

PART C – DECISION UNDER APPEAL

(State the reconsideration decision)

The following is a summary of the Reconsideration Decision of January 15, 2010 which denied the appellant the Persons with Disabilities (PWD) designation:

- You have met the age requirement.
- Your medical practitioner confirms that your impairment is likely to continue for at least 2 years.
- The minister is not satisfied that you have a severe physical or mental impairment.
- Your prescribed professional does not confirm that your impairment directly and significantly restricts your ability to perform daily living activities either continuously or periodically for extended periods.

Your prescribed professional does not confirm that as a result of direct and significant restrictions, you require help to perform daily living activities.

PART D – RELEVANT LEGISLATION

(State the relevant Legislation considered)

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

Please set out the facts as determined by the panel, based on the evidence at the hearing. Please note that subsection 22(4) of the Employment and Assistance Act states that, in a hearing referred to in subsection (3), a panel may admit as evidence only:

- (a) the information and records that were before the minister when the decision was being made, and
- (b) oral or written testimony in support of the information and records referred to in paragraph (a).

Prior to the Appeal Hearing, the panel members and the ministry were sent a package from the Appeal Tribunal under the heading of Appellant's Submission, Appeal No. 10-00130. This package contained a cover letter from the appellant's advocate stating that this was evidence and legal arguments from the Reconsideration Request that were left out of the Appeal Booklet. The panel questioned this statement and neither the advocate nor the ministry could explain how it was left out. The panel asked the ministry if there was any objection to it being accepted and there was no objection. The panel accepted this evidence under subsection 22 (4) of the EAA as written testimony in support of information before the ministry when the decision was being made. This includes, a letter dated December 14, 2009 from the advocate to the physician, a revised page from the physician's report initialed by the physician on July 14, 2009, a letter of support to the physician dated June 6, 2009 from the appellant's friend, and three pages of advocate notes. The panel accepted a 26-page Judicial Review dealing with a different hearing as submission only (Argument).

The evidence before the ministry is based on the physician report dated August 13, 2009, which was done by a medical practitioner who has been the appellant's physician for the past six months. Evidence was also based on the assessor report dated August 26, 2009, which was done by a Social Worker who indicated that she had only known the appellant since the date the report was completed. A prescribed professional as required by the EAPWDR did both reports.

The diagnosis of the physician is recurrent shoulder dislocation and secondary arthritis, which is the result of a motor vehicle accident that occurred in 1981 and has left the appellant with subluxations of the right shoulder. The physician report indicates that the appellant is not suitable for even lighter types of employment. However, employability is not a component of a PWD designation.

In his functional assessment, the physician indicates that the appellant is able to walk 4+ blocks unaided and lift under 5 pounds with his right hand. There was no assessment given for the left shoulder, arm and hand. There are no limitations for remaining seated and no significant deficits with cognitive and emotional function.

For Daily Living Activities (DLA), the physician answers 'no' to the question "Does the impairment directly restrict the person's ability to perform DLA?" This assessment is contradicted further down the page when 7 of 10 activities are indicated to be restricted. The physician initially indicated no restrictions in this area. The page had been changed and left incomplete. Personal self-care, meal preparation, management of medications, basic housework, daily shopping, mobility inside the home and management of finances are indicated as restricted. Mobility outside the home, use of transportation and social functioning are indicated as not restricted. There is no indication as to whether any of the activity restrictions are continuous or periodic. An asterisk appears to indicate, however, that periodic assistance with washing the back as well as difficulty with food preparation, getting out of bed, dressing and some minimal activities is required because of severe shoulder arthritis. The physician further indicates that assistance is required with most meals, laundry, housework, lifting, carrying, correspondence and completing forms.

The assessor report indicates poor reading skills but communication is listed as good. Walking, climbing stairs, and standing are all independent, with periodic assistance required for lifting, carrying and holding. The physician indicated no deficits with cognitive and emotional function yet the assessor indicates a major impact with 7 of the 14 functions. The assessor indicates that the appellant requires continuous assistance with diet, laundry, basic housekeeping, shopping, carrying purchases home, meal planning, food preparation, cooking, food storage, banking, budgeting, paying bills, filling prescriptions as well as taking the medications. She also indicates that he is either independent or just takes longer with dressing, grooming, bathing, toileting, eating, getting in and out of bed, reading prices, making appropriate choices, purchasing items, handling medications and getting in and out of a vehicle.

The Daily Living Activities page that was supplied to the panel by the advocate prior to the hearing is contradictory to previous evidence that was available at the time of the ministry decision. The advocate stated that because the physician had neglected to indicate on the original page as to whether restricted activities were continuous or periodic, she filled out the form and then had the physician re-do it in his handwriting. He again indicated 'no' to the question "Does the impairment directly restrict the person's ability to perform DLA?" 'Yes' is then circled with a check mark. There is no initial as to who changed it. Again, all the 'no' boxes are ticked, then crossed out for the question "Is activity restricted?" 'Yes' is then ticked for 7 of the 10 activities but not the same as the form dated August 13, 2009. This new page is initialed and dated by the physician 14/7/09 in two places but the advocate stated that it is the one she did and had the physician copy in order to re-do the report dated August 13, 2009. The advocate could not explain to the panel why the physician dated and initialed the changes as having been made on July 14, 2009 if it was in fact done after the one, which was available at the time of the ministry decision. The panel finds the credibility of this evidence questionable.

