

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of September 4, 2015, which found that the appellant did not meet one of the 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 was satisfied that the appellant met the age requirement, that the information establishes that he has a severe physical impairment, that the impairment directly and significantly restricts his daily living activities (“DLA”) and that the appellant requires help with his DLA. However, the ministry was not satisfied that the appellant’s severe impairment is, in the opinion of a medical practitioner, likely to continue for at least 2 years as required by section 2(2)(a) of the EAPWDA.

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 form dated May 6, 2015 ("SR"), a physician's report ("PR") completed by the appellant's general practitioner (the "physician") on April 23, 2015; and an assessor's report ("AR") completed by a nurse practitioner (the "Assessor") on April 21, 2015.
- Physician's physiotherapy referral note dated April 27, 2015 indicating the appellant requires 6-9 months physiotherapy
- Physiotherapy report, undated indicating that the appellant is taping the appellant's scapula and shoulder to offload strained structure and support/reposition the scapula but that this is not a long term solution and that he is re-referred the appellant to an orthopedic surgeon for a consultation for custom bracing. The physiotherapist also states that the delay between the time of injury and focused rehabilitation may have a negative impact on long term outcomes
- Note from a community health centre dated March 13, 2015 stating that the appellant is unable to work for at least 6 more months due to ongoing right shoulder weakness and pain following an injury in October 2014
- The appellant's Request for Reconsideration ("RFR") form dated August 7, 2015

Additional information provided

In his Notice of Appeal the appellant states that he has been dealing with a shoulder injury for over one year now and is no further ahead. He states that he is at risk of losing the use of his right arm and cannot work. He has been in a psychiatric hospital over 1.5 months for diagnosed mental illness exacerbated by physical health problems and inadequate supports.

Prior to the hearing the appellant's advocate provided two written submissions. The first submission dated October 30, 2015 includes the following:

- Appellant's written submission dated October 30, 2015
- Letter from a social worker dated October 26, 2015 indicating that the appellant was an inpatient at an adult psychiatric program from August 23 to September 29, 2015, during which time he was in an acutely psychotic state, had significant difficulties with communication, but has now begun responding to treatment. The social worker also indicates that he observed the appellant's shoulder injury, describing that "it is obvious that the shoulder indicates significant disfigurement, and it is easy to imagine that this condition would cause a significant amount of ongoing pain".
- Letter from an orthopedic surgeon dated August 11, 2015 regarding his recommendation for a custom-made shoulder orthosis and his opinion that the severity of the appellant's shoulder deformity will not allow for complete correction
- Hospital discharge planning flowsheet dated August 25, 2015
- Consult report from the appellant's physiotherapist indicating that the appellant has extreme scapular instability and loss of muscular stabilization, along with a list of appointments from February 1 to October 6, 2015
- Appointment Notice from a hospital indicating that the appellant has an MRI Arthrogram for his right shoulder scheduled for June 9, 2016.

The appellant's second submission includes the following:

- Letter from the Assessor dated November 5, 2015 indicating that the appellant has no hope of recovery and is severely disabled for a period of two years
- Letter from the appellant's physiotherapist advising that the appellant underwent nerve conduction studies and that he has a report dated March 24, 2015 that would be part of the appellant's physician's records
- Letter from the appellant's physiotherapist, undated indicating that the appellant's function has not improved to any significant extent since his injury, that his use of his right arm is 10%, that physiotherapy will help manage his pain but is unlikely to result in his condition improving from a severe to moderate impairment in the next two years and that the appellant continues to require a custom brace

At the hearing the appellant provided oral evidence describing his shoulder injury, the taping treatment he receives from the physiotherapist, his requirement for the recommended brace and the impact of his impairment on his DLA. The appellant states that he was a roofer and always worked but is not able to do so anymore because of his injury.

Admissibility of New Information

The ministry did not object to the appellant's two submissions. The panel has admitted the appellant's oral testimony and new information contained in the two submissions, as it is evidence in support of information and records that were before the ministry at the time of reconsideration, in accordance with section 22(4) of the *Employment and Assistance Act*. In particular, the new information corroborates the information at reconsideration respecting the appellant's impairment, his ongoing difficulties with his left shoulder injury, prognosis of his injury, and help needed.

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 in the opinion of a medical practitioner, the appellant's impairment is not likely to continue for at least 2 years as required by section 2(2)(a) of the EAPWDA.

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.

