

### **PART C – DECISION UNDER APPEAL**

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the ministry) reconsideration decision dated December 18, 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 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**

The ministry did not attend the hearing. After confirming that the ministry was notified, the hearing proceeded under Section 86(b) of the Employment and Assistance Regulation.

The evidence before the ministry at the time of the reconsideration decision included the Persons With Disabilities (PWD) Application comprised of the appellant's information and self-report dated October 10, 2017, a medical report (MR) and an assessor report (AR) both dated October 10, 2017 and completed by a general practitioner (GP) who has known the appellant since August 2017 [2 months] and has seen her 2 to 10 times.

The appellant also included the Request for Reconsideration dated December 13, 2017.

### ***Diagnoses***

In the MR, the GP diagnosed the appellant with congenital musculoskeletal weakness with the date of onset "unknown." When asked in the AR to describe the appellant's mental or physical impairments that impact her ability to manage DLA, the GP wrote: "left hand/arm weakness affecting functioning severely." There was no diagnosis of a medical condition within the mental disorders category of the diagnostic codes.

### ***Physical Impairment***

In the MR and the AR, the GP reported:

- With respect to the appellant's health history, "moderate-severe weakness of left arm and left hand/fingers. This condition affects ability to lift objects, perform any tasks using this affected hand."
- The appellant does not require any prostheses or aids for her impairment.
- In terms of functional skills, the appellant can walk 4 or more blocks unaided on a flat surface, climb 5 or more steps unaided, with no limitation on remaining seated. She can perform no lifting "left hand."
- For additional comments, the GP wrote: "This is a congenital weakness of left arm and left hand severely affecting functioning and adding strain on right arm and neck. She requires physiotherapy of the C-spine."
- The appellant is assessed as independent with walking indoors and walking outdoors, climbing stairs, and standing. The appellant requires periodic assistance from another person with lifting and carrying and holding. The GP wrote: "Any task requiring two hands will require assistance."
- In the section of the AR relating to assistance provided, none of the listed assistive devices are indicated by the GP as being applicable to the appellant and the appellant does not have an assistance animal.

In her self-report, the appellant wrote:

- Since she was a child, she has a disabled, weak left hand, which has wasted muscles. The wrist and the fingers are wasted and weak. She cannot use them to hold, catch, type, and print at all.
- Her disabled hand makes her depend completely on her right hand, which with time and overload causes multiple disc prolapsed in her neck.

- She cannot lift things of even moderate weight because she cannot use both hands.
- Pain and discomfort in her neck and shoulders prevents her from continuing many activities unless she takes pain killers.

In her Request for Reconsideration, the appellant wrote:

- She found many incompatibilities between the ministry's denial and her disability confirmed by her physician's report.
- She cannot lift a small cup with her left hand, which has "zero ability."

### ***Mental Impairment***

In the MR and the AR, the GP reported:

- The appellant has difficulties with communication, identified as "other", "immigrated from [another country]."
- The appellant has no significant deficits with her cognitive and emotional function.
- The appellant has a good ability to communicate in all areas, specifically speaking, reading, writing and hearing.
- With respect to the section relating to daily impacts to the appellant's cognitive and emotional functioning, the GP assessed no major impacts. There is a moderate impact in the area of motor activity and a minimal impact in bodily functions. There are no impacts in the remaining 12 listed areas. The GP did not provide any comments.
- Regarding an assessment of the appellant's social functioning, the GP reported that the appellant is independent in all areas, specifically with making appropriate social decisions, developing and maintaining relationships, interacting appropriately with others, dealing appropriately with unexpected demands, and securing assistance from others. There are no comments by the GP.
- The appellant has good functioning with both her immediate and extended social networks.
- Asked to describe the support/supervision required that would help to maintain the appellant in the community, the GP left this section incomplete. For additional comments, the GP wrote: "requires assistance with certain physical activities."

