

## PART C – Decision under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Social Innovation (the ministry) dated May 31, 2016, which held that the appellant did not meet 3 of the 5 statutory requirements of section 2 of the *Employment and Assistance for Persons with Disabilities Act* for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement and that a medical practitioner confirmed that the appellant has an impairment that is likely to continue for at least 2 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
- as a result of those restrictions, in the opinion of a prescribed professional, the appellant requires an assistive device, the significant help or supervision of another person, or the services of an assistance animal to perform DLA.

## 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

### Information before the ministry at reconsideration included:

- A PWD application comprised of the appellant's Self-report (SR) dated October 7, 2015, as well as a Physician Report (PR) dated October 22, 2015 and an Assessor Report (AR) dated November 25, 2015, which were both completed by the appellant's general practitioner (GP) of 2 years.
- An orthopaedic surgeon's August 20, 2015 consult letter respecting a diagnostic procedure (biopsy) and October 29, 2015 Surgical Operation Note respecting that procedure.
- 11-pages of the PR and AR, which were completed by the appellant as a self-report and provided to the GP on October 7, 2015.
- December 22, 2015 consult letter from the orthopaedic surgeon respecting upcoming right shoulder replacement surgery.
- May 4, 2016 letter from the appellant's GP, reporting the appellant's day activity levels as compared those reported in the PR and AR, which were completed prior to the complete right shoulder replacement surgery on March 7, 2016.
- The appellant's written reasons for requesting reconsideration, dated May 5, 2016.
- An undated letter from the appellant's ex-wife (additional copy provided on appeal identifies the date of the letter as May 18, 2016).
- Copy of an x-ray image (unclear) with no annotated information.

### Additional evidence submitted on appeal and admissibility

Section 22(4) of the Employment and Assistance Act limits the evidence that the panel may admit to information and records before the minister at the time of reconsideration and oral and written testimony in support of the information available at reconsideration.

Prior to the hearing, the appellant provided four separate submissions, which included additional copies of some of the documents already before the ministry at reconsideration, as well as:

- (1) An October 5, 2015, letter from the orthopaedic surgeon stating that a shoulder immobilizer has been prescribed as part of the postoperative treatment and rehabilitation.
- (2) Two black and white x-rays (blurry). One is identified as relating to surgery in 2013 and the other as relating to the second surgery on March 7, 2016.
- (3) Clear, coloured copies of the same two x-rays.
- (4) July 19, 2016, 3-page letter from a vocational rehabilitation specialist (registered psychologist) respecting a July 18, 2016 diagnostic interview conducted with the appellant in support of his application for Canada Pension Plan (CPP) benefits.

The ministry did not object to the new information being admitted into evidence. The panel admitted the above documents into evidence pursuant to section 22(4) of the EAA as the information therein corroborated and substantiated the information before the ministry at reconsideration and was therefore in support of the information available at reconsideration.

The ministry did not provide additional evidence on appeal and relied on its reconsideration decision.

### Summary of relevant evidence

#### Diagnoses and history

As confirmed by the appellant's GP and orthopaedic surgeon, the appellant suffered an injury to his right shoulder in 2009 (4-part proximal humerus fracture) for which he underwent surgery (hemiarthroplasty) in 2013. Subsequent to the completion of his PWD application form, the appellant underwent a surgical biopsy on October 29, 2015, in advance of a complete right shoulder reverse revision replacement which took place in March 7, 2016.

The appellant is diagnosed with right shoulder – total deterioration, chronic pain, and depression.

#### Physical Impairment

In the PR and AR, the GP provides the following information.

- The appellant is able to stand, walk indoors and outdoors, and climb stairs independently, with no noted limitation.
- In the PR, the appellant is reported as being unable to do any lifting. In the AR, the need for periodic assistance with lifting is reported, with carrying and holding being managed independently.
- The appellant can remain seated for 1 to 2 hours.
- The appellant has limited use of his right arm and suffers from chronic pain syndrome.

In his letter updating the appellant's status following the complete right shoulder replacement surgery, the GP writes that the appellant is limited in the use of his right arm and right shoulder due to severe pain. As a result of this surgery, it is unlikely he will ever be able to return to a labour type job.

In his written submissions, the appellant writes that following the unsuccessful 2013 surgery, he has had no mobility in his right shoulder and constant unbearable pain which disrupted his sleep. He independently manages walking and climbing stairs but experiences pain after standing 20 minutes. He can remain seated for less than 1 hour and it is 10-15 minutes before arm/shoulder pain increases. He is unable to do his own housekeeping and cannot write, as he is right handed. He will never be able to return to construction work.

