

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated August 6, 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 May 8, 2013, a physician report (PR) dated January 24, 2013, with one assessment page missing, and an assessor report (AR) dated February 5, 2013, with two assessment pages missing, both reports completed by a general practitioner who has known the appellant since June 2012. The evidence also included the following:

- 1) Fax sheet dated March 7, 2014 from the physician's medical clinic stating in part that all the pages have been provided that are available for the appellant; and,
- 2) Request for Reconsideration dated July 23, 2014 with copies of pages from the PR and AR with handwritten notes added by the appellant, a page marked "specialist", and information sheets from a pharmacy for medications to relieve pain, inflammation, and anxiety.

Diagnoses

In the PR, the appellant was diagnosed by the general practitioner with left rotator cuff syndrome, cervical spondylosis, lumbar spondylosis, bilateral bicep tendon tears, and osteoarthritis- hands. There is no diagnosis of a mental health condition.

Physical Impairment

In the PR, the general practitioner reported that:

- In terms of health history, the "conditions are severe- render him unable to do physical work. He is untrained to do any other type of work."
- The appellant does not require any prosthesis or aid for his impairment.
- Regarding the degree and course of the impairment, these are "chronic degenerative conditions- likely to deteriorate with time."
- In terms of functional skills, the appellant can walk 4 or more blocks and climb 5 or more steps unaided, and he can lift 15 to 35 lbs. and remain seated for less than 1 hour.
- In the additional comments, the general practitioner wrote: "incapable of doing manual labour because of his disabilities. Untrained for any other type of work."

In the AR the general practitioner indicated that:

- The appellant is assessed as independent with walking indoors and outdoors, climbing stairs and standing. He requires periodic assistance from another person with lifting and he requires periodic assistance with carrying and holding, with a comment added: "difficulty, attempts- due to back pain."
- No assistive devices are indicated in the section of the AR relating to assistance provided.
- In the additional information, the general practitioner wrote: "as stated previously, severely disabled due to his various diagnoses and untrained/uneducated for non-physical work."

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

- His mobility is very restricted. He has sleep disturbance due to pain and he is frequently tired.

In his Request for Reconsideration with attached submission, the appellant wrote that:

- He only has use of his right arm 50% of the time.
- He can only lift or carry with his right arm for very short periods due to arthritis in his hands.

Mental Impairment

In the PR, the general practitioner reported:

- The appellant has no difficulty with communication and no significant deficits with cognitive and emotional function, with no comments provided.

In the AR, the general practitioner indicated that:

- The appellant has a good or satisfactory ability to communicate in all areas.
- The section of the report describing impacts to cognitive and emotional functioning is not included with the AR.
- The section of the report assessing impacts to social functioning is also missing from the AR.

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

- He suffers from depression.

In his Request for Reconsideration with attached submission including a page marked "specialist", the appellant wrote that:

- He needs help organizing, planning, recalling times and dates.
- He has difficulty making decisions. He often feels dizzy and off balance and has headaches.
- He lacks routine which affects his appetite and sleeping patterns.

Daily Living Activities (DLA)

In the PR, the general practitioner indicated that:

- The appellant has not been prescribed any medication and/or treatments that interfere with his daily living activities.
- The section of the report assessing restriction to DLA is not included with the PR.

In the AR, the general practitioner reported that:

- The appellant is independent with moving about indoors and outdoors.
- For personal care, the appellant is independent with feeding himself and transferring in/out of bed and on/off of a chair. He takes significantly longer than typical with dressing, grooming, bathing, toileting and regulating his diet. The general practitioner wrote: "has difficulty due to pain in shoulders and hands."
- For basic housekeeping, the appellant also takes significantly longer with housekeeping and laundry due to pain in his shoulders and hands.
- For shopping, the appellant is independent with reading prices and labels, making appropriate choices and paying for purchases and takes significantly longer than typical with going to and from stores and carrying purchases home. The general practitioner wrote: "difficulty riding bicycle due to shoulder pain."
- Regarding meals, the appellant is independent with meal planning and safe storage of food and takes significantly longer than typical with food preparation and cooking. The general practitioner commented: "difficulty due to pain and weakness in hands."
- The appellant is independent in all tasks of paying rent and bills and managing his medications.
- Regarding transportation, the appellant is independent with using public transit and using transit schedules and arranging transportation and takes significantly longer with getting in and out of a vehicle. The general practitioner wrote: "difficulty due to pain in neck, shoulders and low back."

