

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (“the ministry”) reconsideration decision dated January 21, 2019 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 established that:

- the appellant has a severe impairment;
- the appellant's 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

Evidence before the Ministry at Reconsideration

The evidence before the ministry at the time of the reconsideration decision included:

- the appellant's PWD Application comprised of the appellant's undated self report ("SR"), a medical report ("MR") and an assessor report (AR) both dated September 26, 2018 and both completed by the appellant's family physician ("the GP"), who has known the appellant for 5 years and who has seen the appellant 2 to 10 times in the past 12 months;
- Request for Reconsideration submitted to the ministry on December 18, 2018;
- amended Request for Reconsideration submitted to the ministry on January 17, 2019 to which was appended a letter from the appellant's social worker ("the SW"), summarized as follows:
 - appellant's orthopedic surgeon determined that the appellant suffers from arthritis in both shoulders, primarily the left;
 - the fingers and thumb of the appellant's right hand are at least ½ inch shorter than the left and in particular the right middle finger is 1 ½ inches shorter than the left;
 - since 2008 the appellant has experienced pain in his left leg and ankle, for which he wears a brace;
 - the appellant is seeing a pain management specialist;
 - the GP did not interview the appellant before completing the MR and AR;
 - the appellant must stop in the midst of performing DLA due to the pain he experiences;
 - his ability to perform DLA is unpredictable;
 - he experiences dramatic limited range of motion in right wrist and cannot bend the wrist or grip objects with his hand, which significantly limits his ability to cook and houseclean;
 - he is limited to lifting a maximum of 15 pounds and receives assistance from friends for activities involving lifting. When friends are unavailable his needs cannot be met;
- Diagnostic Imaging Report dated October 26, 2017 authored by radiologist Dr. W, indicating that the appellant has a chronic rotator cuff tear in his left shoulder;
- Diagnostic Imaging Report dated October 31, 2017 authored by radiologist Dr. O, providing additional information related to the left shoulder rotator cuff tear: "*complete, full thickness tears of the supraspinous and infraspinatus tendons with marked muscular atrophy and tendon retraction*";
- ministry's PWD Designation Summary dated November 16, 2018;

PWD Application

Diagnoses

In the MR the GP notes that the appellant suffers from rotator cuff tendonitis, shorter 3rd finger on right hand, limited range of motion in right wrist – old carpal fracture.

Physical Impairment

In his SR the appellant reported that his:

- thumb and first 2 fingers on his right hand are unable to grasp or hold;
- right wrist is barely functional due to previously broken bones;
- right arm is 1 inch shorter than the left and the bicep muscle is torn;
- left wrist has separated bones;
- left shoulder has a destroyed rotator cuff, tears in the tendons and arthritis, causing frequent neck pain;
- left ankle seizes up due to torn tendon.

In Section B-2 of the SR the appellant reported that due to the above-described injuries he has trouble doing tasks

such as cooking, doing dishes, cleaning, bed-making, vacuuming, dusting, washing walls, opening bottles, washing his hair, shaving, getting in and out of the bathtub and driving long distances.

In the MR the GP reported that the appellant suffers from several musculoskeletal problems and is followed by an orthopedic surgeon who has declined to do surgery because the appellant manages quite well. The GP also noted that the appellant has multiple other arthropathies (joint diseases) due to injuries and age decline, and added: *“with regards to DLA – as defined by this document – he is able to perform all these”*.

The GP assessed the appellants functional skills as:

- able to walk 4+ blocks on a flat surface unaided;
- able to climb 5+ steps unaided;
- able to lift 2-7 kg (5-15 pounds);
- able to sit without limitation;
- having no communication difficulties;
- having no significant deficits to cognitive and emotional function.

In Section B-1 of the AR the GP described the appellant’s impairments as *“musculoskeletal”* and indicated that the appellant had good communication ability and was independent in all areas of mobility and physical ability.

Mental Impairment

No mental condition was noted in the MR. At Section B-4 of the AR the GP wrote *“N/A”* (not applicable).

Daily Living Activities (DLA)

In his SR the appellant reported that he has trouble completing DLA due to his injured right hand and wrist, torn shoulder rotator cuff, arthritis and injured ankle.

In the MR the GP indicated that the applicant has not been prescribed any medication or treatment that interferes with his ability to perform DLA. At Section E the GP reported that the appellant’s impairment does not directly restrict his ability to perform DLA.

