

PART C – DECISION UNDER APPEAL

(State the reconsideration decision)

The decision under appeal is the ministry's reconsideration decision dated April 7, 2010 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 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. The ministry also found that a prescribed professional has not confirmed that, as a result of direct and significant restrictions, the appellant requires help 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

Please set out the facts as determined by the panel, based on the evidence at the hearing. Please note that subsection 22(4) of the Employment and Assistance Act states that, in a hearing referred to in subsection (3), a panel may admit as evidence only:

- (a) the information and records that were before the minister when the decision was being made, and
- (b) oral or written testimony in support of the information and records referred to in paragraph (a).

The evidence before the ministry at the time of reconsideration was comprised of a PWD application (Self-report (SR), Physician Report (PR), and Assessor Report (AR)) and the Request for Reconsideration which included a February 22, 2010 letter from the social worker who completed the AR, a February 8, 2010 letter from the appellant, an information sheet defining various muscular actions, an August 31, 2009 letter from the disability services office of a post-secondary education facility and other information respecting the appellant's studies, a September 4, 2009 Student Aid BC Verification of Permanent Disability Form, and an August 5, 2009 orthopaedic consult.

In the SR, the appellant writes that the fixed supination deformity of her dominant right arm impacts her physically on a daily basis because the inability to rotate her forearm makes it difficult to complete simple tasks including opening a door, carrying heavy objects (groceries), heavy scrubbing or anything that results in extra pressure being placed on the right forearm, and writing for long periods of time; it is impossible to type with two hands. The appellant writes that she has right shoulder pain which she believes is developing into muscular and/or cartilage damage related to the fixed position of her arm. The appellant also reports that her physical impairment has affected her social development, self-esteem, overall mental health, and has resulted in chronic anxiety and depression.

In the PR, completed by the appellant's general practitioner of 20 years, the appellant is diagnosed with fixed supination deformity of the right forearm with fusion of the radius and ulna, anxiety, and depression. The physician writes that, due to the position of the right forearm and hand, the appellant cannot open doors, carry things, or type and that writing is difficult. Chronic right shoulder stress is also reported. A "significant long-term element of anxiety, depression, poor self-esteem & maladaptive coping mechanisms" partially attributed the physical impairment is reported. Use of a specialized one-handed keyboard for typing is required. Regarding Functional Skills, the appellant is able to walk 4+ blocks unaided on a flat surface, climb 5+ steps unaided, lift under 5 lbs, and has no limitations remaining seated or difficulties with communication; significant deficits with 2 of 11 specified aspects of cognitive and emotional function are indicated (emotional disturbance, motivation) which impact the appellant's "ability to be productive & independent". Regarding DLA, no restrictions are indicated for personal self care, meal preparation, management of medications, daily shopping, mobility inside the home, mobility outside the home, use of transportation, management of finances, and social functioning, while a continuous restriction is reported for basic housework. Additional narrative respecting the degree of restriction is that "ADLs are minimally affected except for things requiring heavy lifting (groceries), pushing/pulling (vacuuming, mopping) & reaching". Assistance needed is described as "currently none specifically although some tasks are difficult".

In the AR, completed by a social worker who has known the appellant for 2 weeks, the appellant's Ability to Communicate is reported as good for speaking, reading, and writing; background noise results in decreased hearing. Regarding Mobility and Physical Ability, the appellant is independent walking indoors and outdoors but requires an assistive device (rail) and takes significantly longer climbing stairs (fears right knee going out/separated ACL on left knee in past); continuous assistance is indicated for lifting and carrying/holding. Regarding Cognitive and Emotional Functioning a major impact on daily functioning is indicated for 3 aspects:

- motor activity – "host of tensions in her life at this time", believes hand and arm will limit options for the future;
- emotion – depression and anxiety (generalized and in relating to relationship with father);
- other emotional – angst towards father producing anxiety and probably affecting depression.

A moderate to major impact is reported for 2 aspects:

- bodily functions (poor eating habits and anxiety may result in difficulty getting to sleep);
- motivation – the appellant reports motivation had been waning over the past several years but that there has been some improvement

Moderate, minimal, or no impact is reported on daily functioning for the remaining 9 aspects of cognitive and emotional function.

