

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of May 8, 2013, which found that the appellant did not meet three of five statutory requirements of section 2 of the *Employment and Assistance for Persons With Disabilities Act* (“EAPWDA”) for designation as a person with disabilities (“PWD”). The ministry found that the appellant met the age requirement and that in the opinion of a medical practitioner the appellant’s impairment is likely to continue for at least two 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 that
- as a result of those restrictions, the appellant requires the significant help or supervision of another person, an assistive device, or the services of an assistance animal.

## PART D – Relevant Legislation

*Employment and Assistance for Persons with Disabilities Act* (“EAPWDA”), section 2  
*Employment and Assistance for Persons with Disabilities Regulation* (“EAPWDR”), section 2

## PART E – Summary of Facts

### Preliminary Procedural Matter

The appeal hearing had originally been scheduled for June 5, 2013. On that day the appellant requested an adjournment so that he could obtain a current psychological assessment. The requested adjournment was granted. At today's rescheduled hearing the appellant requested another adjournment, saying that later today he was scheduled to pick up copies of his old child development records dating approximately from the period 1992 to 1997. The appellant was particularly interested in obtaining the record of a speech assessment that had been done during that time. He said that the records may be old, but that he may be able to find information that is relevant to his appeal, and that he'd like to get the old records "updated". In response to a question from the panel as to why he hadn't been able to obtain the records earlier, the appellant said that he'd requested them at the end of August but that he'd had trouble arranging to pick them up substantially because of conflicts with his part-time temp work schedule. Regarding a new psychological assessment, the appellant explained that he'd requested an assessment from one agency, but that he was denied help as he was deemed "too intelligent" to qualify for the agency's criteria.

The ministry took no position with respect to the appellant's request for adjournment.

The panel took a recess to deliberate over the appellant's request. The panel considered the circumstance that the appellant has not obtained a current psychological assessment, and gave no indication that he will be able to obtain one in the foreseeable future. The panel also noted that the appellant has had almost 3 months to obtain his old records, and if he has had trouble picking up the documents in person he could have had them mailed to him. Finally, in the panel's view, the appellant is speculating as to whether his old child development records will contain any relevant or helpful information. Based on these circumstances, the panel decided not to grant the adjournment, and to proceed with the appeal hearing instead.

### Evidence

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

- A physician's report ("PR") and assessor's report ("AR") both completed by the appellant's physician on November 6, 2012.
- The appellant's self-report dated November 6, 2012.
- A report prepared by a consulting psychologist regarding a psychological assessment of the appellant performed on July 7, 2000 (the "2000 Assessment Report").
- Supplemental medical information (the "SMI") consisting of a two page advocate-prepared document signed by the appellant's physician on April 10, 2013.
- The appellant's advocate-prepared written reconsideration submission.

### *Physical Impairment*

- In the PR, the physician has provided no diagnosis of a physical impairment.

- Also in the PR, the physician indicated no limitations with respect to the appellant's physical functional skills, reporting that the appellant can walk 4+ blocks unaided on a flat surface, can climb 5+ steps unaided, and that he has no limitations in lifting or in being able to remain seated.

#### *Mental Impairment*

- In the PR and the SMI the physician diagnosed the appellant with developmental delay, manifested by a lifelong tendency to have impaired speech. In the PR the physician noted that the appellant "Expresses himself in a rapid, difficult to understand manner."
- With respect to functional skills, the physician noted in the PR that the appellant has cognitive difficulties with communication commenting "Speech – rapid, tangential difficulty being understood."
- The physician indicated in the PR that the appellant has significant difficulties with 2 of 12 categories of cognitive and emotional function: executive and language, commenting "Disorganized thought, expressive verbal makes it difficult to understand."
- In the AR the physician noted major impacts to daily functioning in 2 of 14 categories of cognitive and emotional functioning: "language" and "other neuropsychological problems." The physician noted no impacts in 9 of the 14 categories (including "motivation"), and made no comment on 3 of the 14 categories (including "executive").
- In his self-report, the appellant wrote that he has had speech impairment since childhood, which may be connected to a sleep disorder, and that he has also been labeled as "learning disabled." He wrote that people take him as being stupid, and "not being able to do the job."
- In the 2000 Assessment Report, the consulting psychologist assessed the appellant's intellectual functioning as being in the "low average" range but concluded that "[The appellant] does not meet the generally accepted criteria for mental retardation."
- The consulting psychologist concluded that the appellant's "social knowledgeability" fell in the average range of functioning. He noted that some of the appellant's social and relationship problems have been exacerbated by his abnormal speech and constant movement, but that during the assessment the appellant was able to modify both conditions to the point where they were less disruptive to the people around him.
- In the SMI the physician indicated the appellant has difficulty concentrating and paying attention, issues with executive functioning (planning, abstract thinking), lack of motivation, language difficulties, learning disability, and difficulty with social functioning.

