

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated August 16, 2013 which found that the appellant did not meet four of the five 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. However, the ministry was not satisfied that the evidence establishes that:

- the appellant's impairment is likely to continue for at least two years;
- the appellant has a severe physical or mental impairment;
- 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; and,
- as a result of these restrictions, the appellant 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.

## 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 the time of the reconsideration decision included the Person With Disabilities (PWD) Application comprised of the applicant information dated April 30, 2013 in which the appellant did not describe his disability, a physician report (PR) and an assessor report (AR) both dated April 30, 2013 and completed by a general practitioner who has known the appellant approximately one month, as well as the following: Request for Reconsideration- Reasons dated August 13, 2013.

### *Diagnoses*

The appellant has been diagnosed by the general practitioner with cerebral palsy with onset in November 1984 and right shoulder rotator cuff tear, impingement with date of onset December 2011.

### *Duration*

- In the PR, the appellant's general practitioner checked "no" in response to the question whether the appellant's impairment is likely to continue for two years or more and wrote that "...physiotherapy treatments and appropriate exercises will resolve or minimize the right shoulder injury."
- In his Request for Reconsideration, the appellant wrote that his physician mentioned that it would take between 12 to 18 months to heal, with the aid of physiotherapy and exercises.

### *Physical Impairment*

- In the PR, the general practitioner indicated for the appellant's health history that due to cerebral palsy he has decreased range of motion in his left arm and hand. The general practitioner wrote that with pain from the rotator cuff, the appellant is "...unable to work overhead with his right arm and continue pain makes it difficult to do any work with it."
- The general practitioner indicated that the appellant does not require any prosthesis or aids for his impairment.
- Functional skills reported by the general practitioner in the PR indicated that the appellant is able to walk 4 or more blocks unaided on a flat surface, he can climb 5 or more steps unaided, is able to lift 5 to 15 lbs., and has no limitation with remaining seated.
- In the additional comments to the PR, the general practitioner wrote that with appropriate treatment, e.g. physiotherapy, she expects that the appellant can return to full functioning with his right shoulder and arm.
- In the AR, the general practitioner indicated that the appellant is independent with walking indoors and outdoors, with climbing stairs and with standing, but requires periodic assistance from another person with lifting and carrying and holding. The general practitioner commented that the appellant is "...currently unable to lift usual weight in right hand/shoulder due to shoulder pain; limited to 15 lbs. maximum."
- In his Request for Reconsideration, the appellant wrote that his shoulder impingement/partial tear in his right shoulder is classified as a stage below a rotator cuff tear. The appellant wrote that it is often painful to hold a coffee cup or even sleep.
- The appellant wrote that he has trouble and pain when reaching his right arm above his head and to the side and even holding his arm up. He has to stop carrying out specific tasks after around 5 seconds to alleviate the pain in his shoulder. It is highly recommended by his physician that he seeks physiotherapy as soon as possible to prevent further damage.
- The appellant wrote that he has cerebral palsy of the hemiplegia, affecting the left side of his body, he does not have good mobility with his left hand and that he uses the right side for a majority of everyday tasks. The appellant expressed fear that if the condition of his right shoulder gets any worse, he will not be able to use his right arm without causing significant pain or that he cannot use it at all for an extended period of time.

*Mental Impairment*

- In the PR, the general practitioner indicated that the appellant has no difficulties with communication.
- The general practitioner reported that there are no significant deficits with cognitive and emotional function.
- In the AR, the general practitioner indicated no impacts to any of the areas of cognitive and emotional functioning, and reported that the appellant has a good ability to communicate in all areas.
- The general practitioner reported that the appellant is independent in all areas of social functioning, including making appropriate social decisions, developing and maintaining relationships, interacting appropriately with others, dealing appropriately with unexpected demands, and securing assistance from others.
- In his Request for Reconsideration, the appellant wrote that his shoulder injury causes pain and a lot of discomfort to carry out normal daily tasks and this causes him mental stress and hurts his confidence.

*Daily Living Activities (DLA)*

- In the PR, the general practitioner reported that the appellant is not restricted with any of the listed DLA, including personal self care, meal preparation, management of medications, basic housework, daily shopping, mobility inside and outside the home, use of transportation, management of finances and social functioning.
- The general practitioner reported that the appellant has not been prescribed medications or treatments that interfere with his ability to perform his DLA.
- In the AR, the general practitioner responded to the request to summarize the mental or physical impairments that impact the appellant's ability to manage his DLA with the note "none."
- The general practitioner indicated that the appellant is independent with walking indoors and outdoors.
- The general practitioner reported that all of the tasks of the DLA personal care, basic housekeeping, meals, paying rent and bills, medications, transportation, and social functioning are performed independently by the appellant with no need for assistance from another person. The general practitioner reported that for one of 5 tasks of the DLA shopping, namely carrying purchases home, the appellant requires periodic assistance from another person. The general practitioner did not provide an explanation or description of the assistance required.
- In his Request for Reconsideration, the appellant wrote that if the condition of his right shoulder gets any worse, it would leave him "...highly disabled and extremely dependant on help from others to fulfill everyday tasks," that he would not be able to carry out any tasks using his arms and hands which includes cooking, eating, using the washroom, bathing, or even using a telephone.

