

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated August 7, 2015 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 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

With the consent of both parties, the hearing was conducted as a written hearing, pursuant to section 22(3)(b) of the *Employment and Assistance Act (EAA)*.

The evidence before the ministry at the time of the reconsideration decision included the Persons With Disabilities (PWD) Application comprised of the applicant information and self-report dated March 6, 2015, and a physician report (PR) and an assessor report (AR) both dated April 23, 2015 and both completed by a general practitioner who has known the appellant for a few months.

The evidence also included the appellant's Request for Reconsideration dated July 25, 2015, which referred to an attached letter from the appellant, a receipt dated July 20, 2015 issued to the appellant for home care, transportation and "cook, cleaning, laundry, shopping, etc." for the sum of \$150, and a business card for an orthopedic surgeon.

Diagnoses

In the PR, the appellant was diagnosed by the general practitioner with arthritis in his feet, right shoulder, neck, and right knee with an onset of approximately 2007. When asked in the AR to describe the appellant's mental or physical impairments that impact his ability to manage daily living activities, the general practitioner wrote: "limited due to arthritic pain."

Physical Impairment

In the PR and AR, the general practitioner reported that:

- In terms of health history, the appellant "...got stiff joints starting in 2007, starting in right knee and right foot and right shoulder." He had trauma to his jaw in 2007 too. It is getting worse with time. He had left and right knee operations for meniscus tears. Arthritis has been diagnosed over the years. He is "not able to work. Last worked a few months, too painful."
- Under the degree and course of impairment: "arthritis getting worse- no cure. [Operation] will help [right] foot only."
- The appellant does not require any prosthesis or aid for his impairment, with a note: "not yet; [operation] booked May 2015."
- In terms of functional skills, the appellant can walk 2 to 4 blocks unaided, climb 5 or more steps unaided, lift 7 to 16 kg. (15 to 35 lbs.), with a note: "or more", and remain seated for less than 1 hour.
- In the additional comments, the appellant is "not able to work into the future... not trained for a non-physical job. Needs to retire now- too late to retrain. Takes medications [name]; therapy wanted- expensive for acupuncture."
- The appellant is assessed as being independent with walking indoors, standing (note: "1/2 hour"), lifting (note: "50 lbs.") and carrying and holding. The general practitioner indicated that the appellant uses an assistive device and takes significantly longer than typical with climbing stairs, with a note added: "with limping." The appellant also takes significantly longer than typical with walking outdoors, with a note added: "3 to 4 blocks."
- In the section of the AR relating to assistance provided, the general practitioner did not identify any of the listed devices as applying to the appellant.
- In the additional information, notes are added: "prognosis poor for any recovery; can live independently after operation." He is not able to work and not able to retrain, and he is "disabled with pain and stiffness." He worked in physical jobs all his life.

In his self-report, the appellant wrote:

- He has bunions with arthritis in both feet and he has a hard time to walk as it is very painful and must be operated on as soon as possible.
- He has arthritis in his neck and both shoulders.
- It is hard to lift his arm over past his shoulder and he cannot sleep on either side.
- He has right knee pain due to his foot problem and he needs to take medication every day.
- It is very hard to bend and his hands are very tight, with pain in the joints (fingers).
- Due to lack of movement and pain, he cannot work and it is hard to get a good sleep.

In his Request for Reconsideration Reasons, the appellant wrote:

- He had surgery on his right foot in July 2015, which has left him incapable of walking, driving, and standing. The healing will take at least 3 months and he has a cane to aid him in walking. Complete recovery will take about a year.
- After he recovers, he will need the same surgery on his left foot.
- He also had an injury to the index finger of his right hand; this makes it even harder to get along in daily living. It will take about 3 months to recover. Due to the tendon being cut, he has to wear a [splint] on the finger.

Mental Impairment

In the PR and AR, the general practitioner reported:

- The appellant has no difficulty with communication and no significant deficits with cognitive and emotional function.
- The appellant has a good ability to communicate in all areas, specifically: speaking, reading, writing, and hearing.
- The section of the report designed to indicate the degree of impact to the appellant's cognitive and emotional functioning is marked "N/A", indicating that it is not applicable to the appellant.
- With respect to social functioning, the appellant is independent in all aspects, and he is assessed with good functioning in both his immediate and extended social networks.

