

PART C – Decision under Appeal

The decision under appeal is the Reconsideration Decision of the Ministry of Social Development dated 12 June 2012 denying the appellant designation as a person with disabilities (PWD). The ministry determined that the appellant did not meet all of the required criteria for PWD designation set out in the Employment and Assistance for Persons with Disabilities Act, section 2. Specifically the ministry determined that the information provided did not establish that the appellant has a severe mental or physical impairment that in the opinion of a prescribed professional

(i) directly and significantly restricts the person's ability to perform daily living activities (DLAs) either continuously or periodically for extended periods; and,

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

The ministry did determine that the appellant satisfied the other 2 criteria: he has reached 18 years of age; and his impairment in the opinion of a medical practitioner is likely to continue for at least 2 years.

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 reconsideration included the following:

- The appellant's PWD Designation Application, dated 07 February 2012, containing a Physician Report (PR) dated 14 February 2012 prepared by the appellant's general practitioner (GP), an Assessor Report (AR) dated 08 March 2012 completed by a social worker (SW) employed by a Health Authority, and the appellant's Self Report (SR). (See below)
- A Personal Medication History printout from the appellant's pharmacy listing prescriptions filled from 11 February 2012 to 06 March 2012.
- A return letter from the GP to the appellant's advocate dated 28 May 2012 clarifying certain points set out in the PR. (See below)
- The appellant's Request for Reconsideration dated 11 May 2012.

In the PR, the GP indicates that she has known the appellant for 2 years and has seen him 11 times over the past year. The GP diagnoses the appellant with anxiety/depression (onset January 2011) and myofascial pain due to a motor vehicle accident (MVA) in January 2010. Under health history, the GP reports that the appellant's condition has deteriorated in the past 6 months. His right shoulder hurts – clinically this is right subacromial bursitis and supraspinatus full thickness tear with tendonitis of right biceps. He is being referred to another doctor. He walks with a cane and limps. His right arm is useless. He cannot sit longer than 20 minutes due to lower back pain and pain down the left leg. He feels hopeless. There is some suicidal ideation about his condition, but no plan. A CT scan of lumbar spine shows degenerative disc disease from L3 to S1.

The GP indicates that the appellant's impairment will continue for 2 years or more, commenting that he is unable to do any physical work. He has grade 12 and wants to be retrained. With respect to functional skills, the GP reports that the appellant can walk unaided 1 to 2 blocks, climb 5+ stairs, lift under 5 lbs, and remain seated less than 1 hour (20 minutes max.) The GP reports no difficulties with communications. As to significant deficits to cognitive and emotional function, the GP checks the box for emotional disturbance (depression, anxiety), commenting that he became depressed because he cannot get better and has constant pain; he is also depressed because a few of his friends died.

With respect to DLAs, the GP reports that the appellant's impairment directly restricts his ability to perform the following on a continuous basis: personal self care, meal preparation, basic housework, daily shopping, mobility inside and outside the home and the use of transportation. No restrictions are noted for social functioning, with the comment that the appellant mixes with friends but there is little relief from his depressive mood. The GP further comments that the appellant cannot use buses due to his instability; he walks with a cane; and due to unsteadiness and right shoulder pain he can easily fall in the bathtub. Under assistance needed, the GP writes that he needs his meals to be prepared for him – this is happening in the shelter where he lives. He needs help to make bed and washing clothes. Under additional comments, the GP notes that the appellant is unable to do physical work and needs retraining.

In the AR, the SW states that she met with the appellant at his home to complete the form. She had met with him on one previous occasion in connection with an earlier PWD application. The SW reported the appellant lives in transitional supported housing. She describes his impairments as anxiety, depression, chronic pain in shoulder, leg, hip and back, and high blood pressure. As to his

ability to communicate, she assesses him as poor in reading and writing, requiring assistance due to poor comprehension and difficulty in expressing himself. With respect to mobility and physical ability, she indicates he uses an assistive device – a cane – for walking indoors and outdoors (limited to 2 blocks), climbing stairs and standing. He requires continuous assistance from another person for lifting and carrying and holding. He can lift/carry under 5 lbs only, as he has to use his cane at all times, so he can only lift/carry items that are light enough to be lifted with one hand.

