

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of June 2, 2014, 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

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 (which she left blank) along with a physician's report ("PR") and assessor's report ("AR") both signed by the appellant's family physician of 1 1/2 years, dated January 27, 2014.
- An advocate-prepared form of supplementary medical opinion (the "SMO") in which the appellant's physician was asked to agree or disagree with a number of statements made by the appellant regarding the appellant's physical and mental functioning. The physician provided her responses and signed the SMO on May 30, 2014.

The panel reviewed the evidence as follows:

### Diagnoses

- In the PR the appellant's physician diagnosed her as having moderate-severe depression and anxiety, along with learning disabilities.

### Physical Impairment

- In the PR and AR the physician reported that the appellant has no limitations in terms of physical functional skills, and that she independently manages all aspects of mobility and physical ability.
- In the SMO the physician indicated her disagreement with the appellant's statement that she "is only able to sit up to 30 minutes at a time before she has to stretch and move around."

### Mental Impairment

- In the PR the physician wrote that the appellant "has limited ability to concentrate, limited ability to cope w/stress, poor memory, low motivation and is easily overwhelmed."
- In describing the degree and course of impairment, the physician wrote that "Pt has not had good effect w/medication or counselling. Expect a prolonged course (years)."
- The physician reported that the appellant has no difficulty with communication, but indicated that the appellant's speaking ability is "satisfactory" and her reading/writing are poor, commenting "She has a good command of English but has trouble putting thoughts into words. Also struggles w/reading + writing."
- In the PR and AR the physician reported that the appellant's mental impairment causes major impacts to 3 of 14 categories of cognitive and emotional functioning: emotion, attention/concentration, and executive. She also reported moderate impacts to another 4 categories: bodily functions, memory, motivation, and language. The remaining categories showed minimal or no impacts.
- In the SMO the physician agreed with the appellant's statements that she has major impacts in the areas of emotions (anxiety/depression), attention/concentration, and learning disabilities. The physician disagreed that the appellant suffers major impacts in the following areas: bodily functions (the physician commented "she has mod insomnia, would not consider this disabling"), executive, memory, motor activity, and language.

DLA

- In the PR and AR the physician reported that the appellant has not been prescribed any medication or treatments which interfere with her ability to perform DLA, and that the appellant lives alone and is the sole caregiver for her 3 young children.
- In the AR the physician indicated that the appellant independently manages all tasks associated with the following 5 of 10 prescribed DLA: *personal self-care, basic housekeeping, meal preparation, management of medications, and use of transportation* (the physician marked 2 tasks – using public transportation and using transit schedules and arranging transportation as “N/A”).
- With respect to *daily shopping*, the physician indicated that the appellant is independent with all tasks except she requires periodic assistance with going to and from stores (“sometimes needs friend to go w/her to store due to anxiety.”)
- With respect to *manage personal finances*, the physician indicated that the appellant independently manages the tasks of banking and paying rent/bills, but that she needs continuous assistance with budgeting (“poor budgeting – gets in financial difficulties.”)
- With respect to the DLA of “relate to, communicate or interact with others effectively” (“*social functioning*”), the physician indicated the appellant independently makes appropriate social decisions, interacts appropriately with others, and is able to secure assistance from others. The physician reported the appellant requires periodic support/supervision with developing and maintaining relationships (“very difficult for her”) and dealing appropriately with unexpected demands (“poor ability to deal w/unexpected situations”). The physician indicated that the appellant has marginal functioning in terms of her immediate and extended social networks.
- In the SMO the physician agreed with the appellant’s statement that she requires continuous assistance with *social functioning*. The physician disagreed with the appellant’s statement that she requires continuous assistance with going to and from stores. With respect to the appellant’s statements that she requires continuous assistance with budgeting and paying rent/bills, the physician commented “pt has been doing this herself for 9 yrs!”
- In her oral testimony on appeal the appellant stated, through her friend, that she has very bad social anxiety and her friend has to go with her everywhere whenever she leaves her home. She stated that she cannot go out in public by herself and so she can’t work.
- In response to questions from the panel, the appellant responded (either herself or through her friend) that:
  - She can independently help her children with homework, prepare their meals, prepare them for school, and do housework.
  - She needs her friend to go with her whenever she leaves her home – for grocery shopping and all appointments.
  - She has relied on her friend in this way for the past 5 years. Her friend spends at least 5 hours a day with her, every day.
  - Her friend provides her transportation needs.
  - The physician does not know the appellant well, and the physician provided her own answers in the application forms rather than what the appellant was telling her.
  - The physician has tried the appellant on 5 or 6 different medications in the past year.
  - The physician has referred the appellant to a psychiatrist, with the first appointment scheduled for next month.