In the AR the GP indicated that the appellant is independent in all areas of DLA and social functioning.

Assistance Required

The GP did not indicate that the appellant requires an assistive device or the significant help or supervision of another person to perform DLA.

Additional Information at the Hearing

At the hearing the appellant provided the following oral evidence:

- the GP did not go over the PWD application with him;
- the GP will probably diagnose him with chronic obstructive pulmonary disease (*“COPD”*);
- he can walk only 2 blocks before taking a break, but hasn’t done much walking since he lost his job in 2017;
- his arthritis causes him a lot of pain;
- he has worn a right wrist brace since he was 18 years old, and now wears braces on both wrists every day. The GP knows the appellant uses a wrist brace because he ordered the left wrist brace in 2013;
- he uses an ankle brace when he is out walking, to prevent his ankle from kicking out;

- he can no longer wear boots due to his ankle problem;
- in 2018 the orthopedic surgeon advised that he had to limit his lifting to 15 pounds;
- he has been on medical employment assistance (EI) since he had to leave his job. The EI runs out in approximately 4 weeks;
- he uses a truck with automatic transmission.

Oral Evidence of the SW

The SW testified that she interviewed the appellant 3 times over a 2 week period before submitting her assessment. Each interview lasted at least an hour.

Admissibility of Additional Information

The ministry did not object to the admissibility of the SW's oral evidence or to the oral evidence of the appellant other than the evidence suggesting the presence of COPD.

The panel admitted all of the SW and appellant's information under EAA Section 22 (4)(b) as evidence in support of the information that was before the ministry at reconsideration, except the appellant's statement that he believed his GP would discover that he has COPD. Respiratory problems constitute new information that was not referenced at any time prior to the hearing by the appellant, the SW or the GP.

PART F – REASONS FOR PANEL DECISION

The issue in this appeal is whether the ministry reasonably determined that the appellant was ineligible for designation as a PWD. The ministry determined that the appellant did not meet all of the required criteria for PWD designation set out in the *Employment and Assistance for Persons with Disabilities Act*, Section 2. Specifically, the ministry determined that the information provided did not establish that:

- the appellant has a severe impairment;
- the appellant's 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.

Relevant 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.

EAPWDR:

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 argues that he suffers a severe physical impairment arising from several musculoskeletal conditions.

The ministry's position is that the information provided by the appellant, the SW and the GP related to the appellant's functional skills are not indicative of a severe physical impairment.

Panel Decision

A diagnosis of a serious medical condition does not in itself determine PWD eligibility. Under the legislation, eligibility for PWD hinges on an "impairment" and its severity. "Impairment" is more than a diagnosed medical condition. An impairment is a medical condition that results in restrictions to a person's ability to function independently, appropriately, effectively or for a reasonable duration.

To assess the severity of 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 the ability to perform DLA is restricted. The legislation makes it clear that the determination of severity is at the discretion of the minister, taking into account all of the evidence, including the evidence of the appellant. However, the legislation is also clear that the fundamental basis for the analysis is the evidence from a medical practitioner or a "prescribed professional" – in this case, the GP, the SW and radiologists Drs. W and O. The legislation requires that for PWD designation, the minister must be satisfied that the person has a severe mental or physical impairment.

The GP unequivocally expressed his opinion that the appellant does not suffer from a severe physical impairment. He notes that the appellant's functional skills and mobility are not impaired other than a lifting limit of 15 pounds. He also comments that the appellant is able to perform all DLA.

In the reconsideration decision the reconsideration officer determined that the information provided by the SW

was problematic because she did not provide any information regarding how long she has known the appellant and whether she has completed an assessment. Section 2 of the EAPWDA and Section 2 of the EAPWDR do not require a prescribed professional to provide this information unless he or she is the prescribed professional who completes the MR and/or the AR in the PWD application. The SW conducted three one-hour interviews with the appellant prior to submitting her information. The GP completed the MR and AR in the absence of the appellant and based his assessments on his 5 year clinical relationship with the appellant.

The panel considered the evidence submitted by the SW, which details the chronic neck, shoulder, leg and ankle pain experienced by the appellant. The pain is significant enough to have caused the patient to see a pain management specialist, and the injuries to the right wrist make it difficult for the appellant to grasp objects, cook and houseclean. However, the information provided by the SW regarding the limits to physical functioning and mobility describes a person whose functional ability and mobility are moderately impaired.