The package supplied by the advocate prior to the appeal hearing also included a letter written to the physician from the friend who lives with the appellant. She informs the physician that the appellant has trouble sleeping because of the pain in his right shoulder. She indicates that this occurs at least a couple time per week and that it takes the appellant time to get mobile in the mornings. The friend goes on to describe the medications taken by the appellant and states that they only mask the problem. She also indicates in the letter that what he really needs is surgery but that he keeps being told that he is too young. This is very frustrating for the appellant, according to the friend, as he has been unable to find employment. The appellant informed the panel that he is currently on Employment Insurance, which will run out later this year. The panel enquired about his work history and was told that he had been working as a tow truck driver from August through to November 2009.

ATTACH EXTRA PAGES IF NECESSARY

PART F – REASONS FOR PANEL DECISION

(State the reasons for the panel decision)

The issue in this hearing is the reasonableness of the ministry's decision to deny the appellant the Persons with Disabilities status. To be designated as a Person with Disabilities, the applicant must meet all of the criteria set out in Section 2 of the Employment and Assistance for Persons with Disabilities Act. Specifically the applicant must meet the age requirement of 18 years and a medical practitioner must confirm that the impairment is likely to continue for at least 2 years. The minister must be satisfied that the appellant has a severe mental or physical impairment that, in the opinion of a prescribed professional, directly and significantly restricts the applicant's ability to perform daily living activities as described in Section 2 of the Employment and Assistance for Persons with Disabilities Regulation. In the opinion of a prescribed professional, the restrictions must be either continuous or periodic for extended periods, and as a result of the restrictions, the person must require help to perform those activities.

The ministry's position is that the appellant meets the criteria of the legislation in that he is at least 18 years of age and his medical practitioner has confirmed that his impairment will continue for at least 2 years. The ministry argues, however, that he does not have a severe impairment and based on the physician and assessor reports, the prescribed professionals have not shown that the appellant meets the criteria of requiring help or that his ability to perform daily living activities is directly and significantly restricted either continuously or periodically for extended periods of time.

In the Reconsideration Decision, the ministry points out that both the physician and assessor indicate that the appellant is independent in walking, climbing stairs, standing and remaining seated. The physician indicates that there are restrictions with lifting and carrying on the right side but no functional assessment was provided for the left shoulder, arm and hand. The physician also reports periodic assistance is required for washing the appellant's back and that he has difficulty with food preparation, getting out of bed, getting dressed and some other minimal activities, but frequency and duration have not been verified. The assessor who has never met the appellant prior to the day of the assessment, reports that he is independent walking indoors and outdoors as well as climbing stairs and standing. The report then indicates that continuous assistance is required with regulating his diet, laundry, basic housekeeping, going to and from stores, meal planning, food preparation, cooking, safe storage of food, banking, budgeting, paying bills, filling prescriptions and taking them as directed. It is also indicated that he is either independent or just takes longer with dressing himself, grooming, bathing, eating, getting in and out of bed, reading prices, making appropriate choices, purchasing items, handling medications and getting in and out of a vehicle.

The appellant argues that he has difficulty lifting and carrying and that he cannot move his arm enough to wash his back. He periodically has problems getting out of bed and is in constant pain. Because of his physical limitations and the medications that he takes, he has difficulty maintaining employment. It takes him between 30 to 45 minutes to get mobile in the morning and he states that the pain in his shoulder and arm keeps him bedridden for 4-5 days per week. He indicates that his girlfriend has to do anything that requires carrying and lifting, such as laundry and bringing in groceries. The advocate indicated that the physician has established a severe impairment, as it was indicated that the appellant suffers from severe shoulder arthritis. She also indicated that the physician confirmed that the appellant required assistance with daily living activities for most meals,

physician confirmed that the appellant required assistance with daily living activities for most meals, laundry, housework, lifting, carrying, correspondence and completing forms.

The panel finds that the appellant meets the age requirement and a medical practitioner has confirmed that the appellant has an impairment that is likely to continue for at least two years. The physician report, which has been altered twice, as well as the assessor report, only once refers to the appellant's impairment as 'severe'. The panel is not questioning the diagnosis or the seriousness of the impairment, as it no doubt is very painful. The panel therefore finds that a medical practitioner has confirmed that the appellant does have a severe physical impairment. The panel found no consistency in the evidence provided by the prescribed professionals, to indicate that the impairment directly and significantly restricted the appellant's ability to perform DLA either continuously or periodically for extended periods.

The physician indicated that the appellant could walk unaided for 4+ blocks and climb 5+ stairs. On the next page, which has been altered, it is indicated that he has no mobility restrictions outside, but is restricted inside. A revised page, which was also altered with an earlier date, indicates restricted both indoors and outdoors. Both of these pages also indicate no impairment for DLA. The page from the report with the earlier date was changed to restricted for the ability to perform DLA. The assessor found the appellant to be independent with walking indoors, outdoors, climbing stairs and standing. Periodic help was required for lifting and carrying. Both prescribed professionals indicate a variety of other DLA that the appellant requires some degree of assistance with. Because of the many discrepancies between the two assessments, as well as the alterations and discrepancies of the physician reports, the panel could not find that a prescribed professional determined that the appellant was directly and significantly restricted in performing DLA. The panel also considered the fact that the appellant was employed as a tow truck driver, on call 24 hours a day for the four-month period from August to November 2009, which is during the timeframe in question.

As the panel could not find that the appellant was continuously or periodically restricted in his ability to perform DLA, it could not confirm that help was required for DLA. The panel therefore confirms the Reconsideration Decision under the EAA, Section 24 (1) (a) and 24 (2) (b) as it is reasonably supported by the evidence.