In his self-report, the appellant wrote that:

- He takes pain medication on a regular basis. His concentration and memory are affected.
- He requires assistance from another person for bathing, washing his hair, getting dressed, carrying groceries, cooking, opening cans, peeling vegetables, washing dishes, housecleaning, and laundry. All these DLA take him significantly longer to do or he cannot do them at all and require assistance from another person.

In his Request for Reconsideration, the appellant wrote that:

- His DLA are also affected by his medications.
- He requires help 75 to 100% of the time for all activities as he only has use of one arm about 50% of the time.
- He tends to spend hours, to the point of exhaustion and frustration, trying to do things on his own. As time goes on and his conditions deteriorate, he can no longer conceal his disabilities.
- All of his DLA can take hours as he uses his right arm to the point of exhaustion. By the end of each day, he cannot use his right hand at all, and usually not the next day either.
- He has no use of his left arm due to severe pain and he cannot lift or hold anything with his left arm; he cannot extend or exert. If his right hand is not too swollen or if the pain killers have "kicked in", he will exhaust all of his efforts to do things on his own due to his stubborn nature but the actuality is that he needs help 80 to 100% of the time.
- For meals, for example, it can take up to 30 minutes to open a can by himself
- He has use of only his right arm and only full use when his hand is not afflicted with pain which is most of the time.
- All of the DLA cause severe pain, frustration, depression, and are only going to deteriorate in the future.
- After hours of trying to do things on his own, he will ask for help once he has completely exhausted all efforts.

Need for Help

The general practitioner indicated in the AR that, with respect to the assistance provided by other people, there is no help currently provided but the appellant "would need help with housekeeping, cooking." The section of the report indicating assistance provided through the use of assistive devices is not completed.

In his Notice of Appeal dated August 20, 2014, the appellant expressed his disagreement with the ministry's reconsideration decision, and wrote that he disagrees that he does not have a severe physical impairment and disagrees that his impairment does not significantly restrict his ability to perform DLA.

At the hearing, the appellant stated that:

- He experiences a great amount of pain doing his household chores and getting groceries.
- When his doctor asked if he could lift 35 lbs, he answered 'yes' but that is only with his right arm because he cannot lift at all with his left arm.
- The muscles and tendons are ripped in both arms.
- He has tendonitis in his hands and they sometimes swell up and feel like they have been hit with a hammer.
- It takes him 2 hours to get ready in the morning. Every day life is a chore. When he thinks

about his conditions, he gets depressed and wonders if he can continue.

- All of his teeth are rotting and he cannot rinse his mouth out properly because the nerves are exposed and it is very painful. Every time he goes to the dentist, he gets teeth pulled.
- He sees people who have been designated a PWD who are far better off than he.
- It takes longer for him to do everything. Some days are better than others.
- His family doctor completed both the PR and the AR. He had two appointments and the doctor asked him questions but he did not complain because "men don't let people know their weaknesses."
- Regarding the pages missing from the PWD application, the appellant stated that he does not read very well and they may have been lost by an advocate who was helping him at one point.
- When he wrote that his mobility is restricted, he meant that his main form of mobility is riding his bicycle which puts weight on his shoulders and causes pain. He cannot ride that well.
- His days of climbing into a dumpster to find food are gone because if he managed to climb in, he would never get out again.
- The extra page included with his Request for Reconsideration was completed by a specialist to whom he had been referred by his family doctor. He could not remember what type of specialist; either a radiologist who read the reports or a shoulder specialist.
- He has not had a long-term family physician who would know how his conditions are getting worse. He ends up going to different clinics for his different problems.

Admissibility of New Information

The ministry did not raise an objection to the appellant's oral testimony. The appellant provided additional information regarding his impairment as diagnosed in the PWD application. The panel admitted this additional information as being in support of information and records that were before the ministry at the time of reconsideration, in accordance with s. 22(4)(b) of the *Employment and Assistance Act*.

The ministry relied on its reconsideration decision as summarized at the hearing.

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 based on the information provided 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. Also, 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 pain and weakness he experiences due to left rotator cuff syndrome, cervical and lumbar spondylosis, bilateral bicep tendon tears, and osteoarthritis in his hands. At the hearing, the appellant argued that his doctor did not have full information about his impairment since the appellant was reluctant to reveal his weaknesses. In his Request for Reconsideration the appellant argued that he only has use of his right arm 50% of the time and he can only lift or carry with his right arm for very short periods due to arthritis in his hands.