Regarding DLA, the evidence is as follows:

- personal care – 6 aspects performed independently, with restrictions indicated for 2 aspects - grooming takes significantly longer (cannot pluck eyebrows) and regulating diet requires continuous help (wants to eat unhealthy foods to self punish)
- basic housekeeping – laundry takes significantly longer (small loads one at a time) and basic housekeeping requires continuous assistance (cannot scrub floors/bathroom or vacuum)
- shopping – 1 aspect is managed independently while the remaining 4 aspects require continuous assistance (anxiety, food choices, and lifting)
- meals – 3 of 4 aspects take significantly longer (lifting pots difficult and dangerous, limitations with repetitive motions), 1 aspect is managed independently
- paying rent and bills – 2 of 3 aspects managed independently with 1 aspect requiring an assistive device
- medications – all 3 aspects managed independently
- transportation – periodic assistance is required for 1 aspect, getting in and out of a vehicle (seat belts difficult, sometimes needs help) and asthma, with the potential of developing into pneumonia, is indicated respecting waiting outside for public transit
- social functioning – 2 aspects managed independently, periodic assistance indicated for 2, and continuous assistance indicated for the remaining 1 aspect (able to develop and maintain relationships); very disrupted functioning is reported with both immediate and extended social networks.

Assistance is provided by family and the appellant uses a puffer and splint for her right forearm and wrist.

In the August 5, 2009 orthopaedic consult letter, the specialist writes that the inability to rotate the right forearm does impair the appellant's ability to type though the appellant reports she can type about 50 wpm with her left hand. Right shoulder trouble, asthma, high blood pressure, being overweight, and a left ACL reconstruction, which went well, are noted. The specialist writes that the "current" position of the right arm is not ideal, as it is the dominant arm, but that the appellant is "functioning fairly well and I am not sure if her current level of impairment is sufficient to justify a rotational osteotomy of the radius".

In his February 22, 2010 letter, the assessor argues that the evidence of the physician clearly identifies severe deficits with cognitive and emotional function, that the appellant considers herself to be a person with a disability, and that the appellant's physical limitations will "likely increase" as too might the psychological factors with "significant potential" for serious difficulties in the future.

In her February 8, 2010 letter, the appellant argues that the evidence of the physicians and the assessor establishes that the eligibility criteria for PWD designation have been met.

The panel makes the following findings of fact: (a) the appellant is diagnosed with fixed supination deformity of the right (dominant) forearm with fusion of the radius and ulna, anxiety, and depression; (b) the appellant is able to walk 4+ blocks unaided on a flat surface, climb 5+ steps unaided, lift under 5 lbs, and has no limitations remaining seated; (c) no physical functional limitations are indicated respecting the left (non-dominant) arm and hand; and (d) significant deficits are reported for some aspects of cognitive and emotional function.

PART F – REASONS FOR PANEL DECISION

(State the reasons for the 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 DLA are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods, and that the appellant does not require help to perform DLA. The ministry determined that the age requirement had been met and that the appellant has an impairment that will last for 2 years.

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 a medical practitioner, to continue for at least 2 years. Section 2(2)(b)(i) requires that the impairment, in the opinion of a 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, 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 a severe mental impairment: making decisions about personal activities, care or finances; and, relating to, communicating or interacting with others effectively.

The appellant's position is that she is eligible for designation as a PWD because her impairment is severe and continuously restricts her ability to function on a daily basis.

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

Regarding the existence of a severe physical impairment, the evidence of the appellant's general practitioner is that the appellant has fixed supination of the right forearm and that, due to the fixed position of the arm, the appellant cannot open doors, carry things, or type with her right arm and writing is difficult. The evidence of the appellant is that the inability to rotate her forearm makes it difficult to complete simple tasks including opening a door, carrying heavy objects (groceries), heavy scrubbing, and writing for long periods of time, with it being impossible to type with two hands. Regarding physical functional skills, the physician indicates no limitations for walking, climbing stairs, or remaining seated; lifting is limited to 5 lbs. The physician writes that "ADLs are minimally affected except for things requiring heavy lifting (groceries), pushing/pulling (vacuuming, mopping) & reaching". The evidence of the orthopaedic specialist, in the August 5, 2009 consult letter, is that although the positioning of the appellant's right forearm is not ideal, the appellant is "functioning fairly well". The evidence of the assessor is that the appellant is independent walking indoors and outdoors, requires rails to climb stairs, can only stand for 5 minutes due to ankle pain, and requires continuous assistance lifting and carrying/holding. While the assessor indicates limits to functioning with climbing stairs

due to an ACL injury of the left knee and with standing due to ankle pain, the panel finds that the general practitioner has not identified either of these conditions or any consequent degree of impairment and that the orthopaedic specialist indicates that the past ACL repair went well. Given the above evidence, the panel finds that, although limitations regarding the use of the appellant's dominant right hand and arm have been established, as the evidence of two medical practitioners is that "ADLs are minimally affected" and that the appellant is "functioning fairly well", the ministry reasonably determined that the appellant is not significantly impacted in terms of overall physical functioning. Therefore, the panel finds that the ministry reasonably determined that a severe physical impairment has not been established under section 2(2) of the EAPWDA.

