

## PART C – Decision under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development (the ministry) dated 22 February 2013 denying the appellant designation as a person with disabilities (PWD). The ministry determined that the appellant did not meet all of the required criteria for PWD designation set out in the Employment and Assistance for Persons with Disabilities Act, section 2. Specifically the ministry determined that the information provided did not establish that the appellant has a severe mental or physical impairment that in the opinion of a prescribed professional

(i) directly and significantly restricts his ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and,

(ii) as a result of those restrictions, he requires help to perform those activities.

The ministry did determine that the appellant satisfied the other 2 criteria: he has reached 18 years of age; and his impairment in the opinion of a medical practitioner is likely to continue for at least 2 years.

## 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

At the request of the appellant, an American Sign Language interpreter attended the hearing.

With the consent of the appellant, a co-op student from another ministry attended the hearing as an observer.

The evidence before the ministry at reconsideration consisted of the following:

1. The appellant's PWD Designation Application dated 02 October 2012. The Application contained:
  - The appellant's Self Report (SR).
  - A Physician Report (PR) dated 02 October 2012 completed by the appellant's general practitioner (GP) who had known the appellant for 1 day.
  - An Assessor Report (AR) of the same date, completed by the same GP.
2. The appellant's Request for Reconsideration, dated 20 February 2013, to which was attached:
  - A submission, undated, by the appellant's advocate.
  - A letter of support from the appellant's uncle dated 17 February 2013.
  - A letter of support, undated, from the appellant's parents.
  - Additional reasons for reconsideration, edited by his uncle and signed by the appellant,
  - A Permanent Disability Medical Certificate dated 28 August 2000 issued by the student financial assistance authority of another province, certifying that the appellant meets the applicable definition of permanent disability.

### *Physician Report*

In the PR, the GP diagnoses the appellant with deafness, onset 1967. Under health history, the GP comments: "Deafness – permanent – restricts employment opportunities. Unable to communicate. 2° deafness & poor speech." The GP indicates that the appellant has not been prescribed any medication and/or treatments that interfere with his ability to perform DLA. The GP also indicates that the appellant does not require any prostheses or aids for his impairment. The GP reports that the appellant's impairment is likely to continue for two years or more commenting: "permanent."

The GP reports that the appellant is able to walk 4+ blocks unaided, climb 5+ steps, has no limitations with respect to lifting or remaining seated. The GP indicates that the appellant has difficulties with communication, commenting: "Poor speech, 2° deafness." The GP indicates that significant deficits with cognitive and emotional function are "unknown."

### *Assessor Report*

The GP reports that the appellant lives with family or friends.

In terms of ability to communicate, the GP assesses the appellant's speaking ability as poor and hearing ability as unable, attributing both to his deafness. Reading and writing abilities are assessed as good.

In terms of mobility and physical ability, the GP assesses the appellant as independent in all listed

aspects: walking indoors, walking out doors, climbing stairs, standing, lifting, and carrying and holding.

In terms of cognitive and emotional functioning, no impacts on daily functioning are reported. With respect to DLA, the appellant is assessed as independent in all aspects of personal care, basic housekeeping, shopping, meals, pay rent and bills, medications, transportation. The GP provides no assessment with respect to social functioning.

As to assistance provided, the GP reports that the appellant receives help for DLA from family and friends. The GP reports that the appellant routinely uses the following to compensate for his impairment: TDD, sign language interpreter and hearing aids. The GP indicates that the appellant does not have an assistance animal.

### *Self Report*

The appellant writes in part:

"I have been deaf since birth. I mainly communicate through ASL (American Sign Language). I sometimes can read lips but not always. I have lots of "communication barriers" with employment for a long time. It is really frustrating for me to see the hearing employers or employees lacking in understanding towards deaf employee like myself. My disability affects my life when it comes to trying to attain/retain the employment. Many hearing employers lack their understanding towards a person with disability especially with the accommodation issues. For example many employers told me that they could not afford to hire a sign language interpreter for our training sessions or important meetings. Even a large company like [big box store] refused to accommodate my special needs."

