

### PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development (the ministry) reconsideration decision of October 25, 2012, which found that the appellant did not meet three of five statutory requirements of section 2 of the *Employment and Assistance for Persons With Disabilities Act* (EAPWDA) for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement and that in the opinion of a medical practitioner his impairment is likely to continue for at least two years. However, the ministry was not satisfied that the evidence establishes that he has a severe physical or mental impairment. The ministry was also not satisfied 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. As the ministry found that the appellant is not significantly restricted with DLA, it could not be determined that he requires help as defined in section 2(3)(b) of the EAPWDA.

### 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 information before the ministry at the time of reconsideration included the following:

- The appellant's application for designation as a PWD. The application included a physician report (PR) and assessor's report (AR) both completed and signed by the appellant's physician on March 23 and March 20, 2012 respectively. The application also included a self-report signed by the appellant on January 16, 2012.
- A letter and decision summary from the ministry to the appellant, dated September 12, 2012 advising the appellant that he had been found ineligible for designation as a PWD.
- The appellant's Request for Reconsideration form signed by the appellant on October 15, 2012, with written submission attached.
- A "To Whom it May Concern" letter from an acquaintance of the appellant dated August 21, 2012. The writer of the letter has known the appellant for 5 years and was formerly the appellant's co-worker. The appellant is easily distracted and unable to follow through on tasks without guidance. He has chronic pain in his shoulder and it spasms uncontrollably. The appellant's home is in disarray because he is sick 4 or 5 days a week. The writer and a friend have cleaned up the appellant's house from time to time, and the writer occasionally brings the appellant meals. The appellant has stopped keeping up with his personal hygiene and his decline has become noticeable to others.
- A letter from the appellant's physician, dated October 15, 2012. In the letter the appellant wrote that while he had indicated in the PR that the appellant had no difficulties with communication, he had not known that the appellant was diagnosed with a learning disability at age 10. The physician also noted that physical DLA take the appellant at least twice as long as typical and they are often put off for days due to a lack of motivation and energy attributable to his hepatitis C.

In the PR the appellant's physician, a general practitioner who has known him for 3 years, diagnosed the appellant with a dislocated and unstable shoulder (2 surgeries), hepatitis C, and chronic pain due to osteoarthritis. In the health history portion of the PR, the physician wrote that muscle spasms and tremors cause consistent pain and impairment, and affect the appellant's sleep. The appellant has poor dental hygiene with multiple extractions and his self-care is compromised because of a lack of motivation and pain. The appellant has been prescribed narcotic pain medication which interferes with his ability to perform DLA. In terms of functional skills the appellant can walk more than 4 blocks and can climb more than 5 steps unaided. He can remain seated for 1 to 2 hours, but can lift less than 5 pounds. The physician reported the appellant as having no difficulty with communication, and noted no significant deficits with respect to cognitive and emotional functioning.

In the AR the physician reported the appellant as living alone. He described the appellant's ability to communicate as good in terms of speaking, reading, writing and hearing. In terms of mobility and physical ability the appellant is independent, except for lifting/carrying/holding which takes him significantly longer than typical. Section B.4 of the AR form is to be completed for an applicant with an identified mental impairment or brain injury. The physician left section B.4 blank. In terms of personal care the physician assessed the appellant as being independent with dressing, grooming,

toileting, feeding self, regulating diet, transfers in and out of bed, and transfers on and off chairs, but as taking significantly longer with bathing (difficulty getting in/out). He also assessed the appellant as being independent in terms of shopping, paying rent and bills, managing medications, and transportation (but takes longer than typical getting in/out due to pain.) The appellant gets periodic assistance from another person with laundry/basic housekeeping, and with cooking. He takes significantly longer than typical with meal planning (lack of motivation) and needs continuous help with meal preparation. The social functioning portion of the AR is to be completed if the applicant has an identified mental impairment, including brain injury. It assess restrictions in making social decisions, the ability to develop and maintain friendships, to interact with others, to deal appropriately with unexpected demands and to secure assistance from others. The physician left the social functioning portion of the AR blank. Part D of the AR is used to describe assistance provided for the applicant. The physician has noted that help for DLA is provided by friends. The appellant could also use help carrying, lifting and for DLA like cleaning. The physician noted no assistive devices routinely used by the appellant and indicated that the appellant does not have an assistance animal.

