

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated January 22, 2014 which found that the appellant did not meet three 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 and that his impairment is likely to continue for at least two years. However, the ministry was not satisfied that the evidence establishes that:

- 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 and self-report dated July 10, 2013, a physician report (PR) dated August 12, 2013 and prepared by the appellant's general practitioner and an assessor report (AR) dated August 22, 2013 and completed by a physiotherapist who has known the appellant since December 19, 2012.

Also included were the following:

- 1) Letter dated January 3, 2013 prepared by the appellant's advocate and addressed to the appellant's physiotherapist who prepared the AR. This letter asks the physiotherapist to answer five questions by checking "agree" or "disagree" and the letter is signed by the physiotherapist at the bottom of the second page and dated January 7, 2014 ("the PT Letter");
- 2) Letter dated December 23, 2013 prepared by the appellant's general practitioner who completed the PR and addressed to "To Whom It May Concern" ("the GP Letter"); and,
- 3) Request for Reconsideration ("RFR") dated January 3, 2014 attaching 3 pages of written submissions prepared by the appellant and dated December 23, 2013 (together, "the RFR Submissions").

At the hearing, the appellant sought to have admitted into evidence a one page medical report dated January 20, 2014 and prepared by his general practitioner who completed the PR ("the GP Report"). This report is a ministry form that relates to the appellant's employability and describes his physical condition, prognosis and restrictions. The panel notes that the information contained in the GP Report reflects that which is set out in the PR. The ministry representative did not object to the GP Report's admissibility. The panel therefore admits the GP Report as written testimony in support of the information and records that were before the minister when the decision being appealed was made pursuant to section 22(4)(b) of the *Employment and Assistance Act*.

### *Diagnoses*

The appellant has been diagnosed by his general practitioner with arm pain secondary to osteoarthritis in his spine with the date of onset being 2012.

### *Physical Impairment*

- In the PR, the general practitioner indicated in the health history that "the [appellant's] arm and shoulder pain is mild to moderate. It affects his ability to lift and do heavy labour."
- The general practitioner reported that the appellant does not require any prostheses or aids for his impairment.
- In response to the question as to whether the appellant's impairment is likely to continue for two years or more the general practitioner does not check either the "yes" or "no" boxes but comments "Uncertain. Spine degeneration is unlikely to improve. Pain may vary based on therapy."
- Functional skills reported in the PR indicate that the appellant can walk 4 or more blocks and climb 5 or more steps unaided, and he can lift 2 to 7 kg (5 – 15 lbs.) and remain seated without limitation.
- In the additional comments to the PR, the general practitioner reported that the appellant "should continue to attend physio 1-2x/month."
- In the GP Report, the general practitioner describes the appellant's secondary medical condition as "constant pain in left arm, neck, back/right arm numbness" and she describes the appellant's overall medical condition as severe.
- In the GP Report, the general practitioner notes that the appellant is unable to carry or lift more than 5 lbs with his left arm, he is unable to sit or stand for extended periods and unable to walk more than 2-3 blocks.
- In the AR, the physiotherapist summarized the appellant's impairments that impact his ability to

manage daily living activities as "...left shoulder/arm weakness and pain affects/restricts his ability to left/carry [more than] 5 lbs for a reasonable time. [Appellant] is left hand dominant."

- The physiotherapist indicated that the appellant is independent walking indoors and outdoors, climbing stairs and standing. The physiotherapist indicated that the appellant requires periodic assistance from another person with lifting, carrying and holding and added the comment "[appellant] is limited in the use of his left hand/arm and must use his right more often for weight [greater than] 5 – 8 lbs. [Appellant] is left handed."
- The physiotherapist added further comments with respect to the appellant's mobility and physical ability stating "[Appellant] will require assistance for heavier items from friends and store staff."
- In the GP Letter, she revises her opinion with respect to the duration of the appellant's impairment saying "I now wish to affirm my professional opinion that [the appellant's] impairment is likely to continue for two years or more from the time of the report." The general practitioner also indicates that she has initialed each page of the appellant's December 23, 2013 written submissions "as attestation to the veracity of the information provided therein..."

