

PART C – Decision under Appeal

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

With the consent of the appellant the ministry had an observer attend the hearing.

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 October 26, 2014; a physician's report ("PR") completed by the appellant's general practitioner (the "physician") on December 2, 2014; and an assessor's report ("AR") completed by the physician on December 14, 2014.

Admissibility of Additional Information

Prior to the hearing the appellant submitted the following 11 documents to the office of the Employment and Assistance Appeal Tribunal:

1. A Notice of Appeal dated April 15, 2015 containing information about the appellant's impairments.
2. A Request for Reconsideration form dated March 10, 2015.
3. A "To Whom it May Concern" letter from the physician dated March 18, 2015.
4. A follow up/reassessment report from an orthopaedic surgeon dated April 4, 2013.
5. An operative report from the orthopaedic surgeon dated December 5, 2012.
6. A follow up/reassessment report from the orthopaedic surgeon dated September 7, 2010.
7. A consultation report from the orthopaedic surgeon dated July 26, 2012.
8. A consultation report from the orthopaedic surgeon dating apparently from 2008 or 2009.
9. A consultation report from another orthopaedic surgeon dating apparently from 2008.
10. The appellant's two-page hand-written submission dated April 15, 2015.
11. A "To Whom it May Concern" note from the appellant's friend, dated May 2, 2015.

The ministry stated it had no objection to admissibility of any of these documents.

Each of these documents either reiterates information that was before the ministry at the time of reconsideration, or provides additional detail tending to corroborate information that was before the ministry. Accordingly, the panel has accepted each of the foregoing documents 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 an injury of the right shoulder and an injury of the right knee. Date of onset for both injuries was 2007. In the Health History portion of the PR the physician also referred to pain and discomfort in the appellant's left knee, as well as low back pain and numbness in the right leg.

Physical Impairment

In the PR the physician reported that:

- The appellant has been his patient since June, 2014 and he had seen the appellant two to ten times over the previous 12 months.
- In terms of physical functional skills the appellant can walk 4+ blocks unaided on a flat surface, climb 5+ steps unaided (“worse going down”), can do no lifting, and can remain seated for less than one hour.

In the AR the physician reported that:

- The appellant independently manages walking indoors, but requires periodic assistance walking outdoors. He is “worse going down” stairs than up stairs. He can’t lift for “too long”, and he requires periodic assistance with carrying and holding.

In his letter of March 18, 2015 the physician stated that:

- The appellant has ongoing problems mostly related to a work-related injury to his left knee and right shoulder in 2008 (though WorkSafeBC has not accepted the right shoulder injury as being work-related.)
- The appellant has pain in both knees.
- Because of his disabilities the appellant is not able to work, though he would like to be able to get back into the workforce.
- The simple act of shoveling snow can set the appellant back a couple of days with pain in his knees and shoulder.

Other relevant information from documents 1 through 11 includes the following:

- The appellant has had surgeries on both knees including a tendon repair on his left knee, arthroscopic surgery on his right knee, and subsequently a full right knee replacement.
- He also had an arthroscopic procedure on his right shoulder which showed degenerative changes.
- The appellant has been advised by his orthopaedic surgeon to delay a left knee replacement as long as possible.

In his self-report the appellant stated that:

- He has sleeping problems from leg and shoulder pain causing aches, stiffness and twitching.
- He suffers from hip pain and numbness of his leg if walking for more than one hour.
- It is difficult and frustrating to try to get comfortable in any position when sleeping or sitting.
- Medication seems to help the pain but affects his concentration.
- He doesn’t trust his footing.

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.

- In his oral testimony the appellant said that he can't be part of peoples' lives anymore because his pain keeps him restricted to his home much of the time. He also said that he had been on anti-anxiety medication but he had to stop because he couldn't think straight.

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, though he is indefinitely on narcotics for pain relief.
- In the PR the physician indicated that the appellant experiences restrictions with the DLA of basic housework and daily shopping, without indicating whether the restrictions are periodic or continuous. He also indicated the appellant experiences periodic restrictions with the outdoor aspect of the DLA mobility indoors and outdoors.
- In the AR the physician reported that the appellant independently manages all tasks related to the six DLA of personal self-care, meal preparation, management of personal finances (pay rent and bills), management of medications, use of transportation, and social functioning. He indicated that the appellant has good functioning with both his immediate and extended social networks (but put a question mark beside his assessment on the extended social network).
- The physician also reported in the AR that the appellant requires periodic assistance with basic housekeeping, and periodic assistance with carrying purchases home.

In his self-report the appellant stated that:

- He has a hard time keeping up with housework because of pain.
- His medical issues affect his mood and he sometimes needs to be alone.

In his written appeal submission the appellant stated that:

- He doesn't do much cooking – mostly fast food such as soup and sandwiches.
- Sweeping and vacuuming make his right shoulder ache for up to two hours.
- He sometimes has to crawl up the five steps to his front door when his leg is tired.
- It is difficult to stand in the shower and he had a fall in the shower that knocked him unconscious. He is restricted now to bathing rather than showering. He has difficulty reaching parts of his body for washing.
- He fell down while taking out the garbage and the garbage man had to help him back on his feet and into the house. It took three days for him to recover.
- He is on numerous medications including pain killers, muscle relaxers, antipsychotics, anti-inflammatories, antibiotics, and sleeping pills. Sometimes no matter how many pills he takes it doesn't seem to help.
- He can participate in virtually no recreational activities.
- His specialist has told him he will not ever be able to go back to work at his previous job.