#### *DLA*

- In the health history portion of the PR the physician wrote that the appellant "...has a limited ability to perform tasks requiring visual memory, visual motor speed, or extract cues from visually presented materials."
- In the AR the physician reported that the appellant is completely independent in all aspects of all DLA except for *social functioning*. Regarding *social functioning*, the physician indicated the appellant requires periodic support/supervision in making appropriate social decisions, developing and maintaining relationships, dealing appropriately with unexpected demands, and being able to secure assistance from others. He also indicated the appellant needs continuous support/supervision interacting appropriately with others (largely related to speaking).
- In the AR the physician indicated that the appellant functions marginally with his immediate

social network, and has disrupted functioning with his extended social network.

- In the SMI, the physician indicated the appellant is "directly and significantly restricted in his ability to do his [DLA] continuously, as a result of [his developmental delay]." Identified restrictions were with respect to dressing (lack of motivation to change clothes), laundry/housekeeping (lack of motivation to do more than once per week), paying for purchases (difficulty communicating with cashiers), and banking (difficulty communicating).
- Meal planning was also identified as a restricted DLA in the SMI, but the physician did not check this box.

*Help*

- In the PR and AR the physician indicated the appellant does not use assistive devices and does not have an assistance animal. He also noted that the appellant receives assistance from his elderly grandmother.
- In the SMI, the physician indicated the appellant receives "continuous" assistance with laundry and housekeeping "once per month" from his grandmother, and continuous assistance from his grandmother with all aspects of social functioning. The physician also indicated that the appellant needs assistance with paying for purchases and banking (must keep calm and slow speech down when communicating.)

In his oral testimony the appellant said that the ministry did not consider how much the stress due to his speech impediment affects his ability to get a job. In response to a question from the ministry asking for evidence of the severity of the level of restrictions to DLA identified in the SMI, the appellant acknowledged that "Some aren't so bad. It's just trying to deal with everything is hard some days."

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

## PART F – Reasons for Panel Decision

The issue on this appeal is whether the ministry's decision to deny the appellant designation as a PWD was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. In particular, was the ministry reasonable in determining that the appellant does not have a severe physical or mental impairment, and that in the opinion of a prescribed professional the appellant's impairments do not directly and significantly restrict him from performing DLA either continuously or periodically for extended periods, and that as a result of those restrictions the appellant does not require help to perform DLA?

The relevant legislation is as follows:

### EAPWDA:

2 (1) In this section:

**"assistive device"** means a device designed to enable a person to perform a daily living activity that, because of a severe mental or physical impairment, the person is unable to perform;

**"daily living activity"** has the prescribed meaning;

**"prescribed professional"** has the prescribed meaning.

(2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act if the minister is satisfied that the person has a severe mental or physical impairment that

(a) in the opinion of a medical practitioner is likely to continue for at least 2 years, and

(b) in the opinion of a prescribed professional

(i) directly and significantly restricts the person's ability to perform daily living activities either

(A) continuously, or

(B) periodically for extended periods, and

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

(3) For the purposes of subsection (2),

(a) a person who has a severe mental impairment includes a person with a mental disorder, and

(b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires

(i) an assistive device,

(ii) the significant help or supervision of another person, or

(iii) the services of an assistance animal.

**EAPWDR section 2(1):**

2 (1) For the purposes of the Act and this regulation, "**daily living activities**" ,

(a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following activities:

- (i) prepare own meals;
- (ii) manage personal finances;
- (iii) shop for personal needs;
- (iv) use public or personal transportation facilities;
- (v) perform housework to maintain the person's place of residence in acceptable sanitary condition;
- (vi) move about indoors and outdoors;
- (vii) perform personal hygiene and self care;
- (viii) manage personal medication, and

(b) in relation to a person who has a severe mental impairment, includes the following activities:

- (i) make decisions about personal activities, care or finances;
- (ii) relate to, communicate or interact with others effectively.

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

The appellant advanced no argument with respect to severe physical impairment.

The ministry's position, as set out in the reconsideration decision, is that the evidence does not establish a severe physical impairment.

**Panel Decision**

The physician has not diagnosed a physical impairment, and the appellant has not made reference to a physical impairment in his self-report. The evidence shows no limitations to the appellant's physical functional skills. The panel finds that the ministry reasonably concluded that the evidence does not

establish that the appellant has a severe physical impairment.

### **Severe Mental Impairment**

The appellant's position is that his developmental delay constitutes a severe mental impairment. He argued that his speech impediment causes him significant stress which affects his ability to obtain and retain employment.

The ministry's position is that while it acknowledges the appellant has certain limitations because of his developmental delay, the information provided does not establish evidence of a severe mental impairment.

### **Panel Decision**

The diagnosis of a medical condition is not itself determinative of a severe impairment. One person with developmental delay may be significantly restricted from being able to manage DLA independently, while another person with the same diagnosis may be entirely unrestricted. Accordingly, to assess the severity of an impairment one must consider the nature of the impairment and its impact on the appellant's ability to manage his DLA as evidenced by functional skill limitations, the restrictions to DLA, and the degree of independence in performing DLA. The PR form describes this approach well when it defines the word "impairment" as being "*a loss or abnormality of psychological, anatomical or physiological structure or function causing a restriction in the ability to function independently, effectively, appropriately or for a reasonable duration.*" Of course, this definition is not set out in legislation and is not binding on the panel, but in the panel's view it quite appropriately describes the legislative intent.

