

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated September 19, 2014 which found that the appellant did not meet the 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 he has an impairment that is likely to continue for at least two years. However, the ministry was not satisfied that 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 Assistance Act*.

The evidence before the ministry at the time of the reconsideration decision included the appellant's PWD Application comprised of the applicant information and self-report ("SR") prepared by the appellant and dated May 7, 2014, as well as a physician report ("PR") dated May 7, 2014 and prepared by the appellant's general practitioner ("the GP") who has known the appellant for approximately 19 years and treated him on 11 or more occasions in the previous 12 months and an assessor report ("AR") dated May 2, 2014 and prepared by the appellant's physical therapist ("the PT") who has known the appellant for approximately 3 months and has seen him 11 or more times. The PT has assessed the appellant during the course of treatment for his shoulder and knee conditions.

Further evidence before the ministry at the time of the reconsideration decision included the following:

1. The appellant's Request for Reconsideration ("RFR") dated September 12, 2014;
2. A letter from a physician dated September 12, 2014 commenting on the appellant's physical condition ("the Physician Letter");
3. A report dated April 15, 2014 documenting the results of an MRI Scan of the appellant's left knee ("the MRI Report"); and
4. A consultation report dated September 7, 2012 prepared by a hospital documenting the results of a sonogram of the appellant's left shoulder ("the Sonogram Report").

Diagnoses

In the PR, the appellant is diagnosed by the GP as follows:

- Soft tissue injury to the back with date of onset as July 26, 2012;
- Injury to the left shoulder with no date of onset noted; and
- Injury to the left knee with date of onset as March 13, 2014.

In the Physician Letter, the physician reported that he examined the appellant for symptoms regarding knee and back pain and that the appellant was referred to a specialist whose investigations showed "unremarkable findings with mild spondylosis." The appellant was reassured of these findings and recommended to continue with ongoing physical therapy and symptomatic treatment.

The MRI Report notes all findings to be normal aside from a possible remote ligamentous tear in the appellant's left knee and "no other internal knee derangement." The Sonogram Report documents all findings to be normal other than a "small incomplete/partial thickness tear in the mid supraspinatus tendon at its insertion" and that the tear measures "approximately 3x2 mm."

In the AR, the PT comments that the appellant suffers from an acute injury to his left knee and that it is therefore too early to determine a prognosis. The appellant also suffers from a chronic left shoulder condition secondary to a failed shoulder surgery and the PT recommends an FAE ("functional abilities evaluation" to determine overall function with DLA.

Physical Impairment

In the SR, the appellant describes his physical impairment and symptoms as including the following:

- Shoulder, back and neck pain secondary to a motor vehicle accident on July 20, 2012;

- Reference to shoulder surgery on June 25, 2013 and ongoing pain;
- Lack of sleep due to ongoing pain;
- Left knee injury secondary to motor vehicle accident dated March 13, 2014;
- Nerve problems in left leg, left shoulder and back resulting in loss of control in left arm and numbness in left leg.

In the PR, the GP reports that:

- The appellant suffers from soft tissue pain in his upper back.
- The appellant had surgery on his left shoulder on June 25, 2013 and continues to suffer from ongoing pain and stiffness.
- The appellant has severe left knee damage from a motor vehicle accident.
- The appellant is noted as 5'9" tall and 200 lbs.
- The appellant has been prescribed pain medication and a muscle relaxant and that the duration of his medication is greater than 10 months.
- The appellant requires no aids or prostheses for his impairment which is likely to continue for two years or more.
- Functional skills reported indicate that the appellant can walk 1-2 blocks and climb 2-5 steps unaided, lift under 2 kg and remain seated for less than 1 hour.

Under Additional Comments, the GP notes that the appellant is a "motivated patient who has been injured and is under treatment and may need surgery."

In the AR, the PT reports that:

- The appellant lives with a roommate and that his physical impairments include lifting and carrying with his left shoulder and that walking, standing and climbing stairs are limited due to his left knee injury which is described as acute.
- The appellant's ability to communicate through speaking, reading, writing and hearing are all satisfactory.
- The appellant is described as being independent walking indoors and outdoors, climbing stairs, standing, lifting, carrying and holding with the added comment that his left shoulder tolerance and capacity is unknown and needs to be assessed through a FAE.

In the RFR the appellant appears to indicate that he "can [not] sit or stand" due to pain and he reports "no stars [sic] no sleep" due to pain. The Sonogram Report notes a decreased range of motion in the appellant's left shoulder.

Mental Impairment

In the SR, the appellant describes his mental impairment as including short term memory loss and depression and he writes that he has taken an unspecified antidepressant medication for the past two years.

