

PART C – Decision under Appeal

The decision under appeal is the Ministry's Reconsideration Decision dated November 24, 2010, which held that the Appellant is not eligible for designation as a Person with Disabilities (PWD). The decision stated 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 (EAPWDA) for designation as a PWD. The ministry found that the Appellant met the age requirement and that her impairment is likely to continue for at least 2 years. The ministry determined that:

- the information before the Ministry at reconsideration did not establish that the Appellant has a severe physical and/or mental impairment;
- the information before the Ministry at reconsideration did not establish that the Appellant's impairment directly and significantly restricts her ability to perform daily living activities (DLAs); and,
- The information before the Ministry at reconsideration did not establish that to perform directly and significantly restricted DLA's the Appellant requires an assistive device, the significant help of another person or the services of an assistance animal.

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

Information before the Ministry at Reconsideration included:

- The Appellant's Persons with Disabilities Designation Application, stamped as received by the Ministry July 6, 2010.
- The Appellant's Request for Reconsideration, with attachments, stamped as received by the Ministry October 7, 2010.

At the hearing, the Appellant stated that she suffered a workplace injury to her right shoulder which was treated. She returned to work, reinjured her right shoulder, then Workers' Compensation Board determined that no further rehabilitation could be achieved. She stated that she developed tendonitis in her left shoulder as a result of overusing it to compensate for the restrictions of her left shoulder. As a result, she is severely restricted in the use of both arms, and cannot cook, clean, wash her hair or hold utensils. The Appellant stated that she has a severe physical, not mental, impairment. The Panel admitted the Appellant's oral evidence under Section 22(4)(b) of the Employment and Assistance Act as oral testimony in support of the information and records that were before the minister when the decision being appealed was made.

The Appellant submitted a letter from her physician dated December 31, 2010, which confirmed the functional restrictions to her arms and shoulders and the restrictions to her ability to perform daily living activities. The physician stated that the Appellant has a permanent functional impairment to her right shoulder due to a work related injury and tendonopathy in her left shoulder with a significant reduction in range of motion. The Panel admitted the letter under Section 22(4)(b) of the Employment and Assistance Act as evidence in support of the information and records that were before the minister when the decision under appeal was made.

The Ministry responded that their decision is based on the information before them. In their review of the information, it was determined that not all of the criteria for designation as a PWD had been met.

The physician indicated that the Appellant can walk 4+ blocks unaided, climb 5+ steps unaided, lift up to 5 lb. and has no limitation in how long she can remain seated. He indicated that the Appellant requires continuous assistance with lifting and carrying/holding.

With respect to the Appellant's ability to perform DLA's, in the Assessor section of the PWD application, the Appellant's physician reported that the Appellant requires continuous assistance with lifting and carrying/holding and continuous assistance with laundry, basic housekeeping and carrying purchases home, as well as periodic assistance with dressing, grooming, and bathing, taking significantly longer due to shoulder pain. The physician reported that the Appellant's sons help with shopping, cleaning and carrying.

With respect to the Appellant's physical impairment the Panel's findings of fact are:

- The appellant's physician is a prescribed professional pursuant to the *EAPWDR*, s.2 (2) (a);
- In the Application for PWD Designation the Appellant's physician indicated that her impairment will continue for two years or more;
- The Appellant's physician indicated that she can walk 4+ blocks, climb 5+ steps, lift under 5 pounds and remain seated without limitation;
- The Appellant's physician reported that she has a significant reduction in range of motion, ability to lift and carry causing a severe/chronic limitation in work and domestic activities;
- In the additional physician's information admitted by the Panel, the physician confirmed that the Appellant has a permanent functional impairment to her right shoulder, and, as a result of overuse, she has developed tendonitis in her left shoulder, with a significant reduction in range of motion.

With respect to a mental impairment, the Panel's findings of fact are:

- The Appellant's physician reported significant deficits with emotional disturbance and motivation, noting that this is due to frustration with ongoing pain and limitation of activity;
- Acting as assessor, the physician reported moderate impacts to emotion and motivation.

With respect to the Appellant's DLA restrictions, the Panel's findings of fact are:

- In the application for PWD designation, the Appellant is reported by her physician as requiring continuous assistance with lifting and carrying and holding, laundry, basic housekeeping and carrying purchases home;
- The physician reported that the Appellant requires periodic assistance with dressing, grooming, bathing and cooking.

With respect to the Appellant's requirement for help to perform DLA's, the panel's findings of fact are:

- The Appellant's physician reported in the original PWD application that she receives assistance from her sons with shopping, cleaning and carrying, noting "help from sons" with laundry, basic housekeeping and carrying purchases home;
- In the additional physician's information admitted by the Panel at the hearing, the physician reported that the Appellant needs her sons to help with shopping, cooking and cleaning her apartment.