Daily Living Activities (DLA)

In the PR and AR, the general practitioner indicated that:

- The appellant has not been prescribed medications and/or treatments that interfere with his ability to perform DLA.
- The appellant is independent with moving about indoors and outdoors, taking significantly longer than typical with walking outdoors within the range of 3 to 4 blocks.
- The appellant is independent with all of the listed tasks of the DLA personal care (dressing, grooming, bathing, toileting, feeding self, regulate diet, transfers in/out of bed and on/off chair), with the comment "slower" indicated by grooming and transfers.
- The appellant is also independent with all of the listed tasks of the DLA meals (meal planning, food preparation, cooking and safe storage of food), with an indication that periodic assistance is also required with cooking.
- The appellant is independent with all of the listed tasks of the DLA pay rent and bills (including banking and budgeting), and the DLA medications (filling/refilling prescriptions, taking as directed, safe handling and storage).
- The appellant is independent with tasks of the DLA shopping (reading prices and labels, making appropriate choices and paying for purchases), and requires continuous assistance with going to and from stores and carrying purchases home, with the comment added "drives

OK”.

- The appellant requires periodic assistance with the DLA housekeeping (including laundry) and with one task of the DLA transportation, getting in and out of a vehicle, with the other tasks being not applicable to the appellant.

In his self-report, the appellant wrote:

- Due to lack of movement and pain, he cannot work and it is hard to get a good sleep.

In his Request for Reconsideration, the appellant wrote:

- He had to pay for his home care, and some pain medications not covered by MSP, because he could not do his own cooking, cleaning and driving.
- He cannot make ends meet on what he gets every month and this problem will continue all this year and most of next year.

Need for Help

In the AR, the general practitioner did not indicate any assistance provided by other people and wrote “homeless today.” In response to the request to describe the assistance necessary where help is required but there is none available, the general practitioner wrote: “has a tent. Lives in car too.” In the section of the AR for identifying assistance provided through the use of assistive devices, the general practitioner did not identify any of the listed items as being applicable to the appellant.

Additional information

In his Notice of Appeal dated July 50, 2015, the appellant wrote that:

- His health is getting worse.
- He had to stop work in the spring of this year because of the arthritis in his neck, shoulder, foot and knees.
- His right arm is worse and he cannot lift his right arm over his shoulder now.
- He has a hard time walking and standing because of his foot swelling and pain.
- Also, his right hip is painful and he needs a cane to go to the bathroom.
- He needs help to bathe, cook and drive to the doctor and shopping and such.
- All of his previously mentioned conditions are getting worse after his foot surgery in July, 2015 and his daily pain is getting worse.
- His arthritis is an ongoing problem and will be with him for life.
- Sleeping is difficult and he needs medication nightly as well as other medications.
- He finds it hard to lift anything as his hands have a hard time closing because of arthritis.
- He paid \$150 for home care out of his own pocket in July but now he cannot afford to do that and he owes money for August 2015.
- Please feel free to consult with his doctors.

The ministry relied on its reconsideration decision and did not provide a submission on the appeal.

Admissibility of Additional Information

The panel considered the information in the appellant’s Notice of Appeal as information that corroborates the extent of the appellant’s impairment as diagnosed in the PWD application, which was before the ministry at reconsideration. Therefore, the panel admitted this additional information as being in support of information and records that were before the ministry at the time of the reconsideration, in accordance with Section 22(4)(b) of the *Employment and Assistance Act*.

PART F – Reasons for Panel Decision

The issue on appeal is whether the ministry's reconsideration decision, which found that the appellant is not eligible for designation as a person with disabilities (PWD) under Section 2(2) of the EAPWDA, 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 evidence does not establish that the appellant has a severe mental or physical impairment and that his daily living activities (DLA) are, 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) and (2) of the EAPWDR provide definitions of DLA and prescribed professionals as follows:

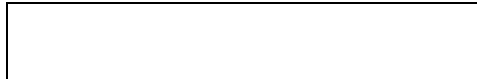
Definitions for Act

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.

(2) For the purposes of the Act, "prescribed professional" means a person who is

(a) authorized under an enactment to practise the profession of

- (i) medical practitioner,
- (ii) registered psychologist,
- (iii) registered nurse or registered psychiatric nurse,
- (iv) occupational therapist,
- (v) physical therapist,
- (vi) social worker,
- (vii) chiropractor, or
- (viii) nurse practitioner, or

(b) acting in the course of the person's employment as a school psychologist by

- (i) an authority, as that term is defined in section 1 (1) of the Independent School Act, or
- (ii) a board or a francophone education authority, as those terms are defined in section 1 (1) of the School Act, if qualifications in psychology are a condition of such employment.

Severe Physical Impairment

The appellant's position is that a severe physical impairment is established by the pain he experiences due to worsening arthritis in various parts of his body. In his self-report, the appellant wrote that he has bunions with arthritis in both feet and he has a hard time to walk as it is very painful. In his Request for Reconsideration Reasons, the appellant argued that the surgery he had on his right foot in July 2015 has left him incapable of walking, driving, and standing, it will take at least 3 months to heal, and he has a cane to aid him in walking. The appellant wrote in his self-report that he has arthritis in his neck and both shoulders, it is hard to lift his arm over past his shoulder, and he needs to take medication every day. The appellant argued that, due to lack of movement and pain, he cannot work and it is hard to get a good sleep. In his Request for Reconsideration, the appellant added that he also had an injury to the index finger of his right hand, which will take about 3 months to recover and makes it even harder to get along in daily living.