With respect to cognitive and emotional functioning, the SW assesses a major impact for bodily functions, consciousness and emotion, and moderate impact for attention/concentration, memory, motivation and other emotional or mental problems. Five other areas are assessed as minimal impact and 2 with no impact. The SW comments that the appellant has difficulty falling asleep and staying asleep due to pain – he gets approximately 4 hours of uninterrupted sleep per night. Throughout the day he feels bad all the time and will often go back to bed after breakfast. He gets counseling from local mental health for his depression. He has felt suicidal at times. He takes anti-depressants. He gets chronic headaches and blurred vision, and feels angry and frustrated due to his pain.

Regarding assistance required for DLAs, the SW reports the use a cane for dressing, grooming, transfers in/out of bed/chair, going to and from store and getting in/out of a vehicle. The use of grab bar in shower is noted. Continuous assistance from others is required for basic housekeeping, meals (meals are prepared and cooked for him at his hostel) and for transportation, as he does not take buses as he gets carsick. It takes him 2 times longer than typical to do laundry. As to social functioning, the SW reports periodic support/supervision required for all aspects, and marginal functioning with both immediate and extended social networks, with the comment that he isolates and withdraws, and has days when he doesn't want to be around anyone. The SW indicates that for social functioning, the appellant requires continued counseling.

Under additional comments, the SW indicated that the appellant takes 8-10 Tylenol 3s per day for pain, he has a pass to the local recreation centre and he goes to physiotherapy regularly. Reconstructive surgery for his right shoulder is upcoming.

In his SR, the appellant begins by listing his various medical conditions, consistent with those reported by his GP and the SW. He states that he was hit by a vehicle in a crosswalk in January 2010. Since that time he has lived in the shelter as it provides meals and assistance with other daily living activities. The balance of the SR reviews in narrative form points covered in the AR.

In his return letter to the appellant's advocate before reconsideration, the GP was asked to rate the severity of the appellant's impairments. He rates the anxiety and depression as "mild" and the myofascial pain due to MVA as "severe." When asked to confirm that the appellant requires significant assistance with DLAs, the GP writes "In my notes I stated he can walk with a cane ≈ 2 blocks. I meant by unaided that he does not need a walker or a wheelchair."

In his Request for Reconsideration, the appellant writes:

"I have a severe physical impairment which has resulted in depression. Chronic pain and restricted mobility result in need for assistance with daily living. My physician confirms seven out of ten daily living activities require continuous assistance. He also confirms that my right arm is "useless", which limits my ability to do all activities that require two arms.

Limited mobility results in need for assistance with transportation. My depression is significant and results in low motivation and high frustration. I require a cane for assistive device and grab bars in the shower.”

In his Notice of Appeal, dated 19 June 2012, the appellant writes:

“I have confirmation from my physician that I have a severe impairment. I get assistance with daily living activities because it takes me significantly longer to do daily activities.”

At the hearing the appellant's advocate presented a submission, which summarized the evidence in the PR and AR. The balance of the submission went to argument.

In answer to questions from his advocate and the panel, the appellant clarified the following points:

- His injuries stemmed from an MVA in January 2010, in which he was hit by a truck in a crosswalk on his right side and thrown 50 feet, landing on his left side. He suffered a concussion and in addition to the other physical injuries referred to by his GP, his left hand was injured, resulting in some tendon problems with his fingers.
- He is right-handed. Despite his right shoulder /arm problems, he has learned to use his right hand for his cane, as he cannot grip the cane properly with his left hand; this leaves his left hand free for other uses, even though his left fingers are not fully functional.
- By the comment that his right arm is useless the GP means that there is no mobility in his right arm - he cannot raise it. He is able to use his right hand for light-duty activities such as writing and feeding himself with the fork or spoon. However he is unable to do anything that requires the use of both hands, such as opening a jar or peeling vegetables.
- He does know how to cook, but he has to have his meals prepared for him because of his difficulty in using both hands and that because of the pain, he cannot stand in front of a stove for any length of time.
- He can walk only the reported two blocks, but only with the aid of the cane. After two blocks, the pain in his left hip and leg is so bad that he needs to sit down. He cannot walk that distance without the cane.
- He cannot travel by bus because he gets carsick and needs to be in a vehicle where he can open the windows.
- The wait time for the reconstruction surgery for his right shoulder is a year to a year and a half. The surgery would be followed by 10 weeks of intensive physical therapy.

