

### **PART C – DECISION UNDER APPEAL**

The decision under appeal is the Ministry of Social Development and Poverty Reduction's ("ministry") reconsideration decision dated June 26, 2018, in which the ministry found that the appellant is not eligible for designation as a Person with Disabilities ("PWD") under section 2 of the *Employment and Assistance for Persons with Disabilities Act* ("EAPWDA"). The ministry found that the appellant meets the age and duration requirements but was not satisfied that:

- the appellant has a severe mental or physical impairment;
- 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 restrictions caused by the impairment, the appellant requires an assistive device, the significant help or supervision of another person, 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 and documentation before the minister at the reconsideration consisted of:

1. Information from the ministry's Record of Decision that indicated the PWD application was received on March 12, 2018 and denied on April 17, 2018. The appellant submitted a Request for Reconsideration ("RFR") on June 15, 2018 and the ministry reviewed it on June 26, 2018.

2. An RFR signed by the appellant on June 15, 2018 with attached letters from medical professionals:

- June 12, 2018: letter from the appellant's General Practitioner ("GP") summarizing the appellant's medical conditions: severe injury to his right forearm, subsequent heart disease, and depression, with the inability to work as a result of his impairments. The GP indicates the appellant is right handed and has limited ability to use that hand. The GP describes restrictions with DLA; in particular, the appellant has "some trouble" with meal preparation and personal hygiene, and has difficulty with housecleaning and grocery shopping. The GP indicates the appellant has "very poor reading skills", and is unable to write or type effectively because of the damage to his right arm. The appellant also has trouble sleeping and socializing (unable to sustain relationships) and he has become more withdrawn, anxious and depressed as a result of his situation.
- May 18, 2018 letter from the appellant's social worker ("RSW") stating that the appellant is severely restricted in his DLA. The RSW states that the appellant has restrictions with walking: "gets very dizzy due to his heart disease...he reports being able to walk a maximum of half a block before he has to stop." The appellant is also "unable to carry or lift anything with his right hand, not even his toothbrush" and he is "unable to fold laundry, carry groceries or put on clothes with that hand" and driving is also "a serious challenge." The RSW states that the appellant experiences post-traumatic stress ("PTSD") due to his injury which causes him to sob constantly and retreat from "any and all social contact. He has no relationships with friends or family." The RSW indicates the appellant has sleep and memory problems that are partly due to side effects from his heart medication. The appellant requires a "glove" for his right hand but cannot afford the cost.

3. The appellant's PWD application comprised of:

- his self-report ("SR") dated November 5, 2017; and
- a Medical Report ("MR") and Assessor Report ("AR") dated November 20, 2017 and completed by the GP who has known the appellant for 2 years and has seen him 11 or more times in the past 12 months. The GP based the assessment on an office interview with the appellant and numerous chart notes and consult reports.

*Summary of relevant evidence from the application:*

### *Diagnoses*

In the MR, the GP indicates: traumatic severing of muscles/tendons in right forearm (workplace accident), weakness/paralysis of right hand/forearm, Ischemic heart disease, Depression, and Hepatitis C. The appellant had several surgeries for his right arm injury but has never regained full function. The appellant is permanently disabled according to his Workers' Compensation assessment ("WCB") and went into a depression following his accident.

### *Functional skills*

In the SR, the appellant states that losing the use of his right hand causes him daily pain and frustration. He suffers from PTSD, grief, and depression related to the trauma from his accident and the loss of his job and ability to take care of his self. The appellant reports nervous reactions to loud noise as well as severe reactions "which kick in fight or flight". The appellant states that his depression causes him to not want to leave the house and he feels very self-conscious when he does go out.

In the MR, the GP indicates the appellant can walk 4+ blocks unaided on a flat surface; climb 5+ steps unaided; lift 5 to 15 pounds; and has no limitations with remaining seated. The appellant has no difficulties with communication. The appellant has significant deficits in one area of cognitive and emotional function: Emotional disturbance - depression/anxiety [comment: "some PTSD since his accident. Poor self-image since loss of ability to work"].

In the AR, the appellant's Ability to Communicate is good in all areas (speaking, reading, writing, and hearing) [comment: "reads at Grade 5 level"]. Regarding Mobility and Physical Ability, the appellant is independent with Walking indoors, Walking outdoors, and Standing. The appellant takes significantly longer than typical when Climbing stairs [comment: "gets tired, stops mid-way"]. For Lifting, and Carrying/holding, the GP wrote, "very limited...Poor grip strength."

