

## PART C – Decision under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Social Innovation (the ministry) dated 23 September 2013 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 his ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and,

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

The ministry determined 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 consisted of the following:

1. The appellant's PWD Designation Application dated 10 April 2013. The Application contained:
  - A Physician Report (PR) dated 10 April 2013, completed by the appellant's general practitioner (GP) who has known the appellant for 3 years and has seen him 11 or more times in the past year.
  - An Assessor Report (AR) of the same date, completed by the same GP.
  - The appellant chose not to complete a Self Report.
2. A 21 page hand-written account, dated 29 November 2011, prepared by the appellant for the Workers' Compensation Board, describing a workplace injury on 19 November 2010, his subsequent interactions with the workplace management, and his medical examinations and treatment up to 11 November 2011.
3. The appellant's Request for Reconsideration, dated 05 September 2013, in which it is noted that the appellant's GP has left the appellant's hometown and therefore not available. His new physician writes: "We will have to reevaluate and complete a new application. Please issue new application form." A Doctor of Chiropractic (DC) provides further comments (see below).

In the PR, the GP diagnoses the appellant's impairment as right elbow chronic lateral epicondylitis (onset December 2010) and depression (onset January 2011).

The panel will first summarize the evidence from the PR and AR relating to the appellant's impairments as it relates to the PWD criteria at issue.

### Severity/health history

#### *Physical impairment*

PR:

The GP writes:

"Injured right elbow while carrying boards repetitively in December 2010. Pain in right elbow getting progressively worse. He currently is unable to lift > 5 lbs. due to the pain in right elbow." And:

"This patient has severe chronic right elbow pain. This has not responded to physiotherapy, rest, anti-inflammatories or repeated cortisone injections. He is not a candidate for surgery and will lack strength in his right elbow, which is debilitating

The GP indicates that the appellant has not been prescribed any medication and/or treatments that interfere with his ability to perform DLA.

The GP indicates that the appellant's impairment is likely to continue for two years or more, commenting:

This patient's elbow injury is chronic and will not get better. He was seen by an [another doctor], an orthopedic surgeon who decided that he will not benefit from surgery.

The GP reports that the appellant is able to walk 4+ blocks unaided and climb 5+ steps unaided, is limited to lifting under 5 pounds, and has no limitation in remaining seated. No difficulties with communications are noted

AR:  
The GP describes the impairment as "Severe chronic right elbow pain due to chronic epicondylitis of lateral aspect.

*Mental impairment*

PR:  
The GP assesses the appellant with significant deficits with cognitive and emotional function in the areas of emotional disturbance, motivation and attention or sustained concentration.

The GP comments:

"This patient's depression is chronic and is not responding to antidepressant treatment."  
"Patient with severely depressed mood. Unable to concentrate > 1 hour and extremely fatigued."  
"Severe depression with lack of interest, fatigue and lack of concentration." And:  
"This patient also has severe depression, which is chronic, and not responding to antidepressants and counseling and is debilitating."

AR:  
The GP describes the appellant's mental impairment as "Severe chronic depression."

Ability to perform DLA

AR:  
The GP assesses the appellant's ability to communicate as follows: good for speaking, reading and hearing; poor for writing, commenting: "pain in right arm."

Regarding mobility and physical ability, the GP assesses the appellant independent for walking indoors, walking outdoors, climbing stairs, and standing, and continuous assistance from another person or unable for lifting and carrying and holding, commenting: "Unable to lift or carry > 5 lbs with right arm."

As to cognitive and emotional functioning, the GP assesses the appellant's mental impairment as having a major impact in the areas of emotion, attention/concentration and motivation. A moderate impact is assessed on consciousness. No impact is reported for the areas of bodily functions, impulse control, insight and judgment, executive, memory, motor activity, language, psychotic symptoms, other neuropsychological problems, or other emotional or mental problems. The GP comments:

"Patient has chronic, severe depression. This leads to depressed mood, fatigue, lack of motivation, inability to concentrate and not responding to antidepressants and counseling."

The GP assesses the assistance required for managing DLA as follows (the GP's comments in

parentheses):

- Personal care: periodic assistance from another person for dressing (pain in right arm – severe); independent for all other aspects.
- Basic housekeeping: continuous assistance from another person required or unable for laundry and basic housekeeping (due to fatigue and severe depression).
- Shopping: continuous assistance from another person or unable for carrying purchases home (unable to lift > 5 lbs.); independent for all other aspects.
- Meals: independent for all aspects.
- Pay rent and bills: independent for all aspects.
- Medications: independent for all aspects.
- Transportation: independent for all aspects.