PART F – Reasons for Panel Decision

The issue in this appeal is the reasonableness of the Ministry's decision to deny the Appellant's application for designation as a Person with Disabilities (PWD).

EAPWDA:

2 (1) In this section:

"assistive device" means a device designed to enable a person to perform a daily living activity that, because of a severe mental or physical impairment, the person is unable to perform;

"daily living activity" has the prescribed meaning;

"prescribed professional" has the prescribed meaning.

(2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act if the minister is satisfied that the person has a severe mental or physical impairment that

(a) in the opinion of a medical practitioner is likely to continue for at least 2 years, and

(b) in the opinion of a prescribed professional

(i) directly and significantly restricts the person's ability to perform daily living activities either

(A) continuously, or

(B) periodically for extended periods, and

(ii) as a result of those restrictions, the person requires help to perform those activities.

(3) For the purposes of subsection (2),

(a) a person who has a severe mental impairment includes a person with a mental disorder, and

(b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires

(i) an assistive device,

(ii) the significant help or supervision of another person, or

(iii) the services of an assistance animal.

(4) The minister may rescind a designation under subsection (2).

EAPWDR:

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 authorized under an enactment to practice the profession of

- (a) medical practitioner,
- (b) registered psychologist,
- (c) registered nurse or registered psychiatric nurse,
- (d) occupational therapist,
- (e) physical therapist,
- (f) social worker,
- (g) chiropractor, or
- (h) nurse practitioner.

The Appellant's position is that she is eligible for designation as a PWD. She argued that she has a severe physical impairment that has been confirmed by her physician and that severely restricts her ability to perform DLA's to the point where she cannot perform cooking, cleaning, grooming or carrying without assistance.

The Ministry's position is that the information provided does not establish that the Appellant has a severe mental or physical impairment, that her ability to perform DLA's is significantly restricted nor that she requires assistance to perform DLA's from other persons, assistive devices or an assistance animal. The Ministry, in the Reconsideration Decision, found that the information provided by the Appellant's physician did not establish a severe mental or physical impairment. The Ministry noted that the Appellant is reported to be independent in performing 21 of the listed aspects of DLA's. As a result, the Ministry found that the information provided does not establish that the Appellant has significant restrictions to her DLA's. The Ministry found that the Appellant's physician did not describe the type of assistance required where periodic assistance is indicated, nor how much longer the Appellant takes with activities where she is reported to take longer than typical. With respect to a requirement for assistance to perform DLA's, the Ministry found that as it has not been established that the Appellant is significantly restricted in performing DLA's, it cannot be determined that she requires help to perform them.

With respect to a severe physical impairment, the Panel notes that the Appellant's physician reported that her impairment is to both shoulders. He reported that the Appellant is unable to lift more than 5 pounds, that she has marked limitations with abduction and rotation and that she has a significant reduction in range of motion with both arms. In the additional material admitted at the hearing, the physician reported that the Appellant has a permanent functional impairment with her right shoulder and tendonopathy with a significant reduction in range of motion in her right shoulder. The Panel finds that the Ministry's determination that the Appellant does not have a severe physical impairment was not reasonable.

With respect to a severe mental impairment, the Panel notes the physician's comment that the Appellant's cognitive and emotional deficits are due to frustration with her ongoing pain and limitation of activity as well as the Appellant's statement that she has a severe physical, not mental, impairment. The Panel finds that the Ministry's determination that the Appellant does not have a severe mental impairment was reasonable.

With respect to the Appellant's ability to perform daily living activities, the Appellant's physician reported that she has periodic restrictions with dressing, grooming, bathing and cooking, and requires continuous assistance with laundry, basic housekeeping and carrying purchases, which is confirmed by the physician in his letter of December 31, 2010. The Panel finds that the Ministry's determination that the Appellant's impairment does not significantly restrict her ability to perform DLA's was not reasonable.

With respect to the Appellant's requirement for significant help to perform DLA's, the Appellant's physician reported that she requires continuous help with laundry, basic housekeeping and carrying purchases, and periodic assistance with dressing, grooming, bathing and cooking. The Panel finds that the Ministry's determination that the information does not establish that the Appellant requires significant help from other persons was not reasonable.

The Panel finds that the Ministry's decision to deny the Appellant's application for PWD designation was not reasonably supported by the evidence. The Panel rescinds the Ministry's decision. Therefore, the ministry's decision is overturned in favour of the appellant