Regarding impacts to Cognitive and Emotional Functioning, the GP reports that the appellant's mental impairment restricts or impacts his functioning as follows:

- No impact in the areas of Consciousness, Insight and judgment, Executive, Language, Psychotic symptoms, and Other neuro-psychological problems;
- Minimal impact for Bodily functions, Impulse control, Attention/concentration, Memory, Motivation, Motor activity, and Other emotional or mental problems;
- Moderate impact: (no areas indicated); and
- Major impact for Emotion.

Under Comments, the GP wrote, "forgets appointments, omits paperwork/procrastinates. Does have anger issues."

### *DLA*

In the SR, the appellant states that "menial housework and personal maintenance have become very painful and hard for me to do." Not being able to do daily activities has contributed to his "mental dilapidation" as well. The appellant states that he loses the ability to control his emotions "which makes it very difficult to have any sort of new relations with people." The appellant reports that his heart medications have side effects such as dizziness and nausea.

In the MR, the GP indicates the appellant has not been prescribed any medications or treatments that interfere with his ability to perform DLA.

In the AR, the GP provides the following information for DLA:

- The appellant is independent with 7 of the 8 areas indicated for Personal Care: Grooming, Bathing [comment: "trouble brushing teeth"], Toileting, Feeding self [comment: "needs electric can opener, scissors"], Regulating diet, Transfers in/out of bed, and Transfers on/off chair. For the activity of Dressing, the GP wrote, "can't work buttons, laces."
- The appellant is independent with one area of Basic Housekeeping: Laundry [comment: "has to do small loads"]. For the activity of Basic Housekeeping, the appellant requires periodic assistance from another person [comment: "can't vacuum, or sweep"].
- The appellant is independent with 4 of the 5 areas for Shopping: Going to and from stores, Reading prices and labels, Making appropriate choices, and Paying for purchases. For Carrying purchases home, the appellant requires periodic assistance from another person [comment: "difficulty managing grocery bag"].
- The appellant is independent with 2 of the 4 areas for Meals: Meal planning, and Safe storage of food. The appellant uses an assistive device for Food preparation and Cooking [comments: "weak grip, drops things...needs handles, can't hold a cup"].
- The appellant is independent with all areas of Pay Rent and Bills: Banking, Budgeting, and Pay rent and bills; and with all areas of Medications: Filling/refilling prescriptions, Taking as directed, and Safe handling and storage.
- The appellant is independent with all areas of Transportation: Getting in and out of a vehicle [comment: "right arm pain and weak"], Using public transit, and Using transit schedules/arranging transportation.
- The appellant is independent with all areas of Social Functioning: Appropriate social decisions, Able to develop and maintain relationships, Able to deal appropriately with unexpected demands, and Able to secure assistance from others. The GP indicates the appellant has marginal functioning with his immediate social network, and good functioning with his extended social networks.

### *Need for help*

In the AR, the GP indicates the appellant lives alone and friends assist him with DLA. The GP provided no additional comments regarding the type and amount of assistance required, identification of any safety issues, or description of the support/ supervision required which would help maintain the appellant in the community. The GP provided no information on the use of assistive devices (section D). The GP check marked *No*, the appellant does not have an assistance animal.

4. A letter from a surgeon dated June 15, 2016, providing follow-up to the GP regarding surgery on the appellant's right hand. The surgeon states that the appellant will be left with "some disability in that hand" including the inability to make a full fist and he may not be able to do all activities with that hand.

5. A letter from a cardiologist dated August 18, 2016, indicating the appellant reported “exertional dyspnea” after walking 3 - 4 blocks.

6. A copy of a Permanent Functional Impairment Evaluation (“functional evaluation”) dated September 2, 2016 and completed by a General Practitioner for the appellant’s WCB claim. The appellant’s chief complaints include PTSD symptoms and the inability to lift boxes, manipulate light objects, and open food containers. The appellant experiences constant right wrist and hand pain and he is not using a splint. The appellant’s sleep is frequently disrupted due to pain and although he acknowledges he is independent in self-care activities, these are more time-consuming. The evaluation states that the appellant “can manage buttons and zippers...he is unable to cook, make the bed, sweep the floor, clean the house, wash dishes, grocery shop...He has driven since the injury and states that he does so primarily with use of his left hand.” The appellant’s right hand issues include loss of strength and restricted range of motion in his right forearm, wrist, thumb, and fingers.

