

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of March 9, 2015, which found that the appellant did not meet three of five statutory requirements of section 2 of the *Employment and Assistance for Persons With Disabilities Act* (“EAPWDA”) for designation as a person with disabilities (“PWD”). The ministry found that the appellant met the age requirement and that in the opinion of a medical practitioner the appellant’s impairment 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 that
- as a result of those restrictions, the appellant requires the significant help or supervision of another person, an assistive device, or the services of an assistance animal.

PART D – Relevant Legislation

EAPWDA, section 2

Employment and Assistance for Persons with Disabilities Regulation (“EAPWDR”), section 2

PART E – Summary of Facts

The information before the ministry at the time of reconsideration included the following:

- The appellant's PWD application form consisting of the appellant's self-report dated September 16, 2014; a physician's report ("PR") completed by the appellant's general practitioner (the "physician") on October 29, 2014; and an assessor's report ("AR") completed by the physician on November 26, 2014.
- A consultation report from a sports medicine physician dated July 25, 2013 (the "Sport Med Report").
- A consultation report from the appellant's orthopedic surgeon dated March 7, 2011 (the "March 7/11 Report").
- An X-ray report dated August 6, 2013 (the "X-ray Report").
- Notes from the appellant's medical file for the period February 26, 2014 to October 16, 2014 (the "File Notes").

Diagnoses

In the PR the physician diagnosed the appellant with a labral tear of the left shoulder and a rupture of the anterior cruciate ligament ("ACL") in the left knee. The left knee was reinjured in 2013 after previous ACL surgery in 2011. In the additional comments section of the PR the physician also referred to a diagnosis of hepatitis C.

Physical Impairment

In the PR the physician (who was acting as a locum for the appellant's regular family doctor) reported that:

- At the time of completing the PR the physician was seeing the appellant for the first time, though he had been a patient of the practice since 1998.
- Impingement tests of the left shoulder show limited strength and mobility due to pain.
- The left knee is unstable and pops out when the appellant walks more than about two blocks.
- The appellant has been referred to the orthopedic surgeon for both issues.
- In terms of physical functioning the appellant can walk for less than one block unaided on a flat surface, climb 5+ steps unaided, and lift under 5 pounds. There are no limitations to his ability to remain seated.

In the AR the physician indicated that:

- The appellant's ability to communicate is good in all respects, except his reading ability is "satisfactory" as he "needs an eye test."
- The appellant manages all aspects of mobility and physical ability independently, though he takes significantly longer than typical with walking indoors (about 100 m – needs to rest), walking outdoors (1/2 block – needs to stop), climbing stairs (has to stop after one flight), lifting/carrying/holding (nothing with left arm, right arm OK).

The File Notes indicate that:

- On July 11, 2014 the appellant was reported as having had cortisone injections in his left shoulder in January 2013, July 2013 and February 2014. He'd had a few months of pain relief

after the February 2014 injection but things flared up in the week previous to July 11, 2014. It became difficult to reach overhead because of pain, but “no functional impairment.” The appellant reported having tingling and weakness in his left arm, but said he was “able to lift heavy objects with his forearm if she (sic) keep his shoulder adducted.” He continued to feel grinding and crepitation in his shoulder.

- On August 1, 2014 the appellant denied tingling and weakness to the left arm, but said pain does limit him from overhead activities or heavy lifting. The appellant received an anti-inflammatory shot in the left shoulder.
- On October 16, 2014 the appellant indicated that he didn’t want another ACL operation on his left knee as it took him a long time to recover from the last one. The physician reported a painful shoulder arc and slightly decreased forward flexion and adduction due to pain in the left shoulder, and normal range of motion with the left knee.

In his self-report the appellant wrote that:

- Most mornings his left shoulder aches and has barely any range of motion to reach forward or sideways with painful grinding in the joint.
- The shoulder has not healed since being injured on Christmas Eve in 2012.
- The shoulder always aches and he can’t sleep.
- He has turned down three jobs with good pay because he won’t be able to keep reaching for the steering wheel.
- He tried weed whacking the lawn but after 15 minutes his shoulder was aching too much.
- He can’t reach into the fridge or lift his arm at all.

In his oral testimony the appellant stated that:

- He is waiting for surgery in both his left shoulder and left knee. He is waiting to see the orthopedic surgeon.
- His shoulder grinds, and sometimes when he steps off the curb his knee fails and he “goes down screaming.”
- He was on pain-killers for a long time but the cortisone shots have provided some relief from shoulder pain.
- His left arm is too weak – lost muscle and strength – making it impossible to work. He has no range of motion in his shoulder.
- He has become so out of shape he can’t climb a flight of stairs without resting.
- The ministry told him to apply for both PWD designation and for designation as a person with persistent multiple barriers to employment (“PPMB”). He is still waiting to hear about his PPMB application – it has been 10 days.
- He does not believe he will require assistance for the rest of his life and he does not want to stay on assistance. He is hoping and expecting that surgery will enable him to go back to work. There is simply a long delay waiting for the surgery.