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

In the MR and the AR, the GP reported:

- The appellant has not been prescribed any medication and/or treatments that interfere with her ability to perform DLA.
- In the AR, the appellant is independent with walking indoors and with walking outdoors.
- The appellant is independent and does not require assistance with all of the tasks for the pay rent and bills DLA (including the tasks of banking and budgeting), and she is independent with all of the tasks of the medications DLA (filling/refilling prescriptions, taking as directed, and safe handling and storage), and with all of the tasks of the transportation DLA (getting in and out of a vehicle, using public transit, and using transit schedules and arranging transportation).
- There is no assessment of a need for assistance with the basic housekeeping DLA.
- Regarding the personal care DLA, the appellant is independent with the tasks of toileting, feeding self, regulating diet, and with the tasks of transfers in/out of bed or on/off chair. The appellant requires periodic assistance from another person with the tasks of dressing

(note: “requires aid from family”), grooming (“some movements/functions”), and bathing (note: “some assistance- minor”).

- With the shopping DLA, the appellant is independent with the tasks of going to and from stores, reading prices and labels, making appropriate choices, and paying for purchases. She appellant requires periodic assistance from another person with carrying purchases home (note: “carrying grocery bags”). The GP commented that the appellant “requires periodic assistance for tasks that require two hand coordination and lifting/ carrying.”
- Regarding the meals DLA, the appellant is independent with the tasks of meal planning and safe storage of food, and requires periodic assistance from another person with food preparation (note: “assistance with chopping”) and cooking (note: “assistance with cooking”).

In her self-report, the appellant wrote:

- All her daily activities such as cooking, washing, cleaning, chopping and so on are limited because of her “useless left hand.”
- The case of multiple disc prolapsed results in pain and discomfort in her neck and shoulders, and this prevents her to continue a lot of activities unless she takes pain killers.
- A lot of times she needs one of her family members to help her to do activities, which need using both hands.

In her Request for Reconsideration, the appellant wrote that she cannot find a suitable job because of this disability.

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

The GP reported in the AR that help required for DLA is provided by family. The GP did not identify any of the listed assistive devices as being used by the appellant. The GP indicated she does not have an assistance animal.

### ***Additional information***

In her Notice of Appeal dated December 22, 2017, the appellant expressed her disagreement with the ministry’s reconsideration decision and wrote that she has “zero ability” in her left hand and arm, which causes strain on the right hand with multiple disc prolapsed in her neck. Her physician confirmed and the ministry rejected.

At the hearing, the appellant stated:

- From childhood, she has had a disability because she cannot use her fingers and wrist and arm on the left. She has to use her right hand for everything.
- Overusing her right hand results in strain, but she still uses her right hand but cannot do much keyboarding or texting. She has pain in her neck and her right shoulder.
- She has her husband , son and daughter with her, and she depends on their support.
- She can drive but only for short distances, about 15 minutes, because of the pain in her neck and shoulder.
- She can go on short walks to do the shopping, but she cannot carry many things.
- She needs assistance for all living activities.
- For the first 5 or 6 years since she came to Canada, she did not need anything, but now

she cannot work because of physical limitations.

- She cannot get a job. She wants to teach children another language but she cannot do keyboarding and she cannot lift things.
- She was told to go to her family physician to explain her limitations.
- She explained to her physician that she cannot do a lot of things and she needs assistance from her family members.
- With her left hand, she cannot lift even a cup of tea.
- Her walking ability is good, but her disability affects her life very much.
- She can lift 4 to 5 kg. with her right hand, but only for a short time and it puts a strain on her right hand.

The ministry relied on the reconsideration decision.

***Admissibility of Additional Information***

The panel considered the information in the appellant's oral testimony as being in support of, and tending to corroborate, the impact from medical conditions referred to in the PWD application which was before the ministry at reconsideration. Therefore, the panel admitted this additional information in accordance with Section 22(4)(b) of the *Employment and Assistance Act*.

The arguments by the appellant, in the Request for Reconsideration and oral submissions, will be addressed in Part F- Reasons for Panel Decision, below.

## **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 PWD designation, 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 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, it could not be determined that, as a result of those 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.

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).

