

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of October 22, 2015, which found that the appellant did not meet four 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. However, the ministry was not satisfied that:

- in the opinion of a medical practitioner, the appellant’s impairment is likely to continue for at least 2 years;
- 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

*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

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

- The appellant's Persons With Disabilities ("PWD") application form consisting of the appellant's self-report dated March 31, 2015; a physician's report ("PR") and an assessor report ("AR") both signed by the appellant's general medical practitioner (the "physician") and both dated June 4, 2015.
- Letter of September 30, 2015 in which another physician reported that the appellant: "has been or will be off work for medical reasons until a resolution of his condition. This will be at least three months, possibly longer."
- Appellant's Request for Reconsideration dated September 24, 2015 requesting an extension of time.

### ***Additional Information***

Prior to the hearing, the appellant provided the following additional documents:

- Undated referral to physiotherapy by an orthopedic surgeon for post-op arthroscopic rotator cuff repair, including a schedule of increased activity culminating in a return to recreational activities by weeks 12 to 24, driving with a dominant arm by 12 weeks and golf within 4 to 5 months. The treatment includes wearing of a 'Cryo Cuff' for 3 weeks straight until the post-op follow up at the hospital scheduled for November 25, 2015.
- Consultation Requests dated December 17, 2014 due to the appellant's pain and while he awaits an MRI.
- Radiology Reports dated August 22, 2013 for the cervical spine and the right shoulder indicating "no abnormality of the bones, joints or soft tissue."
- Referral to a neurosurgeon in May 2014, dated March 3, 2014.

At the hearing, the appellant and his advocate provided an update that the appellant had undergone surgery on his shoulder at the beginning of November 2015 and that the Radiology Reports, Referral, and the Consultation Requests show the previous efforts to investigate the cause of, and provide relief for, the appellant's ongoing pain. The appellant stated that the degree of pain and impact on his ability to perform his daily living activities, especially any activity that involves the use of two arms or repetitive movements, has been greatly exacerbated since the time of the PWD application. The appellant also provided information that was substantially reiterative of information that had been before the ministry at the time of reconsideration, other than argument that the physician may not have appreciated the extent of the appellant's physical impairment.

### ***Admissibility of Additional Information***

The ministry did not object to the admissibility of the additional information. The panel finds that the additional documentation submitted before the hearing and the appellant's testimony at the hearing were generally consistent with the original information. Accordingly, the panel has admitted this information into evidence in accordance with s. 22(4) of the *Employment and Assistance Act*.

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

### ***Duration of Impairment***

- In the PR the physician (who had known the appellant for 7 months) did not respond to the question “Is the impairment likely to continue for two years or more from today?” The physician commented: “The patient is still being assessed by an orthopedic surgeon and he is considering surgery. After the orthopedics interview we will know the prognosis.”
- In the letter dated September 30, 2015, the physician indicated that the appellant will be off work until a resolution of his condition, at least 3 months and possibly longer.
- In his self-report, the appellant commented that “the specialist is optimistic that I can recover fully, but there are no guarantees.”
- At the hearing, the appellant said that there is currently no clear prognosis for his shoulder recovery as this depends on his ability to afford the rehabilitation program. He stated that his shoulder was injured in 2011 but he was unable to access proper medical attention until 2013, and approached the ministry about submitting a PWD application at the end of 2013. He was advised by the ministry to wait until he had sufficient evidence of the impact of his condition before submitting a formal application.

### ***Diagnoses***

- In the PR the physician diagnosed the appellant with “tendon tear right supraspinatus” with no date of onset provided. The physician noted that severe pain affects the appellant’s day-to-day life and he is currently seeing an orthopedic surgeon.

### ***Physical Impairment***

- In terms of functional skills, the physician indicated in the PR that the appellant can walk 2 to 4 blocks unaided on a flat surface, can climb 5+ steps unaided, cannot lift and can remain seated less than 1 hour. In the AR the physician reported that the appellant is independent with walking indoors and requires continuous assistance with walking outdoors, climbing stairs, standing, lifting and carrying and holding. The physician wrote: “severe shoulder pain inhibiting patient because he gets pain on movement or sitting for long time.”
- In his self-report, the appellant wrote that he wears a sling frequently to take the weight off his shoulder, that the pain is “very severe” and sometimes the only way to resolve it is to lie down and support his shoulder with pillows. Sitting in a chair triggers his pain quickly and even walking for 5 to 10 minutes forces him to wear a sling. The appellant wrote that his specialist informed him that the injury requires corrective surgery and months of rehabilitation. The injury has made finding employment very difficult and he can no longer do the tasks required to do his job.
- At the hearing, the appellant stated that for the last two years he has been in much pain, unable to access treatments or to afford pain medication. He can lift lighter weights, a maximum of 5 kg., with his left arm but heavier weights affect his balance and cause pain to the right shoulder. His surgery involved placement of pins in his shoulder and he was told by the orthopedic surgeon that he discovered complications including the presence of arthritis.