The ministry stood by its position at reconsideration.

The panel finds that the new information provided by the appellant at the hearing is in support of the information and records that were before the ministry at the time of reconsideration, as this information clarified various points about the appellant's condition addressed in the PR and AR. The panel therefore admits the new information as evidence pursuant to section 22(4) of the Employment and Assistance Act.

PART F – Reasons for Panel Decision

The issue in this appeal is whether the ministry reasonably determined that the appellant is ineligible for PWD designation because he did not meet all the requirements in section 2 of the EAPWDA.

Specifically the Ministry determined that the information provided did not establish that the appellant has a severe mental or physical impairment that in the opinion of a prescribed professional

- (i) directly and significantly restricts her ability to perform daily living activities either continuously or periodically for extended periods; and,
- (ii) as a result of those restrictions she requires help to perform those activities.

The Ministry did determine that he met the 2 other criteria in EAPWDA section 2(2) set out below.

The following section of the EAPWDA applies to this appeal:

2 (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.

The following section of the EAPWDR applies to this appeal:

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.

At the outset of its decision, the ministry comments that the appellant's PWD application is "problematic" as the AR was completed by a social worker who had met with the appellant once for this application and once before for a previous application. She used the SR, home assessment and the medication list as her source of information - no other medical reports were used to substantiate the information. The ministry notes that the AR states that the form is intended to be completed by a prescribed professional having a history of contact and recent experience with the applicant and is to be based on knowledge of the applicant, observations, clinical data and experience. The panel notes that the ministry has not, for these reasons, explicitly discounted any of the evidence set out in the AR. Without taking a position on the ministry's comment, the panel has been able to reach the decision that follows relying primarily on the evidence of the GP and that of the appellant at the hearing.

Severity of mental impairment

With respect to whether the information provided establishes a severe mental impairment, the ministry's decision reviews the relevant material set out in the PR and AR, including the GPs later assessment that the appellant's depression is mild. The ministry notes that remedial measures in the form of antidepressant medication and counseling are in place. The ministry notes that many of the impacts regarding cognitive and emotional functioning are reported in the AR are physical, not mental in nature, such as sleep disturbance due to pain, feeling tired, chronic headaches and blurred vision. Overall, the ministry determined that the overall information is not supportive of a severe mental health condition.

The appellant's advocate, in her submission to the panel at the hearing, focuses on the severity of the appellant's physical, not mental, impairment.

The evidence is that the appellant has been diagnosed with depression and anxiety as a consequence of his pain and overall situation. The GP has noted some suicidal ideation. The panel notes that there is no evidence that the appellant's depression has any impact on his ability to make decisions about personal activities, care or finances or ability to relate to, communicate or interact with others effectively. The panel therefore finds that the ministry reasonably determined that a severe mental impairment had not been established.

Severity of physical impairment

In terms of physical impairment, the ministry reviewed the relevant material contained in the PR and AR, including the appellant's functional skills (walk 1-2 blocks with a cane, etc). The ministry noted that while lifting with the right arm is currently restricted, upcoming reconstruction surgery may ameliorate condition and allow better functionality. The ministry concluded that, as the functional skill limitations are more in keeping with a moderate degree of restriction and with remedial treatment in play, it is not satisfied that the information provided is evidence of a severe physical impairment.

