

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the ministry) reconsideration decision dated August 21, 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 physical impairment is likely to continue for at least two years. However, the ministry was not satisfied the evidence establishes that:

- in the opinion of a prescribed professional, the appellant has a mental impairment that will last 2 years or more;
- 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

The evidence before the ministry at the time of the Reconsideration Decision included:

Persons with Disabilities (PWD) Application comprised of the appellant's information and self-report dated March 8, 2017, a medical report (MR) and an assessor report (AR) dated March 3, 2017 and completed by a general practitioner (GP) who has known the appellant for 3.5 years and saw the appellant 2-10 times in the past 12 months prior to completing the PWD application. The information the GP used to complete the PWD application was an office interview with the appellant and file/chart information.

The evidence also included the appellant's Request for Reconsideration (RFR), dated August 8, 2017, which stated that she is unable to work due to neck and arm problems, and that she suffers from anxiety and PTSD (post-traumatic stress disorder).

### ***Diagnoses***

In the PR, the GP diagnosed the appellant with anxiety disorder (onset January 2016), PTSD (onset January 2016) and musculoskeletal – right shoulder/ right clavicle fracture (onset July 2013). The GP indicated that the appellant's impairment is likely to continue for 2 years or more and provided the following comment: "given that shoulder pain lasted [more than] 3 years, it is now chronic. For anxiety, PTSD, usually course should be less than 2 years".

### ***Physical Impairment***

In the MR and AR, the GP reported that:

- "[right] clavicular fracture in a bike accident, ended up with malunion and pain at fracture site plus severe right shoulder tendonitis and range of motion limitation".
- The appellant can walk 4+ blocks unaided, climb 5+ steps unaided, lift under 5lbs (with dominant right hand) and remain seated without limitation.
- "furthermore, her [right] arm and shoulder pain and limitation has made life and working for her very difficult".
- Under mobility and physical ability the appellant is independent with walking indoors, walking outdoors, climbing stairs, and standing.
- The appellant requires periodic assistance and takes significantly longer with lifting, and commented "cannot lift > [greater than] 5-10 lbs"
- The appellant takes significantly longer with carrying/holding, and commented: "carrying with right hand is almost impossible".

In her self-report, the appellant did not describe a physical impairment.

### ***Mental Impairment***

In the MR and AR, the GP reported:

- PTSD and severe anxiety due abusive domestic life.
- Cognitive difficulties with communication.
- Significant deficits with cognitive and emotional function in the areas of executive function, memory, emotional disturbance, motivation, impulse control and attention or sustained concentration, and commented: "severe anxiety symptoms social isolation".
- There is a continuous restriction with social functioning with the comment: "severe anxiety".
- The appellant "suffers from dependent personality trait, so that being on her own causes even more anxiety".
- Speaking, reading, writing and hearing are listed as satisfactory
- Under cognitive and emotional functioning, major impacts to 'impulse control', 'executive

function' and 'motivation'; moderate impacts to 'memory', 'attention/concentration', 'other', 'insight and judgement' and 'emotion'; all other listed areas have either minimal or no impacts.

- Under social functioning, the appellant requires continuous assistance with 'able to develop and maintain relationships' and interacts appropriately with others. Continuous assistance is required with 'able to deal appropriately with unexpected demands' and 'able to secure assistance from others'. Immediate social network is marginally functioning and extended social networks are very disrupted. The GP commented: "socially isolated, limited to her known people".
- The appellant is independent with all task related to 'pay rent and bills' and 'medications'.

In her self-reports, the appellant described her mental impairment as mental and emotional abuse, PTSD with severe depression and anxiety.

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

In the MR and AR, the GP reported:

- The appellant is restricted periodically with personal self-care and meal preparation with the comment: "when her shoulder/arm is more painful, she needs to postpone lots of household chores; like dishwashing, cooking, laundry, even dressing takes 2-3 times longer" and "moderate to severe [due to] involvement of right (dominant) hand".
- The appellant is restricted continuously with basic housework and daily functioning.
- Dressing, grooming, bathing and cooking take significantly longer with the comment: "2-3 times longer".
- Laundry and basic housekeeping require periodic assistance and takes significantly longer with the comment: "she either postpones or takes 2-3 times longer".
- Carrying purchases home require continuous assistance and takes significantly longer with the comment: "needs help or takes 2-3 times longer".
- All other listed tasks under each of the DLA headings are performed independently.
- "she has her dominant site chronic pain, so she needs painkillers and a lot of time to manage her household chores".