In the advocate's submission at reconsideration, the advocate provides new information from the appellant, summarized below:

- He is still coping with anxiety and agitation when it comes to being unable to speak or hear within the hearing community.
- He is still coping with depression as he is trying desperately to understand and be understood among hearing peers.
- He is still coping with stress as he is unable to communicate clearly.
- He has the stress of trying to resolve matters without being able to return telephone calls or speak verbally to official representatives and public services. Just the simplest everyday experience is a major undertaking. He cannot use the telephone or hear it ring. He frequently approaches a face-to-face situation using a notepad, frantically trying to make himself understood. It usually takes longer to complete a meeting that would be the case with his normal peers.
- He is still coping with confusion because he cannot hear what's going on at certain places like an airport, school or in an emergency situation.
- He still requires a sign language interpreter in general meetings or courses or school or social clubs. It takes him longer to communicate with his inner circle of hearing friends, parents, siblings and relatives when they do not have sign language. He has to write lengthy notes in order to communicate with these people on a daily basis.
- He still has a hard time interacting with strangers in public as he cannot speak.

- He is unable to speak clearly. He only communicates through sign language. He cannot use a regular phone. He cannot speak or hear people without becoming anxious or scared.
- He requires a hearing dog for safety.
- He needs his hearing parents or hearing friends to assist him in making phone calls for medical appointments, for income tax service, with banks and insurance companies and for government services.
- He needs a sign language interpreter for advanced education classes or working or other activities.

In his letter, the appellant's uncle writes in part:

"Any time that [the appellant] has to communicate with the hearing person can be very difficult, intimidating and frustrating for him. He needs help with such "everyday things" as making an appointment to see a doctor or dentist. He cannot take part in a normal conversation. In a social gathering, he can be left wondering what people are talking about and feeling very much alone, someone takes him under his/her "wing."  
For any type of interview or school program, he needs the assistance of the hearing person who knows American Sign Language. The only way he can communicate with people who do not know American sign language is by writing notes. If he goes to a store or a financial institution, he frequently need to hearing person to go with him. Hopefully, we can all identify with the embarrassment and awkwardness of going to a retail outlet and trying to communicate what you want by writing hastily composed notes to a rushed attendant. Writing notes is a very slow and unsatisfactory communication process..."

In their letter, the appellant's parents write in part:

"Upon graduating from [university] we then had to obtain and other physicians medical report certifying [the appellant's] deafness as we endeavor to have a portion of the remaining student debt forgiveness under the Canada Student Loans Act where his deafness was fully recognized as a severe disability under the CSL Act.

After graduating from [another university], [the appellant] attempted to have his remaining Canada student loans forgiven. He was overwhelmed by the necessary written correspondence and the written rebuttals from the CSL Dept., Ottawa. The stress of trying to resolve matters without being able to return telephone calls or verbally speak to CSL contacts was too much for

[The appellant] therefore repaid thousands of dollars of his CSLs unnecessarily until we intervened under our Power of Attorney. We finally connected or made the right telephone contacts at the administering bank and the CSL Dept., Ottawa. It took us over a year to resolve the issue and the remaining CSL balance of \$3800 was finally forgiven during the past year.....

This is another prime example of [the appellant's] dependence on third-party in conducting every day affairs. He also found it necessary to provide us with powers of attorney for his banking affairs, Canada Student Loans and another for the Federal income tax Dept."

In the additional notes, the following information is also provided:

- When it comes to writing notes between the appellant and hearing people or his family who do not sign language, it will take two or three times longer than other people to complete the whole conversation in writing.
- It can take 2 weeks to book an appointment for a professional sign language interpreter.

In his Notice of Appeal dated 04 March 2013, the appellant gives as his Reason's for Appeal that he

meets the legislative criteria for PWD designation.

After reconsideration but before the hearing, the appellant's advocate submitted a "To whom it may concern" letter signed by the appellant's GP dated 12 April 2013. In this letter, the GP answers questions posed by the advocate to assist in determining PWD eligibility, as follows:

- As to whether the appellant has a severe physical and/or mental impairment: "He has profound deafness & is unable to speak so this is a severe physical impairment. His difficulty communicating causes anxiety also."
- Regarding whether his impairment significantly limits his ability to perform DLA: "His inability to communicate without an interpreter causes difficulty with shopping, bank transactions, phone conversations & other activities of daily living."
- Whether it takes the appellant significantly longer than normal to perform DLA: "He often cannot obtain the services of a sign language interpreter for up to two weeks. Many social clubs cannot afford one so he cannot participate. His lack of communication results in any interactions of normal activities to be prolonged by the need to write everything down."
- As to how much longer than normal it takes him to do routine tasks: "Routine tasks such as shopping or bank transactions take much longer than normal."
- Whether his level of activity is significantly reduced because of his hearing impairment: "Yes. He does not participate in many social activities because he cannot communicate."
- Whether because of his hearing impairment the appellant requires significant help with DLA by needing other people for ongoing help with a phone call or by needing a sign language interpreter for his daily social activities within the hearing community or social clubs/services: "Yes. All of this is true. He definitely is severely impaired."