Panel Decision

The ministry's position, as set out in its reconsideration decision, is that the minister is not satisfied that it is the opinion of the appellant's medical practitioner that the appellant's shoulder injury, while currently considered severe and significantly restrictive, is likely to continue for at least 2 years. The ministry acknowledges that the physician, in the PR, places an 'x' next to 'yes' when asked if the appellant's impairment will likely continue for two years or more from today. However, the ministry's position is that the physician's explanation of "*Long wait with orthopedic surgeon. Uncertain if surgical resolution is even possible. Recovery will be 2+ years*", raises several questions as to whether the appellant's impairment is in fact likely to continue for two or more years. The ministry questions how long is '*a long wait*' for the orthopedic surgeon, and if a surgical resolution is possible, is it likely that the appellant's impairment will improve from severe to moderate during the next two years? The ministry's position is that there are several variables, which are still in question at this time, with respect to the appellant's rehabilitation and recovery.

The reconsideration decision also states that the medical note of the Assessor dated March 9, 2015, which indicates that the appellant is unable to work for at least 6 more months, raises the question of whether the impairment will be severe for at least the next two years because if the impairment lasts that long it would be expected that the appellant would be off work longer than 6 months. The reconsideration decision also raises the question of whether the use of the custom orthopedic brace recommended by the appellant's physiotherapist would reduce the appellant's pain and effectively accelerate his recovery, increasing the likelihood that the appellant's impairment would reduce from severe to moderate sometime over the next two years.

The reconsideration decision also states that the physiotherapist indicates that the appellant is scheduled to receive a nerve conduction study to which the date had not been set and that the study may shed some light on the prognosis for recovery. The ministry's position is that the information provided by the appellant's physiotherapist does not support the likelihood that the appellant's impairment will remain severe for at least the next two years.

The appellant's position is that the information provided by the physician establishes that he has a

severe impairment that is likely to continue for at least 2 years. The appellant's position is that he has to complete physiotherapy first and does not have the funds to obtain the recommended brace and even if he obtained the brace, he would require that for at least 9 months before there would be any likelihood of improvement. The appellant states that he is waiting for an MRI, which is now scheduled to take place on June 9, 2016 and it is only at some point after that when the orthopedic surgeon will determine if he is even eligible for shoulder surgery. The appellant's advocate argues that any ambiguities raised by the Assessor by her comments that the appellant is unable to work for at least 6 months are clearly laid to rest by the Assessor's letter dated November 5, 2015 indicating that after the six months passed, the appellant was reassessed and the Assessor confirms that the appellant will be severely disabled for a period of at least 2 years.

The appellant's advocate argues that although the appellant may have some increased functionality with the use of the brace that has been recommended to him, that does not mean that the information provided at present which indicates that his impairment is likely to continue for at least 2 years, should not be accepted. The advocate also argues that the updated information provided by the physiotherapist confirms that the appellant has undergone a nerve conduction study and that the physiotherapist's opinion is that the appellant's condition has not changed since his injury and that it is unlikely that his condition will improve from a severe to a moderate impairment in the next 2 years.

EAPWDA section 2(2)(a) is satisfied if there is a medical opinion of a medical practitioner that the appellant has a severe impairment that is likely to continue for at least two years. The panel finds that the physician diagnosed the appellant with a shoulder injury, being chronic scapular winging with nerve impingement, that is likely to continue for two years or more from today (being the date the physician completed the PR), and that the ministry's decision that this criteria was not met was not reasonable.

While the physician indicates that there is a long wait for an orthopedic surgeon which may raise a question as to how long of a wait there may be, the physician clearly states that it is uncertain if surgical resolution is even possible and that even with surgery, the appellant's recovery will be 2+ years so although there may be further investigations and treatment, the panel finds that the physician's comments are clear that the appellant's impairment is likely to continue for at least two years as required by the legislation.

Although the Assessor's note of March 9, 2015 indicates that the appellant is medically unable to work for at least 6 months, the letter from the Assessor dated November 5, 2015 confirms that after reassessing the appellant, it is his opinion the appellant is severely disabled for a period of two years. The Assessor further indicates that the appellant has not even been able to access the required physiotherapy to even attempt rehabilitation.

The panel notes that the appellant did not provide a copy of the nerve conduction tests but the physiotherapist has confirmed that he obtained a copy of the nerve conduction report, that the appellant's condition has not improved since his initial injury, and that the ongoing physiotherapy and taping provided is unlikely to result in the appellant's condition improving from severe to moderate impairment in the next two years.

The panel finds that the information of the physician, as set out in the PR, clearly indicates that the legislative criteria of section 2(2)(a) is met but that the additional information provided by the

Assessor and physiotherapist further confirms their opinions that the appellant's impairment is unlikely to improve from a severe impairment to moderate impairment within the next two years.

The panel finds that the reconsideration decision, concluding that the opinion of the appellant's medical practitioner did not confirm that the appellant's impairment is likely to continue for at least 2 years, as required by section 2(2)(a) of the EAPWDA was not reasonable.

Conclusion

Based on the foregoing, as the panel finds that the reconsideration decision was not a reasonable application of the legislation in the circumstances of the appellant the panel rescinds the ministry's reconsideration decision.