The position of the appellant, as set out in his advocate's submission, is that the GP has confirmed that the myofascial pain is severe. His condition requires a cane for support to walk; the maximum distance is two blocks. He cannot lift more than 5 pounds and only with his left arm. The submission refers to a statement in the reconsideration decision that the GP's comment that the appellant is not

able to do any work is not relevant. The advocate argues that the same physical limitations that exclude work also restricted DLAs because they have to be done using the left arm only. Restrictions in sitting, bending, walking and lifting result in restrictions to seven and ten DLAs on a continuous basis. All of this points to a severe physical impairment.

The evidence is that the appellant has two serious physical conditions, which in combination make it difficult for him to function independently and effectively. The first is a damaged right shoulder, which has a muscle tear and tendonitis in right bicep. This condition causes chronic severe pain and the immobility of his right arm (the GP describes the arm as "useless.") This condition prevents him from doing anything that requires the use of both hands. The possible restoration of functionality through surgery and physical therapy is a year or more away. The second condition is the lower back degenerative disc disease, resulting in instability and pain in his left hip and leg, which causes him to limp, restricts his ability to stand to only 20 minutes and walk only 1–2 blocks, and both only with the use of a cane. These conditions have not been alleviated by physical therapy and high intake of pain medication. Indeed, the GP reports his condition has deteriorated over the past 6 months. Considering the seriousness of the loss of functionality from both these conditions, the panel finds that the ministry was not reasonable in determining that a severe physical impairment had not been established.

Whether DLAs directly and significantly restricted

With respect to whether the information establishes that the impairment in the opinion of a prescribed professional directly and significantly restricts DLAs either continuously or periodically for extended periods, the ministry decision notes that the GP reports continuous restrictions to several DLAs. The ministry also notes that the SW reports that numerous activities require continuous help, including basic housekeeping, carrying purchases home, meals and use public transport. The ministry acknowledges the need for help from others with some daily tasks, particularly those requiring the use of the right arm and the need of a cane to ambulate. However, overall the ministry concluded that the information from the prescribed professionals does not establish that the appellant's impairment significantly restricts DLAs, either continuously or periodically for extended periods.

The position of the appellant, as articulated in his advocate's submission, is that severe restrictions have been confirmed by the GP. He also confirmed that the appellant requires a grab bar because of risk of slipping in the tub and the need for help in meal preparation, making bed and washing clothes. The SW also indicated that continuous assistance is required for food preparation and cooking, filling/refilling prescriptions, and arranging transportation. According to the advocate, all this points to this criterion being met.

The evidence of the GP is that 7 out of 9 DLAs requiring physical activity are actively restricted. These restrictions arise from the appellant's pain related mobility difficulties (standing or walking) or his difficulties in doing anything that requires the use of both hands (especially when his right hand is used to support himself with the cane) and most particularly when he has to stand/walk and use his hands at the same time. As the GP as noted, this is most apparent with respect to meal preparation, to the point where he must rely on meals prepared by the shelter. The GP also notes that help is required for such activities as making his bed and washing his clothes. The GP's evidence is consistent in showing that the appellant's DLAs in terms of meals and anything requiring mobility and

carrying/lifting are directly and significantly impacted on a daily basis. In the panel's view, this constitutes evidence of direct and significant restrictions of the appellant's ability to perform DLAs continuously. On balance, the panel concludes that the ministry unreasonably found that it was not the opinion of a prescribed professional that the appellant's severe impairment directly and significantly restricts his ability to perform DLAs either continuously or for extended periods.

Whether help required

While the ministry notes that a cane is used to ambulate, the ministry's position is that, as it has not been established that DLAs are significantly restricted, it cannot be determined that significant help is required to perform significantly restricted DLAs.

Given the panel's findings above concerning DLAs being significantly restricted, and considering that, as confirmed by the GP, the appellant relies on a cane (an assistive device) to ambulate and on the staff of the shelter for meal preparation, making bed and laundry, the panel finds that the ministry was not reasonable in determining that this criterion has not been met.

Accordingly, the panel finds that the ministry's determination that the appellant was not eligible for PWD designation under section 2 of the EAPWDA was not reasonably supported by the evidence. The panel therefore rescinds (overturns) the ministry's decision in favor of the appellant.