The appellant's ex-wife writes that she performs weekly tasks that require the use of two arms for the appellant, including cleaning his bathroom, kitchen, laundry, bed-making, and washing floors. She also does all of his writing activities.

The vocational rehabilitation specialist writes that the appellant experiences restricted range of motion and unabated pain in the shoulder region during the day and night. Although the appellant can still operate a one ton truck on a part-time basis, he is unable to carry out the Heavy Strength Demand duties required of his occupation on a prolonged and sustainable basis due to the

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unresolved functional restrictions and limitations as a result of the failed surgeries. The vocational specialist's opinion is that due to his low education standing, very limited ability to upgrade his education for light work occupations, physical restrictions accompanied with chronic pain and psychological symptoms of depression, the appellant "is minimally nor gainfully employable and likely for the indefinite future." He meets the CPP criteria as he has a severe and prolonged disability and neither the capacity to pursue not secure gainful employment of any kind for an indefinite period.

At the hearing, the appellant stated that following his 2013 surgery, his arm was 100% worse. He experiences major pain 24 hours a day and cannot lift his arm, work, or sleep. He will never be able to return to his former employment, which is the only type of work he knows how to do. He described the 2009 x-ray as showing the prosthesis that was glued into place in 2013. The 2016 x-ray shows the new replacement prosthesis placed during the March 2016 total shoulder replacement surgery, and also the location on his shoulder where the healing was crooked, which has resulted in extensive pain.

### Mental Impairment

In the PR and AR, the GP provides the following information.

- No difficulties with communication; good speaking, reading, writing and hearing abilities.
- Significant deficit with cognitive and emotional function for 1 of 11 listed areas – emotional disturbance.
- A major impact on daily functioning is reported for emotion. A moderate impact is reported for attention/concentration and motivation. No impact on daily functioning is reported for the remaining 11 listed areas of cognitive and emotional functioning.
- Respecting social functioning, in the PR, a continuous restriction is reported. In the AR, appropriate social decisions and interact appropriately with others are reported as managed independently. Ability to develop and maintain relationships and dealing appropriately with unexpected demands require periodic support/supervision. Ability to secure assistance from others is described as "unknown."
- Marginal functioning with immediate and extended social networks.

In his written submissions, the appellant writes that being in major pain all of the time causes major depression. He has depressed moods, lack of motivation and fatigue on a daily basis. He also has significant deficits in the areas of consciousness, language (written comprehension), motor activity, and attention or sustained concentration. He experiences a major impact on daily functioning in most of these areas.

The appellant's ex-wife writes that since the accident, the appellant has become increasingly depressed due to being unable to work, pay bills, and perform simply daily tasks. Loss of sleep due to pain and being a single parent also add to his depression.

The vocational specialist writes that the appellant suffers from depressive symptoms and is easily agitated due to the impact of pain on his mood.

DLA

In the PR, the GP reports continuous restrictions with personal self-care (takes a prolonged amount of time) and social functioning (moods down limits social interaction). No restriction is identified for all other DLA – basic housekeeping..... The chronic need for analgesics impacts the ability to perform DLA with the GP noting “Continual need pending total shoulder replacement.”

In the AR, the GP reports that lifting (moving about indoors and outdoors), carrying purchases home (shopping), and getting in and out of a vehicle (transportation) require periodic assistance from another person and that the appellant’s ability to use public transit is unknown. All other listed DLA tasks are managed independently.

Need for Help

The GP reports that assistance is provided by family. No assistive devices are indicated and the appellant does not require an assistance animal.

## PART F – Reasons for Panel Decision

### **Issue on Appeal**

The issue on 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:

- a severe physical or mental impairment was not established;
- 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
- as a result of those restrictions, in the opinion of a prescribed professional, the appellant does not require an assistive device, the significant help or supervision of another person, or the services of an assistance animal to perform DLA?

### **Relevant Legislation**

#### **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.

(4) The minister may rescind a designation under subsection (2).

## EAPWDR

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 authorized under an enactment to practice the profession of

- (a) medical practitioner,
- (b) registered psychologist,
- (c) registered nurse or registered psychiatric nurse,
- (d) occupational therapist,
- (e) physical therapist,
- (f) social worker,
- (g) chiropractor, or
- (h) nurse practitioner.

### **Severe Impairment**

The legislation provides that the determination of severity of impairment is at the discretion of the minister, taking into account all of the evidence including that of the appellant. However, the legislation is also clear that the fundamental basis for the analysis is the evidence from a prescribed professional respecting the nature of the impairment and its impact on daily functioning. While the legislation does not define "impairment", the PR and AR define "impairment" as a "loss or abnormality of psychological, anatomical or physiological structure or functioning causing a restriction in the ability to function independently, effectively, appropriately or for a reasonable duration." While this is not a legislative definition, and is therefore not binding on the panel, in the panel's opinion, it reflects the

legislative intent and provides an appropriate analytical framework for assessing the degree of impairment resulting from a medical condition.