The ministry's position is that the appellant's functional skill limitations are not significantly restricted aside from sitting less than one hour and the information provided does not demonstrate a severe physical impairment. The ministry argued that, in terms of physical functioning, the general practitioner indicated that the appellant is able to walk 4 or more blocks and climb 5 or more steps unaided and to lift 15 to 35 lbs. The ministry argued that although the general practitioner commented that the appellant's conditions are severe and render him unable to do physical work and he is untrained to do any other type of work, the PWD application is not intended to assess employability.

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 general practitioner.

The general practitioner, who had known the appellant for about 7 months, diagnosed the appellant with left rotator cuff syndrome, cervical spondylosis, lumbar spondylosis, bilateral bicep tendon tears, and osteoarthritis in the hands. The general practitioner reported that the appellant does not require an aid for his impairment. In terms of functional skills, the appellant can walk 4 or more blocks and climb 5 or more steps unaided, and he can lift 15 to 35 lbs. and remain seated for less than 1 hour.

The appellant stated at the hearing that he can lift 35 lbs. with his right arm but not for very long and he cannot lift at all with his left arm. He explained that he likely over-stated his abilities to the doctor. In the AR, the general practitioner assessed the appellant as independent with walking indoors and outdoors, climbing stairs and standing, and requiring periodic assistance from another person with lifting and with carrying and holding, with a comment added: "difficulty, attempts- due to back pain." At the hearing, the appellant stated that his main form of mobility is riding his bicycle which puts weight on his shoulders and causes pain so he has not been able to ride that well. The appellant stated that his conditions have been getting worse; he has tendonitis in his hands and they sometimes swell up and feel like they have been hit with a hammer. The appellant stated that some days are worse than others. Regarding the degree and course of the impairment, the general practitioner wrote in the PR that these are "chronic degenerative conditions- likely to deteriorate with time." The panel notes that the PWD application was completed over a year and half ago and there was no additional information provided by the general practitioner to update the appellant's functional skills assessment.

The general practitioner noted in the health history of the PR that the appellant's "conditions are severe- render him unable to do physical work. He is untrained to do any other type of work." In the additional comments, the general practitioner wrote: "incapable of doing manual labour because of his disabilities. Untrained for any other type of work." For an impairment to be a "severe impairment," section 2(2) of the EAPWDA requires that the ministry must be satisfied that the evidence demonstrates significant restrictions in the person's ability to perform specified areas of daily functioning (DLA). As the ability to search for, accept or continue in employment is not listed as one of the prescribed DLA in subsection 2(1)(a) of the EAPWDR, the panel finds that the ministry reasonably held that employability is not a factor in assessing eligibility for PWD designation.

The panel finds that the evidence demonstrates that while the appellant experiences some limitations to his physical abilities due to chronic pain, particularly in the area of lifting and carrying and holding, he remains independent with his mobility and an updated medical assessment has not been provided. In the absence of further detail from the medical practitioners regarding impacts to the appellant's current functioning, the panel finds that the ministry reasonably determined that there is not sufficient evidence to establish that the appellant has a severe physical impairment under section 2(2) of the EAPWDA.

Severe Mental Impairment

The appellant's position, as expressed in his self-report and his Request for Reconsideration, is that he suffers from depression. In his Request for Reconsideration with attached submission including a page marked "specialist", the appellant wrote that he needs help organizing, planning, recalling times and dates. He has difficulty making decisions, often feels dizzy and off balance and has headaches; he lacks routine which affects his appetite and sleeping patterns.

The ministry's position is that there is insufficient evidence to establish that the appellant has a severe mental impairment. The ministry argued that there is no mental health disorder reported, no difficulties with communication and no deficits to cognitive and emotional functioning.

Panel Decision

In the PR, the general practitioner did not diagnose a mental health condition and reported that the appellant has no difficulty with communication and no significant deficits with cognitive and emotional

function. In the AR, the general practitioner indicated that the appellant has a good or satisfactory ability to communicate in all areas. The sections of the report describing impacts to cognitive and emotional as well as social functioning are missing from the AR. At the hearing, the appellant stated that he did not know what had happened to these missing pages; they may have been lost by the advocate who had provided some assistance to him.