The ministry's position is that there is insufficient evidence to establish that the appellant has a severe physical impairment. The ministry noted in the reconsideration decision that the general practitioner indicated that the appellant completes the majority of his mobility and functional skills independently and reiterates multiple times that the appellant needs to retire, is unable to retrain and can no longer work. The ministry argued that the appellant's inability to work is portrayed as the main reason for the PWD application but the application is not intended to assess employability. The ministry argued

that the limitations to walking, driving and standing due to recovery from surgery on the appellant's right foot, which the appellant stated will take at least 3 months to heal, does not meet the duration criteria of more than 2 years as set out in the EAPWDA.

Panel Decision

A diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a severe impairment. A "severe 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 the ministry 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 the ability to perform DLA is restricted. In making its determination the ministry must consider all of 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 general practitioner.

In the PR, the general practitioner, who has known the appellant for a few months, diagnosed arthritis in his feet, right shoulder, neck, and right knee, with an onset of approximately 2007. The general practitioner wrote that the appellant is "limited due to arthritic pain" and that the appellant got stiff joints starting in 2007, it is getting worse with time and he is "not able to work; last worked a few months, too painful." In the additional comments to the PR, the general practitioner again wrote that the appellant is "not able to work into the future... not trained for a non-physical job; needs to retire now- too late to retrain." In the AR the general practitioner also wrote that the appellant is not able to work and not able to retrain, he is "disabled with pain and stiffness," and he worked in physical jobs all his life. In his self-report, the appellant wrote that due to lack of movement and pain, he cannot work. The appellant also wrote In his Notice of Appeal that his health is getting worse and he had to stop work in the spring of this year because of the arthritis in his neck, shoulder, foot and knees. While all of this evidence centers on searching for work and/or working, the panel finds that employability is not a criterion in section 2(2) of the EAPWDA nor is it listed among the prescribed daily living activities in section 2 of the EAPWDR and, therefore, the ministry was reasonable in concluding that the appellant's restrictions in employment do not confirm a severe impairment under the legislation.

In terms of functional skills, the general practitioner reported in the PR that the appellant can walk 2 to 4 blocks unaided, climb 5 or more steps unaided, lift 15 to 35 lbs. with a note: "or more", and remain seated for less than 1 hour. In the AR, the appellant is assessed by the general practitioner as being independent with walking indoors, standing for "1/2 hour", and lifting and carrying and holding "50 lbs." The general practitioner indicated that the appellant uses an assistive device, which he does not identify, and the appellant takes significantly longer than typical with climbing stairs "with limping." The appellant also takes significantly longer than typical with walking outdoors "3 to 4 blocks." In the PR the general practitioner reported that the appellant does not require any prosthesis or aid for his impairment, with a note added: "not yet; [operation] booked May 2015." In his Request for Reconsideration Reasons, the appellant wrote that he had surgery on his right foot in July 2015, which left him incapable of walking, driving, and standing [unaided]. The appellant wrote that healing will take at least 3 months, he has a cane to aid him in walking, and complete recovery will take about a year. The appellant wrote that he also injured the index finger of his right hand which makes it even harder to get along in daily living and it will take about 3 months to recover.

While the appellant's surgery and injury resulted in further restrictions to the appellant's mobility and physical abilities, the limitations have not been defined in any further assessment by the general practitioner and the panel finds that the ministry reasonably determined that there is insufficient evidence to show that these further restrictions are of more than a temporary duration of approximately 3 months while the appellant heals from his surgery. Although the appellant wrote in his Notice of appeal that the panel is "free to consult with his doctors" and he provided a business card for his orthopedic surgeon, the panel is only able to consider the information provided to it on the appeal and cannot make further investigations on behalf of the appellant. Also, as discussed in more detail in these reasons for decision under the heading "Restrictions in the Ability to Perform DLA", the limitations to the appellant's physical functioning have not directly and significantly restricted his ability to perform his DLA either continuously or for extended periods, as required by the EAPWDA.

Given the emphasis by both the general practitioner and the appellant on the appellant's inability to work, the assessment by the medical professional of the appellant's largely independent mobility and physical ability, and the temporary nature of further restrictions due to his foot surgery, 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 did not advance 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 as required by Section 2(2) of the EAPWDA.