#### *Mental Impairment*

- In the PR, the general practitioner reported no significant deficits with cognitive and emotional function and that the appellant does not have difficulties with communication.
- In the AR, the general practitioner assessed the appellant's speaking, reading, writing and hearing as good but adds the comment that writing causes left arm pain to persist for a few hours.
- In the AR, the physiotherapist noted no impacts to daily functioning in all areas of cognitive and emotional functioning and wrote "N/A" on the page.
- The physiotherapist answered "N/A" with respect to the appellant's social functioning, immediate and extended social networks, with no further comment provided.

#### *Daily Living Activities (DLA)*

- The general practitioner reported that the appellant has not been prescribed medications or treatments that interfere with his ability to perform his daily living activities (DLA)
- In the PR, the general practitioner does not indicate whether or not the appellant's impairment directly restricts his ability to perform DLA. However, the general practitioner reported that the appellant is periodically restricted in meal preparation, basic housework and daily shopping while he is not restricted in personal self care, management of medications, mobility inside and outside the home, use of transportation and management of finances with a comment added that the periodic restriction is "related only to left arm pain, ie, lifting and carrying." With respect to the degree of restriction, the general practitioner comments "mild to moderate."
- In the AR, the physiotherapist indicated that the appellant is independent with all tasks of the DLA personal care but comments with respect to grooming that the appellant is "able, but left shoulder/arm pain develops." Continuing in the AR, the physiotherapist indicated that the appellant is independent with all aspects of basic housekeeping but comments "Able, but left shoulder arm pain will persist a few hours."
- For shopping, the appellant is assessed in the AR as independent in all aspects other than carrying purchases home and the physiotherapist references her previous comment that the appellant is limited to the use of his left hand and arm and must use his right more often for weight that is greater than 5-8lbs.
- For meals, the appellant is assessed as independent in all aspects and the physiotherapist comments that with respect to food preparation and cooking, the appellant is "able, but activity causes pain into his arm."
- For paying rent and bills, medications and transportation, the appellant is assessed as independent in all aspects without further comment.
- Under additional comments, the physiotherapist notes that the appellant is "applying for home support to assist with food prep and cooking meals to reduce the severity of symptoms into his arm."

- In the PT Letter, the physiotherapist has indicated her agreement with the following statements set out by the advocate who prepared the letter by checking the "Agree" space and signing and dating the letter:
  - The appellant has difficulty with meal preparation and cooking and a great deal of difficulty chopping meats or vegetables;
  - The appellant requires help to lift full pots of water, transfer off/on the stove, drain, etc due to pain in his left arm, neck and back;
  - The appellant needs help carrying purchases out of the store, he is only able to carry one bag with his right arm and requires help carrying the rest;
  - The appellant is not able to scrub and clean his home the way he should to keep it sanitary due to pain in his back, neck and left arm; and
  - The appellant's condition is severe, that he has significant restrictions with his DLA and as a result requires continuous assistance with those activities noted above.

#### *Need for Help*

- In the PR, the general practitioner did not indicate that the appellant requires an assistive device.
- The physiotherapist reported in the AR that the assistance provided by other people for DLA includes friends or "other" and comments further that "friends and store staff assist as needed with lifting and carrying items heavier than 10lbs."

In the RFR written submissions, the appellant states that he has satisfied the age criteria for PWD designation and that his physician has now confirmed that his physical impairment is likely to continue for two years or more. The appellant lists his conditions as including osteoarthritis of the spine, neck pain, back pain, shoulder and left arm pain and numbness in the right hand and forearm and he says that his neck, back, shoulder and arm pain impairs his ability regarding all activities every day. With respect to his functional abilities, the appellant states that while he used to walk for miles, he now experiences back pain after 2 or 3 blocks, that he can climb stairs but not without discomfort and that lifting 5-15 lbs as provided in the PR was his own estimate of what he could lift with his right hand only. He adds that he can only sit for approximately 10 minutes before experiencing neck and back discomfort.

Continuing in the RFR submissions, the appellant states that he has difficulty with housekeeping and normal living activities due to his disability and requires assistance with housekeeping, meal preparation and clean up, some personal care and laundry needs.

In his Notice of Appeal dated February 3, 2014, the appellant states that as of January 20, 2014 his general practitioner assessed his condition as severe and worsened since onset. He notes further that as of January 7, 2014, his physiotherapist assessed his condition as severe and that he has significant restrictions with his DLA and as a result requires continuous assistance.