In response to a question from the ministry as to whether the doctors have said surgery will correct his impairments, the appellant said that his orthopedic surgeon has told him surgery will tighten up his knee for sure, but the shoulder will take a lot of therapy.

Mental Impairment

- In the PR the physician reported that the appellant has no difficulties with communication and has no significant deficits with cognitive and emotional function.
- In the AR the physician reported no impacts to cognitive and emotional functioning.

DLA

In the PR the physician indicated that:

- The appellant has not been prescribed any medication or treatments that interfere with his ability to perform DLA.
- The appellant is periodically restricted in terms of three prescribed DLA – basic housework, daily shopping, and mobility inside and outside the home. He is unrestricted in the other seven prescribed DLA.
- The physician explained her use of the term “periodic” as “he is limited in how long he can walk + needs to rest often + is limited in use of his left arm.”

In the AR the physician reported that:

- The appellant independently manages all tasks related to the DLA of personal self-care, though he takes a little longer than typical with the tasks of dressing, grooming and bathing due to lack of use of his left arm.
- The appellant takes three times longer than typical with basic housekeeping and two times longer than typical with laundry.
- He independently manages all tasks related to daily shopping, though he takes four times longer than typical getting to/from stores and takes three times longer than typical carrying groceries home as he only uses his right arm. He can walk at pace with his elderly mother while he leans on a shopping cart and does “ok” at that pace.
- He independently manages all tasks related to meal preparation but he takes twice as long as typical with the tasks of food preparation and cooking.
- The appellant independently manages all aspects of the DLA of managing personal finances (pay rent and bills), managing personal medications, and use of transportation.
- The section of the AR dealing with the DLA of social functioning (relate to, communicate or interact with other effectively), which is only to be completed if the applicant has an identified mental impairment including brain injury, was marked “N/A” by the physician.

In response to questions from the panel, the appellant responded that:

- All his DLA are slowed down by pain.
- Regarding housework, if he turns to the left his knee almost always pops out.
- A friend rakes the lawn for him.
- He can't use a cane because his left shoulder hurts.
- He lives with his elderly mother and almost always goes shopping with her. He hangs onto a shopping cart to walk around the store. His mother does the driving.

Help

- In terms of assistive devices, in the PR the physician reported that a cane might be useful for the appellant, but in the AR she noted that it would be difficult for the appellant to use a cane

because of his painful left shoulder. The physician confirmed that the appellant does not have an assistance animal.

- In the AR the physician responded to a question about help with DLA provided by other people, the physician indicated that the appellant gets help from friends with heavy lifting and yard work. The appellant can't drive due to diminished use of his left arm, so his elderly mother drives.

Admissibility of Additional Information

The panel assessed the appellant's oral testimony as substantially corroborating evidence that was before the ministry at the time of reconsideration, and has admitted it as evidence in accordance with section 22(4) of the *Employment and Assistance Act*.

The ministry relied on its reconsideration decision and submitted no additional information.

PART F – Reasons for Panel Decision

The issue on this appeal is whether the ministry's decision to deny the appellant designation as a PWD was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. In particular, was the ministry reasonable in determining that the appellant does not have a severe physical or mental impairment, and that in the opinion of a prescribed professional the appellant's impairments do not directly and significantly restrict him from performing DLA either continuously or periodically for extended periods, and that as a result of those restrictions the appellant does not require help to perform DLA?

The relevant legislation is as follows:

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 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.

EAPWDR section 2(1):

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.

Severe Physical Impairment

The appellant's position is that his shoulder and knee injuries constitute a severe physical impairment. He argued that his shoulder gives him constant pain and that his mobility is limited as his knee tends to "pop out" frequently without warning. He also argued that his injuries make it impossible for him to work.

The ministry's position, as set out in its reconsideration decision, is that the impacts on the appellant's physical functioning as described by the physician are more in keeping with a moderate degree of impairment.

Panel Decision:

A diagnosis of a serious medical condition 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. A medical barrier to the appellant's ability to engage in paid employment is not a legislated criterion for severity. In making its determination the ministry must consider all the relevant evidence, including that of the appellant.

The appellant's physical functional skills as noted by the physician in the PR are in the mid- to lower end of the scale. However, in the AR the physician indicated that all physical functions – though

taking longer than typical - are accomplished independently. There are also some inconsistencies in the evidence to indicate that some of the physical functioning limitations may be overstated to a degree. For example, while the appellant's lifting capacity is described as being less than five pounds in the PR, the physician indicated in the AR that the appellant's lifting ability with his right arm is "ok". The File Notes also indicate that with the cortisone shots the appellant is able to lift heavy weights if he keeps his shoulder adducted.