Panel Decision

The general practitioner did not diagnose the appellant with a mental health condition and, in the PR and AR, the general practitioner reported that the appellant has no significant deficits with cognitive and emotional or social functioning or the DLA involving mental abilities. The general practitioner further indicated that the appellant has no difficulty with communication.

Given the absence of a mental health diagnosis and the assessment by the general practitioner of no impacts to the appellant's cognitive, emotional and social functioning or the DLA involving mental abilities, 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 impairments directly and significantly restrict his ability to perform DLA on an ongoing basis to the point that he requires the significant assistance of an assistive device, specifically a cane.

The ministry's position is that the information from the prescribed professional does not establish that the appellant's impairments significantly restrict his DLA either continuously or periodically for extended periods of time. The ministry noted in the reconsideration decision that the general practitioner indicated that the appellant can complete the majority of his DLA independently and for those tasks for which the appellant requires periodic assistance, there is no description of the type of periodic assistance required or the frequency.

Panel Decision

Section 2(2)(b) of the EAPWDA requires that the ministry be satisfied that a prescribed professional has provided 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, the 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 general practitioner reported that the appellant has not been prescribed medications that interfere with his ability to perform DLA. The general practitioner reported in the AR that the appellant is independent with moving about indoors and outdoors, taking significantly longer than typical with walking outdoors within the range of 3 to 4 blocks unaided, which the panel notes is at the higher end of the mobility range.

The general practitioner reported that the appellant is independent with all of the listed tasks of the DLA personal care, with the comment "slower" for grooming and bed/chair transfers but without an assessment of how much longer the appellant takes in performing these tasks. The appellant is assessed as independent with all of the listed tasks of the DLA meals, with an indication that periodic assistance is required with cooking but no note to indicate the extent of assistance required or how often he needs help. The appellant is also assessed by the general practitioner as independent with all of the listed tasks of the DLA pay rent and bills, and the DLA medications. The appellant is independent with some tasks of the DLA shopping (reading prices and labels, making appropriate choices and paying for purchases), and requires continuous assistance with the physical tasks of going to and from stores and carrying purchases home, with the comment by the general practitioner "drives OK." Given this ambiguous note by the general practitioner, the nature of the need for continuous assistance is unclear since the appellant has been assessed as capable of walking 3 to 4 blocks unaided and lifting and carrying and holding up to 50 lbs. of weight. The general practitioner reported that the appellant requires periodic assistance with the DLA housekeeping and with one task of the DLA transportation but, again, does not provide a description or explanation to define the extent of the need for periodic assistance. The panel finds that the ministry reasonably determined that there is insufficient information to allow the ministry to conclude that the periodic assistance is required for an extended period of time.

The appellant wrote in his self-report that, due to lack of movement and pain, he cannot work. In his Request for Reconsideration, he wrote that he had to pay for his home care because he could not do his own cooking, cleaning and driving. In his Notice of Appeal, the appellant wrote that his health is getting worse: his right arm is worse and he cannot lift his right arm over his shoulder, he has a hard time walking and standing because of his foot swelling and pain, and he needs help to bathe, cook and drive to the doctor and shopping and such. The appellant provided a receipt dated July 20, 2015 for home care, transportation and "cook, cleaning, laundry, shopping, etc."; however, he also wrote that his daily pain is worse after his foot surgery in July 2015 and that he is expected to recover in about 3 months, or by October 2015. As previously mentioned, the panel finds that employability is not listed among the prescribed DLA in section 2 of the EAPWDR, and the ministry reasonably determined that there is insufficient evidence to show that the restrictions as a result of the appellant's foot surgery are of more than a temporary duration.

Considering the evidence of the general practitioner as the prescribed professional, his emphasis on the appellant's inability to work which is not a criterion for PWD designation, and the assessment that most of the tasks of DLA are performed independently by the appellant or require undefined assistance of unspecified duration, the panel finds that the ministry was reasonable to conclude that the evidence is insufficient to show that the appellant's overall ability to perform his DLA is significantly restricted either continuously or periodically for extended periods, pursuant to Section 2(2)(b)(i) of the EAPWDA.

Help to perform DLA

The appellant's position is that his physical impairment significantly restricts his daily living functions to a severe enough extent that significant assistance is required from home care services and the use of a cane as an assistive device.

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 panel finds that the evidence of the appellant's general practitioner as the prescribed professional is that no assistance is currently provided and that the appellant has become homeless and he "has a tent; lives in car too." Although the appellant indicated in his Notice of Appeal that his right hip is painful and he needs a cane to go to the bathroom, in the section of the AR for identifying assistance provided through the use of assistive devices, the general practitioner did not identify any of the listed items as being applicable to the appellant, including a cane or any other mobility devices.

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 pursuant to Section 2(2) of the EAPWDA was reasonably supported by the evidence, and therefore confirms the decision.