The legislation makes it clear that the determination of severity is at the discretion of the ministry – the ministry must be "satisfied" that the statutory criteria for granting PWD designation are fulfilled. In making its determination the ministry must consider all the relevant evidence, including that of the appellant. While the legislation is clear that the fundamental basis for the analysis is the evidence from prescribed professionals, in exercising its decision-making power the ministry cannot merely defer to the opinion of the professionals with respect to whether the statutory requirements are met as that approach would amount to an improper fettering of discretion. The professional evidence has to be weighed and assessed like any other evidence.

In the appellant's case, the physician has diagnosed a mental impairment – developmental delay. He has indicated that the appellant does have functional skills limitations in respect of speech (cognitive causation) and cognitive and emotional function (executive functions and language). The 2000 Assessment Report is getting rather outdated now, but it indicates that while the appellant's intellect is in the low average range, he does not meet the generally accepted criteria for retardation. In the panel's view this is an indication that the appellant's mental impairment is not severe.

As discussed in more detail in the subsequent section of this decision under the heading Significant Restrictions to DLA, the functional skills limitations resulting from his impairment do not appear to have translated into significant restrictions in the appellant's ability to manage his DLA independently. For these reasons, the panel has concluded that the ministry reasonably determined that there is

insufficient evidence to establish that the appellant has a severe mental impairment.

### **Restrictions to DLA**

The appellant's position is that the physician has indicated that his impairment is continuous and therefore his restrictions to DLA are continuous. He says that based on the information there is no reason for the ministry to deny PWD designation because the SMI confirms he has direct and significant restrictions.

The ministry's position is that the AR demonstrates that the majority of DLA are performed independently, and that the SMI provides no information with respect to the severity of the restrictions experienced by the appellant. The ministry said that the information does not establish that the appellant's impairment significantly restricts his DLA either continuously or periodically for extended periods.

### **Panel Decision**

The legislation requires that a severe impairment directly and significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods. The direct and significant restriction may be either continuous or periodic. If it is periodic it must be for an extended time. Inherently, any analysis of periodicity must also include consideration of the frequency. All other things being equal, a restriction that only arises once a year is less likely to be significant than one which occurs several times a week. Accordingly, in circumstances where the evidence indicates that a restriction arises periodically, it is appropriate for the ministry to require evidence of the duration and frequency of the restriction in order to be "satisfied" that this legislative criterion is met.

In the AR the physician indicated that the appellant independently manages 9 of the 10 prescribed DLA, with the one exception being *social functioning* (relate to, communicate or interact with others effectively) as identified in EAPWDR section 2(1)(b)(ii). There the physician indicated that the appellant requires periodic supervision with respect to 4 of 5 aspects of social functioning, but has provided no information as to how frequently such need arises or how it is provided.

The SMI is consistent with the AR with respect to the appellant's difficulties with *social functioning*. However, the physician's evidence in the SMI conflicts substantially with that in the AR in other respects. In the SMI the physician indicates the appellant experiences significant restrictions with the DLA of *self-care* (dressing himself), *basic housekeeping*, and *managing personal finances* (paying for purchases and banking). No explanation is provided as to why these restrictions are described as "significant" in the SMI but weren't identified at all in the PR or AR.

Again recognizing the rather limited weight that can be given to the 2000 Assessment Report because of its age, the panel notes that the consulting psychologist assessed the appellant's level of "social knowledgeability" fell in the average range of functioning.

On balance, the evidence indicates that the appellant is substantially independent with respect to virtually all DLA except for *social functioning*. Even regarding social functioning, no evidence has been provided as to what type of support/supervision the appellant receives, or how frequently it is required.



On balance, and viewing the evidence as a whole, the panel finds that the ministry reasonably concluded that the evidence is insufficient to prove that the appellant is significantly restricted in his ability to perform DLA either continuously, or periodically for extended periods.

### **Help with DLA**

The appellant argues that he requires help from his grandmother with the DLA of *basic housekeeping, managing personal finances, and social functioning*.

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 ministry noted that no assistive devices are required.

### **Panel Decision**

The evidence indicates that the appellant receives help with *basic housekeeping* once a month from his grandmother. He also apparently receives assistance from his grandmother with all aspects of *social functioning*, but there is no evidence as to what form that assistance takes. The panel cannot conclude that this assistance constitutes "the significant help or supervision of another person" that is required by s. 2(3)(b)(ii) of the EAPWDA.

The appellant does not use an assistive device or have an assistance animal.

For these reasons, the panel finds that the ministry reasonably concluded that as it has not been established that DLA are significantly restricted, it could not be determined that the appellant requires help with DLA as defined by s. 2(3)(b) of the EAPWDA.

### **Conclusion**

The panel acknowledges that the appellant's developmental delay affects his ability to function. However, having reviewed and considered all of the evidence and the relevant legislation, the panel finds that the ministry's decision declaring the appellant ineligible for PWD designation is a reasonable application of the legislation in the circumstances of the appellant. The panel therefore confirms the ministry's decision.