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 July 29, 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

1) PWD application comprised of the appellant's Self-report (SR) dated April 1, 2016, a Physician Report (PR) dated April 1, 2016 which was completed by a spinal neurosurgeon (the surgeon), and an Assessor Report (AR) dated April 10, 2016, which was completed by the appellant's general practitioner (the GP).
2) The appellant's Request for Reconsideration submission dated July 14, 2016.
3) July 26, 2016 1 page letter (the Letter) from the GP.

Information provided on appeal

The appellant provided a neurologist's 5-page Outpatient Clinic Consultation Note (the Note) respecting an August 11, 2016 follow-up visit for carpal tunnel syndrome and myeloradiculopathy.

Section 22(4) of the Employment and Assistance Act (EAA) 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. The ministry did not object to the Note being admitted into evidence. The panel determined that the Note provided additional information respecting the previously reported symptoms impacting the appellant's neck, shoulders, arms and hands and therefore admitted the information in the Note as evidence in accordance with section 24 of the EAA.

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

Summary of relevant evidence

Diagnoses

In the PR, the surgeon diagnoses bilateral C5 palsies post cervical fusion (onset October 2015), cervical myelopathy, and congenital cervical spine fusion.

Physical Impairment

The surgeon provides the following information in the PR.

- Currently unable to lift his arms (abduct shoulders) more than 20 to 30 degrees. Shoulder abduction weakness should gradually improve over approximately 1 year.
- Has bilateral hand numbness and impaired coordination. Hand numbness and incoordination will likely improve but never be completely normal.
- The appellant is able to:

- walk 4+ blocks unaided;
- climb 5+ steps unaided;
- lift 5 to 15 lbs; and
- remain seated 2 to 3 hours.

The GP provides the following information in the AR:

- Left shoulder and hand very weak since operation. Has been in rehab program, however the improvement of his left arm, hand is very slow.
- Walking indoors, climbing stairs, and standing are managed independently.
- Walking outdoors requires periodic assistance from another person described as "in case he uses public transportation."
- Unable to lift, carry and hold with left hand, which is very weak since October 2015 operation.

In the Letter, the GP writes "Patient has severe neurological deficit, he can not (sic) perform labour work.

In his SR, the appellant writes that due to his medical conditions he has a slow, wide gait pattern and impaired balance, upper extremity weakness and numbness, including both hands, neck pain for which he takes medication every four hours, and lower extremity dysfunction and spasticity. At night, he wears a hand brace to reduce numbness. He has poor hand fine motor function and writing and is unable to hold a coffee cup, or button a shirt (sometimes).

In his Request for Reconsideration, the appellant reiterates that he has hand numbness most of the time and the use of a brace on his right hand when sleeping. He is scheduled for follow-up with a physician for his cervical spine. The appellant also reports having a gastric ulcer and high cholesterol, and that he experiences constipation due to his medications. His conditions will very likely continue for a long time.

Information provided by the neurologist in the Note includes:

- Right-handed gentleman who has had some improvement in the weakness of his left shoulder abduction. He still notices this in some of his daily activities, however. He has not endorsed any other weakness of his arms or legs.
- Reports radiating pain from neck down his right arm, into the 4th and 5th digits, which is constant and worse with activity.
- Continues to wear a wrist splint on the right side, which is helping at night, as symptoms no longer wake him up.
- Gait normal with no falls.
- Summary of electrodiagnostic studies: evidence of left C5/6 and right C8/T1 radiculopathy; continues to be mild right carpal tunnel syndrome.
- Clinically, he has improved in terms of strength of C5/6 muscles on the left compared to March 2016. Continues to have radicular symptoms on the right as well as symptoms of carpal tunnel syndrome on the right. Given that he has improved, we would encourage him to continue physiotherapy and maintaining an active life style, while taking care to avoid rapid neck movements. We hope that he will continue to improve beyond his current function. If pain is a limiting factor, then medications such as gabapentin or Lyrica may be helpful. If these are not

working well, then consideration can be given to a low-dose tricyclic antidepressant or duloxetine. Reassuringly, he has not developed any further signs of myelopathy following his surgery.

In his Notice of Appeal, the appellant writes that six months after his operation, he still has weakness in his left arm and shoulder and will not recover to normal for a long time. When the weather changes to coldness, his hands feel more stiff and numb. His hands are quite weak, which makes it more difficult to manage his daily life functioning in almost everything he does.

