

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated April 16, 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 November 20, 2013, a physician report (PR) dated November 6, 2013 and an assessor report (AR) dated November 27, 2013 and completed by the appellant's family physician who has known the appellant for approximately 5 months. The evidence also included the following:

- 1) Letter dated April 1, 2014 with statements to which the appellant's physician responded; and,
- 2) Request for Reconsideration dated April 1, 2014.

### **Diagnoses**

In the PR, the appellant was diagnosed by his physician with right ulna nerve injury with reduced function of right hand, with onset in April 2013, osteoarthritis ("OA") and DDD [degenerative disc disease] of lumbar spine, with onset in 2013, and chronic pain syndrome- neck and ribs, with onset in April 2013. There was no diagnosis indicated for a mental health condition.

### **Physical Impairment**

In the PR, the appellant's physician reported that:

- In terms of health history, the appellant had a work-related injury in April 2013 "...where the right side of his body was struck by a heavy metal object. Medical assessment done 3 months later revealed no evidence of fracture or dislocation, but he has been disabled by pain and loss of function since that time. He has symptoms of ulna nerve impingement at the right elbow which reduces his ability to use his right hand. He has right lower lateral rib pain which limits his mobility. He has pain at the base of his neck and reduced neck movement in left side rotation."
- The appellant does not require any prosthesis or aid for his impairment, and the physician noted "no treatment at present."
- For the degree and course of impairment, the physician noted that the appellant was fully functional prior to his injury "...but in view of his spinal OA and DDD, he is unlikely to become fit for manual labour again."
- In terms of functional skills, the appellant can walk 4 or more blocks and climb 5 or more steps unaided and is able to lift 7 to 16 kg. (15 to 35 lbs.) and remain seated less than 1 hour (note: "needs to move around").
- In the additional comments, the physician wrote: "no hospitalization required. Lives alone. Requires the help of friends for heavier tasks, otherwise he is able to function independently."

In the AR, the appellant's physician indicated that:

- The appellant is assessed as independent with all mobility, including walking indoors and outdoors, climbing stairs, and standing, while requiring periodic assistance with lifting and carrying and holding. The physician noted: "needs assistance with heavy objects."
- The section of the AR relating to assistance provided through the use of assistive devices is not completed by the physician.

In the appellant's self-report, he wrote that:

- He was not able to see a doctor until 3 ½ months after his accident. He now suffers from nerve injury with reduced function of his right hand, osteoarthritis, DDD of his lumbar spine, curve in his spine and chronic pain syndrome (neck and ribs). He is now disabled due to pain and loss of function.

- He is only able to walk up to ½ of a block before he has to stop and take a break. He can only climb up to 3 stairs before he needs to hold onto something to climb any more stairs. He is only able to lift up to 10 lbs. at a time. He is only able to sit for less than 1 hour.
- Without surgery to his elbow, he cannot grip anything and nerve damage makes arm normal functions impossible.
- He needs rib-cage and hip on right hand side dealt with in order to just sit down and a brace for his spinal column to help possibly correct the curve in his spine caused by the accident at his work.

In the letter dated April 1, 2014, the physician indicated with a check mark that he agreed that the appellant states:

- He is only able to walk up to ½ block at a time and he has to use a handrail at all times when he climbs stairs.
- He is only able to lift up to 10 lbs. at a time and if he bends to lift any weight, he will black out.
- He is only able to stand for a maximum of 20 minutes at a time and he is only able to sit for up to 20 minutes at a time.
- He has to lie down at least 4 times a day for about 1 hour at a time.

### ***Mental Impairment***

In the PR, the appellant's physician reported that:

- The appellant has no difficulties with communication and no significant deficits with cognitive and emotional function.

In the AR, the physician indicated that:

- The appellant has a good ability to communicate in speaking and hearing, and satisfactory reading and writing. The physician noted that the appellant is "grade 9 educated."
- The sections of the report describing impacts to cognitive and emotional functioning and social functioning are not applicable to the appellant.

In the appellant's self-report, he did not describe a mental health condition. In the April 1, 2014 letter, there were no statements describing impacts from a mental health condition.