### **Severe Physical Impairment**

In the reconsideration decision, the ministry was not satisfied that the information provided establishes a severe physical impairment. The ministry acknowledged that the appellant was diagnosed by the GP with congenital musculoskeletal weakness with an unknown date of onset and that the GP commented: "moderate-severe weakness of left arm and left hand and fingers. This condition affects ability to lift objects, perform any tasks using this affected hand." For additional comments in the MR, the GP wrote: "this is a congenital weakness of left arm and left hand severely affecting functioning and adding strain on right arm and neck. She requires physiotherapy of the C-spine." In her self-report, the appellant wrote that her disabled hand makes her depend completely on her right hand, which with time and overload has caused multiple disc prolapsed in her neck. The appellant wrote that the pain and discomfort in her neck and shoulders prevents her from continuing many activities unless she takes pain killers. At the hearing, the appellant stated that the overuse of her right hand results in strain, but she still uses her right hand.

A diagnosis of a serious medical condition or conditions does not in itself determine PWD eligibility or establish a severe impairment. An "impairment" involves 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. Section 2(2) of the EAPWDA requires that the ministry be satisfied that the impairment is severe before the ministry may designate an applicant as a PWD. To assess the severity of the impairment, the ministry must consider the nature of the impairment and the extent of its impact on daily functioning.

The ministry considered the impacts of the appellant's diagnosed medical conditions on her daily functioning, beginning with the assessments provided in the MR and the AR. The ministry wrote that the GP reported in the MR that the appellant is able to walk 4 or more blocks unaided on a flat surface, climb 5 or more steps unaided, and has no limitation with remaining seated. The ministry considered that the GP reported the appellant cannot lift any weight "left hand," and the GP does not describe how much weight the appellant can lift with her right arm/hand. In her Request for Reconsideration, the appellant wrote that her left hand has "zero ability" and she cannot lift a small cup with her left hand. At the hearing, the appellant stated that she could lift up to 4 to 5 kg. with her right hand, but only for a short time. In her Request for Reconsideration and at the hearing, the appellant argued that the ministry has focused on her mobility and abilities that are not affected by her particular disability, that her walking is good, and that the focus should be on her inability to lift with her left arm.



For the ministry to be “satisfied” that an impairment is severe, the panel considers it reasonable for the ministry to expect that the information provided by the medical practitioner and prescribed professional presents a comprehensive overview of the nature and extent of the impacts of the medical conditions on daily functioning, including explanations, descriptions or examples in the spaces provided in the MR and in the AR forms.

The ministry also considered the GP’s report in the AR that the appellant’s need for periodic assistance with lifting and carrying and holding is for “any task requiring two hands.” The panel finds that the ministry reasonably determined that this explanation does not describe how often the appellant requires assistance, and that the appellant stated she has lifting ability that falls within a moderate range with her right hand and arm. The appellant argued in her Request for Reconsideration that the ministry referred to her not requiring an assistive device, but she explained that strain on her right hand makes it hard to pull or lift any device; however, there are assistive devices such as lifting devices, splints, and braces that are specifically designed for hands, arms and shoulders.

Given the GP’s assessment of physical functioning in the high range of functional skills limitations and independence with her mobility and physical ability, with the exception of lifting and carrying and holding with both hands as well as moderate lifting ability with her right hand, the panel finds that the ministry reasonably determined that the evidence is not sufficient to establish that the appellant has a severe physical impairment under Section 2(2) of the EAPWDA.

### **Severe Mental Impairment**

In the reconsideration decision, the ministry was not satisfied that the information provided was sufficient evidence of a severe mental impairment. The panel notes that there was no diagnosis of a medical condition within the mental disorders category of the diagnostic codes in the MR. The ministry considered that the GP reported in the MR that the appellant does not have any significant deficits in cognitive and emotional functioning. The ministry also considered that, in the AR, the GP indicated that there are no major impacts to cognitive and emotional functioning, a moderate impact in the area of motor activity, and a minimal impact in the area of bodily functions. The GP did not provide any comments to explain how these impacts relate to a mental impairment. In her Request for Reconsideration, the appellant wrote that the GP mentioned motor activity related to movement and not to a mental issue. There was no further information available at the hearing from the GP to clarify the assessment.

The ministry considered that the GP reported in the MR that the appellant has difficulties with communication, identified as “other” and “immigrated from [another country],” and also reported in the AR that the appellant has a good ability to communicate in all areas, specifically speaking, reading, writing and hearing. The panel finds that the ministry reasonably determined that the GP’s comments in the MR suggest the appellant’s difficulties with communication are due to a lack of fluency in English and not due to a mental impairment.