Regarding the existence of a severe mental impairment, the evidence in the PR is that the appellant suffers from anxiety and depression which result in significant deficits with 2 of 11 specified aspects of cognitive and emotional function (emotional disturbance and motivation) which impact the appellant's "ability to be productive & independent" but do not result in a direct restriction in the appellant's ability to perform DLA, including the appellant's ability to make decisions respecting personal activities or finances and social functioning. The appellant reports that her physical impairment has affected her social development, self-esteem, overall mental health and has resulted in chronic anxiety and depression. The evidence in the AR is that there is a major or moderate impact on daily functioning for 5 aspects of cognitive and emotional function, the need for periodic or continuous assistance with the majority of aspects of social functioning, and very disrupted functioning with both immediate and extended networks. The panel finds that the evidence in the AR conflicts with the evidence in the PR and has determined that greater weight should be placed on the evidence in the PR for the following reasons: the evidence in the PR is not inconsistent with that of the appellant as both indicate depression, anxiety, low self-esteem but do not provide evidence to establish a severe impact on functioning; the physician who completed the PR has been the appellant's primary health care provider for 20 years whereas the assessor had known the appellant for 2 weeks at the time the AR was completed; and, the evidence of the assessor in the AR and February 22, 2010 letter appears to reflect assumptions as to the likelihood and potential for future difficulties not based on a medical assessment but rather, on subjective comments from the appellant. Therefore, the panel finds that the ministry reasonably concluded that a severe mental impairment has not been established under section 2(2) of the EAPWDA.

Regarding the degree to which the appellant's DLA are restricted, the evidence in the PR is that the only DLA which is directly restricted by the appellant's impairment is basic housework and that currently no specific assistance is required though some tasks are difficult; the appellant is reported as independent with all other DLA (personal self care, meal preparation, management of medications, daily shopping, mobility inside and outside the home, transportation, management of finances, and social functioning). The evidence in the AR is that all DLA except 1, medications, have some degree of restriction, including the need for continuous assistance with aspects of 4 DLA. Again, the panel finds that the evidence in the AR conflicts with the evidence in the PR. The panel has placed greater weight on the evidence in the PR over that in the AR for the following reasons: some of the evidence in the AR regarding restrictions with DLA relates to medical conditions not confirmed by a medical practitioner and/or not indicated by a medical practitioner as being likely to result in impairment for at least 2 years (asthma, ankle pain, left knee ACL); the physician who completed the PR has been the appellant's primary health care provider for 20 years whereas the assessor had known the appellant for 2 weeks at the time the AR was completed; and, in the February 22, 2010 letter, the assessor provided supportive argument reflecting possible future outcomes, as opposed to additional or clarifying evidence as to the appellant's current level of functioning. Therefore, the panel finds that the evidence of a prescribed professional establishes a direct and significant continuous restriction with 1 DLA, basic housekeeping, but no direct and significant restriction with all remaining DLA. Accordingly, the panel finds that the ministry reasonably determined that, in the opinion of a prescribed professional, a direct and significant restriction with DLA, either continuously or periodically for extended periods, has not been established as required under

section 2(2)(b)(i) of the EAPWDA.

Regarding the need for help with DLA, the panel has placed greater weight on the evidence in the PR respecting DLA and the need for help for the reasons stated in the above paragraph. Therefore, the panel finds that the evidence of a prescribed professional is that the appellant is not directly and significantly restricted with DLA and that minimal assistance is required. Thus, the panel finds that the ministry reasonably determined that, in the opinion of a prescribed professional, the need for the significant assistance of another person, an assistance animal, or an assistive device with DLA which are directly and significantly restricted was not established as required under section 2(2)(b)(ii) of the EAPWDA.

The panel finds that the ministry's reconsideration decision is reasonably supported by the evidence and confirms the decision.