

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of February 17, 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

With the consent of the parties the hearing was conducted in writing in accordance with section 22(3) of the *Employment and Assistance Act*.

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 November 3, 2014; a physician's report ("PR") completed by the appellant's general practitioner (the "physician") on November 6, 2014; and an assessor's report ("AR") also completed by the physician on November 6, 2014.
- A consultation report from an orthopedic surgeon dated April 21, 2013 (page 1 of 2 only).
- A medical imaging report dated December 29, 2012 (page 1 of 2 only).
- A handwritten note on the physician's prescription form, headed "PWD application correction (addendum)", signed by the physician on February 3, 2015 (the "Addendum").
- The appellant's four-page typewritten reconsideration submission.
- A two-page typewritten statement from the appellant's girlfriend.
- Photographs of construction equipment which the appellant was required to operate in his profession.
- Two letters from the orthopedic surgeon to the physician, both dated February 6, 2015. One letter is in reference to an examination of the appellant on February 4, 2015. The other is in reference to a session with the appellant on February 6, 2015 to review medical imaging results.

Admissibility of Additional Information

On appeal the appellant made a submission in writing. It substantially reiterates information that was included in his reconsideration submission. It also makes reference to the appellant having shoulder pain as well as major depression and anxiety disorders, but these references were made in the context of complaining about the level of service provided by the orthopedic surgeon. The panel accepted the written submission as evidence in support in accordance with section 22(4) of the *Employment and Assistance Act*.

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

Diagnoses

In the PR the physician diagnosed the appellant with a tear of the anterior cruciate ligament ("ACL") in his left knee and a meniscal tear in the left knee. The onset was 2002.

Physical Impairment

In the PR the physician reported that:

- The appellant has been his patient for two years, and he had seen the appellant two to ten times over the previous 12 months.
- Severe left knee pain and instability along with the appellant's weight impair his mobility, his ability to work, and most of his daily home and recreational activities.
- In terms of physical functional skills the appellant can walk 1 to 2 blocks unaided on a flat

surface, climb 2 to 5 steps unaided, lift 5 to 15 pounds, and has no limitations in remaining seated.

- The appellant finds it difficult to drive a standard shift vehicle and his dump truck - this is a safety issue.

In the AR the physician reported that:

- The impairment that impacts the appellant's ability to manage DLA is "severe, chronic, constant [left] knee pain + instability".
- In terms of mobility and physical ability, the appellant independently manages all functions, but he uses a cane to assist with walking indoors and outdoors and climbing stairs. He also cannot stand for long periods. With respect to carrying and holding, pivoting causes pain and instability in the left knee.

In the Addendum, the physician indicated that the appellant:

- Can walk less than one block unaided.
- Can climb no stairs unaided.
- Can sit for less than one hour.
- Takes 10 minutes longer than typical to dress himself.
- Takes longer than typical to get in/out of shower or bathtub.
- Transfers in/out of bed and on/off chairs take longer – 10 minutes.
- Has difficulty getting to/from stores – continuous assistance.
- Is very limited in any activity requiring standing/walking due to his leg pains.

In his letter of April 21, 2013 the orthopedic surgeon stated that the December 29, 2012 medical imaging report showed an ACL tear, and a complex tear of the medial meniscus. He listed three options for the appellant:

1. Continued observation and bracing.
2. Arthroscopic partial medial meniscectomy.
3. Partial medial meniscectomy and ACL reconstruction.

The orthopedic surgeon reported that at the time, the appellant stated a preference for option 1 as he did not feel as though the knee was giving him too much trouble.

In his February 6, 2015 letter dealing with the appellant's February 4, 2015 session, the orthopedic surgeon reported that:

- The pain in the appellant's left knee is progressively worsening.
- The appellant will notice instability if he jumps down off his truck or pivots on his leg.
- He does have some episodes of giving way which is more closely associated with medial joint pain.
- The appellant is walking with a cane in his right hand (the word "right" was struck and replaced with "left" in an unknown person's handwriting), and he can walk without the cane.
- There is no obvious Trendelenburg or change in knee attitude.
- The appellant has exquisite joint line tenderness. McMurray's test is positive for pain.
- There is no posterior instability.
- The diagnosis was a left medial meniscus tear.

In his February 6, 2015 letter dealing with the appellant's February 6, 2015 session, the orthopedic surgeon reported that:

- The pain is likely from the meniscus tear.
- He had offered the appellant an arthroscopy and partial meniscectomy. The success rate is 85%.
- The appellant would like to proceed with surgery and will be notified when a surgical date becomes available.

