

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision dated April 2, 2014 which found that the appellant did not meet two of the five 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 he has a severe mental impairment that, in the opinion of a medical practitioner, 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 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 these restrictions, the appellant requires the significant help or supervision of another person, the use of an assistive device, 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

With the consent of the parties, the appeal hearing was conducted in writing in accordance with section 22(3)(b) of the *Employment and Assistance Act*.

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

- The appellant's PWD application form consisting of the appellant's self-report [dated September 5, 2013], a physician's report ("PR") signed by the appellant's general practitioner [dated September 6, 2013] and an assessor's report ("AR") signed by a social worker [dated November 8, 2013].
- The appellant's 3-page handwritten reconsideration submission [dated March 12, 2014];
- An undated 2-page type-written self-report with the hand-written notation "old form filled out years ago."
- A consultation report and progress note from 2006, and part of a questionnaire filled out by the appellant's physician in October 2008.

The panel reviewed the evidence as follows:

### **Diagnoses:**

In the PR the physician, who has seen the appellant since 2006, diagnosed the appellant with bipolar disorder [onset 1998], COPD [2005], head injury due to a motor vehicle accident [2001], panic attacks [2003] and hepatitis C [2005].

### **Physical Impairment**

In the PR the physician reported that:

- The appellant had recent heart surgery to remove myxoma from the right atrium, and that his COPD and mental problems are stable.
- In terms of functional skills the appellant can walk 2 to 4 blocks unaided on a flat surface, can climb 5+ stairs unaided, can lift under 5 pounds, and can remain seated for less than 1 hour.

In the AR the social worker, who met with the appellant once for 1 hour, reported that:

- The appellant's head injury impaired his ability to communicate in terms of writing (difficult to put thoughts into) but that his speaking and reading are satisfactory and his hearing is good.
- The appellant independently manages walking indoors and standing, but he needs periodic assistance with walking outdoors (2 blocks with pain in chest), climbing stairs (shortness of breath), and lifting/carrying/holding (5-10- pounds maximum).
- COPD/emphysema cause difficulty in breathing, therefore impairing all physical abilities.

In his reconsideration submission the appellant wrote that:

- In his 2006 motorcycle accident he received a head injury and a bad back injury.
- Thirty years ago he had surgery for a collapsed lung.
- Fifteen years ago he suffered a broken jaw. Subsequent infections resulted in many teeth being removed.
- He was to see his cardiologist post-surgery but because of lack of funds he could not attend to

discuss whether the tumor removed from his heart was cancerous.

- The side effects from his medication cause him to sleep 12 to 20 hours a day.
- Since his heart surgery his condition has worsened extremely. He struggles to walk to the community mailbox and is short of breath even though it is only 1 block away.
- His rib cage is wired together and he has chest pains constantly.
- Even if he had a bus pass, he cannot walk far enough to the nearest bus stop because of his emphysema, heart surgery and lung operation.

### ***Mental Impairment***

In the PR the physician reported that:

- The appellant has no difficulty with communication.
- The appellant has significant deficits in 8 of 12 areas of cognitive and emotional function, with the comment "prev. cocaine use. Seen psychiatrists."

In the AR the social worker reported that:

- The appellant's impairments cause moderate impacts in 9 of 14 areas of cognitive and emotional functioning (bodily functions- sleeps up to 14 hours a day, consciousness, emotion – depression and panic attacks causing uncontrolled sweating, attention/concentration – easily distracted, executive, motivation - disinterested, motor activity – continuous foot tapping, psychotic symptoms, and other neuropsychological problems), minimal impact in one area, and no impacts in the remaining areas

In his reconsideration submission the appellant wrote that:

- On bad days he has extreme anxiety attacks and runs away from anybody for no known reason.
- He has severe difficulty relating or talking to anyone he does not know.

The medical reports and questionnaire from 2006 and 2008 confirmed the appellant's bipolar disorder, poor people skills, poor memory, and poor motivation.

### ***DLA***

In the PR the physician indicated that:

- The appellant has not been prescribed any medications that interfere with his ability to perform DLA.
- The appellant has no restrictions with respect to the DLA of *personal self-care, meal preparation, basic housework, daily shopping, use of transportation and mobility indoors and outdoors.*
- The appellant is continuously restricted with the DLA of *management of medications* (needs assistance with medications unsure what they are called and dosages) and *management of finances.*
- The appellant is restricted with the DLA of *social functioning* (nervous around people).