The ministry considered that the GP reported in the AR that the appellant’s social functioning is independent in all areas, requiring no 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 GP

also indicated that the appellant has good functioning with both her immediate and extended social networks. For additional comments, the GP wrote: “requires assistance with certain physical activities,” which the panel notes places an emphasis on the appellant’s physical impairment rather than a mental impairment, as argued by the appellant.

Given the insufficient evidence of significant impacts to the appellant’s cognitive and emotional and social functioning, the panel finds that the ministry reasonably determined that a severe mental impairment was not established 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. Section 2(2)(b) of the EAPWDA requires that a prescribed professional provide an opinion that an applicant’s severe impairment directly and significantly restricts her ability to perform DLA, either continuously or periodically for extended periods. In this case, the GP is the prescribed professional. DLA are defined in Section 2(1) of the EAPWDR and are also listed in the MR and, with additional details, in the AR. Therefore, a prescribed professional completing these forms has the opportunity to indicate which, if any, DLA are significantly restricted by the appellant’s impairment continuously or periodically for extended periods.

In the reconsideration decision, the ministry reviewed the information provided in the MR and wrote that the GP indicated that the appellant has not been prescribed medication/treatment that interferes with her ability to perform DLA. In the AR, the GP assessed the appellant as independent with the “mobility” DLA of moving about indoors and outdoors. The ministry considered that the GP assessed the appellant as being independent with all of the tasks for the pay rent and bills DLA, the medications DLA, and the transportation DLA. The ministry noted that there is no assessment by the GP of the appellant’s ability with the basic housekeeping DLA.

The ministry considered that the appellant requires periodic assistance with some tasks of DLA, specifically: dressing (note: “requires aid from family”), grooming (“some movements/ functions”), and bathing (note: “some assistance- minor”), carrying purchases home when shopping (note: “carrying grocery bags”), and the GP commented that the appellant “requires periodic assistance for tasks that require two hand coordination and lifting/ carrying.” In her self-report, the appellant wrote that all her daily activities such as “cooking, washing, cleaning, chopping and so on” are limited because of her “useless left hand.” The appellant wrote that a lot of times she needs one of her family members to help her to do activities, which need the use of both hands. The GP also reported that the appellant requires periodic assistance with food preparation (note: “assistance with chopping”) and cooking (note: “assistance with cooking”). The panel finds that the ministry reasonably determined that while the GP wrote that the appellant needs assistance for tasks requiring two hands, this does not describe the frequency or duration of the periodic assistance required to allow the ministry to conclude that the assistance is required for extended periods of time. This panel notes that this detail from the GP is particularly important as the appellant wrote in her self-report that she has had a “disabled, weak left hand which has a wasted muscles” since childhood, which has provided time for her to adapt to performing more tasks with her capable right hand and arm.

In her Request for Reconsideration, the appellant wrote that she cannot find a suitable job because of this disability. At the hearing, the appellant stated that she still uses her right hand but cannot do much keyboarding. The appellant stated now she is expected to work and she cannot work as she cannot get a job. She wants to teach children another language but she cannot do keyboarding and she cannot lift things. The panel finds that the ministry reasonably determined that employability is not a criterion in section 2(2) of the EAPWDA, as it is with the status of Persons with Persistent Multiple Barriers (PPMB) to employment, nor is it listed among the prescribed daily living activities in section 2 of the EAPWDR.

Given the GP's assessment of independence with most tasks of DLA and periodic assistance from another person with a few tasks, with an absence of sufficient information to determine that the assistance is required for extended periods, the panel finds that the ministry reasonably concluded that the evidence is insufficient to show that the appellant's overall ability to perform her DLA is significantly restricted either continuously or periodically for extended periods, pursuant to Section 2(2)(b)(i) of the EAPWDA.

#### **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.

The GP reported that the appellant receives help from family, and the appellant stated at the hearing that she depends on the support of her husband, son and daughter. However, 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 in the opinion of a prescribed professional, the panel also 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 pursuant to Section 2(2) of the EAPWDA, was reasonably supported by the evidence. The panel confirms the ministry's decision. The appellant's appeal, therefore, is not successful.