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

In the PR, the physician indicated that:

- The appellant has not been prescribed any medication and/or treatment that interfere with his daily living activities.
- He is restricted on a continuous basis with daily shopping, mobility inside the home and mobility outside the home.
- The appellant is not restricted with personal self care, meal preparation, management of medications, basic housework, use of transportation, management of finances, and social functioning.
- Regarding the degree of restriction, the appellant's "mobility is reduced by pain in neck, back and ribs."
- With respect to the assistance needed with DLA, the appellant is "able to perform the activities of daily living, but may take longer to perform some of them."
- For additional comments, the physician noted that the appellant lives alone and "requires the help of friends for heavier tasks, otherwise he is able to function independently."

In the AR, the physician reported that:

- The appellant is independent with moving about indoors and outdoors.
- The appellant is independent in all 8 tasks of the DLA personal care: dressing, grooming, bathing, toileting, feeding self, regulating diet, transfers in/out of bed and transfers on/off chair.
- The appellant is independent with basic housekeeping and laundry.
- For shopping, the appellant is independent with 4 of 5 tasks, namely going to and from stores, reading prices and labels, making appropriate choices and paying for purchases. The appellant requires periodic assistance with carrying purchases home, with a note added: "needs help for heavy objects."
- The appellant is independent in performing 2 of 4 tasks of the DLA meals, including meal planning and safe storage of food. The appellant requires periodic assistance from another person with food preparation and cooking, described as "uses easy, prepackaged foods."
- The appellant is independent with all 3 tasks of the DLA paying rent and bills: banking, budgeting, and paying rent and bills.
- The appellant is independent in performing all 3 tasks of managing his medications: filling/refilling prescriptions, taking as directed and safe handling and storage.
- The appellant is independent with all 3 tasks of managing transportation: getting in and out of a vehicle, using public transit and using transit schedules and arranging transportation.

In the appellant's self-report, he wrote that:

- He has great difficulty with regulating his diet. He lost 40 lbs. this last summer.
- He only does his shopping once every 3 to 5 months. He is very isolated where he lives and, due to snow fall, he is unable to get to the nearest community to get his groceries. He has to use a shopping cart when shopping and he is unable to read small print without glasses. He is unable to lift over 10 lbs. at a time.
- For meals, he is unable to do meal planning and he relies on easy prepackaged foods.
- He is unable to do daily chores around his home and any chores requiring him to bend at the waist.
- Without surgery to his elbow, he cannot grip anything and nerve damage makes arm normal functions impossible.

In the letter dated April 1, 2014, the physician indicated with a check mark that:

- He agrees that the appellant states he is in need of continuous assistance or he is unable to do the following DLA due to his medical conditions and limitations they present him: carry purchases home ("unable over 10 lbs. at a time"), basic housekeeping ("unable to sweep, unable to bend over to clean out bathtub or shower"), and banking ("unable to stand in line at bank, all banking done by debit card, auto deposit"). The physician wrote that the appellant "...says that his condition is getting worse, but still able to live alone."
- He disagrees that the appellant states he is in need of continuous assistance or he is unable to do the following DLA due to his medical conditions and limitations they present him: regulate diet, meal preparation, and cooking. The physician wrote that the appellant "states that he is not a cook...and has therefore always relied on pre-prepared food."

### ***Need for Help***

The physician reported in the AR that the help required for DLA is provided by the appellant's friends. The section of the report indicating assistance provided through the use of assistive devices is not completed.

In his Notice of Appeal, the appellant expressed his disagreement with the ministry's reconsideration decision and wrote that with his physical condition, he needs a proper doctor and surgery.