### Physical Impairment

The appellant's position is that despite having had two major surgeries to repair his shoulder, he is severely impaired by the injury to his right shoulder which has left him unable to lift his right arm, in constant severe pain that disrupts his sleep, and unable to work. The appellant also argues that his GP completed the PR and AR without any discussion with the appellant and that they were not filled out properly.

The ministry's position is that the reported physical functional skills and abilities for walking, climbing stairs, standing, and remaining seated are not indicative of a severe impairment of physical functioning. Additionally, in the AR the GP does not describe the frequency or duration of periodic assistance required with lifting, and the GP's subsequent letter does not include a description of the ways in which the use of the appellant's right arm and shoulder are limited due to severe pain or provide further description of limitations with physical functioning. Noting that employability is not taken into consideration when determining PWD eligibility, the ministry concludes that the assessments provided by the GP, the supplementary medical documentation, and the information from the appellant and his ex-wife, confirm the appellant is limited in his ability to lift, a severe impairment of his physical functioning has not been established.

### *Panel Decision*

The GP diagnoses the appellant with total deterioration of his right shoulder that has resulted in chronic pain and limited use of his right arm, necessitating a complete right shoulder replacement in March 2016. The GP assessment of the appellant's functional skills prior to this surgery does not identify limitations in the appellant's ability to walk, climb stairs, or stand. The GP reports that the appellant can remain seated for 1 to 2 hours. This report is somewhat conflicting with the appellant's information as he reports being limited to standing for 20 minutes and being able to remain seated for less than 1 hour. The orthopaedic surgeon does not address physical functioning in terms of specific functional abilities or skills, and the updated report from the GP and the letter from the vocational rehabilitation specialist do not address the appellant's ability to walk, climb stairs, or stand.

With respect to the appellant's ability to lift, prior to the March 2016 surgery, in the PR the GP reports that the appellant has limited use of his right arm and can do no lifting, and in the AR, the GP reports that the appellant requires periodic assistance from another person with lifting and that he independently manages carrying/holding. As no limitations are reported by the GP or the appellant respecting his left arm, and the appellant's ex-wife indicates that she provides assistance with two-handed chores, the panel finds that the GP's reference to no lifting refers only to the appellant's right arm.

Following the March 2016 surgery, the GP confirms limited use of the right arm and right shoulder due to severe pain and that it is unlikely the appellant will ever be able to return to a labour type job and the vocational rehabilitation specialist describes the appellant as "minimally nor gainfully



employable and likely for the indefinite future” due to a combination of physical and educational factors. However, as noted by the ministry, employability is not the legislative basis upon which PWD eligibility is assessed.

The panel finds that the ministry has reasonably viewed the information respecting the appellant’s physical abilities in terms of walking, climbing stairs, and standing as not indicative of a severe physical impairment. Additionally, while the information from the health care professionals, the appellant, and the appellant’s ex-wife indicates that the appellant is limited in his use of his right arm and hand, most notably with lifting and writing, the extent of the lifting limitations is not clear. In particular, in the PWD application, the GP reports that the appellant requires periodic, rather than continuous assistance with lifting, and that he independently manages carrying and holding. When describing DLA, the GP reports that the appellant requires periodic assistance carrying purchases home, but that other DLA tasks involving carrying and holding, such as meal preparation and laundry, are managed independently. The GP’s updated report does not provide specific details respecting lifting ability. The vocational rehabilitation specialist concluded that the appellant’s physical limitations are such that he is unable to carry out the Heavy Strength Demand duties required of his occupation on a prolonged and sustainable basis, which suggest the retention of some level of functionality. Based on this analysis, the panel finds that the ministry reasonably determined that while the information establishes that the appellant is limited in his ability to lift, a severe impairment of his physical functioning has not been established.

#### *Mental Impairment*

The appellant argues that he has major depression.

The ministry’s position is that the cumulative impacts on daily cognitive and emotional functioning are not indicative of a severe impairment of mental functioning. Additionally, respecting social functioning, there is no description of the frequency or duration of the periodic support/supervision required or to maintain the appellant in the community and no indication of safety issues. The ministry acknowledges that the appellant is experiencing limitations to his cognitive and emotional functioning due to depression but that the information provided does not establish a severe impairment of mental functioning.