In his self-report the appellant stated that:

- He has limited mobility, constant pain, and is unable to walk for extended periods.
- The pain levels are worse some days than others.
- He never knows when his knee will "give out."
- If he is on flat ground his knee is tolerable, but on uneven or loose ground he feels he could fall at any moment. On flat ground he can handle no more than ½ hour walk.
- Getting in and out of the family car is painful. The appellant has had to stop driving his standard truck.
- Some days his knee gets quite swollen for no apparent reason and no amount of pain killers will take the pain away. Lately he's been using a cane (on the bad days) just to have support to get to the washroom.
- He lives too far away from town to be able to attend physiotherapy weekly, so he has opted for home exercises which he does regularly to improve the strength of his knee. However, the exercise also aggravates his knee, making it ache and swell.
- He needs a railing for support or another person to help him climb down stairs, even only two or three stairs.

In his appeal submission, the appellant stated that:

- He can't get into the shower without help and he can't maintain his household by himself.
- He can't walk long enough to do grocery shopping.
- He finds "menial tasks such as the dishes or sweeping" very difficult as he is in pain and feels weak in his knee.
- He is middle-aged with a grade school education and can no longer work as a heavy equipment operator.
- The orthopedic surgeon is arrogant and doesn't take him seriously about his knee instability and pain.
- When he first saw the orthopedic surgeon two years ago he was told it would be in his best interests to "hold off" on the repair surgery for 10 years or so, yet in his report he wrote that the appellant had simply declined surgery without proper explanation.
- The appellant has been put on the wait list for surgery but he can't afford to drive to where the surgery will occur, he doesn't have reliable transportation, and he will have to try to work the surgery around the days that his girlfriend might possibly get called in to work.
- The orthopedic surgeon refuses to report any information to the ministry that can prove that he has a severe impairment.
- The appellant has tried Advil and other pain killers/muscle relaxers over the years and they barely dull the pain.
- He cannot afford the \$1500-\$2000 knee brace that was recommended to him. He bought a

generic knee brace at a thrift store but it doesn't fit properly and causes him pain.

- Despite what the orthopedic surgeon wrote in his letter, the appellant cannot walk more than five feet without his cane and only with intense pain and instability (on days that his knee is really bad.)
- On good days he can walk without his cane "as long as it is on perfectly level ground & NO stairs are involved. On those days I can walk LESS than a block, without my cane, before I have to sit down & get off my leg."
- He doesn't "jump down" from his truck, he steps down.
- The "giving way" episodes have nothing to do with pain as the orthopedic surgeon reported – the knee just gives out for no reason or cause.
- The orthopedic surgeon's evidence should be given less weight because he isn't clear on the facts and he has poor on-line reviews. The orthopedic surgeon's report was "interpreted in his own words" rather than the appellant's.
- The appellant is hoping his surgery will be successful, but at the same time the appellant will be seeking a different specialist as he does not feel comfortable with the orthopedic surgeon.
- The appellant requires constant assistance with daily life and feels he doesn't have any quality of life.

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 that the appellant's ability to communicate is good in all respects. The physician responded "N/A" in part B.4 of the AR dealing with 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.
- In the AR the physician reported that the appellant independently manages all tasks related to the eight DLA of personal self-care, basic housekeeping, daily shopping, meal preparation, managing personal finances (pay rent and bills), managing personal medications, use of transportation (though the appellant uses a cane for support when getting in and out of a vehicle), and social functioning. The physician reported the appellant as having good functioning with both his immediate and extended social networks.

In her written statement at reconsideration, the appellant's girlfriend wrote that:

- She helps him get in and out of the shower most mornings as he struggles with getting in and out of the tub.
- She does all the household chores as he is unable to stand for any length of time without pain. If the appellant does any twisting activities like sweeping or vacuuming his knee will either give out or will give him grief and pain.
- She does the majority of the grocery shopping. He tries to come shopping sometimes but needs to rely on the cart for support. A lot of the time his knee hurts too much for him to get out of the car to go shopping after she drives to the store.

- Any stairs cause extreme pain. He has to use the railing, a cane, or his girlfriend's support to take the 5 steps into and out of their home.
- She is with him most of the time to help him and do tasks for him. He always feels upset, guilty and depressed that his girlfriend has to do all for him. Some days he doesn't even want to get out of bed due to feeling incapable of doing anything.

Help

- In terms of assistive devices, in the PR the physician reported that the appellant uses a cane, and that a knee brace has been recommended by the orthopedic surgeon but the cost is likely prohibitive.
- In response to a question in the AR asking who provides the appellant with help for DLA, the physician wrote that the appellant's wife accompanies him and provides additional assistance.