As discussed below under the heading Restrictions to DLA, the appellant's impairments do not appear to have translated into significant restrictions in his ability to manage DLA.

The physician did not identify the appellant's hepatitis C as an impairment, and there is no evidence that this condition restricts his DLA.

There are frequent references in the evidence to the impact the appellant's medical conditions have on his ability to work at paid employment. The panel notes that employability is not a statutory criterion regarding PWD designation – the focus of the legislation is on the ability to perform DLA.

Based on the foregoing analysis and reasons, the panel finds that while the appellant does suffer from serious injuries to his left knee and shoulder, the ministry reasonably determined that the evidence is more in keeping with a moderate degree of physical impairment.

Severe Mental Impairment

The appellant advanced no argument with respect to a mental impairment.

The ministry's position is that the evidence does not establish a severe mental impairment. The ministry pointed out that there is no evidence that the appellant has any deficits with cognitive and emotional functioning or any difficulties with communication.

Panel Decision:

The legislation (EAPWDA section 2(2)) requires that a severe impairment must be identified by a medical practitioner and be confirmed as being likely to continue for at least 2 years. The physician has provided no diagnosis of a mental health condition. There is no evidence to show that the appellant has any significant difficulty with decision-making or social functioning, and the evidence of the physician shows no impact in terms of cognitive and emotional functioning.

Based on the foregoing evidence, the panel concludes the ministry reasonably determined that the appellant does not have a severe mental impairment.

Significant Restrictions to DLA

The appellant's position is that his impairments, primarily because of pain from his shoulder and the risk of falls from his knee, significantly restrict his ability to manage his DLA such as personal self-care, basic housework, daily shopping and mobility inside and outside the home. He argued that he is only able to perform these activities very slowly. He argued that he relies on his mother to take him

to and from shopping.

The ministry's position, as set out in its reconsideration decision, is that there is not enough evidence to confirm that the appellant's impairments directly and significantly restrict his ability to perform DLA either continuously or periodically for extended periods. The ministry noted that the information provided by the physician indicates that the appellant's impairments periodically restrict his ability to perform basic housework, daily shopping and mobility inside and outside the home. However, the ministry argued that there is no information on how often the appellant is restricted.

Panel Decision

The legislation – s. 2(2)(b)(i) of the EAPWDA – requires the minister to substantially assess direct and significant restrictions of DLA in consideration of the opinion of a prescribed professional, in this case the appellant's physician. This doesn't mean that other evidence shouldn't be factored in as required to provide clarification of the professional evidence, but the legislative language makes it clear that the prescribed professional's opinion is fundamental to the ministry's determination as to whether it is "satisfied".

In the AR the physician indicated that the appellant is directly and periodically restricted in the three DLA of basic housework, daily shopping and mobility inside and outside the home. However, based on the physician's responses in the AR, restrictions appear to take the form of taking longer than typical with some tasks related to these DLA. The physician shows these tasks as being performed independently by the appellant and the amount of extra time required does not appear to be unreasonable or excessive. It also appears from the July 11, 2014 File Notes that cortisone injections substantially improve his functioning with respect to DLA.

Based on the foregoing evidence and analysis, the panel finds that the ministry's was reasonable in concluding that there is not enough evidence to confirm that the appellant's impairments directly and significantly restrict his ability to perform DLA either continuously or periodically for extended periods.

Help with DLA

The appellant's position is that he requires significant assistance with DLA, relying on his mother get him to and from stores, and on his friend to do yard work.

The ministry's position is that since it has not been established that the appellant's DLA are significantly restricted, it cannot be determined that significant help is required from other persons. The ministry argued that no assistive devices are required.

Panel Decision

A finding that a severe impairment directly and significantly restricts a person's ability to manage his DLA either continuously or periodically for an extended period is a precondition to a person requiring "help" as defined by section 2(3)(b) of the EAPWDA. For the reasons provided above, the panel finds the ministry reasonably determined that the evidence falls short of satisfying that precondition.

Accordingly, the panel finds that the ministry reasonably concluded it could not be determined that

the appellant requires help with DLA as defined by section 2(3)(b) of the EAPWDA.

Conclusion

The panel acknowledges that the appellant's medical conditions affect his ability to function, and understands the disappointment he must feel with the lengthy wait for surgery. However, having reviewed and considered all of the evidence and the relevant legislation, the panel finds that the ministry's decision finding the appellant ineligible for PWD designation is a reasonable application of the legislation in the circumstances of the appellant. The panel therefore confirms the ministry's decision.