At the hearing, the appellant and his advocate stated that:

- The doctor who prepared the reports for the PWD application did not refer the appellant for the testing that he needs to have to detect nerve damage and only did X-Rays. The 'medical assessment' done 3 months after the accident was X-Rays, but these will not detect nerve damage. The doctor seemed to be of the opinion that the appellant only thinks he has a problem.
- The appellant has found a new doctor in another community who has already requisitioned an EMG scan of his right elbow. He has not gone for the scan yet but hopes to have it done soon since he currently has very little use of his right arm. He is also getting new X-Rays and a CT scan of his spinal column. He is relieved because he does not want to end up in a wheelchair.
- The appellant cannot cook for himself. He relies on others to cook for him. He has maintained a pretty good diet in the past by paying others to cook for him.
- It has been costly to get in to see the doctor every 2 weeks, to keep his work safe claim active, and he had to use his food allowance money for transportation costs.
- He would like to look into possible surgeries to correct his spinal column and treatment for the nerve damage. There was damage done to his spine from the impact at the job site. The bulges in his spine can be seen and he can feel friction in spots.
- He has to sit or lie down 3 to 4 times per day to re-align his spine.
- He is not able to do manual labour anymore and that is all he has ever known. He does not even know how to turn on a computer.
- Looking at the AR, he says it depends on what is meant by "feeding self" because he cannot cook for himself but he can put a spoon to his mouth.
- For transfers (in/out of bed and on/off of chair), he can do that now, but probably not in the future.
- It is impossible for him to lift over 10 lbs., or any weight from the ground.
- He has "bad habits" and he has never planned for his meals so he lost 40 lbs. and he has been unable to gain more than about 2 lbs.
- He is allergic to about 65 to 70% of the medications for pain relief, but the medications do not resolve the problem anyway, they just numb the pain.
- After he was injured, he applied for a work safe claim and no one told him to also apply for disability at the same time. At first, he thought he could do things but then he would end up getting vertigo when he bent over and would black out.
- His condition is "not getting better." He has deteriorating disc disease which is getting worse.
- He cannot mow the lawn. He can sweep his travel trailer that he is living in, but it has no hot water and no refrigeration.

The ministry relied on its reconsideration decision. The ministry stated at the hearing that although the appellant is classed as an employable person, he has been excused from looking for work. He does not currently have the status of a Person with Persistent Multiple Barriers to employment (PPMB).

## 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 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.

### **Severe Physical Impairment**

The appellant's position is that a severe physical impairment is established by the evidence of the reduced function of his right hand and arm due to the right ulna nerve injury, back pain due to OA and DDD of his lumbar spine, and chronic pain syndrome in his neck and ribs. The appellant argued that the doctor who provided the evidence for his PWD application was not prepared to conduct the appropriate investigations and seemed to be of the opinion that he only thinks he has a problem. His new doctor, however, has taken the appellant's concerns seriously and has already requisitioned an EMG scan of his right elbow, new X-Rays to compare with the previous X-Rays, as well as a CT scan of his spinal column.

The ministry's position is that the ministry does not have enough information from the general practitioner to confirm that the appellant has a severe physical impairment. The ministry argued that, in terms of physical functioning, the general practitioner indicated in the PR that unaided the appellant can walk 4 or more blocks and climb 5 or more steps and he can lift 15 to 35 lbs. and remaining seated for up to 1 hour, with the comment by the general practitioner that the appellant needs to move around. The ministry argued that the general practitioner indicated that the appellant is independently able to walk indoors and outdoors, climb stairs and stand, with periodic assistance required with lifting and carrying and holding "heavy objects." The ministry argued that the general practitioner reported that no assistive devices are routinely used to help compensate for impairment. The ministry argued that the new assessment by the general practitioner provided in the April 1, 2014 letter does not demonstrate a severe impairment or significant restrictions in the appellant's ability to perform DLA.

### ***Panel Decision***

A diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a severe impairment. An "impairment" is a medical condition that results in restrictions to a person's ability to function independently or effectively.

To assess the severity of an impairment one must consider the nature of the impairment and the extent of its impact on daily functioning as evidenced by functional skill limitations and the degree to which performing DLA is restricted. In making its determination the ministry must consider all the relevant evidence, including that of the appellant. However, the legislation is clear that the fundamental basis for the analysis is the evidence from a prescribed professional – in this case, the appellant's physician.