At the hearing, the appellant stated that:

- His physiotherapist confirmed in the PT Letter that his condition is severe, that he has significant restrictions with his DLA and as a result he requires continuous assistance.
- His general practitioner confirms in the GP Report that his condition is severe and she confirmed in the GP Letter that his impairment is expected to continue for 2 years or more.
- His general physician and physiotherapist know him well, both consider his condition to be severe and their opinions should be given significant weight.
- His physical impairment includes constant left arm and neck pain, back pain due to activity.

- He finds it painful to reach for and lift objects, he is not able to clean his house properly and he has a hard time cooking.

In response to a question, the appellant stated that when his physiotherapist completed the PT Report, she did so based on a personal interview with him and that she did not undertake any objective testing such as range of motion. The appellant said that prior to the PT Report interview, he had not seen his physiotherapist for approximately 5 months.

In response to a question, the appellant stated that the PT Letter should be preferred as opposed to the AR because the AR was completed by the physiotherapist quickly and without sufficient thought and consideration. The appellant stated that he didn't know how good of a position she would have been in to accurately determine his DLA.

In response to a question, the appellant stated that he prepared the RFR submissions and then took them to his general practitioner's office at which time she read through them and initialed each page.

The ministry relied on its reconsideration decision. At the hearing, the ministry stated that the Reconsideration Decision is based on the initial PWD application which did not provide sufficient information to meet the legislative requirement for PWD status. The ministry commented further that the additional information presented by the appellant did not allow for a re-assessment at reconsideration.

In response to a question, the ministry stated that in considering the RFR submissions and the fact that they were initialed by the appellant's general practitioner, they did not add anything to the PWD application.

## PART F – Reasons for Panel Decision

The issue on the appeal is whether the ministry's reconsideration decision, which found 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 and 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 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.

### **Severity of impairment**

Section 2(2)(a) of the *EAPWDA* is clear that when addressing the issue of a severe physical or mental impairment in the context of a person applying for a PWD designation, that person must be found to have a severe physical impairment that, in the opinion of a medical practitioner, is likely to continue for at least 2 years.

### **Severity of mental impairment**

The appellant did not advance an argument at the hearing that he suffered from a severe mental impairment.

The ministry takes the position that the evidence does not establish that the appellant suffers from a severe mental impairment.

#### *Panel Decision*

In the PR, the appellant's general physician does not diagnose the appellant with a mental impairment and notes that he does not experience any significant deficits with cognitive and emotional function. Reviewing the balance of the evidence including the AR and the appellant's submissions attached to the RFR, the panel notes that there is no mention of the appellant suffering from a mental impairment or brain injury.

The panel therefore concludes that the ministry was reasonable in determining that the evidence did not establish that the appellant has a severe mental impairment under section 2(2) of the *EAPWDA*.

### **Severity of physical impairment**

The appellant takes the position that the evidence demonstrates that he has a severe physical impairment. In this regard, he points to the PR and the AR as well as the PT Letter, the GP Report and his RFR submissions which have been initiated by his general practitioner.

The ministry takes the position that the PWD application is the foundation for the appellant's claim and does not establish that he suffers from a severe physical impairment. The ministry states that the additional evidence does not add to that in the PWD application.

#### *Panel Decision*

The panel notes that the appellant's general practitioner, who has treated the appellant for more than 5 years and between 2 and 10 times in the 12 months prior to completing the PR, has described his condition in the PR as mild to moderate arm pain secondary to osteoarthritis in his spine with onset in 2012, that the appellant is able to walk more than 4 blocks unaided on a flat surface, climb more than 5 stairs unaided, lift between 2 and 7 kg and sit without limitation. The panel notes that the general practitioner has commented that the appellant's pain may vary based on therapy.

In the AR, the appellant's physiotherapist comments that he has left shoulder and arm weakness and that he is independent in all aspects of mobility and physical ability adding the comments that the appellant is limited in the use of his left hand and arm and must use his right hand and shoulder more often for weights that exceed 5-8lbs.