With respect to social functioning the GP assesses the appellant independent in all listed areas: making appropriate social decisions, ability to develop and maintain relationships, interacting appropriately with others, ability to deal appropriately with unexpected demands, and ability to secure assistance from others

The GP assesses the appellant's mental impairment as resulting in marginal functioning with both his immediate and extended social networks.

Help provided/required

PR:

The GP indicates that the appellant does not require any prostheses or aids for his impairment.

AR:

The GP states that "He will need daily help to do laundry and clean apartment."

The GP notes that assistance is provided for DLA by friends. The GP lists the help required as cleaning up apartment, doing laundry, and carrying purchases home from stores.

In the Request for Reconsideration the DC writes:

"[The appellant] is suffering from a severe case of chronic lateral epicondylitis which seems to be affecting his radial nerve. As a result, intense pain & weakness of the right arm/hand are constant symptoms. This will inevitably affect many activities of daily living, including but not limited to, cooking, cleaning, washing working. We are awaiting referral to the specialist/neurologist."

In his Notice of Appeal, dated 30 September 2013, the appellant writes: "I got hurt at work. My injury is severe."

Attached to the Notice of Appeal is a decision by the Workers' Compensation Appeal Tribunal (WCAT), dated 13 September 2013, which varied an earlier WorkSafeBC Review Division decision, finding that the appellant suffered a traumatic injury to his right elbow, resulting in the development of right elbow epicondylitis, which arose out of the course of his employment on 19 November 2010.

At the hearing, in his opening presentation and in answer to questions, the appellant provided the

following information:

- He has a new physician, who is prepared to complete a new PWD application, providing more information. He is also scheduled to see a surgeon in mid-November. This surgeon is a specialist in dealing with arm problems.
- He was right hand dominant before his injury. He explained that his right hand does not work anymore – any arm movement and his elbow goes “pop,” and hurts more and more. His injury resulted in the tearing of everything in his right elbow – all the muscles and ligaments. He must constantly work on keeping the area involved “jelly like,” preventing it from hardening up, with the assistance of treatment by his chiropractor and self-massage using balls.
- His left arm and hand are fully functional.
- He has had to figure out how to do many day-to-day tasks one-handed, such as tying his shoelaces, flossing his teeth or opening bottles. He stated that he drops and breaks plates, and burns himself frequently cooking or washing dishes with hot water. At a recent gathering he was denied the opportunity, given to everyone else, to hold a baby. All this is very frustrating.
- After his injury, he would print something by taping a pen to his right hand and guiding it with his left hand. Now he is learning to print again, going back to grade school exercises, and getting better at it.
- Showering is difficult for him and that he no longer has one every day.
- He often has to crawl on the floor to pick things up and doing so on three limbs is a challenge.
- He lives about half a kilometer from a grocery store and occasionally walks there and can carry some purchases home using his left hand.
- He has not been prescribed any medication for his depression – he'd been advised in early life against such medication; indeed, except for a few pills when first injured, he has avoided taking pain medication as well.
- He now lives with the father of a friend, who provides a lot of support and some help with day-to-day tasks. The appellant has a friend who will do his laundry and another who will drive him to the grocery store.

The ministry stood by its position at reconsideration.

The panel accepts the WCAT decision as information, noting that the ministry had determined that it had been established that the appellant's impairment (including his elbow injury) is likely to continue for two years or more. At issue in the WCAT appeal was whether the injury occurred out of the course of his employment. The circumstances under which the injury occurred are not relevant to PWD designation under section 2 of the *EAPWDA*.

The panel finds that the new information provided by the appellant at the hearing is in support of the information before the ministry at the time of the reconsideration, clarifying the nature of the appellant's impairment as diagnosed by the GP and the need for help described by the GP. The panel therefore admits the appellant's testimony pursuant to Section 22(4)(b) 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 his ability to perform daily living activities either continuously or periodically for extended periods; and,
- (ii) as a result of those restrictions he requires help to perform those activities.

The ministry determined 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 (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.

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.