In his oral testimony the appellant substantially followed his written submission. He also stated that:

- He was supposed to have surgery on his left knee first but his right knee “blew up” and was replaced.
- He doesn’t prepare any big meals unless he has visitors. His neighbours sometimes have him over for a meal.
- He tries to keep his home clean enough for his ex-spouse to allow his daughter to come over. Sometimes he can do it and sometimes he can’t. His daughter provides assistance with DLA when she is with him.
- His credit is to the limit and he can’t afford to hire anyone to help him. In another couple of months he is likely to be out on the street.
- He tried a new line of work last spring but had to quit after a month. He subsequently tried the same work again in the fall but simply couldn’t do it because of his medical conditions.
- He can’t even drink a cup of coffee without it causing pain to his right shoulder.
- If he walks more than three blocks his leg gets sore, tired and numb. He often has to sit down for a while in order to be able to get home again.
- He tries to go for a walk around his neighbourhood every day. He has tried exercising with an eight-pound weight to keep in shape but his physician told him to stop because it would do more damage than good.
- He has no confidence in his legs anymore, and he doesn’t trust himself to hold his infant grandchild unless he is sitting down.
- He still has a driver’s licence but 15 minutes of driving causes pain in his right shoulder.
- He has worked hard all his life and has been advised by his physicians that he has worn out every major joint in his body. He is “stuck” and has no hope left.

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

- He was not with the physician when the physician completed the PR and AR. The physician simply relied on his file notes and “blew through” the application forms. The appellant has had difficulty finding a family physician.
- He has been trying to reduce the amount of medication he takes and is now down to 200 pills a month from 240.
- The medications affect his concentration and focus, but he has to take them for the pain.
- He can’t afford to install any aids in his bathroom such as handrails, a floor-to-ceiling pole etc.
- He has had a number of braces for both knees but whichever knee he has them on they interfere with the other leg, and they cause muscle loss.
- He’s tried a cane and a walker, but can’t use them because of the pain in his right shoulder.
- He has been told by his physicians that he will likely end up in a wheelchair.
- His orthopaedic surgeon has advised him to delay further surgery on his right shoulder until he is 60 years old.

Help

- In the PR the physician reported that the appellant does not require any prostheses or aids for his impairment.
- In the AR the physician indicated that the appellant receives assistance with DLA from friends and family, and that the appellant does not have an assistance animal.
- In his letter of May 2, 2015 the appellant’s friend stated that he often helps the appellant with

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chores such as cutting the lawn, raking, shoveling stairs, driveway, walkway, taking the garbage can to the curb and packing groceries into the house.

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 the pain and instability caused by his knee and shoulder injuries constitute a severe physical impairment. He said that he is limited to walking three or four blocks before his leg starts to tire and go numb and his hip starts to hurt, and that he is prevented from doing even routine household chores because of severe pain. He also stated that he cannot work in any kind of employment at the present time.

The ministry's position, as set out in its reconsideration decision, is that the impacts described by the physician are more in keeping with a moderate degree of impairment. The ministry argued that the physician provided no information about how often the appellant requires assistance with aspects of physical functioning such as lifting/carrying/holding.

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 orthopaedic surgeon.

The physician's assessment of the appellant's physical functioning in the PR is at the higher end of the scale with respect to walking and climbing stairs, and at the lower end of the scale with respect to lifting and remaining seated. In the AR the physician indicated that the appellant requires periodic assistance with aspects of mobility and physical activity, but provided no information about how frequently those situations arise or the nature of the assistance provided.

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. Paid employment generally requires a higher level of functioning than DLA. As discussed below under the heading Significant Restrictions to DLA, the appellant's impairment does not appear to have translated into significant restrictions in his ability to manage DLA.

For the foregoing reasons, the panel concludes that the ministry reasonably found that the evidence is more in keeping with a moderate degree of impairment.

Severe Mental Impairment

The appellant did not expressly advance an argument regarding a severe mental impairment. He did, however, argue that his social functioning is impacted by his medical conditions, and that the fact he was prescribed anti-anxiety medication supports his position that he has a mental impairment.

The ministry's position is that the evidence does not establish a severe mental impairment. The ministry referred to the physician's evidence about there being minimal or no impacts to cognitive and emotional functioning, and no 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 medical 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 deficits with 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 due to pain and the risk of falls, 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 assistance.

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 physician provided no information about the frequency of the restrictions to the DLA of mobility outdoors, basic housekeeping, or daily shopping.

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The legislation – s. 2(2)(b)(i) of the EAPWDA – requires the ministry 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".

The legislation requires that a severe impairment directly and significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods. Accordingly, in circumstances where the evidence indicates that DLA are restricted, it is appropriate for the ministry to require evidence as to whether the restriction is continuous or periodic and – if periodic – of how frequently the restriction arises.

The evidence of the physician is that the appellant independently manages virtually all tasks related to all but three DLA. Regarding basic housekeeping the physician indicated the appellant requires periodic assistance but provided no information on frequency. In his oral testimony, the appellant stated that sometimes he can do his housework to a satisfactory standard and sometimes he can't. Regarding daily shopping, the physician indicated that the appellant independently manages all tasks except for requiring periodic assistance with carrying purchases home – again with no evidence of the frequency of the restriction. Finally, with respect the DLA of mobility indoors and outdoors, the physician indicated that the appellant independently manages mobility indoors but requires periodic assistance outdoors. The appellant reported that he is limited to walking three or four blocks before he gets severe pain and numbness, but he also stated in his self-report that it's not until he's walked for over an hour that he has to sit down for five minutes.

There is no medical evidence of restrictions to any of the other seven prescribed DLA.

Based on physician's evidence that the appellant is capable of independently managing virtually all tasks related to most DLA, and the limited evidence of the frequency of periodic restrictions, 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 daughter, friends and neighbours.

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 conditions 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.