In his self-report the appellant noted that he has had 2 surgeries (2006, 2007) on his dislocated left shoulder, that he has hepatitis C, a history of substance abuse (clean for 2 years), a history of sleep problems, severe dental decay, rapid weight loss, a history of balance problems, blackouts, ear problems, eardrum perforation, severe pain, daily uncontrollable tremors, and nerve spasms every day. He can only use his right hand to do DLA such as self-care and food preparation, and is limited to carrying 5 pounds or a very small shopping bag for a few minutes; otherwise he will be in pain for hours. Standing still is difficult due to shoulder pain and walking is limited to 30 minutes. Motivation is a problem because of worry about causing more spasms or pain. The shoulder spasms are prolonged and random – 3 times a week at least – and leave him exhausted and in pain. The pain also affects his sleep. The appellant wrote that his balance is affected about half the time, so he never feels very safe when he is out of the house. He also wrote that he has problems remembering things because he is always so tired. His lack of motivation and energy make it an effort to cope with self-care, and he is suffering weight loss because his diet is restricted due to lack of teeth. The appellant wrote that he has no help at home, so housework remains undone either because of fatigue or because he simply can't physically manage it.

In the written submission prepared by the appellant's advocate and submitted with his Request for Reconsideration, the appellant explained that if he tries to reach overhead or forward his left arm spasms and flails uncontrollably for about 45 minutes. Spasms cause pain not just in his arm/shoulder but in his lower back. He has to keep his upper arm close to his body so activities such as vegetable peeling and using a computer have to be done on his lap. He can't reach all parts of his body when showering, and he no longer uses a bath tub because of the severity of the pain if he slips at all while transferring in/out. Lifting with his right hand is affected because it causes a jolt of pain in his left. All tasks requiring two hands are severely restricted. The appellant wrote that he has about 5 bad days a week on which his left arm goes numb and his hand goes cold and white. His hepatitis C leaves him with little energy or motivation. He also reported that he reads and writes very poorly and that he was diagnosed at age 10 with "learning disabilities or something like that" which affect his ability to concentrate.

At the appeal hearing the appellant's advocate led the appellant through testimony which largely reiterated and confirmed evidence that he had previously provided. His accommodation situation has changed in that he now has a roommate who takes care of most of the housework, laundry and

cooking. He said that the roommate moved in largely because he "could see that things weren't getting done" with respect to housekeeping. In response to questions from his advocate, the appellant said that if his roommate isn't around to make him a sandwich, the appellant will try to make Kraft dinner or will simply "starve" until the roommate returns, and that it may be 5 or 6 days a week that he is incapable of preparing his own meals. In response to a question from the panel asking him to describe what is happening when he can't make a sandwich, the appellant said that he has trouble holding the bread with his left hand so he can slice it, and has on occasion dropped the bread on the floor because of twitchiness in his left arm. In response to a question from his advocate about his ability to do laundry, the appellant said that he can do his own laundry except for folding the clothes – he will just toss his clothes into a drawer. He can do his own shopping, including pushing a grocery cart, but cannot carry purchases with his left hand. In response to a question from his advocate the appellant said that he can use the bath tub but has to rely on his right arm for leverage. With respect to reading, the appellant said that he struggles with the newspaper and that his schooling after grade 2 had been in special education.

The panel admitted the appellant's testimony as evidence as it provides more detail regarding the impacts of his impairment, and constitutes oral testimony in support of information and records that were before the ministry at the time of reconsideration, in accordance with s. 22(4) of the *Employment and Assistance Act*.

The ministry relied on its reconsideration decision and submitted no new evidence.