In the PR, the GP has not diagnosed the appellant with a mental disorder and has further indicated that the appellant does not experience any significant deficits with cognitive and emotional function. The GP does indicate that the appellant has been prescribed antidepressant medication and that the duration of his medication is greater than 10 months.

In the AR, the PT has not completed the section which would otherwise indicate whether the appellant has a mental impairment that restricts or impacts his functioning and comments "Not within my scope of practice!"

Daily Living Activities (DLA)

In the PR, the GP notes that the appellant's impairment does not directly restrict his ability to perform DLA and that the impact on his social functioning is "nil." He comments that the appellant needs help because he is in pain and that the assistance he needs with DLA is "money." The GP comments in the PR that the appellant has been prescribed three medications that interfere with his ability to perform DLA but he does not elaborate as to which activities they would interfere with or to what extent.

In the AR, the PT reports that the appellant is independent in all aspects of his DLA and comments that with respect to going to and from stores the appellant has limited walking and standing tolerance although the distance for each is noted as "unknown." With respect to social functioning, the PT has provided no comment as to whether the appellant experiences any restrictions.

Need for Help

In the PR, the GP did not indicate that the appellant requires an assistive device. In the AR, the PT indicates that the appellant lives with a roommate and notes that the appellant requires no assistance. The PT does note that the appellant uses a brace for his left knee but that this is "short term."

In his Notice of Appeal which is dated September 29, 2014, the appellant writes that he is unable to work due to his physical injury. He states that he has a "disc back injury and knee injury for the last 2 ½ years" and that he is still not doing good. He continues that he had surgery on his shoulder and that he is still in pain, that he suffers from memory loss, depression and a skin infection. The appellant says that he is disabled.

The ministry relied on the Reconsideration Decision and submitted no further evidence.

PART F – Reasons for Panel Decision

The issue on the appeal is whether the ministry's reconsideration decision, which found that the appellant is not eligible for designation as a person with disabilities (PWD), 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 appellant met the age requirement and that he has an impairment that is likely to continue for at least two years. However, the ministry was not satisfied that 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.

The criteria for being designated as a 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)(a) of the *EAPWDR* defines DLA for a person who has a severe physical or mental impairment 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.

Severity of impairment

Section 2(2)(a) of the *EAPWDA* provides that when addressing the issue of a severe physical or mental impairment in the context of a person applying for a PWD designation, that person must be found to have a severe physical or mental impairment that, in the opinion of a medical practitioner, is likely to continue for at least 2 years.

A diagnosis of a serious medical condition or conditions does not in itself determine PWD eligibility or establish a severe impairment. An "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 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 performing DLA is restricted. In making its determination, the ministry must consider all 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 GP and the PT.

Severity of mental impairment

The appellant takes the position that he suffers from depression, memory loss and that he is being treated with anti-depressant medication.

The ministry takes the position that the evidence does not support a finding that the appellant has a severe mental impairment.

Panel Decision

On May 7, 2014, the appellant's GP of 19 years completed the PR. The GP notes that he had seen the appellant 11 or more times in the 12 months prior to completing the PR. The panel notes that the GP does not diagnose the appellant as suffering from a mental impairment and that he further notes that the appellant has no significant deficits with cognitive or emotional function. The panel notes however that the GP writes that the appellant has been prescribed antidepressant medication and that the duration of that medication is greater than 10 months.

Similarly, in the AR the PT declines to comment on whether the appellant experiences any impacts on his

cognitive and emotional functioning stating that to do so is not within his scope of practice.

In cases where there are variations in evidence, the panel must look to the evidence to determine what those variances are, why they have occurred and what weight to attach to the evidence. In this case, the appellant says in the RFR that he suffers from depression and short term memory loss and that he has been prescribed antidepressant medication. However, while the GP appears in the PR to substantiate the appellant's evidence of being prescribed antidepressant medication, he does not provide a diagnosis of a mental impairment and does not indicate that the appellant experiences any significant deficits with cognitive and emotional function. As well, the GP reported that there are no difficulties with communication and no restrictions to the appellant's social functioning.

After considering the evidence as set out in the PR and after considering the appellant's evidence in the SR and the RFR, the panel finds that the ministry reasonably determined that there is not sufficient evidence to establish that the appellant has a severe mental impairment under section 2(2) of the *EAPWDA*.

Severity of physical impairment

The appellant takes the position that a severe physical impairment is established by the evidence of his ongoing injuries to his left shoulder, left knee and back and their impact on his functional skills and ability.

The ministry takes the position that the appellant's functional skill limitations do not support a finding that he suffers from a severe physical impairment.