At the hearing, the appellant stated that his right arm is continuously numb and he is not able to do any work. His surgery has not really helped and has affected his left arm which always has numbness and which he is barely able to lift. He always has pain, for which he has had to increase the dosage of pain medication. He always has fatigue and is not nearly as strong as he used to be. The appellant stated that his doctor stated that there have been changes, though the appellant is not sure of the changes. The appellant stated that he needs to visit his doctor frequently to get the medication he needs and that he drives himself to these appointments. The appellant noted that he recently had x-rays and that those results are included in the Letter provided on appeal.

Mental Impairment

The surgeon provides the following information.

- No difficulties with communication.
- No significant deficits with cognitive and emotional function.
- Social functioning is not restricted.

The GP provides the following information.

- In the section of the AR listing 14 areas of cognitive and emotional functioning, a minimal impact on daily functioning is reported for 1 area, emotion. No impact is reported for the remaining areas.
- Good ability with speaking, reading, writing, and hearing.
- Social functioning is managed independently. Good functioning with immediate and extended social networks.

The appellant reports that the pain and limitations resulting from his physical medical conditions have impacted his mood and made him sad.

DLA

In the PR, the surgeon reports:

- Meal preparation, basic housework, and daily shopping are continuously restricted. Assistance required is described as “Help with any activity that requires lifting his arms above his head.”
- Personal self-care, mobility inside the home, use of transportation, management of finances, and social functioning are not restricted.

- It is unknown whether mobility outside the home is restricted.

In the AR, the GP reports:

- Personal care – all listed tasks are managed independently without any noted limitation - dressing, grooming, bathing, toileting, transfers in/out of bed and on/off of chairs, feeding self, and regulate diet.
- Basic housekeeping – laundry is managed independently and basic housekeeping requires continuous assistance from another person.
- Shopping – going to and from stores and carrying purchases home require continuous assistance from another person. Reading prices and labels, making appropriate choices, and paying for purchases are managed independently.
- Meals – meal planning, food preparation and cooking require continuous assistance from another person. Safe storage of food is managed independently.
- Transportation – getting in and out of a vehicle and using public transit schedules are managed independently. Using public transit require periodic assistance from another person (his left hand is very weak, it is not safe for him to stand when using public transit; he cannot balance himself easily when car moves or stops suddenly).
- All listed tasks of paying rent and bills, medications and social functioning are independently managed without any noted limitation.

Need for Help

The surgeon reports that that the appellant requires assistance with any activity that requires lifting his arms above his head. The GP reports that assistance is provided by family. The GP does not indicate that assistive devices are required and indicates that 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 his medical conditions leave him unable to do any work and that the pain, fatigue, and weakness he experiences, especially in his left arm, constitute a severe physical impairment.

The ministry's position is that the surgeon's assessment of physical functional skills is not indicative of a severe impairment of physical functioning. The ministry notes that the GP does not describe the frequency or duration of the periodic assistance required with walking outdoors. Furthermore, the GP's statement "in case he uses public transportation" does not establish a restriction with walking outdoors and the surgeon reports the ability to walk 4+ blocks unaided. While the GP reports the appellant is unable to lift with his left hand, the surgeon indicates the ability to lift 5 to 15 lbs. Furthermore, the GP does not describe limitations with the use of the right hand. Respecting the GP's information that the appellant has a severe neurological deficit and cannot perform labour work, the ministry notes that employability or ability to work is not taken into consideration when determining PWD eligibility. The ministry concludes that although the appellant is limited in his ability to use his left shoulder and hand, a severe impairment of his physical functioning has not been established. At the hearing, the ministry noted that the Note identified many "normal" test findings and that the appellant was improving.

Panel Decision

The appellant is right hand dominant and has been diagnosed with bilateral C5 palsies post cervical fusion (October 2015), cervical myelopathy, and congenital cervical spine fusion. He experiences limitations to range of motion in his shoulders and the ability to lift his arms, as well as bilateral hand numbness. Additionally, the appellant has neck pain at the site of his surgery and post-surgical weakness and pain in his left arm and hand.

Respecting specific functional abilities, while the appellant reports limitations in his ability to walk, including a wide gait pattern, impaired balance, and spasticity, the information from the GP and surgeon does not reflect a severe limitation. The GP's identification of the need for periodic assistance walking outdoors described as "in case he uses public transportation" was reasonably viewed by the ministry as not establishing a severe impairment of the ability to walk. Furthermore, the

information from the surgeon is that the appellant can walk 4+ blocks unaided and the more recent information in the Note is that the appellant did not self-identify leg weakness and that upon examination the neurologist found that the appellant's gait was unremarkable and not spastic. Additionally, both the surgeon and the GP report that the appellant independently manages walking indoors and climbing stairs.