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 knee injury constitutes a severe physical impairment. He argued that his knee gives him constant pain and that his mobility is limited as his knee tends to "give out" frequently without warning. He also argued that his injuries make it impossible for him to work. He argued that his physician has confirmed that he is severely impaired and that the orthopedic surgeon's evidence should be given little weight as he doesn't take the appellant seriously, he gets poor on-line reviews, and he used his own words in reporting on the appellant's condition rather than restating the appellant's words.

The ministry's position, as set out in its reconsideration decision, is that while there is no doubt that the appellant has a serious medical condition with his left knee, the evidence does not demonstrate a severe physical impairment. The ministry argued that greater weight should be given to this more recent information from the orthopedic surgeon who stated that the appellant has no posterior instability and can walk without a cane.

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. The legislation makes it clear that the determination of severity is at the discretion of the minister, and that the fundamental basis for the analysis is the evidence from prescribed professionals – in this case, the appellant’s physician and the orthopedic surgeon.

The physician noted that the appellant experiences severe chronic pain from his knee. However, the appellant’s physical functional skills as noted by the physician in the PR are generally in the mid-range of the scale. In the AR the physician indicated that all physical functions – though some require the use of a cane - are accomplished independently. In the Addendum the physician reported that the appellant can walk less than one block unaided, climb no stairs unaided, and can sit for less than one hour. The appellant wrote in his self-report that on flat ground his knee is tolerable and that he can walk up to a half hour. In his appeal submission he confirmed that he can walk without his cane on level ground, but for less than one block, and only on “good days”. There is no evidence as to how often either “good days” or “bad days” occur.

The physician offered no explanation for why his own evidence changed from the time he completed the PR and AR on November 6, 2014 to the time of the Addendum on February 3, 2015. His use of the term “correction” in the Addendum may indicate that the physician feels he made an error in his original assessment of the appellant’s physical functioning, or it may indicate that the physician on February 3 was referring to the appellant’s “bad days” rather than his “good days”, or there may be some other reason. Without an explanation from the physician as to his change in evidence, and due to the lack of any detailed narrative in the Addendum, the panel has decided to give the Addendum little weight.

The most recent evidence from the orthopedic surgeon – from February 6, 2015 – indicates that the appellant can walk without his cane and has no posterior instability. The appellant has argued that the orthopedic surgeon’s evidence should be given little weight because it does not reflect the appellant’s own self-assessment. However, the panel notes that the orthopedic surgeon’s letter is consistent with the PR and AR in most respects. The panel is not in a position to assess the orthopedic surgeon’s qualifications and finds the ministry reasonably accepted this evidence.

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

Based on the evidence of the physician in the AR and PR, and of the orthopedic surgeon in his letters of February 6, 2015, the panel concludes that the ministry reasonably found that the evidence falls short of proving that the appellant has a severe physical impairment.

Severe Mental Impairment

The appellant advanced no argument with respect to a mental impairment, though he noted in his appeal submission that he suffers from major depression and anxiety disorders, and his girlfriend stated that he always feels upset, guilty and depressed.

The ministry's position is that the evidence does not establish a severe mental impairment.

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 communication, 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 impairment, primarily because of pain and the risk of falls from his knee, significantly restricts 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 slowly or with the assistance of his girlfriend.

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 argued that the information provided by the physician indicates that the problem with the appellant's left knee is related more to managing pain than to actual physical restrictions.

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 independently manages all tasks related to all DLA, with the exception of mobility indoors and outdoors for which the appellant uses an assistive device in the form of a cane. The physician also noted that the appellant uses a cane to help him with getting in and out of vehicles. The use of a cane or a knee brace is not sufficient to demonstrate that a person has a significant restriction to managing their DLA. The panel notes that the orthopedic surgeon has recommended the use of a knee brace to improve stability of the knee, which the appellant has not followed up on appropriately for lack of resources.

The physician has offered no explanation for why he expressed a different view of the appellant's abilities in the Addendum. Based on the physician's observations in the Addendum, the restrictions

to the appellant's DLA 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 is only with the task of going to/from stores that the physician indicated the appellant requires assistance. As noted above under the discussion of Severe Physical Impairment, the panel has given little weight to the Addendum.

The evidence of the appellant and his girlfriend – that the appellant requires the girlfriend's assistance with virtually all DLA - is significantly at odds with the professional evidence and may reflect a domestic arrangement. Given the requirement in the legislation that restrictions to DLA be based substantially on the opinion of prescribed professionals, the panel has given little weight to the evidence of the appellant and his girlfriend regarding restrictions to DLA.

Based on physician's evidence in the AR that the appellant is capable of independently managing virtually all tasks related to all DLA, the shortcomings of the Addendum noted by the panel, and the limited weight given to the evidence of the appellant and his girlfriend, 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 girlfriend to do most DLA.

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 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 condition affect his ability to function. 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.