The panel will consider each party's position regarding the reasonableness of the ministry's decision under the applicable PWD criteria at issue in this appeal.

### **Severity of impairment**

For PWD designation, the legislation requires that a severe mental or physical impairment be established. The determination of the severity of impairment is at the discretion of the minister, taking into account all the evidence, including that of the applicant. However, the starting point must be medical evidence, with the legislation requiring that a medical practitioner (in this case, the appellant's GP) identify the impairment and confirm that impairment will continue for at least two years.

In the discussion below concerning the information provided regarding the severity of the appellant's impairments, the panel has drawn upon the ministry's definition of "impairment." This definition consists of "cause" and "impact" components: "impairment is a loss or abnormality of psychological, anatomical or physiological structure or function [the cause] causing a restriction in the ability to function independently, effectively, appropriately or for a reasonable duration [impact]." This definition is not set out in legislation and is not binding on the panel, but in the panel's view it appropriately describes the legislative intent. The cause is usually set out as a disease, condition, syndrome, injury or even a symptom (e.g. pain or shortness of breath). A severe impairment requires the identified cause to have a significant impact on daily functioning.

### **Mental impairment**

The position of the ministry, as set out in the reconsideration decision, is that while the appellant's impairments impact his mental functioning, the ministry did not have enough evidence from the GP to confirm that the appellant has a severe mental impairment.

The appellant's position is that his GP has diagnosed his depression as severe, chronic and debilitating. The GP has identified several cognitive and emotional deficits with major impacts in the areas of emotion and attention/concentration and motivation. The appellant argues that this evidence serves to establish a severe mental.

### **Panel findings**

The evidence is that the GP has diagnosed the appellant with severe depression, commenting that "Patient with severely depressed mood. Unable to concentrate > 1 hour and extremely fatigued." The GP has identified the appellant with significant cognitive and emotional deficits in the areas of emotional disturbance, motivation and attention or sustained concentration, assessing major impacts on daily functioning in the same areas. While the GP comments: "Patient has chronic, severe depression. This leads to depressed mood, fatigue, lack of motivation, inability to concentrate and not responding to antidepressants and counseling," no description is provided as to in what way, how often, to what extent and under what circumstances these impacts restrict daily functioning. There is

no evidence to suggest that the appellant is restricted in making decisions about personal activities, care or finances or relating to, communicating or interacting with others effectively. The panel also notes that the GP assesses the appellant independent – not requiring any support or supervision – with respect to social functioning. And while the GP reports the appellant's relationships with his immediate and extended social networks as "marginal functioning," no explanation is provided. On the basis of the information provided by the GP, and without a clearer picture of the impacts of the appellant's depression on his daily functioning, the panel finds that the ministry was reasonable in determining that a severe mental impairment had not been established.

### Physical impairment

In the reconsideration decision, the ministry acknowledged that while the appellant's right arm/elbow impairment may affect his physical functioning, the GP has not indicated that he requires any prostheses or aids for his impairment. The ministry also noted the GP has indicated that the appellant can manage the majority of DLA independently or with periodic assistance. The position of the ministry is that evidence of a severe physical impairment has not been provided by the appellant's GP.

The position of the appellant is that he suffered a traumatic injury to his right elbow three years ago and as a result his right arm/hand virtually useless. The evidence of the GP is that his elbow pain is chronic, severe and debilitating. The GP has also assessed significant restrictions in his ability to manage DLA, such as dressing and grooming, housework and carrying purchases home from shopping. Further, at the hearing he testified as to the difficulties he encounters with many day-to-day tasks that usually involve the use of both hands, ranging from tying shoelaces to showering. At the hearing, he asked the panel to imagine what life would be like going about life with one hand constantly in a pants pocket. The appellant argues that all this evidence confirms that he has a severe physical impairment.

### Panel findings

The panel notes that the GP diagnoses the appellant with right elbow lateral epicondylitis, describing the impact mostly as loss of arm lifting ability, albeit with pain: "Pain in right elbow getting progressively worse. He currently is unable to lift > 5 lbs. due to the pain in right elbow." The impact on the ability to perform DLA are also related to heavy lifting tasks, with the appellant assessed as requiring continuous assistance from another person or unable for housework and carrying purchases home. By comparison, the description by the appellant at the hearing of his physical impairment conveys an impression of the degree and scope of his medical condition, the right elbow epicondylitis, significantly differing from that described by the GP – more along the lines of almost complete loss of functionality of the right arm and hand. However, the panel notes that the appellant has also described how he has managed to adapt to doing tasks which he formerly did with his right hand or using both hands (pulling on socks, tying shoelaces, etc.) by learning how to do these tasks with his left arm and sometimes other limbs.