Both the surgeon and the GP identify shoulder abduction weakness, which is gradually improving but limits the appellant's ability to lift and carry. The surgeon reports that the appellant is able to lift 5 to 15 lbs. and the GP reports that the appellant is unable to lift, carry, and hold with his left hand but does not identify limitations with the appellant's use of his dominant right hand. The surgeon also identifies bilateral hand numbness, which will likely improve, though not to normal, and the neurologist reports mild carpal tunnel syndrome in the right hand without describing any impact on functioning. In the Letter, the GP reports that the appellant has a severe neurological deficit which leaves the appellant unable to perform labour work but does not describe limitations in terms of routine daily functioning, which is likely to be less demanding. Information provided in the Note also reflects some improvement with the appellant reporting to the neurologist that he is no longer awoken by symptoms with the use of a wrist splint on his right side and that there has been some improvement in the weakness of left shoulder abduction. The neurologist's clinical findings confirm improved strength on the left side and that given the improvement, maintenance of an active lifestyle is encouraged, taking care to avoid rapid neck movements.

Based on the above information, the panel finds that the ministry has reasonably concluded that while the appellant is limited in his ability to use his left arm and hand, the overall level of physical functioning does not establish a severe physical impairment.

Mental Impairment

The appellant does not expressly argue that he has a mental impairment but notes that he is very sad about the impact his medical conditions have on his functioning.

The ministry's position is that the identification by the GP of a minimal impact to one area of cognitive and emotional functioning is not indicative of a severe impairment of mental functioning. Additionally, the assessments of social functioning and the ability to communicate provided by both the GP and the surgeon do not establish a severe impairment of mental functioning.

Panel Decision

The appellant is not diagnosed with a mental health condition or brain injury. With the exception of a minor impact on daily functioning in the area of emotion reported by the GP, neither the surgeon nor the GP identifies the appellant's medical conditions as impacting his cognitive or social functioning or his ability to communicate.

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 his medical conditions made it more difficult to manage his daily functioning in almost all activities.

The ministry's position is that as both the surgeon and the GP indicate that the appellant is independent with the majority of DLA, and as a *severe* impairment has not been established, based on the information provided by the physicians in the PWD application and at reconsideration, it is difficult to establish *significant* restrictions to DLA.

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 GP, surgeon and neurologist are prescribed professionals, though the neurologist does not specifically address the appellant's ability to perform DLA.

The surgeon identifies continuous restrictions with the DLA meal preparation, basic housework and daily shopping. No restrictions are identified for all other DLA. The surgeon did not provide a response in the PR where asked to describe the degree of restriction, but does indicate that the appellant requires assistance with any task that required lifting his arms above his head. As discussed above, the surgeon reported that the appellant is able to walk 4+ blocks and climb 5+ stairs unaided and that he is able to lift weights somewhere between 5 and 15 lbs.

Consistent with the restrictions identified by the surgeon, the GP reports the need for continuous assistance from another person with some tasks of those 3 DLA – basic housekeeping (laundry is managed independently); going to and from stores and carrying purchases home; meal planning, food preparation and cooking. The GP also identifies restrictions with walking outdoors and using public transportation, which are both attributed to the appellant's possible use of public transportation. In view of the appellant's own evidence that he is able to routinely drive himself, it is hard to view these restrictions, as well as the reported need for continuous assistance going to and from stores, as being significant. The panel also finds that the information provided does not link the appellant's physical medical conditions to a restriction in the ability to plan meals. Consistent with the surgeon, the GP also reports that the appellant independently manages personal care, medications, finances, and social functioning.

The panel finds that the information from the prescribed professionals establishes that the appellant has continuous restrictions in his ability to perform some physical tasks of DLA, including meal preparation/cooking and carrying purchases home, but that the appellant is also reported by both the

surgeon and the GP as independently managing other physical DLA tasks that would routinely involve the use of both arms, including personal care and laundry. Additionally, the panel finds that the physical functional skills reported by the surgeon together with the surgeon's narrative reflect the need for continuous assistance only with DLA tasks requiring lifting over 5 to 15 lbs. and lifting overhead, a restriction that the panel does not consider significant in the context of the overall ability to perform most DLA.

Based on the above analysis, the panel finds that the ministry reasonably determined that the appellant independently manages the majority of DLA and that the information provided by the prescribed professionals makes it difficult to establish "significant" restrictions in the ability to perform DLA. Therefore, 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 argues that his impairment makes it difficult to manage his daily life functioning.

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 are 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.