCLUSION**

The panel finds that the ministry's reconsideration decision, which determined that the appellant was not eligible for PWD designation, was a reasonable application of the legislation in the appellant's circumstances and was reasonably supported by the evidence. The panel therefore confirms the ministry's decision. The appellant is not successful on appeal.