7. The ministry’s Denial Decision Summary and accompanying letter dated April 17, 2018.

*Additional information*

With the consent of both parties, the appeal proceeded as a written hearing pursuant to section 22(3)(b) of the Employment and Assistance Act (EAA). Subsequent to the reconsideration decision neither party filed any new evidence requiring an admissibility determination in accordance with section 22(4) of the EAA. The appellant filed a Notice of Appeal with hand-written submission which the panel accepts as argument. In an email to the Tribunal, the ministry indicates it will rely on the reconsideration summary.

## PART F – REASONS FOR PANEL DECISION

The issue on appeal is whether the ministry's decision to deny the appellant PWD designation is reasonably supported by the evidence or a reasonable application of the legislation in the circumstances of the appellant. In particular, was the ministry reasonable in finding that the following criteria in section 2 of the EAPWDA were not met?

- the appellant has a severe mental or physical 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 restrictions caused by the impairment, the appellant requires an assistive device, the significant help or supervision of another person, or the services of an assistance animal to perform DLA.

The ministry based its reconsideration decision on the following legislation:

### EAPWDA

**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 is in a prescribed class of persons or that the person has a severe mental or physical impairment that

**(a)** in the opinion of a medical practitioner or nurse 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).

### EAPWDR

#### 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.

## ***Analysis and panel's decision***

### *Severe mental or physical impairment*

To be eligible for the PWD designation, the legislation requires several criteria to be met including the minister being satisfied that the applicant has a severe mental or physical impairment. While "severe" is not defined in the legislation, section 2(2) of the EAPWDA authorizes the ministry to determine whether a severe impairment is established on the evidence as a whole. The diagnosis of a severe medical condition does not in itself establish a severe impairment of mental or physical functioning. To assess the severity of the impairment, the ministry must consider the extent of its impact on daily functioning as evidenced by limitations/restrictions in mental or physical functions, DLA, and whether significant help is required to manage DLA.

### *Mental impairment*

The ministry argues that the information from the GP and the RSW does not establish a severe impairment of mental functioning. The ministry notes that despite the appellant's depression and PTSD since his accident, the GP (in the MR) does not indicate whether the appellant has significant deficits with cognitive and emotional function (section D, item 6) but indicates deficits due to Emotional Disturbance, stating that the appellant has "some PTSD" and a poor self-image due to his inability to work.

Regarding the GP's information in the AR, the ministry argues that the cumulative impacts to cognitive and emotional functioning (section B, item 4) are not considered a severe impairment of mental functioning. A major impact is indicated for only one area of cognitive/emotional functioning while minimal or no impacts are indicated for the remaining 13 areas listed on the form. Regarding Social Functioning, the GP indicates that despite having marginal functioning with his immediate social network, the appellant has good functioning with his extended networks and is independent with all listed areas of Social Functioning in the AR (section C). There is no indication that he needs support/supervision to be maintained in the community or has any safety issues with regard to social functioning. The appellant stated in the SR that he has difficulty controlling his emotions which makes it difficult to form new relationships but in the AR the appellant is able to develop and maintain relationships and interact appropriately with others without assistance. The GP indicates the appellant has good communication skills.

Regarding the letters provided for the reconsideration, the ministry acknowledges that a greater degree of cognitive/emotional restriction was described by the GP and RSW: "trouble socializing...more withdrawn, anxious and depressed...unable to sustain relationships...no relationships with friends or family", as well as sleep and memory problems. But the ministry argues that the GP does not describe a worsening of the appellant's mental or social functioning since the completion of the PWD application. As noted, the appellant was described as independent with his social functioning in the original application and the GP indicated that his conditions had only a minimal impact on his memory.

While the GP indicates the appellant's mental impairments are likely to continue for 2 years or more, there is insufficient evidence to confirm that his PTSD and depression have gotten any worse or significantly impact his cognitive, emotional, and social functioning. The evidence as a whole indicates the appellant has some emotional disturbance due to PTSD and depression, but he is not restricted with most areas of cognitive, emotional, and social functioning and the inconsistencies between the information provided for the reconsideration and the original PWD application are not explained with evidence of a worsening state of mind. The panel finds that the ministry's determination that the appellant does not have a severe mental impairment was reasonably supported by the evidence. The panel finds that the ministry reasonably concluded that the information provided does not establish a severe mental impairment under section 2(2) of the EAPWDA.