This evidence must be considered in light of the GP Letter, the PT Letter, the GP Report and the appellant's RFR Submissions which were reviewed and initialed by his general practitioner. For example, in the GP Report, the general practitioner is asked to describe the appellant's "overall medical condition" and responds by checking the "severe" box. While the general practitioner comments in the GP Report that the appellant's condition has "worsened since onset" which is noted in the report as 2011, the panel finds that this evidence contradicts that in the PR in which the general practitioner describes the appellant's shoulder pain as mild to moderate.

Similarly, in the PT Letter the physiotherapist is asked to either agree or disagree with the statement that the appellant's "condition" is severe, that he has significant restrictions with his DLA and as a result he requires continuous assistance with the activities listed previously in the letter and the physiotherapist checks the "Agree" box. The panel notes however that it is the appellant's evidence at the hearing of this matter that this conclusion was reached based on an in person interview without any objective testing and that further, the appellant had not attended any therapy sessions with his physiotherapist in the five months prior to that interview.

Further noted by the panel are the appellant's RFR submissions which he prepared and presented to his general practitioner for her review. In those submissions, he says that he experiences back pain after walking 2 or 3 blocks, that he can climb stairs but not without discomfort and that his ability to lift 2-7kg was an estimate as to what he could lift with his right hand. He further indicates that he can only sit for approximately 10 minutes before experiencing neck and back discomfort. He says that these factors constitute "substantial impairment of my ability to act independently with regards to mobility, physical abilities and a significant majority of my [DLA] and does, in fact, establish that I have a severe restriction in my ability to function independently, effectively and/or for a reasonable duration."

The panel notes however that the appellant's evidence as to his functional skills as set out in the RFR submissions is consistent with that in the PR. For example, in the PR the appellant is described as being able to walk 4 or more blocks unaided. In the RFR Submissions, the appellant does not reduce that figure but rather says he experiences back pain after walking 2 or 3 blocks. With respect to climbing stairs unaided, the PR reports the appellant as being able to climb 5 or more while the appellant states in the RFR Submissions that he can climb stairs but not without discomfort. The appellant is described in the PR as being able to lift between 2 and 7kg and he clarifies in the RFR Submissions that this is with his right, albeit non-dominant hand. While the PR describes the appellant as being able to remain seated without limitation, the appellant describes himself as only being able to sit for 10 minutes in the RFR Submissions.

The panel notes that in describing the appellant's overall medical condition in the GP Report as "severe," the evidence that the general practitioner appears to rely on is inconsistent with that in the PR and with that provided by the appellant himself in the RFR submissions. Further, both the GP Report and the PT Letter describe the appellant's overall medical "condition" as severe while section 2(2) of the *EAPWDA* provides that it is the "impairment" that must be demonstrated as being severe.

Similarly, while the physiotherapist agrees that the appellant's "condition" is severe, the panel notes that the PT Letter does not comment further on the appellant's functional abilities but rather focuses on restrictions on his DLA. Further, the panel notes that the physiotherapist's description of the appellant's condition as severe is inconsistent with her findings in the AR that the appellant is independent in all aspects of mobility and physical ability. Lastly, the panel notes the appellant's evidence that he had not been examined by his



physiotherapist for approximately 5 months prior to her completing the PT Letter.

Where there is inconsistent or contradictory evidence as to the appellant's functional skills, the panel must look to see whether the appellant provides a reasonable explanation and in the present case, the panel is unable to find such an explanation. The general practitioner and physiotherapist both provided evidence of the appellant's functional abilities in the PWD application and for the reasons set out above, in considering the question of whether the appellant has a severe physical impairment, the panel prefers and places greater weight on this evidence than that in the GP Report, the GP Letter, the PT Letter or the appellant's RFR Submissions.

Despite the general practitioner's diagnosis of spinal osteoarthritis and associated arm pain, the inconsistent and contradictory nature of the GP Report, GP Letter, PT Letter and RFR submissions when viewed in light of the PWD application leads the panel to conclude that the ministry was reasonable in determining that the evidence did not establish that the appellant has a severe physical impairment under section 2(2) of the *EAPWDA*.

### **Restrictions in the ability to perform DLA**

The appellant takes the position that he has significant restrictions with his DLA.

The ministry's position is that it has not been established by the evidence that the appellant's ability to perform DLA has been directly and significantly restricted by his physical impairment either continuously or periodically for extended periods as required by section 2(2) of the *EAPWDA*.