In his self-report, the appellant wrote that he suffers from depression. In his Request for Reconsideration, the appellant wrote that he needs help organizing, planning, recalling times and dates. He has difficulty making decisions. He often feels dizzy and off balance and has headaches. He lacks routine which affects his appetite and sleeping patterns.

With respect to the two DLA that are specific to mental impairment – make decisions about personal activities, care or finances (decision making), and relate to, communicate or interact with others effectively (social functioning), the available evidence indicates that the appellant is not significantly restricted in either. With respect to decision making, the general practitioner reported in the AR that the appellant independently manages his finances (banking, budgeting, pay rent and bills) and his medications (taking as directed and safe handling). He is also reported as independent in the decision-making components of the DLA of daily shopping (making appropriate choices), meal preparation (meal planning and food storage) and transportation (using transit schedules and arranging transportation). Regarding the DLA of social functioning, there is no assessment by the general practitioner regarding the appellant's ability to develop and maintain relationships, to interact appropriately with others, and to secure assistance from others. The appellant is assessed with a good of satisfactory ability to communicate in all areas. Given the absence of a mental health diagnosis and no reported impacts to the appellant's 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. The appellant argued in his Request for Reconsideration that his DLA are also affected by his medications, which affect his concentration and his memory. He requires help 75 to 100% of the time for all activities as he only has use of one arm about 50% of the time; he cannot lift or hold anything with his left arm due to severe pain. After hours of trying to do things on his own, he will ask for help once he has completely exhausted all efforts. For meals, for example, it can take up to 30 minutes to open a can by himself. In his self-report, the appellant wrote that he requires assistance from another person for bathing, washing his hair, getting dressed, carrying groceries, cooking, opening cans, peeling vegetables, washing dishes, housecleaning, and laundry.

The ministry's position is that all DLA are performed independently and require no 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 of time. The ministry argued that while numerous tasks take longer than typical described as "has difficulty due to pain in shoulders and hands", information on how much longer than typical these tasks take is not provided.

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 general practitioner 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, the page in the PR that provides an opportunity for the general practitioner to report on the restrictions to various listed DLA, and the extent and degree of those restrictions, is missing. While the appellant argued that his DLA are also affected by his medications, which affect his concentration and his memory, the general practitioner reported in the PR that the appellant has not been prescribed any medication and/or treatments that interfere with his DLA. The panel notes that the PR was completed well over a year ago and the information sheets from a pharmacy provided by the appellant with his Request for Reconsideration describe medications to relieve pain, inflammation, and anxiety. While these medications may now interfere with the appellant's DLA, there was no further information provided from the appellant's general practitioner, as the prescribed professional, to update his opinion. The general practitioner commented in both the health history and the additional comments sections of the PR that the appellant's conditions are severe in that they render him unable to do physical work and he is untrained to do any other type of work. The general practitioner's assessment focused on employability and the panel finds that the ministry reasonably determined that this is not a factor for evaluating eligibility for PWD designation.

In the AR, the general practitioner reported that the appellant is independent with walking indoors and outdoors and with all tasks of all other listed DLA. While the general practitioner assessed some tasks of the DLA personal care, housekeeping, shopping, meals and transportation to take the appellant significantly longer than typical, there is no indication of how much longer than typical it takes the appellant. The general practitioner added comments that the appellant experiences difficulty with these tasks due to pain in his shoulders and low back as well as pain and weakness in his hands. In his self-report, the appellant wrote that he requires assistance from another person for bathing, washing his hair, getting dressed, carrying groceries, cooking, opening cans, peeling vegetables, washing dishes, housecleaning, and laundry. For help that is required where none is available to the appellant, the general practitioner wrote that he "would need help with housework and cooking." Although this is an indication from a prescribed profession for a need for assistance in tasks of DLA, the general practitioner has not provided sufficient detail to determine whether the need for assistance is periodic for extended periods or continuous.

The appellant stated at the hearing that his condition continues to deteriorate and that he now requires assistance 75 to 100% of the time for all activities as he only has use of one arm about 50% of the time. The appellant also stated at the hearing that some days are worse than others and did not provide further information from a prescribed professional to describe the degree or extent of his restrictions to DLA. 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 his combined physical and mental impairments affect his daily living

functions to a severe enough extent that assistance is required.

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.

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 general practitioner indicated in the AR that, with respect to the assistance provided by other people, there is no help currently provided but the appellant "would need help with housekeeping, cooking." The section of the report indicating assistance provided through the use of assistive devices is not completed. 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.