Panel Decision

In the PR, the appellant's GP diagnoses the appellant as suffering from a soft tissue injury to his back as well as injuries to his left shoulder and left knee. He describes the appellant as able to walk 1-2 blocks unaided on a flat surface, climb 2-5 steps unaided, lift under 2kg and sit for less than one hour.

In the AR, the PT notes that the appellant is independent in all listed aspects of mobility and physical ability while commenting that the appellant's left shoulder tolerance and capacity for carrying and holding is unknown pending an assessment. The PT reports that the appellant does not require an aid for his impairment aside from a short term knee brace and for those DLA which are of a physical nature, the appellant is noted by the PT as being independent in all respects.

In the SR, the appellant describes shoulder, back and neck pain secondary to a motor vehicle accident on July 20, 2012, shoulder surgery on June 25, 2013 and ongoing pain causing lack of sleep, a left knee injury secondary to motor vehicle accident on March 13, 2014 as well as nerve problems in his left leg, left shoulder and back resulting in loss of control in his left arm and numbness in his left leg.

While the MRI Report's findings "may reflect a remote ligamentous tear" all other findings are noted as normal with "no other internal knee derangement."

Similarly, while the Physician Letter indicates that the appellant has been referred to a specialist and recommended to continue with ongoing physical therapy and symptomatic treatment, the investigations undertaken by the specialist show "unremarkable findings with mild spondylosis."

Lastly, the Sonogram Report, which pre-dates the appellant's left shoulder surgery by approximately 9 months, indicates a "small incomplete/partial thickness tear in the mid supraspinatus tendon at its insertion."

The evidence as a whole indicates that the appellant suffers from a number of physical conditions but, as indicated above, these do not in and of themselves constitute a severe physical impairment. It is necessary to

consider how these conditions restrict the appellant's ability to function independently or effectively. As mentioned previously, the appellant is noted as being independent in all DLA including those which are of a physical nature and the PT has found the appellant to be independent in all aspects of mobility and physical ability.

The panel notes that the appellant states that he suffers from numbness and nerve problems as well as a skin condition but the evidence of the GP does not provide a clinical finding to support this. Further, while the PT comments on the appellant's left shoulder and left knee conditions, he is of the view that it is too early to determine a prognosis for the appellant's knee and that an assessment is necessary to determine the appellant's overall shoulder function within the context of his DLA.

Overall, while it is clear that the appellant does suffer from a number of physical conditions, the panel finds that the ministry was reasonable in its finding that there is not sufficient evidence to establish that the appellant has a severe physical impairment under section 2(2) of the *EAPWDA*.

Restrictions in the ability to perform DLA

The appellant's position is that his physical and mental impairments directly and significantly restrict his ability to perform DLA on an ongoing basis.

The ministry's position is that it has not been established by the evidence of a prescribed professional that the appellant's ability to perform DLA has been directly and significantly restricted by his physical or mental impairments either continuously or periodically for extended periods as required by section 2(2) of the *EAPWDA*.

Panel Decision

Section 2(2)(b) of the *EAPWDA* requires that a prescribed professional, in this case the GP and PT, provide an opinion that an applicant's severe impairment directly and significantly restricts his or her DLA, continuously or periodically for extended periods.

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, a 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 PR, the GP notes that the appellant's impairment does not directly restrict his ability to perform DLA while in the AR, the PT describes the appellant as independent in all of the 28 listed tasks of DLA commenting only that the appellant has limited walking and standing tolerance ("distance unknown") while going to and from stores.

The panel notes that the evidence of the GP and the PT, both who are prescribed professionals, indicates that the appellant is independent in all tasks of DLA. Therefore, based on this evidence the panel finds that the ministry was reasonable in finding that there is not sufficient evidence to establish that the appellant's mental and physical impairments directly and significantly restrict his ability to perform DLA, either continuously or periodically for extended periods under section 2(2)(b) of the *EAPWDA*.

Help with DLA

The appellant's position is that that his physical and mental impairments affect his DLA to the extent that assistance from others is necessary.

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. Section 2(3) of the *EAPWDA* provides that a person requires help in relation to a DLA if, in order to perform it, the person requires an assistive device, the significant help or supervision of another person, or the services of an assistance animal.

In the PR, the GP indicates that the appellant does not require any aids or prostheses for his impairment and that the assistance that the appellant needs with DLA is "money." In the AR, the PT indicates that the appellant lives with a roommate, wears a brace on his left knee which is of short term duration and does not require assistance with DLA.

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 was a reasonable application of the applicable enactment in the circumstances of the appellant, and therefore confirms the decision.