

## PART C – Decision under Appeal

The decision under appeal is the ministry's reconsideration decision dated December 01, 2010 which held that the appellant did not meet 3 of the 5 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 2 years. However, the ministry was not satisfied that the appellant has a severe physical or mental impairment or 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. The ministry also found that as the appellant is not significantly restricted with DLA, it could not be determined that he 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: (a) Request for Reconsideration, dated September 26, 2010, 32 pages handwritten; (b) Persons with Disabilities Designation Application, (i) Applicant Information (AI), dated May 31, 2010, 7 pages, (ii) Physician Report (PR), dated April 13, 2010, (iii) Assessor Report (AR), dated January 14, 2010.

At the hearing, evidence was submitted; (a) a letter from the appellant's ex-wife; and (b) a letter from the Assessor. Both letters were admitted under section 22(4) as being in support of the issue.

The Prescribed Professional/Medical Practitioner (PP) indicates the following diagnoses: shoulder rotator cuff tear (onset 2009), trochanteric bursitis (onset 2010), and ankle osteoarthritis (onset 2008). The PP indicates that the severity of the impairment is due to a combination of pain from the specific diagnosis and that the pain interferes with work and Daily Living Activities (DLAs). The PP confirms that the osteoarthritis is severe in the appellant's right (R) ankle. The appellant is on the waitlist for surgery on his shoulder. Mild-moderate pain is associated with this injury. Bursitis of the left (L) hip is a recent diagnosis and causing significant disability due to pain.

The PP notes that the appellant has not been prescribed any medication or treatments that interfere with his ability to perform DLAs, but that he uses a walking stick and an ankle brace.

The PP further notes that, "all 3 specific diagnoses may respond to surgery or treatment and in time will not be significant chronic problems. Osteoarthritis of the R ankle would cause moderate disability."

Functional skills in the PR are listed as: walk 2-4 blocks, climb 5+ stairs unaided, lift 15-35 lbs and remained seated less than 1 hour. No significant deficits in cognitive and emotional functioning are noted.

The PR indicates that the appellant is continuously restricted in 8/10 DLAs and that the, "limitation is primarily due to pain from the L hip bursitis. This may not be a permanent condition." The PR provides additional information which states, "disability is primarily due to the pain from the L hip bursitis. This condition can, but may not become a chronic problem. It is too early to determine this outcome. The L shoulder causes some disability in terms of lifting and causes mild-moderate pain. The R ankle causes moderate ongoing pain and disability but may be erased by orthotics."

The AR (mental health nurse) reports the same diagnoses as the PP but also adds in COPD and depression as impairments and that the appellant lives alone. The appellant's ability to communicate ranges from good to poor and the AR notes that it takes the appellant significantly longer to write due to shooting pain from shoulder to fingers. The AR confirms the use of a cane, and that he experiences significant pain in numerous joints. With regard to cognitive and emotional functioning the AR indicates a major impact in motivation, moderate impact in bodily functions, emotion, attention/concentration, motor activity. The remaining 9/14 aspects are listed as minimal or no impact.

The AR indicates that the appellant takes significantly longer in 20/28 aspects of DLAs. The AR notes that the appellant uses a cane, that motivation is poor and that pain in joints limit his ability to perform

DLAs. The AR indicates that the, "client maintains his needs with minimal assistance from others, however cumulative effect of the activities cause unpredictable pain and fatigue rendering him incapable of living." The AR concludes that the appellant has motivation/poor self cares issues, beginning to be problematic with choices. Social functioning is listed as marginal with periodic support with periodic support indicated for 2/5 aspects of social functioning – that of appropriate social decisions and able to develop and maintain relationships and notes that the appellant should consider a mental health referral for assistance with coping mechanisms.

The AI advises that he is physically and emotionally not able to cope. The appellant stated that he is not physically able to do much of anything due to extreme pain. The AI advised that he is able to function well for 4-5 hours a day and during that time he travels to an ex-family member's businesses and works either for one of two businesses which ever one needs assistance that day.

The appellant advises that he is coping on his own, and that he is not able to complete basic housework and that he washes his clothes in the bathtub rather than go to the laundry mat across the street (mostly due to cost \$9.00 per laundry load). The appellant stated that he requires financial help to buy food, care for his kids, rent, utilities, and for ongoing physiotherapy treatments.

The letters accepted into evidence at the hearing include the information that the appellant has deteriorated over time from being a vibrant person to someone who is underweight and not able to function well due to injuries at work over a sustained period of time. The second letter indicates that the appellant life with a significant amount of pain and has experienced a deterioration of health; that the appellant requires help with transportation, basic housework and assistance with financial management.