In the AR the social worker reported that the appellant:

- Lives alone in a trailer he rents.
- Independently manages his *personal self-care*, though taking longer than typical with some tasks, and neglecting his personal care.
- He requires periodic assistance with basic housekeeping one time per month, with comment by the social worker that he is not maintaining residence and requires increased support.
- Independently manages most aspects of *daily shopping* (including making appropriate choices), though seeking assistance for a vehicle to get to and from stores and using a shopping cart or vehicle to carry purchases home. The social worker noted that the appellant only needs assistance when he needs food for shopping and appointments.
- Independently manages all aspects of *meal preparation* (including meal planning), though taking significantly longer than typical with the tasks of food preparation and cooking. He is not motivated to cook for self and only prepares simple, easy meals.
- Independently manages all aspects of *managing personal finances* (pay rent and bills), though he has had trouble with budgeting with overdrawn accounts.
- Independently manages all aspects of *managing personal medications*, though he uses notes to remember to take as directed.
- Independently manages most tasks related to use of transportation, though taking significantly longer than typical with all aspects.
- With respect to the DLA of *social functioning*, independently manages the tasks of making appropriate social decisions and developing and maintaining relationships, but requires continuous support/supervision with interacting appropriately with others (disinterested, non-communicative), dealing appropriately with unexpected demands (gets angry and overwhelmed), and securing assistance from others (does not like asking for assistance). The support required by the appellant in relation to *social functioning* is alcohol and drug counselling.
- Has good functioning with respect to his immediate social network and marginal functioning with respect to his extended social network (likes to be at home, not interested in interacting).
- In the additional information the social worker wrote than when the appellant has been manic he does not take care of himself, taking drugs, alcohol and cigarettes followed with severe depressed periods. Also, the appellant's COPD is severe and has taken away his ability to perform any physical tasks, low energy, difficult to breathe.

The appellant's evidence was as follows:

- In the self-report that formed part of his PWD application, the appellant wrote that he is afraid of most people so he generally walks rather than taking a bus, and most times he is "broke" and can't afford to take a bus. He also wrote that he has difficulty organizing his thoughts since having heart surgery, and that he has many medications that he has to take at different times of day.
- In his reconsideration submission the appellant wrote that his depression is so bad, he does not want to face the day. The side effects from his medication make him sleep 12 to 20 hours a day. Every day he eats the same meal of a box of Kraft dinner, a can of soup, and a package of noodles. Because he lives in the country he needs a taxi to get to the nearest bus stop. Walking the ½ mile to the bus stop is near impossible. It takes hours to cook meals or to perform housework due to his physical and mental impairments. He deposits \$10 per month to keep his bank account open. He has severe difficulty relating or talking with anyone he does not know.

**Help**

In the PR the physician noted that the appellant:

- Needs other peoples' assistance.
- Attends a drug counsellor.
- Does not require any prostheses or aids for his impairment.

In the AR the social worker noted that the appellant:

- Is provided assistance for DLA by family, a few friends, his family physician, and his alcohol and drug counsellor.
- Uses assistive devices in the form of a walker, puffers for breathing, and grab bars in the shower.
- Has an assistance animal in the form of a kitten which provides emotional support.

In his Notice of Appeal dated April 4, 2014 the appellant expressed his disagreement with the ministry's reconsideration decision and wrote that being bi-polar is a mental impairment and his impairment restricts his ability to perform DLA.

The ministry relied on its reconsideration decision in its written submission.

## 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 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

(a) authorized under an enactment to practise the profession of

- (i) medical practitioner,
- (ii) registered psychologist,
- (iii) registered nurse or registered psychiatric nurse,
- (iv) occupational therapist,
- (v) physical therapist,
- (vi) social worker,
- (vii) chiropractor, or
- (viii) nurse practitioner, or

(b) acting in the course of the person's employment as a school psychologist by

- (i) an authority, as that term is defined in section 1 (1) of the *Independent School Act*, or
- (ii) a board or a francophone education authority, as those terms are defined in section 1 (1) of the *School Act*,

if qualifications in psychology are a condition of such employment.

\*\*\*\*\*

**Severe Physical Impairment**

The appellant's position is that his heart surgery, COPD/emphysema, lung operation, head injury and hepatitis C together constitute a severe physical impairment.

The ministry's position is that the impacts described by the physician and the social worker are more

in keeping with a moderate degree of impairment, and that there is not enough evidence to establish a severe physical impairment.

### Panel Decision

A diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a severe impairment. An "impairment" is a medical condition that results in restrictions to a person's ability to function independently or effectively.

To assess the severity of an impairment one must consider the nature of the impairment and the extent of its impact on daily functioning as evidenced by functional skill limitations and the degree to which performing DLA is restricted. A medical barrier to the appellant's ability to engage in paid employment is not a legislated criterion for severity. 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 physical functional skills described by the physician are generally in the mid-range of functionality. The social-worker's evidence on this is consistent with the physician's, though it emphasizes the effect that the appellant's shortness of breath has on physical functioning. While suggesting that the appellant requires periodic assistance from another person with walking outdoors and climbing stairs, there is no indication as to how often this occurs. The periodic assistance with lifting/carrying/holding is presumably for weights that exceed the 5 to 10 pound lifting capacity noted by the social worker.