*Need for Help*

- In the PR, the general practitioner reported that the appellant lives with his family, friends or caregiver and help required for DLA is provided by the appellant's family.

In his Notice of Appeal, the appellant expressed his disagreement with the reconsideration decision. The appellant also wrote that:

- Since he applied for PWD, his physical health has deteriorated tremendously. There are several things that he is not capable of doing since his first assessment.
- He is no longer able to lift up to 15 lbs. unaided and he needs assistance to lift anything over 5 lbs. and he can only hold his arm up for no longer than 5 to 10 seconds. He is often in need of help to get dressed as the range of motion in his right arm has declined. He often has significant pain putting on his shoes, with pain in his right shoulder, knees and lower back.
- He needs help and can no longer perform DLA such as basic housework and cooking. He cannot hold a telephone or use the computer for very long before having to rest his shoulder. He often has to take

short breaks when he eats to rest his arm. He has issues with taking a shower as he does not have mobility and it aggravates his shoulder injury tremendously. He needs to hold on to the towel rack to get in and out of the tub due to pain in his knees.

- He was diagnosed with scoliosis at the age of 17 and it causes strain and pain in his lower back. He often cannot sit in one spot for more than a few minutes before the pain gets unbearable and he has to stand up and stretch out his back. He feels his back problems are worse due to the compensating due to his right shoulder and lack of mobility on his left side.
- He also has Patello Femoral Syndrome in his right knee which is a badly bruised bone under the knee cap preventing fluids to help mobility. He was also diagnosed with a mild lateral collateral ligament sprain which has progressively gotten worse and he can no longer walk a block without stopping and sitting down to rest. He needs a knee brace to even accomplish this. He cannot stand in one spot for more than a few seconds as it aggravates both of his knees and he often has to walk around to prevent this. He can no longer use stairs without crawling or taking one step at a time. This also aggravates his right shoulder and he tries to avoid using stairs as much as possible.
- He has a torn meniscus in his left knee which has also deteriorated as he has had to compensate the way he walks with his right knee injury, causing pain in both knees.
- He cannot sleep well as it is hard to get comfortable, with pain in his arms, legs or back.
- He will have cerebral palsy and scoliosis for the rest of his life.

At the hearing, the appellant provided the following oral evidence:

- The appellant stated that he has a shoulder impingement/ partial rotator cuff tear and he needs physiotherapy to improve the condition but he cannot afford to continue treatments. He tried to get some exercises that he can do at home but the physiotherapist wants to see him at least once per week.
- His left arm mobility is not great and he relies on his right side quite a bit. If the right side is not working, it is a big problem for him.
- He also has Patello Femoral Syndrome in his right knee and a lateral collateral ligament sprain which was diagnosed last year but it is not getting better. He needs to wear a brace to walk a block.
- He has a torn meniscus in his left knee and it is not improving due to more stress on that side. He is off balance and it is also causing pain in his back. He has scoliosis that was diagnosed when he was 17 years old.
- The appellant stated that he is frustrated because the doctor did not realize that all of his conditions needed to be put into the application, but thought she had to concentrate on his shoulder injury. She referred him to have an ultrasound done of his shoulder. He felt that he was treated like a 'walk-in' patient and was not given much time for the appointment. He did not go back to the doctor for more information because someone at the ministry said it was not necessary.
- The appellant stated that he went to physiotherapy 6 or 7 times in 2012 for his shoulder but his MSP was running out and it was putting him in a financial strain.
- The appellant stated that even though he has tried to exercise his shoulder it is not helping and he thinks it is getting worse. Once in while he will have a good day and other days he does not want to get out of bed because he has found a position where there is no pain in his shoulder and he does not want to move.

The ministry objected to the appellant's evidence regarding medical conditions not set out in the reports by the medical professional. The panel admitted the appellant's evidence relating to his cerebral palsy and right shoulder rotator cuff tear/impingement, pursuant to Section 22(4) of the *Employment and Assistance Act*, as providing further detail in support of information that was before the ministry on reconsideration. The panel did not admit the evidence relating to conditions impacting the appellant's back and knees as this was not part of the information or records before the ministry at reconsideration.