### ***Need for Help,***

In the MR and AR, the GP reported that:

- The appellant requires a shoulder brace
- The help required for DLA is provided by friends.
- Under 'assistance provided through the use of assistive devices', the GP left the section blank and commented: "N/A".
- The appellant does not have an assistance animal.

### ***Additional information***

In her Notice of Appeal (NOA), dated August 24, 2017, the appellant stated that she has both physical and mental illness and is therefore eligible for PWD.

### ***Evidence at the Hearing***

Through her interpreter the appellant stated the following at the hearing:

- She has not been well mentally for the last 7-8 months and needs help. If she could learn English than she could do a small job.
- The ministry's decision is unreasonable because she cannot find work.
- Her arm movement is affected and she had hoped it would heal in 7-8 months so she could find work.
- Anxiety affects her concentration and she feels lost. Her sleep is also impacted. This impact

is due to her divorce.

- She is not sure why the scans do not show her shoulder problems but when she washes the dishes or does any small job it takes longer (up to to 3 hours long) and with this type of movements she cannot be employed.
- She does not have money to attend counselling. In the past she took medication [anti-depressants] is not currently taking them because when using the medication she felt like a robot and was unable to function.
- She lives with a roommate who helps with her DLA and her sister helps her psychologically.
- Currently she takes over the counter medication for her shoulder pain and the prescribed medication only when there is a lot of pain.
- She does not go to physiotherapy because she cannot afford it.
- The pain from her shoulder flares up unexpectedly and affects her mentally.
- She had a suicide attempt 4 months ago [the appellant showed the panel the scars on her arms from this incident].

At the hearing the ministry relied on its reconsideration decision. In response to a panel question, the ministry stated that it is unknown if there was follow-up with the appellant's GP regarding the duration of her mental impairment.

## PART F – Reasons for Panel Decision

The issue on appeal is whether the ministry's reconsideration decision, which found that the appellant is not eligible for 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. The ministry found that the evidence does not establish that the appellant has a mental impairment that is likely to continue for 2 years or more, has a severe mental or physical impairment and that her DLA are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods. Also, 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.

The criteria for being designated as a PWD are set out in Section 2 of the EAPWDA as follows:

### **Persons with disabilities**

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 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).

The EAPWDR provides as follows:

### **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.

## **Part 1.1 — Persons with Disabilities**

### **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).

### **Duration**

The reconsideration decision indicates that the ministry was satisfied that the appellant's physical impairment is likely to continue for 2 or more years. However, the ministry was not satisfied that the information provided by the GP establishes that the appellant's mental impairment will last 2 years or longer. The appellant argued that she is both physically and mentally impaired.

The ministry noted that in the MR the GP stated "for anxiety, PTSD, usually course should be less

than 2 years”. The ministry’s conclusion was that it is difficult to establish that the impairment related to anxiety and PTSD is likely to continue for 2 years or more. Therefore the ministry is unable to establish that the appellant’s mental impairment is likely to continue for 2 or more years.

Given the statement by the GP in the MR regarding the duration of the appellant’s mental impairment, the panel finds that the ministry reasonably determined that there is insufficient evidence to establish that the appellant’s mental impairment will continue for 2 or more years pursuant to Section 2(2) of the EAPWDA.

### **Severe Impairment**

In the reconsideration decision, the ministry was not satisfied that the information provided establishes a severe physical or mental impairment. Determining a severe physical or mental impairment requires weighing the evidence provided against the nature of the impairment and its reported functional skill limitations. A diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a severe impairment. An “impairment” is a medical condition that results in restrictions to a person’s ability to function independently or effectively or for a reasonable duration. To assess the severity of an impairment, the ministry must consider the nature of the impairment and the extent of its impact on daily functioning.