At the hearing, the appellant's advocate presented a submission, which went to argument, drawing on the evidence from the GP, the appellant and his family members as well as on the GP's 12 April 2013 letter.

In answer to questions, the appellant gave the following information:

- When he went to see the GP about completing the PWD forms, the visit took only about 15 to 30 minutes. He felt that the GP had little experience with dealing with deaf people and that her attitude was that there were a number of sick people waiting to see her and here was a healthy person just wanting a form to be filled out.
- He uses a hearing aid, but it is only good for alerting him to loud noises. It helps him when he tries to speak: he cannot tell how loudly he is talking and the device will help him modulate his voice if he begins to talk to loudly.
- His talking is limited to short, simple sentences.
- He can drive a car. Deaf drivers shoulder-check all the time, so would be aware of the flashing lights of emergency vehicles. His hearing aid might also alert him to the sound of a siren.
- He does not have an assistance animal because he cannot currently afford one. He would like an assistance dog for safety reasons. For instance, he cannot hear the doorbell or a ringing phone. A dog would help him avoid the hazards posed by cyclists and people on scooters when he is out walking. A dog would also alert him to times when he leaves a faucet running, something that has happened to him several times.
- The use of a TDD (TTY) is very frustrating. While government offices list TDD numbers, they are rarely answered. Using a third-party relay is equally frustrating, as the government official being called will frequently ask for a privacy waiver, a time-consuming hassle.

The ministry stood by its position at reconsideration.

The ministry did not object to the admission of the evidence in the GP's 12 April 2013 letter. The panel finds the additional information provided by the GP in her 12 April letter and by the appellant in his testimony at the hearing are in support of information that was before the ministry on reconsideration. The GP's letter confirms some of the information regarding the appellant's restrictions to performing DLA provided by the appellant and his family members before reconsideration. The appellant's evidence gives further background to his PWD application. The panel therefore admits this new information as evidence pursuant to section 22(4) of the Employment and Assistance Act.

## PART F – Reasons for Panel Decision

The issue in this appeal is whether the ministry reasonably determined that the appellant is ineligible for PWD designation because he did not meet all the requirements in section 2 of the EAPWDA.

Specifically the ministry determined that the information provided did not establish that the appellant has a severe mental or physical impairment that in the opinion of a prescribed professional

- (i) directly and significantly restricts his ability to perform daily living activities either continuously or periodically for extended periods; and,
- (ii) as a result of those restrictions he requires help to perform those activities.

The Ministry did determine that he met the 2 other criteria in EAPWDA section 2(2) set out below.

The following section of the EAPWDA applies to this appeal:

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.

The following section of the EAPWDR applies to this appeal:

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.

The panel will consider each party's position regarding the reasonableness of the ministry's decision under the applicable PWD criteria at issue in this appeal.

### Severity of impairment

For PWD designation, the legislation requires that a severe mental or physical impairment be established. The determination of the severity of impairment is at the discretion of the minister, taking into account all the evidence, including that of the appellant. However, the starting point must be medical evidence, with the legislation requiring that a medical practitioner (in this case, the appellant's physician) identify the impairment and confirm that impairment will continue for at least two years.

In the discussion below concerning the information provided regarding the severity of the appellant's impairments, the panel has drawn upon the ministry's definition of "impairment." This definition consists of "cause" and "impact" components: "impairment is a loss or abnormality of psychological, anatomical or physiological structure or function [the cause] causing a restriction in the ability to function independently, effectively, appropriately or for a reasonable duration [impact]." The cause is usually set out as a disease, condition, syndrome or even by a symptom (e.g. pain). A severe impairment requires the identified cause to have a significant impact on daily functioning.