### *Physical impairment*

The ministry notes the appellant's limitations with his right hand but argues that limitations in the use of his left hand are not described and although he is right-handed he should be able to use his left hand for activities not requiring fine motor skills. The GP was not specifically asked to describe the appellant's ability to use his non-dominant hand but the information in the Functional Evaluation indicates the appellant has driven a vehicle since his injury, primarily with the use of his left hand.

Regarding the appellant's physical functions, the information in the MR indicates a less severe level of restriction for most of the areas listed. The appellant is able to walk 4+ blocks and climb 5+ steps unaided and he has no limitations with remaining seated. Similarly, in the AR, the appellant is independent with Walking indoors, Walking outdoors, and Standing. The ministry argues that these assessments are not indicative of a severe impairment of physical functioning.

The letter from the cardiologist indicates the appellant could walk 3 - 4 blocks before developing exertional symptoms but the more recent letter from the RSW states that the appellant gets very dizzy while walking (due to his heart condition) and he reports being able to walk only half a block before he has to stop. The most recent information from the GP (June 12, 2018 letter) does not provide an update on the appellant's ability to walk.

With respect to lifting, the appellant is assessed as able to lift 5 -15 pounds (MR) but in the AR, his ability to lift (as well as his ability to carry and hold items) is described as "very limited" due to the problems with his right hand: "poor grip strength...severe muscle and nerve damage." The Functional Evaluation and the letters from the GP and RSW at reconsideration also highlight the appellant's restrictions with his right hand including significant pain. The RSW indicates the appellant is "unable to carry or lift anything in his right hand, not even his tooth brush." The ministry argues the GP does not describe a worsening of the appellant's abilities in the areas of walking or lifting to explain the greater degree of restriction described by the RSW.

With respect to climbing stairs, the appellant takes significantly longer than typical ("gets tired, stops mid-way") but there is no indication he cannot navigate stairs independently. The ministry noted as well that there is no information on how much longer it takes the appellant to climb stairs. While information on the frequency and duration of restrictions is not a legislative requirement, it assists the ministry to form a clearer picture of the severity of the restriction.

The panel finds that the ministry reasonably determined that the information provided does not establish a severe impairment of physical functioning. The GP's evidence indicates the appellant does not have significant restrictions with Walking, Climbing stairs, Standing, Lifting, and Carrying/holding despite his heart condition and right-hand limitations. As the ministry noted, the greater degree of restriction with Walking and Lifting, reported at the reconsideration, was not explained by evidence of a worsening condition. Based on the information in its entirety, the panel finds that the ministry reasonably determined a severe physical impairment under section 2(2) of the EAPWDA was not established.

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

Subsection 2(2)(b)(i) of the EAPWDA requires the ministry to be satisfied that, in the opinion of a prescribed professional, a severe impairment directly and significantly restricts a person's ability to perform DLA either continuously, or periodically for extended periods. In this case, the prescribed professionals are the GP that filled out the forms and the medical specialists, social worker, and consultant GP who provided letters/reports about the appellant's restrictions. The term "directly" means there must be a causal link between the severe impairment and the restriction to DLA. The direct restriction must also be significant.

Finally, there is a component related to time or duration - the direct and significant restriction may be either continuous or periodic. If periodic, the restriction must be for extended periods. Inherently, any analysis of periodic restrictions must also include consideration of how frequently the activity is restricted. All other things being equal, a restriction that arises once a year is less likely to be significant than one that occurs several times a week. Accordingly, in circumstances where the evidence indicates that a restriction arises periodically, it is appropriate for the ministry to require evidence of the duration and frequency of the restriction in order to be satisfied that this criterion is met.

DLA are defined in section 2(1) of the EAPWDR and are also listed in the MR, with additional details in the AR. Therefore, a medical practitioner completing these forms has the opportunity to indicate which, if any, DLA are significantly restricted by the appellant's impairments either continuously or periodically for extended periods and to provide additional narrative. DLA, as defined in the legislation, does not include the ability to work or to perform specific vocational tasks. While the RSW argues that approval of the appellant's WCB claim is evidence of significant restrictions to DLA, the panel notes that WCB is a separate program with its own legislative requirements that do not determine PWD eligibility under the EAPWDA.