### **Severe Physical Impairment**

In the PWD application, self-reports and at the hearing, the GP and the appellant have emphasized the appellant’s inability to work. It is noted that 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.

In the reconsideration decision the ministry noted that in the MR, the GP diagnosed the appellant with musculoskeletal – right shoulder pain / right clavicle fracture. The MR indicated the appellant can walk 4+ blocks unaided, climb 5+ steps unaided, lift under 5lbs (with dominant right hand), and can remain seated without limitation. The ministry noted that the GP clarifies that the lifting restriction is for the right hand. The ministry also noted that in the AR the GP indicated that the appellant can lift 5-10lbs and that carrying/holding is almost impossible with the right hand. The ministry noted that the assessments in the MR and AR regarding walking, standing and climbing stairs are not indicative of a severe impairment.

The ministry noted that the GP indicated that there is periodic assistance required and it takes significantly longer to lift. The appellant takes significantly longer with carrying/holding. The ministry noted that the GP does not describe the frequency or duration of the periodic assistance required with lifting or how much longer it takes with lifting and carrying/holding. The ministry noted that the appellant is independent with the majority of the listed areas of mobility and physical ability. The ministry concluded that based on the assessments provided by the GP and the appellant’s self-report, a severe physical impairment has not been established.

The panel finds that the ministry reasonably concluded that the appellant’s functional ability, as described by the GP, is not indicative of a severe impairment (namely: the appellant can walk 4+ blocks unaided, climb 5+ step unaided, lift under 5lbs and remain seated for an unlimited time), the GP did not describe the frequency and duration of the periodic assistance required for lifting and carrying/holding, that the GP has indicated that the lifting and carrying/holding restriction is limited to the dominant right hand, and that there is a discrepancy in the information provided in the MR and AR in regards to the amount the appellant can lift.

Section 2(2) of the *EAPWDA* requires that the minister must be satisfied that a person has a severe physical impairment that results in restrictions to a person's ability to function independently or effectively. Given the assessments of the appellant's physical ability provided at the time of the reconsideration decision and with no revised assessments provided at appeal, the panel finds that the ministry reasonably determined that the evidence does not establish that the appellant has a severe physical under Section 2(2) of the *EAPWDA*.

### *Severe Mental Impairment*

In the reconsideration decision, the ministry determined that the appellant does not have a severe mental impairment.

The MR and AR indicated that the appellant suffers from PTSD and anxiety. The ministry noted that the GP stated that the appellant's PTSD and anxiety was caused by her current life circumstances which include abuse and divorce, and that she suffers from dependent personality trait. The ministry noted that in the MR the GP indicated that the appellant has difficulty with communication of cognitive cause, yet in the AR the GP indicated all listed aspects of communication are satisfactory. The ministry noted that in the MR the GP indicated 5 areas of significant deficit with cognitive and emotional functioning (namely: executive, memory, emotional disturbance, motivation, impulse control and attention/sustained concentration) yet in the AR the GP indicated under cognitive and emotional functioning that there were major impacts only to impulse control, executive and motivation, with emotion, memory and attention/concentration having moderate impacts. The ministry noted that 2 more listed areas were indicated as moderate and all remaining listed areas were indicated as either minimal impact or no impact. The ministry concluded that the cumulative impact to cognitive and emotional functioning, as indicated by the GP, is indicative of a moderate as opposed to a severe impairment of mental functioning.

The ministry noted that in the AR the GP indicated that the appellant required periodic support/supervision with tasks listed under social functioning. However the GP did not indicate the frequency or duration of the periodic support/supervision that was required with these tasks. The ministry noted that the GP indicated that the appellant has marginal functioning with her immediate social network yet also indicated that the assistance which is required, is provided by friends. The ministry noted that "for these reasons, it is difficult to establish a severe impairment of mental functioning based on the GP's assessment of social functioning".