The ministry relied on its reconsideration decision.

## PART F – Reasons for Panel Decision

The issue on the appeal is whether the ministry's determination that the appellant is not eligible for designation as a person with disabilities (PWD), was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. The ministry found that the appellant does not have a severe mental or physical impairment that, in the opinion of a medical practitioner, is likely to continue for at least 2 years. The ministry also found that his daily living activities (DLA) are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods and that, as a result of those restrictions, it could not be determined that the appellant 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 as follows:

### Persons with disabilities

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).

Section 2(1)(a) of the EAPWDR defines DLA for a person who has a severe physical or mental impairment as follows:

### Definitions for Act

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.

### **Duration**

The appellant's position is that he will have cerebral palsy for the rest of his life and his shoulder injury has not resolved and, instead, has gotten worse since the onset in December 2011. The appellant argued that his physician stated that it would take between 12 to 18 months to heal his shoulder injury, with the aid of physiotherapy and exercises, but he has not been able to afford the required physiotherapy treatments.

The ministry's position is that the appellant's general practitioner has not confirmed that the appellant's impairment will continue for two years or more.

### **Panel Decision**

Section 2(2)(a) of the EAPWDR requires that there must be an opinion of a medical practitioner indicating that the appellant's impairment is likely to continue for at least two years. The panel notes that it will soon be two years since the date of onset of the appellant's shoulder injury.

The appellant's general practitioner reported in the PR that the appellant's impairment will not continue for two years or more. In response to this question, the general practitioner commented that the appellant's shoulder injury will resolve or be minimized with physiotherapy and appropriate exercises and did not refer to the appellant's cerebral palsy as part of his impairment. The panel finds that the ministry's determination that the medical practitioner had not confirmed that the appellant's impairment will continue for two or more years from the date of the application was reasonable.

### **Severe Physical Impairment**

The appellant's position is that a severe physical impairment is established by the evidence of his cerebral palsy and right shoulder rotator cuff tear/impingement. The appellant argued that his cerebral palsy affects the left side of his body and he does not have good mobility with his left hand and, therefore, he relies heavily on his right side which is impacted by significant pain from his shoulder injury. Although the appellant argued that he has several other medical conditions also impacting his knees and back that were not included in the PWD application, the panel found that the evidence of these conditions was not admissible under the legislation.

The ministry's position is that there is not sufficient information to establish that the appellant has a severe physical impairment. The ministry pointed out that the general practitioner indicated no untoward physical limitations aside from lifting limited to 5 to 15 lbs., and the appellant is independently able to do most aspects of mobility and physical ability with periodic help to lift/carry/hold. The ministry argued that no assistive devices are routinely used to help compensate for impairment and the functional skills limitations are not significantly restricted aside from lifting over 15 lbs. The ministry argued that while the appellant fears that his shoulder injury will progress, eligibility for PWD is based on present circumstances and not on the potential future. The ministry pointed out that the appellant's right arm injury is expected to resolve or minimize with medical treatment.

*Panel Decision*

The legislation clearly provides that the determination of severity of impairment is at the discretion of the minister, taking into account all of the evidence including that of the appellant. However, the legislation is also clear that the fundamental basis for the analysis is the evidence from a medical practitioner or prescribed professional respecting the nature of the impairment and its impact on daily functioning.

The medical practitioner, the appellant's general practitioner of a month, has diagnosed the appellant with cerebral palsy and right shoulder rotator cuff tear/impingement. In the PR, the general practitioner indicated for the appellant's health history that due to cerebral palsy he has decreased range of motion in his left arm and hand and, with pain from the rotator cuff, the appellant is "...unable to work overhead with his right arm and continue pain makes it difficult to do any work with it." The general practitioner also wrote that with appropriate treatment, e.g. physiotherapy, she expects that the appellant can return to full functioning with his right shoulder and arm. The only current restriction identified to the appellant's functional skills is in the area of lifting, which is limited to 5 to 15 lbs. In the AR, the general practitioner indicated that the appellant is independent with walking indoors and outdoors, with climbing stairs and with standing, but requires periodic assistance from another person with lifting and carrying and holding, that he is "...currently unable to lift usual weight in right hand/shoulder due to shoulder pain; limited to 15 lbs. maximum."

