

APPEAL #

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

(State the reconsideration decision)

The decision under appeal is the ministry's reconsideration decision dated December 10, 2009 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 requirement and that her impairment is likely to continue for at least 2 years. However, the ministry was not satisfied that the appellant has a severe physical or mental impairment or that her daily living activities (DLA) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods. The ministry also found that as the appellant is not significantly restricted with DLA, it could not be determined that she requires the significant help or supervision of another person, the use of an assistance device, or the services of an assistance animal to perform DLA.

### **PART D – RELEVANT LEGISLATION**

(State the relevant Legislation considered)

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

A ministry representative was not in attendance at the hearing. After confirming that the ministry was notified, the hearing proceeded under section 86(b) of the Employment and Assistance Regulation (the "EAR").

The following is a summary of the key dates and information related to the appellant's Request for Reconsideration:

- On August 7, 2009, the application for Persons with Disabilities Designation (PWD) was submitted.
- On October 6, 2009, the ministry determined that the appellant did not meet the criteria for PWD designation.
- On October 27, 2009, the appellant submitted a Request for Reconsideration.
- On December 10, 2009, the ministry completed its review of the Request for Reconsideration and confirmed its decision.

The evidence before the Ministry was comprised of the following:

- Physician's Report dated July 8, 2009
- Assessor's Report dated July 30, 2009
- Typed unsigned, undated note from the appellant
- Signed handwritten letter with a list of scheduled daily chores, dated October 21, 2009 from the appellant's husband and a renter in the family home.

The Physician's Report diagnoses the appellant with arthritis in both hands, musculoskeletal pain in wrists, depression, anxiety and diabetes mellitus type 11. The physician describes the wrist condition as a significant problem and states the appellant is unlikely to be symptom free.

The Assessor's Report indicates that the applicant needs continuous lifting, carrying and holding help. The assessor, a physiotherapist comments that the appellant has grip strength of 14 kilograms on the left and 6 kilograms on the right. The physiotherapist also notes that the applicant can independently walk, climb stairs and stand. The physician reports that the applicant can lift less than 5 pounds, can walk more than four blocks unaided, climb more than five steps unaided and remain seated without limitation. The physician further reports occasional help needed when in pain, however, the frequency and duration of occasional help is not addressed.

In terms of cognitive function, the appellant's physician indicates that the appellant has significant deficits in five cognitive and emotional skills; psychotic symptoms, emotional disturbance, motivation, impulse control and attention or sustained concentration, while the physiotherapist indicates that three of the appellant's deficits; emotion, motivation, and other emotional or mental problems, have a major impact on functioning. However, the physician notes that the appellant does not have deficits in her remaining cognitive and emotional skills and the physiotherapist reports that the majority of cognitive and emotional skills have no impact. The physician does not describe how the noted deficits affect the applicant's functioning; the physiotherapist only provides information regarding the appellant's hand and wrist pain.

In terms of assistance with daily living activities, the appellant's physician indicates that the appellant is periodically restricted in two daily living activities; personal self care and social functioning and continuously restricted in three others; meal preparation, basic housework and daily shopping. The physiotherapist reports that the appellant takes significantly longer with some activities, need periodic help with two activities; carrying purchases home and getting in and out of a vehicle and continuous help with two more; food preparation and cooking. However, the physician and the physiotherapist do not clarify how often or for how long the appellant is periodically restricted or needs periodic help. Although the physician comments that; carrying, lifting, pushing, pulling and some housework, the physician does not indicate the type of activities with which the appellant needs help. He also does not indicate that the appellant needs help with unrestricted activities. The physiotherapist does not explain how much time the appellant needs with activities that take longer or indicate that she needs help to perform them. The physiotherapist's comments indicate that the appellant needs help with heavier objects and further comments; lifting full bags and off top shelves is a problem. He also reports that the appellant finds pots hard to handle.

The ministry finds these assessments do not establish that the appellant's restrictions are significant. Therefore, with this

degree of independent function, the ministry concludes that the information from the physician and assessor does not confirm that the impairment directly and significantly restricts the appellant's ability to perform daily living activities either continuously or periodically for extended periods.