The panel finds on the following facts: (a) the physical impairments confirmed with documentation by the medical practitioner (PP) are: shoulder rotator cuff tear, trocharteric bursitis L hip, and ankle osteoarthritis; (b) the mental impairment of depression is noted as a diagnoses by the AR who is a mental health nurse but not a PP.

## PART F – Reasons for Panel Decision

The issue under appeal is whether the ministry reasonably concluded that the appellant is ineligible for PWD as he does not have a severe physical or mental impairment and that his daily living activities (DLA) are, in the opinion of a prescribed professional, not directly and significantly restricted either continuously or periodically for extended periods and as a result of those restrictions, it could not be determined that he 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. The minister may designate a person as a PWD when the following requirements are met. Pursuant to section 2(2) the applicant must have reached the age of 18 and the minister must be satisfied that the person has a severe mental or physical impairment. Under section 2(2)(a) the impairment must be likely, in the opinion of a medical practitioner, to continue for at least 2 years. Section 2(2)(b)(i) requires that the impairment, in the opinion of a prescribed professional, directly and significantly restricts the person's ability to perform daily living activities (DLA) either continuously or periodically for extended periods. Section 2(2)(b)(ii) states that as a result of those restrictions, in the opinion of the prescribed professional, the person must require help to perform DLA. Section 2(3)(b) of the EAPWDA states that a person requires help in relation to a DLA if the person requires an assistive device, the significant help or supervision of another person, or the services of an assistance animal.

Section 2(1)(a) of the EAPWDR defines DLA for a person who has a severe physical or mental impairment as preparing own meals, managing personal finances, shopping for personal needs, using public or personal transportation facilities, performing housework to keep one's residence in acceptable sanitary condition, moving about indoors and outdoors, performing personal hygiene and self care and managing personal medication. Section 2(1)(b) adds two additional activities for a person with a severe mental impairment: making decisions about personal activities, care or finances; and, relating to, communicating or interacting with others effectively.

The Ministry's position is that the information contained in the appellant's PWD application and subsequent submissions from his physician are not sufficient to determine that he meets the legislative criteria for designation as a PWD. Specifically, the PP does not indicate that the appellant has a severe physical impairment with his diagnoses of bursitis, rotator cuff tear and ankle osteoarthritis as all 3 diagnoses may be treated successfully with surgery and may not become chronic conditions. The DLAs do not appear to be significantly restricted as the appellant is able to complete DLAs when his pain is under control. The appellant lives independently and with little help from others but uses a walking stick, cane for assistance.

The appellant's position is that the evidence establishes that the appellant does have a severe physical and mental impairment that does significantly and continuously restrict his ability to perform DLA and that he could use the help of another person to complete DLA. Specifically, that the appellant has a severe physical impairment as he is in a lot of pain and that although he can get things done the pain is a disability and he needs assistance to ensure he has enough food, and that he can pay his rent and utilities. The appellant argues that all together this establishes the direct and significant assistance required and supervision needed by another person to complete DLAs and

therefore he meets all the legislated criteria.

Regarding EAPWDR section 2(2), the confirmed diagnoses of: shoulder rotator cuff tear (onset 2009), trochanteric bursitis (onset 2010), and ankle osteoarthritis (onset 2008) do not, themselves, confirm a severe physical impairment. The PP indicates that the severity of the impairment is due to a combination of pain from the specific diagnoses and that the pain interferes with work and DLAs. The PP confirms that the osteoarthritis is severe in the appellant's right (R) ankle. The appellant is on the waitlist for surgery on his shoulder. Mild-moderate pain is associated with this injury. Bursitis of the left (L) hip is a recent diagnosis and causing significant disability due to pain. The PP further notes that, "all 3 specific diagnoses may respond to surgery or treatment and in time will not be significant chronic problems. Osteoarthritis of the R ankle would cause moderate disability." The PR provides additional information which states, "disability is primarily due to the pain from the L hip bursitis. This condition can, but may not become a chronic problem. It is too early to determine this outcome. The L shoulder causes some disability in terms of lifting and causes mild-moderate pain. The R ankle causes moderate ongoing pain and disability but may be erased by orthotics." Functional skills in the PR are listed as: walk 2-4 blocks, climb 5+ stairs unaided, lift 15-35 lbs and remained seated less than 1 hour. No significant deficits in cognitive and emotional functioning are noted by the PR. The appellant confirmed that he is in significant pain but he is able to walk, climb stairs (with his walking stick or cane), lift up to 35 lbs. Sitting for any period of time is very painful (less than 1 hour). The panel acknowledges the level of pain the appellant described but determined that given that his functioning is good, and that due to the documentation from the PR who confirms that the disabilities are limiting the appellant due to pain, but that they are mild-moderate impairments at this time, the ministry was reasonable in the determination that this legislative test of section 2(2) of the EAPWDA had not been met.