The appellant's family physician of approximately 5 months, diagnosed the appellant with ulna nerve injury with reduced function of his right hand, OA and DDD of his lumbar spine and chronic pain syndrome in his neck and ribs. The physician noted in the health history that a medical assessment conducted 3 months after the appellant's workplace accident revealed no evidence of fracture or dislocation, but that the appellant has been disabled by pain and loss of function since that time. At the hearing, the appellant stated that the 'medical assessment' was X-Rays and the appellant argued that these will not detect nerve damage. The physician wrote that the appellant has symptoms of ulna nerve impingement at the right elbow which reduces his ability to use his right hand. He has right lower lateral rib pain which limits his mobility. He has pain at the base of his neck and reduced neck movement in the left side rotation. The physician indicated that the appellant does not require any prosthesis or aid for his impairment wrote: "no treatment at present."

In terms of functional skills, the physician indicated in the PR that the appellant can walk 4 or more blocks and climb 5 or more steps unaided and is able to lift 15 to 35 lbs. and remain seated less than 1 hour. In the additional comments, the physician wrote: "...lives alone. Requires the help of friends for heavier tasks, otherwise he is able to function independently." In his self-report, the appellant wrote that he is only able to walk up to ½ of a block before he has to stop and take a break, and he can only climb up to 3 stairs before he needs to hold onto something to climb any more stairs. The appellant wrote that he is only able to lift up to 10 lbs. at a time, he cannot grip anything and nerve damage makes normal arm functions impossible. In the letter dated April 1, 2014, the physician indicated with a check mark that he agreed that the appellant states he is only able to walk up to ½ block at a time, he has to use a handrail at all times when he climbs stairs, he is only able to lift up to 10 lbs. at a time and if he bends to lift any weight, he will black out. The physician agreed that the appellant states he has to lie down at least 4 times a day for about 1 hour at a time.

In the AR, the physician assessed the appellant as independent with all mobility, including walking indoors and outdoors, climbing stairs, and standing, with no need for assistance from another person or from an assistive device. The physician reported that the appellant requires periodic assistance with lifting and carrying and holding, but limited the assistance needed for "heavy objects." While the appellant indicated in his self-report that he needs a brace for his spinal column to help possibly correct the curve in his spine caused by the accident at his work, the physician has not completed the section of the AR relating to assistance provided through the use of assistive device and has not indicated equipment or device required but not currently being used.

As discussed in more detail in the subsequent section of this decision under the heading 'Restrictions in the ability to perform DLA', any physical limitations resulting from the appellant's impairments do not appear to have translated into significant restrictions in his ability to manage his DLA independently. In view of the reports of level of independence, the panel has concluded that while the appellant does have some physical health issues, the ministry reasonably determined that the evidence falls short of establishing that he has a severe physical impairment under section 2(2) of the EAPWDA.

### **Severe Mental Impairment**

The appellant did not maintain a position that he has a severe mental impairment.

The ministry's position is that there is insufficient evidence to establish that the appellant has a severe mental impairment, particularly since the appellant's general practitioner did not diagnose a



mental health disorder. The ministry argued that the general practitioner did not indicate that the appellant has any significant deficits with his cognitive and emotional function nor do his impairments have an impact on his cognitive and emotional functioning.

*Panel Decision*

The physician did not diagnose a mental disorder in the PR or the April 1, 2014 letter. No significant deficits were reported with cognitive and emotional functioning and impacts to areas of daily functioning were marked by the physician as not applicable to the appellant. In the PR, the physician reported that the appellant does not have difficulties with communication and, in the AR, that the appellant has a good or satisfactory ability to communicate in all areas. In the AR, the section of the report describing impacts to social functioning was noted as not applicable to the appellant. Given the absence of a mental disorder diagnosis and no impacts reported to mental or social functioning, 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 impairment directly and significantly restricts his ability to perform DLA on an ongoing basis to the point that he requires the significant assistance of another person and the use of a brace as an assistive device. The appellant argued that his condition is deteriorating and the doctor who prepared the initial reports did not conduct the necessary investigations to document the extent of the injury and deterioration.