## PART F – Reasons for Panel Decision

The issue on this appeal is whether the ministry's decision to deny the appellant designation as a PWD was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. In particular, was the ministry reasonable in determining that the appellant does not have a severe physical or mental impairment, and that in the opinion of a prescribed professional the appellant's impairments do not directly and significantly restrict him from performing DLA either continuously or periodically for extended periods, and that as a result of those restrictions the appellant does not require help to perform DLA?

The relevant legislation is as follows:

### 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.

**EAPWDR section 2(1):**

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.

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**Severe Mental Impairment**

The appellant did not expressly state a position with respect to severe mental impairment. The appellant argued, through his advocate, that his physical impairments are the main issue and that his cognitive difficulties with respect to reading contribute to his overall degree of impairment.

The ministry's position, as set out in the reconsideration decision, is that the evidence does not establish that the appellant has a severe mental impairment.

*Panel Decision*

In both the PR and the AR the appellant's physician made no diagnosis of a mental impairment, and in the PR the physician reported that the appellant has no significant deficits in cognitive and emotional functioning and no difficulties with communication. In the AR, section B.4 of the form - which deals with Cognitive and Emotional Functioning - is to be completed "for an Applicant with an identified mental impairment or brain injury." Similarly, the portion of the form dealing with Social Functioning is to be completed "Only...if the Applicant has an identified mental impairment, including brain injury." The appellant's physician left both of these sections blank. The appellant and the physician have provided evidence that the appellant's reading skills are likely lower than average, and there is an indication by the physician that the appellant's self-care is compromised by a lack of motivation, but it would be difficult to characterize these as constituting a severe mental impairment, and indeed the appellant has not argued that that is the case. Based on the foregoing evidence, the panel concludes the ministry reasonably determined that the appellant does not suffer from a severe mental impairment.

**Severe Physical Impairment**

While acknowledging through his advocate that the medical information provided by his physician is "sparse", the appellant's position is that the lack of energy caused by the appellant's hepatitis C, pain and poor sleep and his difficulties doing any DLA that require the use of two hands show that the appellant does have a severe physical impairment.

The ministry's position, as set out in the reconsideration decision, is that the functional skill limitations identified by the appellant's physician are not significantly restricted aside from lifting, and are more in keeping with a mild to moderate degree of impairment. The ministry was not satisfied that the information provided is evidence of a severe physical impairment.

*Panel Decision*

To assess the severity of an impairment one must consider the nature of the impairment and its impact on daily functioning as evidenced by functional skill limitations and the degree of independence in performing DLA. In terms of functional skills assessment, the only limitations identified by the appellant's physician were with respect to lifting (under 5 pounds) and ability to remain seated (1 to 2 hours). The appellant confirmed in his self-report that he can walk for up to half an hour.

With respect to DLA, the physician has indicated that the appellant is independent in all or most aspects of most DLA, and at least some aspects of all DLA. He says that the appellant takes up to twice as long lifting/carrying/holding, bathing, meal planning, and getting in/out of a vehicle and that he needs periodic assistance with housekeeping and meals. While the appellant's evidence is that he now relies on his roommate to do the majority of housekeeping and meal preparation/cooking, he was generally independent in meal preparation/cooking before his roommate moved in, and there is no corroborating medical evidence that the appellant's health or physical abilities have deteriorated in the interim. The physician and the appellant indicate that he has low energy levels due to hepatitis C and his sleep being interrupted by shoulder pain. The appellant says that he suffers almost constant

pain and he is limited in the use he can make of his left arm because of its twitching and because of the likelihood that use of the arm will trigger days of pain. While there is evidence that the appellant is getting some treatment for his shoulder in the form of pain medication, there is no evidence that the appellant is, or has been, under any treatment for the hepatitis C.

The panel acknowledges that appellant's physical medical conditions – the unstable shoulder and hepatitis C – are serious conditions. However, on balance the ministry's conclusion that the appellant's degree of impairment is moderate rather than severe is supported by the evidence that the appellant is independent with most aspects of most DLA and the lack of evidence of any treatment regime for the hepatitis C. Accordingly, the panel finds that the ministry reasonably concluded that the appellant does not have a severe physical impairment.