Respecting the existence of a severe mental impairment, the evidence provided by the PP and the AR are inconsistent. The PR does not confirm any mental impairment diagnoses whereas the AR (not a PP) indicates a diagnosis of depression. The AI indicates that his mental functioning is, at this time, good, although that may change in the near future. The PR identifies that there are no deficits in cognitive and emotional functioning. The AR notes that the appellant should consider a mental health referral for assistance with coping mechanisms. With regard to cognitive and emotional functioning the AR indicates a major impact in 1/14 aspects: motivation, 4/14 aspects are listed as having moderate impact in bodily functions, emotion, attention/concentration, motor activity. The remaining 9/14 aspects are listed as minimal or no impact. There is documentation provided to confirm some restrictions in mental functioning, but as the evidence submitted establishes that the appellant has 1 major impact to functioning (motivation) with 4 other aspects being moderately impacted and the majority of functioning aspects being listed as having no impact, the panel finds that the ministry reasonably determined that there is insufficient evidence to establish the existence of a severe mental impairment and that as neither a severe physical nor a severe mental impairment has been established, the legislative requirement of section 2(2) of the EAPWDA has not been met.

The PP noted that the appellant has not been prescribed any medication or treatments that interfere with his ability to perform DLAs, but that he uses a walking stick and an ankle brace.

Regarding the appellant's ability to manage DLA, evidence submitted by the PR, AR, AI, oral testimony by the appellant at the hearing and letters submitted at the hearing are consistent that all

confirm that the appellant is limited in his ability to complete DLAs by the pain caused by his impairments. The AR indicates that the appellant takes significantly longer in 20/28 aspects of DLAs. The AR notes that the appellant uses a cane, that motivation is poor and that pain in joints limit his ability to perform DLAs. There is no evidence included in the AR to establish how much longer it takes the appellant to complete the DLAs. The AI and oral testimony of the appellant at the hearing indicates that he can get things done but that he requires help with basic housework and mobility. The appellant advised that he is able during his pain free hours (4-6 hours per day) to take public transit, get some household chores completed (laundry in bathtub), and complete his employment duties at the ex-family's 2 businesses. The work completed is not physically strenuous. The AR indicates that the, "client maintains his needs with minimal assistance from others, however cumulative effect of the activities cause unpredictable pain and fatigue rendering him incapable of living." The PR and AR are in conflict with the aspect of social functioning. The PR indicates that social functioning is not restricted nor is any help required. The AR indicated that the appellant has marginal social functioning in both immediate and extended networks with periodic support/supervision in 2/5 aspects of social functioning that of: appropriate social decisions, and able to develop and maintain relationships. The panel accepts that the documentation provided establishes some degree of restrictions exist in the aspect of social functioning as indicated by the AR who is a mental health nurse. The AR notes DLAs taking significantly longer, but also specifically states that the "client maintains his needs with minimal assistance from others, however, cumulative effect of the activities cause unpredictable pain and fatigue rendering him incapable of living." The PR indicates that the appellant requires continuous assistance in 8/10 DLAs. The appellant stated that he is coping but needs help with basic housekeeping and getting enough food but is independent with the majority of DLAs. Cumulatively, with the documentation provided, the panel confirms that the evidence establishes that the appellant has some degree of restriction in his ability to complete DLAs; however, as the evidence does not establish a significant restriction in the appellant's ability to complete DLAs, the panel finds that the ministry reasonably determined that the evidence does not establish a direct and significant restriction, in the opinion of a prescribed professional, of the appellant's ability to perform DLA as required by section 2(2)(b)(i) of the EAPWDA.

With regard to the ministry's position that the appellant does not require help with DLAs, the PR and AR do not indicate that the appellant requires significant assistance in performing DLAs. In determining whether the ministry reasonably concluded that the appellant does not require help with DLA, the panel finds that the evidence of both the PR, AR, AI, and oral testimony of the appellant is consistent that the appellant does take significantly longer to complete DLAs but that he does not require the support/supervision of another person to complete DLAs. The appellant does use an assistive device, walking stick/cane and ankle brace. The appellant has used crutches in the past and the AR advises that appellant is advised to consider the installation of grab bars and a raised toilet seat as additional assistance. Based on the established evidence, the panel confirms the use of assistive devices however given that the evidence confirms that the appellant does not require the significant help or supervision of another person to complete DLAs, the ministry reasonably determined that it could not be determined that significant help is required. The panel finds that based on the whole of the evidence that the appellant does not have a severe physical or mental impairment, that the ministry reasonably determined that the appellant's impairment does not establish a direct and significant restriction and that as a result of those restrictions, the person requires help to perform those activities under section 2(2)(b)(ii) of the EAPWDA.

APPEAL #

The panel finds that the ministry's decision was reasonably supported by the evidence and confirms the decision.