The physician's evidence indicates that any restrictions the appellant experiences with his ability to perform DLA – in the areas of *management of personal medications, management of personal finances, and social functioning* - are caused by his mental health rather than a physical impairment. The social worker indicates that the appellant is restricted in some tasks of some DLA by chest pain and/or shortness of breath.

Considering the evidence as a whole, the panel finds that the ministry reasonably concluded that the appellant's physical limitations are more in keeping with a moderate impairment and that the evidence falls short of establishing a severe physical impairment.

### **Significant Restrictions to DLA**

The appellant's position, as expressed in his Notice of Appeal, is that being bi-polar is a mental impairment which does restrict his ability to perform DLA. He stressed in his reconsideration submission that the combination of mental impairment and physical impairments significantly restricts his ability to manage his DLA.

The ministry's position, as set out in its reconsideration decision, is that there is inconsistency between the evidence of the physician and the social worker as to the degree of limitations. The



ministry also observed that there is no evidence as to how much longer than typical it takes the appellant to perform some tasks as noted by the social worker. The ministry stated that there is not enough evidence to confirm that the appellant's impairments directly and significantly restrict his ability to perform DLA either continuously or periodically for extended periods.

### Panel Decision

The legislation – s. 2(2)(b)(i) of the EAPWDA – requires the minister to substantially assess direct and significant restrictions of DLA in consideration of the opinion of a prescribed professional, in this case the appellant's general practitioner. This doesn't mean that other evidence shouldn't be considered as required to provide clarification of the professional evidence, 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".

In this case there is evidence from two prescribed professionals – the appellant's physician and the social worker. Because the physician has known the appellant since 2006 and the social worker met the appellant once for one hour, the panel has given more weight to the physician's evidence when there is a conflict between the two.

As noted above, the physician's evidence indicates an opinion that the appellant's DLA are restricted by his mental condition rather than by his physical condition. This is evident from the nature of the three DLA for which the physician identified restrictions (*management of personal medications, management of personal finances, and social functioning.*) Unfortunately, the physician's brief comments do not provide much clarity as to the significance of these restrictions and he has provided no information as to the nature of the continuous assistance he indicated the appellant requires with these DLA. The panel has relied on the social worker's and the appellant's evidence in this regard.

Section 2(1)(b) of the EAPWDR prescribes two DLA that are specific to mental impairment – make decisions about personal activities, care or finances (*decision making*), and relate to, communicate or interact with others effectively (*social functioning*).

While the physician's evidence indicates that the appellant is restricted with respect to *management of personal medications*, his comments and those of the social worker indicate that the restriction has to do with remembering the names of the medications and their dosages. The social worker's comments indicate that the appellant has developed a way to manage this issue through the use of reminder notes.

The physician indicated that the appellant is restricted in terms of *management of personal finances*. The comments of the social worker and the appellant indicate that this restriction is more related to a lack of money than to the mental capacity to handle finances. The appellant noted that he deposits a set amount to his bank account each month in order to maintain the account.

The evidence indicates that the appellant independently manages the DLA of *decision-making* in that he independently manages the decision making aspects of *daily shopping* (making appropriate choices), *manage personal medication* (filling/refilling/taking as directed), *meal preparation* (meal planning) and *social functioning* (appropriate social decisions).

Regarding the DLA of *social functioning*, the physician has indicated restrictions but has provided no information with respect to significance of the restrictions. Considering the evidence of the social worker and the appellant, it appears that while the appellant has an aversion to dealing with people he does not know, he does have good functioning with respect to his immediate social network and manages to fill his basic needs in respect of extended social networks.

Although the appellant wrote that the side effects from his medications make him sleep 12 to 20 hours a day, the physician reported in the PR that the appellant has not been prescribed any medications that interfere with his ability to perform DLA.

Viewing the evidence as a whole, the panel finds that the ministry reasonably concluded that the evidence is not sufficient to demonstrate on the balance of probabilities that the appellant experiences significant restrictions in his ability to manage DLA either continuously or periodically for extended periods.

### **Help with DLA**

The appellant's position is that he requires assistance from others to perform his DLA, and that he makes extensive use of assistive devices – puffers, bathroom bars, and a walker.

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

### **Panel Decision**

Findings of a severe impairment and significant restrictions in the ability to perform DLA are preconditions to a finding that an appellant requires help with DLA.

For the reasons provided above, the panel finds that the ministry reasonably concluded 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 medical conditions have an impact on his ability to function. However, having reviewed and considered all of the evidence and the relevant legislation, the panel concludes that the ministry's decision finding 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.