

## PART C – Decision under Appeal

The decision under appeal is the ministry's reconsideration decision dated January 21, 2011 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 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. The ministry also found that a prescribed professional has not confirmed that, as a result of direct and significant restrictions, the appellant requires help 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 reconsideration was a PWD application comprised of a Self-report (SR), Physician Report (PR), and Assessor Report (AR) and the Request for Reconsideration.

In the SR, the appellant writes that his disability is right elbow epicondylitis, tendon damage, bone spurs, and circular popping which results in chronic pain and great agony when his elbow pops. In the past few months, blood has had to be drained from his elbow which is very painful. Everyday functions which are performed mostly using the left arm including cooking, brushing teeth, and cleaning, are very difficult and take twice as long. Due to his limited education and inability to work as a labourer due to his right arm impairment the appellant is in debt. He often wakes 5 times a night because of his arm. As a result of his physical impairment, he has depression which is sometimes overwhelming, no motivation at all, and feelings of guilt and being useless. He no longer socializes with other people and has been unable to play any of the sports he used to prior to his injury in 2004.

In the PR, the appellant's physician of 9 years, who also acted as the assessor, diagnoses the appellant with chronic right epicondylitis, nerve injury to left foot, multiple injuries (both wrists fractured, left ankle), and dysthymia and reports that the appellant's major disability is due to his right arm dysfunction. The appellant suffers from weakness and pain and is unable to perform trades that involve lifting heavy objects, especially above his head. At times, the appellant experiences pain and tingling then numbness for several seconds. He also experiences a "pop" in the elbow if he uses it too much and is concerned his arm will just "give" on him. The chronic pain and disability have affected his mood, causing severe despondency. He is impaired both physically and mentally. Regarding functional skills, the appellant can walk 4+ blocks and climb 5+ steps unaided, lift 5 to 15 lbs, and has no limitations remaining seated or difficulties with communication. Significant deficits with cognitive and emotional function are reported for emotional disturbance and motivation due to his physical disability.

In the AR, the appellant's ability to communicate is reported as satisfactory. The appellant is reported as unable to do much with his right arm. Walking indoors, walking outdoors, climbing stairs, and standing are managed independently without assistance; lifting and carrying/holding take significantly longer and require continuous assistance due to the right arm/elbow problem. No major impact on daily functioning is reported for cognitive and emotional functioning with a moderate impact reported for emotion and motivation and a minimal impact reported for bodily functions. No impact is reported for the remaining 11 aspects of cognitive and emotional functioning. Regarding DLA, with the exception of 1 of 5 aspects of shopping, carrying purchases home which takes significantly longer and requires continuous assistance, the appellant is reported to independently manage personal care, basic housekeeping, shopping, meals ("affected by his elbow disability"), medications, paying rent and bills, transportation, and social functioning. Narrative is "overall the activities are affected by his chronic elbow disability". Marginal functioning with both immediate and extended social networks and increasing isolation and withdrawal from the community, secondary to his disability, are reported. Assistance is provided by family and the assessor notes that the appellant has lost all of his friends.

In the Request for Reconsideration, the appellant confirms much of the information he provided in the SR adding that he cannot lift over 10 lbs without pain and is unable to work on a computer as it is too hard on his elbow. While he can carry groceries, it is only with his left arm. Similarly, he can do chores left-handed which takes 5 times as long. His condition has gotten worse since his injury and will continue to do so. He also reports he has become reliant on non-prescription drugs.

In his Notice of Appeal, the appellant confirms that he will never be able to return to his former employment and that daily functions take twice as long as he must use his non-dominant left arm.

No additional evidence was provided by the ministry on appeal.

## PART F – Reasons for Panel Decision

The issue under appeal is whether the ministry reasonably determined that the appellant has not met the criteria for designation as a PWD because he does not have a severe physical or mental impairment, which, in the opinion of a prescribed professional, directly and significantly restricts his ability to perform DLA either continuously or periodically for extended periods resulting in the need for help to perform DLA. The ministry determined that the age requirement was met and that he has an impairment that will last for 2 years.

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 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, 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.

With respect to the existence of a severe physical impairment, the appellant's position is that a severe physical impairment is established because he has chronic pain in his dominant right arm/elbow which impacts his ability to perform daily activities and, together with his lack of formal education, leaves him unable to find gainful employment. The appellant contends that he cannot lift anything over 10 lbs without experiencing pain and that DLA take between 2 and 5 times longer to perform. The ministry argues that a severe physical impairment has not been established because the appellant independently manages all aspects of physical ability and mobility with the exception of the need for continuous assistance with carrying and holding which is considered with the information that the appellant can lift between 5 and 15 lbs. Additionally, the ministry argues that a severe physical impairment is not established by the evidence that the appellant completes all aspects of DLA independently with the exception of carrying purchases home.