### ***Mental Impairment***

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- In the PR the physician indicated the appellant has no difficulties with communication and no significant deficits with cognitive and emotional function.
  - In the AR the physician reported the appellant's ability to communicate is good in all respects and there are no impacts in all 14 categories of 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 physician reported that the appellant's impairment does not restrict his ability to manage the DLA of personal self-care, meal preparation, management of medications, daily shopping, management of finances or social functioning. The appellant is also not restricted with mobility inside the home. The physician indicated that two DLA are directly and continuously restricted: basic housework and use of transportation, as well as mobility outside the home (but not mobility inside the home). Regarding the degree of restriction the physician commented: "...pain in the shoulder makes it difficult to do housework" and "he currently can do minimal activity."
- In the AR the physician indicated that the appellant independently manages all assessed tasks related to the DLA of personal self-care, meals, managing personal finances (pay rent and bills), managing medications, and use of transportation. Regarding the DLA of basic housekeeping, the physician reported that the appellant requires continuous assistance with basic housekeeping and his "friend helps," though he independently manages doing his laundry. Regarding the DLA of daily shopping, the physician reported that the appellant is independent with going to and from stores, reading prices and labels, making appropriate choices and paying for purchases, and requires continuous assistance with carrying purchases home as he "cannot lift."
- In his self-report the appellant wrote that in his daily routine he tries not to do anything that will trigger his pain and the simplest of tasks are the most painful. Whereas he can pick up small pieces of firewood, he cannot chop kindling. He can pick up, but any tasks that require repetitive movements, such as scrubbing or sweeping, are too painful. He can no longer do the tasks required to do his former trade.

### ***Help***

- In the PR the physician indicated that the appellant does not require any prostheses or aids for his impairment, although in the AR the physician wrote "shoulder sling."
- In the PR and AR the physician indicated that the appellant receives help with DLA from friends and wrote that his friend helps with cleaning and driving him around.
- In his self-report, the appellant wrote that he wears a sling frequently to take the weight off his shoulder.

## 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 section 2 of the EAPWDA 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;
- the evidence does not establish that the appellant has a severe physical or mental impairment;
- the appellant's DLA are not, 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 does not require the significant help or supervision of another person, an assistive device, or the services of an assistance animal?

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.

(2) For the purposes of the Act, "**prescribed professional**" means a person who is

(a) authorized under an enactment to practise the profession of

- (i) medical practitioner,
- (ii) registered psychologist,
- (iii) registered nurse or registered psychiatric nurse,
- (iv) occupational therapist,
- (v) physical therapist,
- (vi) social worker,
- (vii) chiropractor, or
- (viii) nurse practitioner, or

(b) acting in the course of the person's employment as a school psychologist by

- (i) an authority, as that term is defined in section 1 (1) of the *Independent School Act*, or
- (ii) a board or a francophone education authority, as those terms are defined in section 1 (1) of the *School Act*,

if qualifications in psychology are a condition of such employment.

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## **Duration of Impairment**

The appellant's position is that he injured his shoulder in 2011, he first approached the ministry about applying for PWD designation at the end of 2013 and was discouraged from proceeding until he had sufficient evidence, and it has already been at least 2 years that he has suffered with shoulder pain.

The ministry's position is that the physician has not confirmed that the appellant's impairment will continue for two years or more.

### **Panel Decision**

The legislation – section 2(2)(a) of the EAPWDA – does not permit the ministry to designate an applicant as a PWD unless it is satisfied that, in the opinion of a medical practitioner, the applicant's impairment is likely to continue for at least 2 years.

Although the appellant pointed out that he has suffered with shoulder pain for at least 2 years at this point, this legislative criterion relates to the anticipated duration of the impairment from the date of the application and must be confirmed by a medical practitioner. In the appellant's situation, his physician expressed uncertainty regarding the duration of his physical condition. At the time of completing the PR in June 2015, the physician did not express the opinion that the physical impairment (tendon tear right supraspinatus) is likely to last for at least two years and he commented that there will be a clearer indication after the appellant has been assessed by an orthopedic surgeon. The schedule for physiotherapy set out by an orthopedic surgeon for post-op arthroscopic rotator cuff repair, which occurred in November 2015, indicates a general prognosis of return to full activity including driving with a dominant arm within 6 months at the latest.

Based on the foregoing evidence, the panel finds that the ministry reasonably determined that this legislative criterion has not been satisfied.

## **Severe Physical Impairment**

The appellant's position is the tendon tear in his right shoulder, which required surgery, constitutes a severe physical impairment as a result of severe pain for which he currently requires use of a Cryo Cuff and therapy. His physician referred to his condition being "severe" several times throughout the PWD application.