### Physical impairment

The position of the ministry is that, while the ministry acknowledges that the appellant's hearing impairment may impact his communication, based on the information provided by the GP the ministry found that there is not enough evidence to establish a severe physical impairment.

The appellant's position, as outlined in the advocate's submission at the hearing, is that the evidence shows that as a result of his deafness in this communication impairment, caused by his deafness and poor speech, the appellant suffers severe functional restrictions that limit his ability to perform his day-to-day activities in an effective, appropriate and timely way, consistent with the ministry's definition of "impairment." As to social functioning, the appellant refers to the quote by Helen Keller as eloquently summing up his position: "Blindness separates us from things but deafness separates us from people." The appellant submits that the severe functional restrictions establish that his impairment is severe.

The evidence is that the GP has diagnosed the appellant with permanent, profound deafness since birth and as a consequence he is unable to hear and speaks poorly. The panel notes that deafness is considered a physical impairment. The evidence of the appellant, his parents and his uncle all point to how the appellant's deafness restricts his ability to interact with most other people independently and effectively. Such interactions are a necessary part of everyday life, whether communicating with shop clerks, medical professionals, financial institutions, government officials, or with friends, relatives or strangers not skilled in sign language. He uses a hearing aid, but this is only effective in alerting him to loud noises, not for hearing others speak. For complex transactions he requires the



assistance of a sign language interpreter, not usually available at short notice. His difficulty with communicating effectively regarding financial matters is demonstrated by his willingness to give up his independence in that respect to his parents, assigning them his power of attorney. As to social functioning, the panel notes the evidence of his family members that clearly demonstrates how the appellant's hearing and speaking impairments greatly limits his ability to enjoy the company of others. The panel finds that the ministry was unreasonable in not considering the evidence as to how and to what extent the appellant's deafness results in the significant restrictions to the appellant's ability to function independently and effectively in everyday interactions with others. As such everyday interactions are an essential part of daily functioning, the panel finds the ministry was not reasonable in determining that a severe physical impairment had not been established.

### *Mental impairment*

The position of the ministry is that the information provided does not establish a severe mental impairment. Although the appellant refers to situations that, because of his deafness and difficulties in communication, cause anxiety, agitation, stress and depression, he does not argue that he suffers from a severe mental impairment. As the GP has not diagnosed a mental health impairment and has not identified any significant cognitive or mental deficits, the panel finds that the ministry reasonably determined that a severe mental impairment had not been established.

### *Significant restrictions in the ability to perform DLA.*

In the reconsideration decision, considering the information in the application as a whole, the ministry acknowledged that the appellant has certain limitations as a result of his physical condition. However, the ministry found that the information provided does not consistently support that the appellant's impairment directly and significantly restricts DLA continuously or periodically for extended periods. At the hearing, while indicating that the ministry did not object to the admissibility of the evidence contained in the GP's 12 April 2013 letter, the ministry representative stated that it did not provide enough detail.

The appellant's position is that the evidence shows that the appellant's impairment directly, significantly and continuously restricts his ability to perform DLA such as managing personal finances and shopping for personal needs. Performing these activities in person takes much longer than it would for hearing people because the communication needs to take place through writing. Sometimes the people that the appellant needs to communicate with in this way just refuse to do so. Performing these activities over the phone, which is something that hearing people do all the time, and something that may be necessary in certain situations, is impossible for the appellant and therefore he continuously needs the assistance of his parents, relatives or others for these tasks.

The panel notes that, according to the legislation, the direct and significant restriction in the ability to perform DLA must be a result of a severe impairment, a criterion which the panel has determined has been established, and be in the opinion of a prescribed professional. This does not mean that other evidence should not be factored in, but the legislative language makes it clear that the prescribed professional's opinion is fundamental to the ministry's determination as to whether it is "satisfied" that this criterion is met.

The appellant argues that he is significantly restricted in 2 DLA referred to in section 2(1)(a) of the

EAPWDR, namely "manage personal finances" and "shop for personal needs." The panel will examine the evidence with respect to these two DLA.