In the appellant's application for PWD status, the appellant states that her disability is severe arthritis in both of her wrists, depression and anxiety as well as type 2 diabetes. She states that she can no longer work due to arthritis in her wrists and that she is in constant pain and has very little mobility in her left wrist and no strength in her right wrist. The appellant stated in her application that she had surgery on her right wrist about 3 months ago and will be having further surgery in the fall of 2009. She went on to state that about 10 years ago she had four surgeries on her left wrist and continues to have problems with this wrist.

The appellant went on to state that in the past she received support from her ex-husband with daily chores, now that they are no longer together she finds it very difficult to take care of her daily needs. She went on to state that her disability affects her life on a daily basis. She is in constant pain and the weakness in her hands has limited what she can do independently, and cannot perform basic tasks of cooking and cleaning her home. The appellant also states that she is isolating from her friends due to her depression, and that there are days she finds that she cannot or does not want to do anything and stays home.

In the Request for Reconsideration, a statement from family and friends of the appellant dated and signed on October 31, 2009, with an attached schedule of the amount of time needed to complete each chore on a daily/weekly basis. The statement does not say who assists the appellant with her daily chores or when.

At the hearing the appellant's advocate read from the Physician's and physiotherapist Report which describes the appellant's impairments and concluded with the statement that because of these impairments the appellant is eligible for Persons With Disabilities Designation (PWD).

At the hearing, the appellant whose right wrist was in bandage, stated that she had an operation a couple of weeks ago and was told that the wrist will take around six weeks to heal and that there was only a 30% chance that the wrist will make a full recovery and that she will need 12 months of physiotherapy to build up the strength in that wrist. She also stated that she needs constant assistance from her husband with all daily living activities. She also confided that she had been able to drive a vehicle approximately once week up until the operation on her right wrist, but doubted that she will be able to for a very long time if ever.

The appellant's witness, her husband confirmed that he completes approximately 80% of the daily living activities for his wife. He admits that they were separated but got back together when his wife started having medical problems. He says they both live on social security and his CPP which he receives for his disability. He stated that they have taken in a boarder to make ends meet but he does not assist with the daily living chores around the home just his own room. The appellants' husband also stated that he has to assist his wife on a daily basis with showering and washing her hair.

The panel admitted this oral evidence pursuant to section 22(4) of the EAA in support of the evidence which was before the ministry at the time of reconsideration.

The panel finds that: (a) the appellant suffers from arthritis in both hands, musculoskeletal pain in wrists, depression, anxiety and diabetes mellitus type 11 (b) the physician reports that the appellant's wrist condition is a significant problem and states the appellant is unlikely to be symptom free (c) a physiotherapist reports the appellant has grip strength of 14 kilograms on the left and 6 kilograms on the right (d) the physician's report that the appellant can walk more than four blocks unaided, climb more than five steps unaided and remain seated without limitation; deficits with cognitive and emotional functioning, especially with psychotic symptoms, emotional disturbance, motivation, impulse and attention/sustained concentration (e) the physiotherapist indicates that the appellant is independent with almost all daily living activities but takes significantly longer to perform these activities and may require continuous assistance with food preparation and cooking.

**PART F – REASONS FOR PANEL DECISION**

The issue under appeal is whether the ministry reasonably concluded that the appellant does not have a severe physical or mental impairment, and that her 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, it could not be determined that she 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 person with disabilities (PWD) are set out in section 2 of the EAPWDA. The minister may designate a person as a PWD when the following requirements are met. Pursuant to section 2(2) the applicant must have reached the age of 18 and the minister must be satisfied that the person has a severe mental or physical impairment. Under section 2(2) (a) the impairment must be likely, in the opinion of the medical practitioner, to continue for at least 2 years. Section 2(2) (b) (i) requires that the impairment, in the opinion of the prescribed professional, directly and significantly restricts the person's ability to perform daily living activities (DLA) either continuously or periodically for extended periods. Section 2(2) (b) (ii) states that as a result of those restrictions the person must require help to perform DLA. Section 2(3)(b) of the EAPWDA states that a person requires help in relation to a DLA if the person requires an assistive device, the significant help or supervision of another person, or the services of an assistance animal.