The ministry's position is that as the majority of the appellant's DLA are performed independently or require little help from others and the information from the prescribed professional does not establish that impairment significantly restricts DLA either continuously or periodically for extended periods. The ministry argued that the general practitioner reported that the appellant can independently perform the majority of the tasks of his DLA, or 25 out of a total 28 tasks. The ministry argued that the general practitioner noted that the appellant is able to perform the activities of daily living but may take longer to perform some of them; however, how much longer is not described.

*Panel Decision*

Section 2(2)(b) of the EAPWDA requires that a prescribed professional provide an opinion that an applicant's severe impairment directly and significantly restricts his DLA, continuously or periodically for extended periods. In this case, the appellant's previous physician is the prescribed professional. DLA are defined in section 2(1) of the EAPWDR and are also listed in the PR and, with additional details, in the AR. Therefore, a prescribed professional completing these forms has the opportunity to indicate which, if any, DLA are significantly restricted by the appellant's impairments continuously or periodically for extended periods.

In the appellant's circumstances, his physician initially reported that the appellant is independent in all tasks of several DLA, including personal care, basic housekeeping, paying rent and bills, managing his medications and transportation, and with social functioning. For the DLA shopping, the physician indicated in the PR that the appellant is continuously restricted and, in the AR, that the appellant requires periodic assistance with 1 of 5 tasks, namely carrying purchases home, and that it is for "heavy objects." In his self-report, the appellant explained that he only does his shopping once every 3 to 5 months as he is very isolated where he lives. He has to use a shopping cart when shopping and he is unable to lift over 10 lbs. at a time. For mobility inside and outside the home, the physician

reported in the PR that the appellant is continuously restricted and, regarding the degree of restriction, noted that the appellant's "mobility is reduced by pain in neck, back and ribs." The functional skill limitation as set out in the letter dated April 1, 2013 is walking unaided up to ½ block, and the appellant wrote in his self-report that he has to stop and take a break before continuing. With respect to the meal DLA, the physician reported in the AR that the appellant requires periodic assistance from another person with 2 of 4 tasks, namely food preparation and cooking, and that he "uses easy, pre-packaged foods." In the April 1, 2014 letter, the physician disagreed that the appellant states he is in need of continuous assistance with regulating his diet, meal preparation, and cooking. The physician wrote that the appellant "states that he is not a cook...and has therefore always relied on pre-prepared food." In his self-report, the appellant wrote that he is unable to do meal planning and he relies on easy prepackaged foods and, at the hearing, explained that he has never learned how to plan meals or do much cooking because he has always paid others to prepare meals for him. The panel finds that the evidence describes impacts to the appellant's ability to manage the meal DLA which pre-date his injury and do not relate to the appellant's physical health condition.

In the April 1, 2014 letter, the physician agreed that the appellant states he is in need of continuous assistance or he is unable to carry purchases home ("unable over 10 lbs. at a time"), basic housekeeping ("unable to sweep, unable to bend over to clean out bathtub or shower"), and banking ("unable to stand in line at bank, all banking done by debit card, auto deposit"). At the hearing, the appellant stated that he can sweep his residence because it is a small space but bending over has been causing him to black out and this is one of the reasons he believes more tests are necessary to determine the extent of his injury and the deterioration in his condition. In the April 1, 2014 letter, the physician wrote that the appellant "...says that his condition is getting worse, but still able to live alone." In the additional comments to the PR, the physician noted that the appellant lives alone and "requires the help of friends for heavier tasks, otherwise he is able to function independently."

The panel finds that the ministry reasonably determined that the appellant performs the majority of his DLA independently and the assistance required is for lifting heavier weights or performing heavier cleaning requiring bending, and he requires rests due to restrictions to his mobility. Overall, the panel finds that the ministry reasonably concluded that there is not enough evidence from the prescribed professional to establish that the appellant's impairment significantly restricts his ability to manage his 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 another person or an assistive device to perform 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. The ministry argued that the general practitioner indicated that the appellant does not require any assistive devices.

### ***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 evidence of the physician, as a prescribed professional, is that the help required with DLA is provided by the appellant's friends and that no assistive devices are required. 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, as defined by 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 decision which determined that the appellant was not eligible for PWD designation was reasonably supported by the evidence, and therefore confirms the decision.