With respect to "manage personal finances," the panel notes that the AR form is confined to asking about the mechanical and cognitive aspects of "pay rent and bills" – banking, budgeting and pay rent and bills. In the AR, the GP assesses the appellant independent in all these aspects. However the AR form does not directly seek information about restrictions on the whole range of activities relating to managing personal finances and the personal interactions required, including those interactions that would be impacted by hearing and speaking impairments. The panel considers this DLA, as listed in the EAPWDR, to encompass areas such as arranging credit, buying insurance, renting accommodation, dealing with the tax authorities and applying for public benefits. These activities usually require personal interactions, either face-to-face or on the telephone, with people not used to or trained to deal with people who are deaf. There is a need to provide information, ask questions of clarification, arrange appointments and sometimes even negotiate. When given the opportunity, the GP confirmed in her 12 April 2013 letter that these transactions pose difficulties for the appellant and can be prolonged by the need to write everything down. The letter from the appellant's parents further points to the difficulties that can arise, how time-consuming it can be and the sometimes costly risks of misunderstandings. The panel finds that the ministry was unreasonable in not taking a broad view of what this DLA entails, including not considering the importance of the daily, ongoing personal interactions in performing this DLA, and the consequent impact of deafness and speech impairment. The panel therefore finds the ministry was not reasonable in taking into account the evidence that shows that the appellant is significantly restricted in managing this DLA on an ongoing, continuous basis.

As to the "shopping for personal needs" DLA, the panel notes that the AR form is also confined to asking about limited aspects of the DLA – in terms only of mobility, and cognitive and visual skills. The AR asks about restrictions in going to and from stores, reading prices and labels, making appropriate choices, paying for purchases and carrying purchases home, all of which are assessed as independent by the GP. However, the AR does not ask about restrictions relating to personal interactions in the shopping experience, an essential element in the ability to perform this DLA. The panel considers shopping to involve such interactions as asking where something can be found in the store, ordering a quantity of something from the deli counter, explaining the return of a defective good, asking for an explanation of options, inquiring about guarantees and warranties, disputing an incorrect charge and so on. Again, in her 12 April 2013 letter the GP states that shopping is difficult for the appellant and can be prolonged. The panel finds that, taking this broader view of this DLA, the ministry was unreasonable in determining that the appellant is not significantly restricted in shopping for personal needs on an ongoing and continuous basis.

The evidence of the GP, the appellant and his family members all lead to the conclusion that his impairment directly and significantly restricts, on a continuous basis, his ability to "relate to, communicate or interact with others effectively." The panel notes that the wording in quotes, while clearly describing an area of daily functioning in which the appellant is significantly restricted, is one of the additional DLA applicable only to a person with a severe mental impairment. However, the legislation does not allow restrictions in this DLA to be formally applied in relation to deafness, as this is considered a physical impairment.

At the hearing, the ministry representative noted that the GP's letter did not provide much detail. The

panel acknowledges that the information provided by the GP does not go to the level of detail that the ministry would expect in typical PWD applications relating to a physical impairment, most of which have a significant impact on mobility and physical ability to lift, carry, hold, stand, etc. – impacts that can be quantified in some way. In the present appeal, the impacts cannot be readily quantified, only described in a general way, with the GP confirming the restrictions identified by the appellant and his family members. Moreover, it is unreasonable for the ministry to expect the medical practitioner/prescribed professional to provide detailed information when the ministry does not seek such information in the AR form in a critical area of these 2 DLA, namely ability to communicate effectively in personal interactions required to perform the DLA.

On the basis of the foregoing, and considering the GP's and others' evidence regarding the appellant's need for assistance through the continuous use a hearing aid (useful only in registering loud sounds), other devices such as TDD/TTY, sign language interpreters, and the prolonged time it can take for even the simplest transactions, the panel finds that the ministry was not reasonable in determining that this criterion had not been met.

#### Help with DLA

The ministry's position is that as it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required from other persons.

The position of the appellant is that the evidence shows that he requires help to manage his significantly restricted DLA.

The evidence is that the appellant's ability to perform DLA is significantly restricted on a continuous basis. The panel finds that the evidence clearly demonstrates the appellant requires help in relation to the significantly restricted DLA: from his parents as Power of Attorney, the use of sign language interpreters and the use of a hearing aid. Therefore the panel finds that the ministry was not reasonable in determining that the information provided did not establish that this criterion had not been met.

#### Conclusion

Having reviewed and considered all of the evidence and the relevant legislation, the panel finds that the ministry's decision that the appellant was not eligible for PWD designation was not reasonably supported by the evidence. The panel therefore rescinds the ministry's decision in favour of the appellant.