Section 2(1) (a) of the EAPWDR defines DLA for a person who has a severe physical or mental impairment as preparing own meals, managing personal finances, shopping for personal needs, using public or personal transportation facilities, performing housework to keep one's residence in acceptable sanitary condition, moving about indoors and outdoors, performing personal hygiene and self care and managing personal medication. Section 2(1) (b) adds two additional activities for a person with severe mental impairment: making decisions about personal activities, care or finances; and, relating to, communicating or interacting with others effectively.

The ministry's position is that the evidence does not establish that the appellant has a severe mental or physical impairment that in the opinion of a prescribed professional significantly restricts DLA or necessitates help with DLA.

The appellant's position is that she is eligible for PWD status due to her disabilities and resulting restrictions and that her impairment does significantly restrict her activities of daily living and that she does require significant help daily.

Regarding the existence of a severe physical impairment, the panel finds that the evidence confirms physical impairment of arthritis in both hands, musculoskeletal pain in wrists, and diabetes mellitus type 11. The panel acknowledges the appellant's cumulative effect of all the diagnoses together, but the physician states that the appellant can independently walk indoors and outdoors, climb stairs and stand. The panel acknowledges that the appellant has some physical limitations, but the evidence does not establish a severe physical impairment.

The panel finds that although the appellant self describes the pain and the physical impairments as severe, legislation requires that the ministry must be satisfied that a prescribed professional must confirm the severity of the impairment. The panel finds that a prescribed professional has not provided enough evidence to confirm a severe physical impairment. Therefore the ministry reasonably concluded that the evidence does not establish a severe physical impairment.

Respecting the existence of a severe mental impairment, the physician diagnoses a significant deficit with cognitive and emotional function, especially with psychotic symptoms, emotional disturbance, motivation, impulse and attention/sustained concentration. The physiotherapist indicates the appellant that the degree to which these effect the appellant's functioning is moderate to major. The physician indicates that the appellant has periodic restrictions with social functioning and the physiotherapist has not indicated if the appellant as any restrictions with daily functioning and does not indicate how social functioning effects the appellant's immediate or extended social networks.

The panel finds that the prescribed professional has not provided enough evidence to confirm a severe mental impairment. Therefore the ministry is not satisfied that the evidence establishes a severe mental impairment. As neither a severe physical or mental impairment has been established, the legislative requirement of section 2(2) or the EAPWDA has not been met.

Regarding the appellant's ability to manage Daily Living Activities (DLA), the panel has relied on the evidence of the

physician and physiotherapist report which establishes that the appellant is independent in most areas of DLA's and does not confirm that the appellant's impairment directly and significantly restricts her ability to perform DLA's either continuously or periodically for extended periods.

The panel finds that while the evidence establishes that the appellant's impairment impacts her ability to perform some DLA and that she has periodic assistance to complete some DLA's; personal care, social functioning, carrying purchases home and getting in and out of a vehicle, the physician and physiotherapist's evidence regarding independence of the appellant to complete DLA's does not establish that the appellant's impairment has directly and significantly restricted the appellant's ability to perform DLA's. Therefore the panel finds that the ministry reasonably concluded that the evidence does not establish a direct and significant restriction, in the opinion of a physician and physiotherapist, of the appellant's ability to perform DLA as required by section 2(2)(b)(i) of the EAPWDA.

In determining whether the ministry reasonably concluded that the appellant does not require significant help or supervision with DLA, while the panel finds that the appellant and her witnesses states that she receives assistance from family members and friends to complete DLA, the legislation requires the evidence of a prescribed professional establishes that the appellant is independent with the majority of DLA, the appellant's need for help has not been established. The panel finds that the evidence does not establish a direct and significant restriction to DLA, the panel finds that the ministry reasonably determined the requirement for significant help or supervision to perform the DLA under section 2(2)(b)(i) of the EAPWDA has not been met.

The panel therefore finds the Ministry's decision in this case was reasonable based on the evidence and was a reasonable application of the legislation in the circumstances of this appellant.

The panel confirms the reconsideration decision of the Ministry under section 24 (2) (a) of the Employment and Assistance Act (EAA).