The ministry's position is that a severe impairment of physical functioning has not been established, as the physician reported mobility within a high to moderate range of functional ability, and while the appellant's physical ability is restricted, particularly with lifting, the physician did not confirm that he had an impairment that is likely to continue for two years or more.

### **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.

The appellant's mobility skills as described by the physician are at the high end of the scale. He is able to walk 2 to 4 blocks unaided and climb 5 or more steps unaided. Although the physician assessed the need for continuous assistance with most aspects of mobility and physical ability, with the exception of walking indoors, the assistance has been provided through the use of a shoulder sling and is now provided by a Cyro Cuff. The panel finds that these devices are designed to protect the shoulder from movement, which is identified by the physician as the trigger of the appellant's shoulder pain. Therefore, a shoulder sling or a Cyro Cuff does not fall within the definition of assistive device as set out in the legislation as a device designed to enable a person to perform a DLA.

While the appellant is limited in his ability to lift with his right arm, he clarified at the hearing that he is able to lift up to 5 kg. with his left arm; he also emphasized his inability to do the tasks required for his former trade, as confirmed by the physician's letter dated September 30, 2015. As for finding work and/or working, the panel notes that employability is not a criterion in section 2(2) of the EAPWDA nor is it listed among the prescribed DLA in section 2 of the EAPWDR. While the advocate pointed out that the appellant's physician used the word "severe" several times, this was in reference to the appellant's shoulder pain and not to the severity of the appellant's impairment per se. The appellant's shoulder has now been repaired through surgery and the expectation is for recover to normal activity levels within 6 months.

As discussed in more detail below under the heading Significant Restrictions to DLA , the appellant's physical condition does not appear to have translated into significant restrictions in his ability to manage his DLA independently.

Accordingly, the panel has concluded that the ministry reasonably determined that the evidence falls short of establishing that the appellant has a severe physical impairment.

### **Severe Mental Impairment**

The appellant did not advance an argument with respect to a severe mental impairment.

The ministry's position is that there is not enough evidence to establish a severe mental impairment.

### **Panel Decision**

In terms of mental functional skills, the evidence of the physician in the PR and AR indicates that the appellant's communications skills are satisfactory in all respects. The physician did not diagnose a mental disorder and reported no significant deficits with cognitive and emotional function. With respect to social functioning, the physician indicated the appellant is independent in all aspects and he has good functioning with respect to both his immediate and extended social networks. The panel concludes that the ministry reasonably determined that the evidence does not demonstrate a severe mental impairment.

### **Significant Restrictions to DLA**



The appellant's position is that his impairment causes significant restrictions to his ability to manage his DLA. He argued that his physician confirmed that he is restricted in a number of DLA and may not have appreciated his inability to perform any activity involving two arms or repetitive movements.

The ministry's position is that the evidence shows that there is not enough evidence to confirm that the appellant's impairment directly and significantly restricts his ability to perform DLA either continuously or periodically for extended periods.

### Panel Decision

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. The term "directly" means that there must be a causal link between the severe impairment and the restriction. The direct restriction must also be significant. In circumstances where the evidence indicates that DLA are directly 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.

In the PR the physician indicated that the appellant's impairments directly and continuously restrict his ability to manage two DLA independently – basic housework and use of transportation. While mobility outside the home is continuously restricted, mobility inside the home is not restricted. Regarding the degree of restriction, the physician wrote that "pain in the shoulder makes it difficult to do housework" and he also commented that the appellant "currently can do minimal activity."

The AR provides a more detailed breakdown of the DLA into discrete tasks which provide some evidence of the significance of the restrictions. In the AR the physician indicated restrictions to two tasks related to two DLA – basic housework (his friend helps) and daily shopping (carrying purchases home since he cannot lift). The appellant is assessed as being independent with all tasks of the other listed DLA, specifically personal care (noted that the appellant sleeps on his couch), meals, paying rent and bills, medications, transportation and social functioning. The appellant wrote in his self-report that any tasks that require repetitive movements, such as scrubbing or sweeping, are too painful and he emphasized that he can no longer do the tasks required to do his former trade. While the advocate argued that the physician may not have appreciated how an upper body injury of this type restricts the ability to perform activities involving two arms or repetitive movements, there was no information provided by the physician further to that set out in the PR and AR, and the panel finds that the ministry reasonably relied on the assessment in these written reports.

Considering the foregoing, the evidence does not present a compelling picture of an individual whose ability to manage his DLA is significantly restricted as contemplated by the legislative scheme. As previously mentioned, employability is not a criterion in the legislation with respect to PWD designation. Accordingly, the panel concludes that the ministry reasonably determined that the appellant's ability to manage his DLA independently is not significantly restricted either continuously or periodically for extended periods.

### Help with DLA

The appellant's position is that he requires help from his friend, recommended therapies, and the use of a shoulder sling and/or Cryo Cuff.

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.

*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 currently affects his ability to function. However, having reviewed and considered all of the evidence and the relevant legislation and for the foregoing reasons, 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.