#### *Panel Decision*

The appellant is diagnosed with depression which the GP reports has a major impact on daily functioning in the area of “emotion.” However, for the remaining 13 listed areas of cognitive and emotional functioning, there is no impact on most areas with a moderate impact on two – attention/concentration and motivation. The GP does not identify cognitive or emotional problems with communication or difficulties with decision-making. The appellant is reported to limit social interaction, but either independently manages or requires periodic support/supervision with specific aspects of social functioning. There is no indication as to the nature of the support/supervision or how frequently the appellant requires this assistance.

Based on the above analysis, the panel finds that the ministry reasonably determined that the

information does not establish that the appellant has a severe mental impairment.

**Restrictions in the ability to perform DLA**

The appellant argues that he is unable to do his own housework or write as a result of the injury to his right shoulder which, despite surgeries has left him in constant severe pain and unable to lift his right arm.

The ministry notes that the legislation requires that DLA restrictions be both significant and either continuous or periodic for extended periods. While the legislation does not expressly require the frequency and duration of the restrictions, this information is valuable in determining the significance of restrictions. The ministry notes that in the PR, the GP does indicate a continuous restriction with personal self-care and that these tasks do take a prolonged amount of time, but he does not describe how much longer personal care tasks take and, in the AR, indicates that all listed personal care tasks are managed independently. The ministry notes that in the AR, the appellant is reported as not being restricted with the majority of listed DLA tasks and that for those requiring periodic assistance, the GP doesn't describe the frequency or duration of the assistance. The ministry concludes that there is not enough evidence to confirm that the appellant has a severe impairment that *significantly* restricts DLA either continuously or periodically for extended periods.

*Panel Decision*

The legislative requirement respecting DLA set out in section 2(2)(b) of the EAPWDA is that the minister be satisfied that as a result of a severe physical or mental impairment a person is, in the opinion of a prescribed professional, directly and significantly restricted in the ability to perform DLA either continuously or periodically for extended periods. Consequently, while other evidence may be considered for clarification or support, the ministry's determination as to whether or not it is satisfied, is dependent upon the evidence from prescribed professionals. DLA are defined in section 2(1) of the EAPWDR and are listed in both the PR and the AR sections of the PWD application with the opportunity for the prescribed professional to check marked boxes and provide additional narrative.

In this case, the appellant's GP is the prescribed professional who provided information addressing the appellant's ability to perform DLA. Information from the other prescribed professionals does not address DLA.

In the PR, the GP reports that the appellant is continuously restricted with two DLA - personal self-care (tasks take prolonged amount of time) and social functioning (moods down, limits social interaction). However, in the AR, the GP also reports that the appellant independently manages all listed personal-care tasks and does not, where given the option, indicate that the appellant takes significantly longer to perform these tasks. Additionally, in the AR, the GP reports that the appellant independently manages two of five listed aspects of social functioning and that no aspects require continuous support or supervision from another person. For the two aspects of social functioning that require periodic support/supervision, there is no description of either the frequency or duration of the assistance to assist in assessing both the significance of the restrictions and whether the need for periodic assistance is for extended periods.

The GP also identifies the need for periodic assistance with carrying purchases home (DLA shopping) and getting in and out of a vehicle (DLA transportation) but again, does not indicate the frequency or duration of this assistance. For all remaining tasks of shopping, and all listed tasks of all remaining DLA – basic housekeeping, meals, pay rent and bills, and medications, the appellant is reported as managing independently, with no noted limitation.

The panel finds that the information from the prescribed professional establishes limitations in the appellant's ability to manage some DLA tasks. However, in the absence of information describing the frequency and duration of those restrictions, and as the appellant is reported as managing the vast majority of DLA tasks independently, the panel finds that the ministry reasonably determined that a severe impairment that significantly restricts the appellant's ability to perform DLA continuously or periodically for extended periods as required by section 2(2)(b)(i) of the EAPWDA has not been established.

### **Help to perform DLA**

The appellant's position is that he is unable to write or perform household chores and requires the assistance of his ex-wife with these activities.

The ministry's position is that because it has not been established that DLA are significantly restricted, it cannot be determined that help is required.

### *Panel Decision*

Section 2(2)(b)(ii) of the EAPWDA requires that, as a result of direct and significant restrictions in the ability to perform DLA, a person requires help to perform those activities. Help is defined in subsection (3) as the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform DLA.

The establishment of direct and significant restrictions with DLA is a precondition of the need for help criterion. As the panel found that the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established, the panel also finds that the ministry reasonably concluded that it cannot be determined that the appellant requires help to perform DLA as required by section 2(2)(b)(ii) of the EAPWDA.

### **Conclusion**

The panel finds that the ministry's reconsideration decision, which determined that the appellant was not eligible for PWD designation, was reasonably supported by the evidence, and therefore confirms the decision. The appellant is not successful on appeal.