The appellant stated that since he applied for PWD, his physical health has deteriorated tremendously and there are several things that he is not capable of doing since his first assessment. The appellant stated that he is no longer able to lift up to 15 lbs. unaided and he needs assistance to lift anything over 5 lbs. and he can only hold his arm up for no longer than 5 to 10 seconds. The appellant stated that his left arm mobility is not great and he relies on his right side quite a bit so if the right side is "not working", it is a big problem for him. While the appellant's evidence is that the pain from his shoulder injury has not resolved or minimized as expected by the general practitioner but has, rather, gotten worse, the appellant agreed that he has not pursued the prescribed medical treatment of regular physiotherapy and appropriate exercises and he attributed this to his limited finances. The panel finds that the ministry reasonably concluded that a limitation to lifting with one arm/hand is not indicative of a significant restriction to functional skills as the appellant is able to use his left arm and hand, although they have a decreased range of motion due to his cerebral palsy. The panel concludes that the ministry reasonably determined that the evidence currently available regarding the appellant's physical condition does not establish that the appellant has a severe physical impairment under section 2(2) of the EAPWDA.

**Severe Mental Impairment**

The appellant did not advance a position that he has a severe mental impairment but stated that the pain he experiences to carry out normal daily tasks due to his shoulder injury causes him mental stress and hurts his confidence.

The ministry's position is that the information provided is not sufficient evidence of a severe mental impairment. The ministry argued that there is no mental health condition, no deficits to cognitive and emotional functioning, and no impacts on daily functioning.

*Panel Decision*

The appellant's general practitioner did not diagnose a mental disorder. The appellant is assessed as having no difficulty with communication and a good ability to communicate in all areas. The general practitioner reported that there are no significant deficits with cognitive and emotional function and no impacts to daily functioning in any area. The appellant is also assessed by the general practitioner as independent in all areas of social functioning. Therefore, the panel finds that the ministry reasonably determined that a severe mental impairment was not established under section 2(2) of the EAPWDA.

**Restrictions in the ability to perform DLA**

The appellant's position is that his physical and mental impairments directly and significantly restrict his ability to perform DLA to the point that he requires the assistance of another person in many tasks of his DLA.

The ministry's position is that the evidence of the prescribed professionals is that there are no restrictions to the appellant's DLA and no assistance is required with 27 of 28 (tasks of) DLA. The ministry argued that as all but one (task of) DLA is performed independently, the information from the prescribed professional does not establish that the appellant's impairment significantly restricts DLA either continuously or periodically for extended periods.

***Panel Decision***

The evidence of a prescribed professional, the appellant's general practitioner, is that the appellant is independent with mobilizing indoors and outdoors. The general practitioner reported that the appellant performs all his DLA with no restrictions, including his personal self care, meal preparation, management of medications, basic housework, daily shopping, mobility inside and outside the home, use of transportation, management of finances, and social functioning. The appellant stated that his physical health has deteriorated tremendously since the time of his PWD application and there are several things that he is not capable of doing since his first assessment. The appellant stated that he is often in need of help to get dressed as the range of motion in his right arm has declined, he needs help and can no longer perform DLA such as basic housework and cooking, and he has issues with taking a shower as it aggravates his shoulder injury tremendously. However, the appellant did not provide further evidence from a prescribed professional to confirm the deterioration in his ability to perform DLA since the reports were completed.

In the AR, the general practitioner responded to the request to summarize the mental or physical impairments that impact the appellant's ability to manage his DLA with the note "none." The general practitioner reported that all of the tasks of the DLA, with the exception of carrying purchases home from shopping, are performed independently by the appellant with no need for assistance from another person. The general practitioner did not provide an explanation or description of the assistance required with this task to allow a determination that it is required for extended periods of time. The panel finds that the ministry reasonably concluded that the information from the prescribed professional does not establish that the appellant's impairment directly and significantly restricts DLA either continuously or periodically for extended periods, thereby not satisfying the legislative criterion of section 2(2)(b)(i) of the EAPWDA.

**Help to perform DLA**

The appellant's position is that he requires the significant assistance of others to perform many of his DLA.

The ministry's position is that because it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required, and there is no indication that an assistive device is required.

***Panel Decision***

Section 2(2)(b)(ii) of the EAPWDA requires that, as a result of direct and significant restrictions in the ability to perform DLA, a person requires help to perform those activities. Help is defined in subsection (3) as the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform a DLA.

The panel finds that the evidence of the prescribed professional is that the appellant lives with family, friends or caregiver and the help required for DLA is provided by his family. The panel finds that the ministry reasonably determined that as direct and significant restrictions in the appellant's ability to perform DLA have not been established, it cannot be determined that the appellant requires help to perform DLA as a result of



those restrictions.

**Conclusion**

Having reviewed and considered all of the evidence and relevant legislation, the panel finds that the ministry's reconsideration decision which determined that the appellant was not eligible for PWD designation was reasonably supported by the evidence, and therefore confirms the decision.