The panel notes that the legislation requires that the minister be satisfied that "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...." The panel understands this to mean that the impairment - cause and impact - being assessed for PWD designation be the impairment identified by the medical

practitioner, in this case the appellant's GP, who also provided the opinion that the impairment will continue for at least 2 years. Accordingly, the panel has given greater weight to the evidence of the degree and scope of the appellant's epicondritis as described by the GP in considering the reasonableness of the ministry's determination of the severity of physical impairment.

The appellant's chiropractor wrote in the Request for Reconsideration that "... intense pain & weakness of the right arm/hand are constant symptoms. This will inevitably affect many activities of daily living, including but not limited to, cooking, cleaning, washing working. We are awaiting referral to the specialist/neurologist." The panel notes that the chiropractor, a prescribed professional under the EAPWDR, describes symptoms, not impacts on the ability to function physically, and, as the ministry noted in the reconsideration decision, outlines prospective ("will inevitably") restrictions on the ability to perform DLA, not current ones.

Based on the evidence provided by the GP, the panel considers the limitations described are more in keeping with a moderate impairment and finds that the ministry was reasonable in determining that a severe physical impairment had not been established.

**Significant restrictions in the ability to perform DLA.**

The position of the ministry is that there is not enough evidence from the appellant's GP to establish that the appellant's impairments significantly restrict his ability to manage her DLA, either continuously or periodically for extended periods

The appellant's position is that his medical conditions significantly restrict his ability to perform many DLA, particularly personal self care, shopping for personal needs and performing housework.

*Panel findings*

The panel notes that, according to the legislation, the direct and significant restriction in the ability to perform DLA must be a result of a severe impairment, which is not established in this appeal. This DLA criterion must also be considered in the broader context of the legislation, which provides that the minister may designate a person as a person with disabilities "if the minister is satisfied that" the criteria are met, including this one. In exercising the discretion conferred by the legislation, it is reasonable that the minister would expect that the opinion of a prescribed professional be substantiated by information that would satisfy the minister that there are direct and significant restrictions in the ability to perform DLA, either continuously or periodically for an extended period.

The GP has assessed the appellant independent in most aspects of DLA requiring physical effort, with the exception of requiring continuous assistance from another person or unable for both aspects basic housekeeping -- laundry and basic housekeeping, and one aspect of shopping for personal needs -- carrying purchases home. The panel notes that for the latter task, the appellant at the hearing acknowledged that he occasionally walks to a nearby store and can carry some purchases home. The GP also assessed the appellant requiring periodic assistance from another person for one aspect of personal care -- dressing, but no information is provided as to what this assistance involves or how frequently it is needed.

With regard to the DLA applicable to a person with a severe mental impairment, there is no evidence

to suggest that the appellant is restricted in making decisions about personal activities, care or finances or relating to, communicating or interacting with others effectively.

While the GP has identified one DLA – basic housekeeping – which can be reasonably considered to be significantly restricted, the majority of DLA requiring physical effort were assessed as independent by the GP. Taking into account the appellant's testimony regarding his ability to carry occasional purchases home from the store and to adapt to the restrictions arising from his elbow injury, and the full functionality of his left arm/hand, it is difficult for the panel to conclude that he is "significantly" restricted in his overall ability to perform DLA, as reported by the GP, either continuously or periodically for extended periods. Considering that a severe mental or physical impairment has not been established, the panel finds that the ministry reasonably determined that this criterion had not been met.

### **Help with DLA**

The ministry's position 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.

The appellant's position is simply that he requires ongoing help from others, particularly for household chores and shopping.

The panel notes that the legislation requires that in the opinion of a prescribed professional the need for help must arise from direct and significant restrictions in the ability to perform DLA that are either continuous or periodic for extended periods. The panel finds that the ministry reasonably determined that since it has not been established that DLA are directly and significantly restricted, it cannot be determined that help is required as provided under section 2(2)(b)(ii) of the EAPWDA.

### **Conclusion**

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