Section 2(2) of the *EAPWDA* requires that the minister must be satisfied that a person has a severe physical impairment that results in restrictions to a person's ability to function independently or effectively. Given the fact that the evidence provided by the GP does not describe the frequency or duration of the assistance required with social functioning and the evidence is inconsistent in describing the impact of the mental impairment on cognitive and emotional functioning and social functioning, the panel finds that the ministry reasonably determined that there is insufficient evidence to establish that the appellant has a severe mental impairment under Section 2(2) of the *EAPWDA*.

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

In the reconsideration decision, the ministry was not satisfied that the appellant has a severe physical or mental impairment that, in the opinion of the prescribed professional, directly and significantly restricts DLA either continuously or periodically for extended periods of time.

According to the legislation, Section 2(2)(b) of the *EAPWDA*, the ministry must assess direct and significant restrictions to DLA in consideration of the opinion of a prescribed professional, in this case the appellant's GP. This does not mean that the other evidence is not factored in as required to provide clarification of the professional evidence, but the legislative language makes it clear that a prescribed professional's evidence is fundamental to the ministry's determination as to whether it is



“satisfied.” Therefore, the prescribed professional completing the assessments has the opportunity to indicate which, if any, DLA are significantly restricted by the appellant’s impairments either continuously or periodically for extended periods.

In the reconsideration decision, the ministry reviewed the information provided in the MR and AR and concluded that there is not enough evidence to confirm that the appellant has a severe impairment that significantly restricts her ability to perform her DLA continuously or periodically for extended periods.

The ministry noted that the GP indicated that the appellant is prescribed medication that interferes with her ability to perform her DLA and the narrative as described above. The ministry also noted that the GP indicated that the appellant is continuously restricted with basic housework and daily shopping and periodically restricted with personal self-care and meal preparation. The GP indicated that this restriction is moderate to severe. The ministry noted, however, that the GP indicated in the AR that the appellant requires periodic assistance with basic housekeeping and laundry and is independent with 4 of 5 listed areas of shopping. The ministry points out the GP’s narrative, namely “when her shoulder/arm is more painful, she needs to postpone lots of household chores”, and concluded that this suggests that the appellant is restricted with basic housework when her shoulder/arm is more painful. The ministry goes on to explain that the GP did not describe the frequency or duration of the periodic assistance required. The ministry further notes that taking 2-3 times longer to perform DLA is not considered indicative of significant restriction to DLA.

The ministry noted that in the AR the GP does not describe the frequency or duration of the periodic assistance required with laundry and basic housekeeping. The ministry also noted that the majority of the listed DLA are performed independently according to the GP.

Section 2(2) of the *EAPWDA* requires that in the opinion of a prescribed professional a person's ability to perform daily living activities is directly and significantly restricted either continuously, or periodically for extended periods. The panel finds that since the GP did not describe the frequency and duration of the periodic assistance required, was inconsistent with the assessment of whether or not basic housekeeping is continuously or periodically restricted and indicated that the appellant’s restriction is focused to one shoulder/arm, it is difficult to determine if the appellant’s restriction is significant and for extended periods. The panel finds that the ministry reasonably determined that taking 2-3 longer to complete tasks of daily living is not indicative of a significant restriction.

The panel finds that the ministry’s decision that this criterion is not met is a reasonable application of the legislation because the information provided by the GP did not establish that the appellant is directly and significantly restriction in performing her DLA either continuously or periodic for extended periods.

### **Help to perform DLA**

In the reconsideration decision, the ministry held that, as it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required. Section 2(2)(b)(ii) of the *EAPWDA* requires that, as a result of being directly and significantly restricted in the ability to perform DLA either continuously or periodically for extended periods, a person must also require help to perform those activities. That is, the establishment of direct and significant restrictions under section 2(2)(b)(i) is a precondition of meeting the need for help criterion. 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 ministry noted the that GP indicated that the appellant requires a shoulder brace, counselling and has assistance from friends, the panel finds that as the ministry reasonably determined that since 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 under 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 pursuant to Section 2(2) of the EAPWDA, was reasonably supported by the evidence. The panel therefore confirms the ministry's decision. The appellant's appeal, therefore, is not successful.