The appellant argues that his ability to perform DLA has changed since his cardiac events and his DLA are severely restricted by his disability. The appellant refers to specific DLA in the SR, indicating that "menial housework and personal maintenance have become very painful and hard for me to do" and it is "very difficult to have any sort of new relations with people" due to PTSD and depression which make it difficult for the appellant to control his emotions and to even leave the house.

The ministry argues there is not enough evidence to confirm significant restrictions to DLA, noting that the GP assessed the appellant as independent with most DLA and he requires periodic assistance or an assistive device for only a few tasks: Basic Housekeeping, Carrying purchases home, Food preparation, and Cooking. The GP does not describe the frequency or duration of the periodic assistance required and the only information he provided for an assistive device is “handles” for Food preparation and Cooking. While the appellant and the RSW report side effects from the appellant’s heart medication (dizziness, in particular) the GP indicates the appellant is not prescribed any medications that interfere with his ability to perform DLA.

The ministry notes inconsistencies in the evidence between the various reports/letters. For example, in the AR the appellant is restricted with Personal Care - Dressing (“can’t work buttons, laces”) and he has “trouble brushing teeth”, but in the letter from the RSW the appellant is unable to lift a toothbrush. In the Functional Evaluation, the appellant is independent in self-care activities (“he can manage buttons and zippers”) but he needs to do activities slowly and pace himself. The ministry argues there was no information from the GP indicating the appellant’s physical functioning has worsened since the PWD application was completed and based on the information provided, it is difficult to establish “why you cannot perform one-handed activities with your left hand in cases where these activities do not require a high degree of fine motor skills (e.g., brushing teeth).”

In the AR, the appellant needs periodic assistance with Basic housekeeping and Carrying purchases home and he needs “handles” while cooking due to his weak grip, but in the Functional Evaluation, the appellant is assessed as unable to cook, clean the house, or grocery shop. The panel notes that the AR is a more recent assessment (November 20, 2017) while the Functional Evaluation was completed in September 2016.

The panel finds that the ministry reasonably concluded the information from prescribed professionals was insufficient to establish that the appellant’s DLA are directly and significantly restricted either continuously, or periodically for extended periods as required by the legislation. The information in the AR indicates the appellant is independent with most DLA and inconsistencies in the evidence are not adequately explained. The panel finds that the ministry’s conclusion was reasonably supported by the evidence and the ministry reasonably determined the criteria in section 2(2)(b)(i) of the EAPWDA were not met.

#### *Help to perform DLA*

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 DLA.

Despite the letters from the GP and RSW that indicate the appellant is socially isolated, the GP notes in the AR that the appellant’s friends assist him with DLA and he does not require any supervision/support to be maintained in the community. The appellant requires “handles” for Food preparation and Cooking (AR) as well as a “glove” that he cannot afford the cost of (RSW’s letter) but there is no detailed information on the need for any assistive devices 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 notes that neither the MR nor the AR indicates that the appellant has any aids for his impairments. Under the legislation, confirmation of direct and significant restrictions to DLA is a precondition for needing help to perform DLA. As the panel found that the ministry reasonably determined that significant restrictions to DLA were not established by the information provided, the panel also finds that the ministry reasonably concluded it cannot be determined that the appellant requires help to perform DLA as required by EAPWDA section 2(2)(b)(ii).

#### *Conclusion*

The panel finds that the ministry’s reconsideration decision, which determined the appellant was not eligible for PWD designation, is reasonably supported by the evidence and is a reasonable application of the legislation. The panel confirms the decision and the appellant is not successful on appeal.



**PART G – ORDER**

THE PANEL DECISION IS: (Check one)       UNANIMOUS       BY MAJORITY

THE PANEL       CONFIRMS THE MINISTRY DECISION       RESCINDS THE MINISTRY DECISION

If the ministry decision is rescinded, is the panel decision referred back to the Minister for a decision as to amount?       Yes       No

**LEGISLATIVE AUTHORITY FOR THE DECISION:**

*Employment and Assistance Act*

Section 24(1)(a)  or Section 24(1)(b)

and

Section 24(2)(a)  or Section 24(2)(b)

**PART H – SIGNATURES**

PRINT NAME

Margaret Koren

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2018-09-06

PRINT NAME

Carla Tibbo

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2018-09-06

PRINT NAME

Robert McDowell

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2018-09-06