The panel finds that a medical practitioner has diagnosed the appellant with chronic right epicondylitis, nerve injury to left foot, and multiple injuries (both wrists fractured, left ankle) with the major impairment relating to damage to the right arm/elbow. In terms of physical functioning, the physician identifies no restrictions in the appellant's ability to walk, climb stairs, remain seated, or stand but he does report a lifting limit of 5 to 15 lbs and the need for continuous assistance with lifting and carrying. The appellant's evidence is that while he does manage activities including cooking, carrying groceries, and cleaning, he is severely limited in his ability to do so as he must rely on his non-dominant left arm and takes 2 to 5 times longer to perform these tasks. The panel finds that the evidence of both the physician and the appellant establishes that he is independent with all aspects of physical ability and mobility with the exception of lifting and carrying anything over 10 lbs. Additionally, although the appellant is impacted in his ability to manage aspects of DLA involving use of both arms due to his right arm impairment and takes longer to perform those tasks, he independently manages all aspects of DLA except for lifting and carrying weights over 10 lbs. While the panel acknowledges the appellant's argument that, due to his limited education and right arm impairment he is unable to obtain

employment, employability is not a criterion for designation as a PWD. The panel finds that the ministry reasonably determined that the evidence respecting the appellant's physical functional skills, mobility and physical ability, and degree of independence with DLA does not establish a severe physical impairment under section 2(2) of the EAPWDA.

Respecting the existence of a severe mental impairment, the appellant's position is that, as a result of his right arm impairment and inability to find employment, he has become depressed, has no motivation, has cut himself off from other people, has feelings of despondency and being useless and has nowhere else to turn for help. The ministry's position is that, although significant deficits with cognitive and emotional function are identified for emotional disturbance and motivation, the physician reports no problems with communication, no major impact on daily functioning or DLA, including social functioning, which does not establish a severe mental impairment.

The panel finds that the physician has diagnosed the appellant with depression and reported significant deficits in the areas of emotional disturbance and motivation. Additional descriptive information is that the appellant has become very despondent and has become withdrawn and isolated to the point of losing all of his friends. The panel finds that the physician's narrative respecting isolation and withdrawal from friends establishes that there is some degree of restriction with at least 1 aspect of social functioning, namely, the ability to develop and maintain relationships. However, the physician indicates that there is no major impact on daily functioning in any of 14 identified areas of cognitive and emotional functioning with both emotion and motivation having a moderate impact on daily functioning. Further, with the exception of a minimal impact respecting bodily functions, which may, in view of the appellant's evidence, relate to sleep disturbance, no impact on daily functioning is reported for the remaining 11 remaining areas. Additionally, with the exception of the narrative identifying a restriction in the appellant's ability to maintain friendships, no restrictions in the appellant's ability to perform DLA is reported. The panel finds that the ministry reasonably determined that the evidence of the appellant and his physician respecting limitations to functioning due to the depression does not establish a severe mental impairment under section 2(2) of the EAPWDA.

Regarding the degree of restriction with DLA, the appellant argues that a direct and significant restriction in his ability to perform DLA is established by the evidence that he is limited to using his non-dominant left arm to manage tasks including, cooking, cleaning, and carrying groceries, and as a result these activities take 2 to 5 times as long to perform. The ministry argues that, although the physician writes that activities are overall affected by the chronic elbow disability, the appellant is reported to independently manage all aspects of all DLA except for carrying purchases home which takes significantly longer and required continuous assistance. Therefore, the ministry argues that the evidence of the appellant's physician does not establish a direct and significant restriction with DLA.

The panel notes that the legislation requires that there be a direct and significant restriction with DLA in the opinion of a prescribed professional. Therefore, the panel has based its findings on the evidence of the appellant's physician/assessor who is a prescribed professional. The panel finds that, although the physician reports that "overall the activities are affected by his chronic elbow disability" and that isolation and withdrawal from the community has resulted in the appellant losing all of his friends, the physician goes on to indicate that the appellant manages all but 1 of 33 aspects of DLA independently without any assistance and without taking any longer to perform the activities. In the absence of further elaboration from the physician as to how the appellant is impacted in his ability to manage DLA, the panel finds that the ministry has reasonably determined that the evidence does not establish that the appellant is, in the opinion of a prescribed professional, directly and significantly restricted in his ability to perform DLA either continuously or periodically for extended periods under 2(2)(b)(i) of the EAPWDA.

Regarding the need for help with DLA, the appellant argues that due to the impairment of his dominant right

arm, he cannot lift anything over 10 lbs and takes 2 to 5 times longer to perform chores including cooking, cleaning, and brushing his teeth. The ministry argues that it has not been established that DLA are significantly restricted and therefore it cannot be determined that significant help is required from other persons.

The panel finds that the evidence of the prescribed professional establishes that the appellant requires continuous assistance from another person with lifting and carrying anything over 5-15 lbs but that all other DLA are managed independently without any assistance. The panel finds that the ministry reasonably determined that, as it has not been established that DLA are directly and significantly restricted in the opinion of a prescribed professional, it cannot be determined that help is required under section 2(2)(b)(ii) of the EAPWDA.

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