### *Panel Decision*

Section 2(2)(b) of the *EAPWDA* requires that in the opinion of a prescribed professional, a person's DLA are directly and significantly restricted by their severe impairment either continuously or periodically for extended periods.

In the PR, the general practitioner reports the appellant to experience no restrictions with personal self care, management of medications, mobility inside and outside the home, use of transportation and management of finances. He is described as being periodically restricted with meal preparation, basic housework and daily shopping but that the periodic restriction is "related only to left arm pain, ie, lifting and carrying."

In the AR, the physiotherapist indicates that the appellant is independent in 27 of 28 tasks of DLA. She says that with respect to grooming, laundry, basic housekeeping, food preparation and cooking that he develops left shoulder and arm pain which will persist following activities and that for carrying purchases home he requires periodic assistance from another person.

Again, the evidence in the PR and AR must be considered in light of the additional evidence. For example, with respect to DLA, in the PT Report the physiotherapist checks "Agree" with the statements that the appellant has difficulty with meal preparation and cooking, he is not able to scrub and clean the way his home should be to keep it in a sanitary condition and that his neck, back and left arm pain prevent him from properly sweeping and vacuuming. The physiotherapist further checks "Agree" with the statement that the appellant has "significant restrictions with his activities of daily living...".

In his evidence at the hearing, the appellant argued that the panel should prefer the physiotherapist's evidence in the PT Report as opposed to the AR as it was more recent in time. He further stated that the evidence in the AR was prepared quickly and without adequate consideration. However, the panel notes the appellant's evidence that the PT Report, prepared by his advocate, was completed by the physiotherapist who had not seen the appellant in the five months prior to its completion. The panel further notes that while the

physiotherapist agrees that the appellant has significant restrictions on his DLA, the only evidence of such in the PT Report is with meal preparation, cooking and basic housework which were all noted as independent in the AR with some minor qualifications. Considering the evidence, the panel prefers the AR to the PT Report.

In the RFR submissions initialed by the general practitioner, the appellant states that he has "difficulty with housekeeping and normal living activities because of my disability" and that he requires assistance with "house cleaning, meal preparation and clean up, some personal care and laundering needs." The panel notes that the evidence of the general practitioner in the PR is consistent with these comments.

In the present case, the evidence of two prescribed professionals, the appellant's general practitioner and physiotherapist, is that the appellant is able to perform the majority of his DLA independently. For the tasks in the PR that require periodic assistance – meal preparation, basic housework and daily shopping - the evidence is that the periodic nature is related only to the appellant's left arm pain which is described by the general practitioner in the PR as mild to moderate. The panel notes that the evidence in the AR is consistent in that regard in that the qualifying comments by the physiotherapist with respect to grooming, laundry, basic housekeeping, food preparation, cooking and carrying purchases home, while all independent, cause left arm and shoulder pain.

Based on the evidence, the panel concludes that the ministry was reasonable in finding that the appellant's physical impairment does not directly and significantly restrict his ability to perform DLA, either continuously or periodically for extended periods under section 2(2)(b) of the *EAPWDA*.

#### **Help with DLA**

The appellant's position is that he requires assistance to perform DLA. Specifically, he says in his RFR submissions that he has requested assistance in the past for housekeeping, meal preparation and clean up, some personal care and laundry.

The ministry's position is that as it has not been established that the appellant's DLA are directly and significantly restricted, it cannot be determined that significant help is required from other persons.

#### *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. Section 2(3) of the *EAPWDA* provides that a person requires help in relation to a DLA if, in order to perform it, the person requires an assistive device, the significant help or supervision of another person, or the services of an assistance animal.

As noted above, the panel has found the ministry's conclusion that the evidence of the prescribed professional does not establish that the appellant requires assistance with his DLA either continuously or periodically for extended periods of time to be reasonable.

The panel therefore finds that as 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, as defined in section 2(3)(b) of the *EAPWDA*.

#### **Conclusion**

Having reviewed and considered all of the evidence and relevant legislation, the panel finds that the ministry's reconsideration which determined that the appellant was not eligible for PWD designation was a reasonable application of the applicable enactment in the circumstances of the appellant, and therefore confirms the decision.