The diagnostic imaging reports submitted with the SW's assessment corroborate the evidence of the appellant and the GP that the appellant has a complete rotator cuff tear with marked muscular atrophy and tendon retraction. While both of the diagnostic imaging reports are descriptive of the appellant's injuries neither report provides comments as to the effect of these injuries upon the appellant's functional ability. As a result they are of limited assistance in determining the degree of severity of impairment experienced by the appellant.

The panel therefore finds that the ministry reasonably determined that the combined information provided by the appellant, the GP, the SW and radiologists Drs. W and O do not establish that the appellant suffers from a severe physical impairment.

Severe Mental Impairment

Panel Decision

No information related to a mental impairment was submitted. The panel finds that the ministry reasonably determined that the information does not establish that the appellant has a severe mental impairment.

Restrictions in Ability to Perform DLA

The appellant argues that his ability to perform DLA is significantly restricted as a result of his severe physical impairment.

The ministry's position is that a severe impairment has not been established that directly and significantly restricts the appellant's ability to perform DLA, and that the information submitted by the prescribed professionals is not sufficient to establish that the appellant's DLA are directly and significantly restricted either continuously or for extended periods.

Panel Decision

The legislative requirement respecting DLA set out in section 2(2)(b) of the EAPWDA is that the minister be satisfied that as a result of a severe physical or mental impairment a person is, in the opinion of a prescribed professional, directly and significantly restricted in the ability to perform DLA either continuously or periodically for extended periods. While other evidence may be considered, the ministry's determination as to whether or not it is satisfied is dependent upon the evidence from prescribed professionals. DLA are defined in section 2(1) of the EAPWDR and are listed in both the PR and the AR sections of the PWD application with the opportunity for the prescribed professional to check marked boxes and provide additional narrative.

In the MR and AR the GP indicated that the appellant is independent in the performance of all DLA. The SW noted that for the majority of DLA the appellant must stop activities due to pain in shoulders, hands and legs or the activities are not done at all. She added that the appellant experiences limited range of movement in both wrists and cannot grasp objects with his right hand. As a result cooking, food preparation, writing and housekeeping activities are significantly limited, to be done with his left hand or not at all.

The information provided by the SW and the appellant demonstrates that his ability to perform DLA is directly restricted due to musculoskeletal pain and weakness. However the information does not establish that the restrictions to DLA are significantly restricted either continuously or periodically for extended periods. The frequency and duration of restrictions to performance of DLA are not specifically addressed, and in the opinion of the SW are unpredictable, making it difficult to determine whether the restrictions are continuous or periodically over extended periods.

The panel therefore finds that the ministry reasonably determined that the information provided by the prescribed professionals was insufficient to establish that the appellant's impairment significantly restricts his DLA either continuously or periodically for extended periods.

Help in Performing DLA

The appellant argues that he requires the significant help of friends and assistive devices, namely wrist and ankle braces, to perform his 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 from other persons.

Panel Decision

The appellant appeared at the hearing with well-worn braces on both wrists. He also showed his ankle brace to the panel. By his own evidence he has required the right wrist brace for more than 40 years and has worn the left wrist brace since 2013. Also, the panel acknowledges that the appellant requires help from friends for activities involving heavy lifting. No information is provided to explain why the GP did not indicate that the appellant requires an assistive device to help him in the performance of DLA.

Although the panel recognizes the appellant's need for assistive devices in the form of wrist and ankle braces Section 2(2) (b) (ii) of the EAPWDA can only be met if the person requires help as a result of direct and significant restrictions with ability to perform DLA. In other words, the establishment of direct and significant restrictions to DLA is a precondition of the "need for help" criterion.

Because the panel found that the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established, the panel also finds that the ministry reasonably concluded that it cannot be determined that the appellant requires help to perform DLA as required by section 2(2)(b)(ii) 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 because the legislative criteria set out in EAPWDR Section 2 (b) (i) and (ii) were not met, was reasonably supported by the evidence, and confirms the decision. 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

Joan Bubbs

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2019/Feb/20

PRINT NAME

Patrick Cooper

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019/Feb/20

PRINT NAME

Mel Donhauser

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019/Feb/20