### **Restrictions to DLA**

The appellant's position is that his ability to perform DLA is directly and significantly restricted by his physical impairments, in some respects continuously and in other respects periodically. In particular, the appellant says that any DLA that requires the use of two hands is significantly and continuously restricted because of the limitations of his left arm.

The ministry's position, as set out in its reconsideration decision, is simply that the evidence from the appellant's physician does not establish that the appellant's impairments significantly restrict his DLA either continuously or for extended periods.

### *Panel Decision*

The legislation – s. 2(2)(b)(i) of the EAPWDA – requires the minister to substantially assess direct and significant restrictions of DLA in consideration of the opinion of a prescribed professional, in this case the appellant's physician. This doesn't mean that other evidence shouldn't be factored in, but the legislative language makes it clear that the prescribed professional's opinion is fundamental to the ministry's determination as to whether it is "satisfied".

The main restrictions identified in the evidence appear to be with respect to 3 DLA; personal self-care, housework, and meal preparation. In his letter of October 15, 2012, the physician indicated that where he had noted in the AR that the appellant takes longer than typical to perform a DLA, he meant that some activities – presumably those most affected by motivation - take "much" longer while physical activities take the appellant up to twice as long as typical.

The physician has indicated that the appellant takes longer than typical bathing. In his written reconsideration submission the appellant said that he can't reach all parts of his body when showering, and that he no longer bathes at all because of the severity of the pain when he slips when getting out of the tub. In response to a question from his advocate at the hearing the appellant contradicted this statement and said that he does still use the bathtub but is sure to use only his right arm for transferring in/out. With respect to housework the physician indicated that the appellant requires periodic assistance from another person with respect to laundry and basic housework. He gave no indication of the frequency or duration of the periodic need for assistance. The appellant's evidence is that his roommate does most of the housework, but at the appeal hearing the appellant was clear that he can do laundry independently except for folding the clothes. With respect to



meals, the physician's evidence is that the appellant takes up to twice as long with meal planning due to lack of motivation. The physician indicated that the appellant requires continuous assistance from another person with respect to meal preparation and periodic assistance cooking, but at the appeal hearing the appellant testified that he can prepare and cook his own meals at least part of the time.

There was also evidence from the physician that the appellant is restricted in one aspect of another DLA - transportation – as he takes up to twice as long as typical getting in and out of a vehicle due to pain, and in the lifting/holding/carrying aspects of the DLA shopping.

In the panel's view, taking twice as long as typical to complete some aspects of some DLA doesn't constitute a significant restriction, and accordingly the appellant's ability to manage his own self-care and transportation needs are not significantly restricted. He is currently relying on his roommate to do most of the housework and meal preparation, but the evidence that the appellant cannot meet his basic needs in these DLA is not compelling. The appellant acknowledged that he can look after his own shopping, though he can't carry more than 5 pounds. On balance, the panel finds that the evidence reasonably supports the ministry's conclusion that the appellant's ability to perform DLA is not directly and significantly restricted either continuously or periodically for an extended time.

#### *Help with DLA*

The appellant's position is that he requires assistance from his roommate in order to manage DLA of housework and meal preparation.

The ministry's position, as set out in its reconsideration decision, is that as it has not been established that DLA are significantly restricted it cannot be determined that significant help is required from other persons.

On the evidence, the appellant requires assistance from his roommate with respect to two DLA. It is difficult to describe this as being the "significant help or supervision of another person" as required by EAPWDA s. 2(3)(b)(ii). Neither the appellant's physician nor the appellant indicated that he requires any assistive devices. There is no evidence to indicate that the appellant requires or would benefit from an assistance animal.

The panel finds that based on the evidence the ministry reasonably determined that the appellant does not require help to perform DLA as defined by the legislation.

#### *Conclusion*

Having reviewed and considered all of the evidence and the relevant legislation, the panel finds that the ministry's decision declaring the appellant ineligible for PWD designation was reasonably supported by the evidence and was a reasonable application of the legislation in the circumstances of the appellant, and therefore confirms the ministry's decision.