Help

- The physician reported that the appellant does not require any prostheses or aids for her impairment, and that she does not have an assistance animal.
- In the AR, in response to the question as to what help/supervision would help to maintain the appellant in the community, the physician wrote "w/ family in community, pt has few friends that help her. Would require more social supports." Asked to describe what help the appellant currently receives, the physician wrote "pt has few friends difficult to maintain relationships."

*Admissibility of Additional Information*

In their oral testimony the appellant and her friend provided additional information regarding her impairment. This information generally provides additional detail with respect to matters raised in the original PWD application. Accordingly, the panel has admitted this new information as being in support of information and records that were before the ministry at the time of reconsideration, in accordance with s. 22(4) of the *Employment and Assistance Act*.

The ministry relied on its reconsideration decision and submitted 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 her from performing DLA either continuously or periodically for extended periods, and that the appellant does not require help to perform DLA as a result of those restrictions?

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.

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**Severe Physical Impairment**

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

The ministry's position – as set out in its reconsideration decision – is that the appellant does not experience limitations to her physical functioning, and that the evidence indicates that no degree of

physical impairment exists.

### Panel Decision

Section 2 of the EAPWDA specifies that a severe impairment must be identified by a medical practitioner. In the appellant's case, her physician has provided no diagnosis of a physical impairment. The physician's evidence – which was not contradicted by the appellant except to the extent to which she may be able to sit without having to move and stretch – is that the appellant has no limitations to her physical functional skills.

Based on the evidence, the panel's view is that the ministry reasonably determined that the appellant does not have a severe physical impairment.

### Severe Mental Impairment

The appellant's position is that her depression, anxiety, and learning disability constitute a severe mental impairment. The appellant argues that she cannot leave her home alone, and so cannot work at paid employment. She also states that her physician does not know her well enough to fully understand the extent of her impairment.

The ministry's position, as set out in its reconsideration decision, is that the evidence does not establish a severe mental impairment. The ministry argues that the appellant's cognitive and emotional limitations impact her ability to function only "somewhat", and that the physician has provided no detail as to the types of medication or clinical therapy that has been tried.

### Panel Decision

The physician provided a diagnosis of chronic depression, anxiety and learning disabilities. The physician identified a number of major and minor impacts related to the appellant's degree of cognitive and emotional functioning, but the evidence doesn't show that those impacts have translated into significant restrictions in the appellant's ability to function.

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*).

The physician's evidence indicates that the appellant is not significantly restricted with respect to *decision making* in that she independently manages the decision making aspects of *daily shopping* (making appropriate choices), *manage personal medication* (filling/refilling/taking as directed), *social functioning* (appropriate social decisions) and *meal preparation* (meal planning). In the AR the physician indicated that the appellant requires continuous assistance with the budgeting aspect of *managing personal finances*, but in the SMO the physician wrote that the appellant "...has been doing this herself for the past 9 yrs!"

The physician has indicated that the appellant does require periodic support/supervision with aspects of *social functioning*, but has provided no information about the frequency or duration of the required

support. The physician has also indicated that the appellant is functioning – albeit marginally – with respect to both her immediate and extended social networks to an extent sufficient to fulfill her basic needs.

The panel notes that the appellant has only recently been referred to a psychiatrist and her first scheduled appointment has not yet occurred. It may be that the psychiatrist's assessment will provide evidence to support the appellant's application, but the panel can only rely on the evidence that it has currently.

Considering the evidence as a whole, the panel concludes that the ministry reasonably determined that it does not demonstrate a severe mental impairment.

### **Significant Restrictions to DLA**

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 factored in 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".

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 term "directly" means that there must be a causal link between the severe impairment and the restriction. The direct restriction must also be significant. Finally, there is a component related to time or duration. 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 entirely 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.

There are references in the evidence to the impact the appellant's medical conditions have on her ability to work at paid employment. The panel notes that employability is not a statutory criterion regarding PWD designation – the focus of the legislation is on the ability to perform DLA.

The physician's evidence indicates that the appellant independently manages almost all aspects of all DLA. In the two areas where the physician has indicated the appellant requires periodic assistance – going to and from stores and aspects of *social functioning* – the physician has provided no information on the frequency or duration of the required assistance. The physician has provided conflicting evidence with respect to the appellant's ability to manage the task of budgeting, indicating in the AR that she requires continuous assistance and then commenting in the SMO that "she's been doing this herself for the past 9 yrs!" The physician's evidence is, however, substantially consistent in the PR, the AR, and the SMO.



The panel notes that while it is the appellant's evidence that she cannot leave her home for any DLA without the support of her friend, this degree of dependence is not reflected in the professional evidence. The appellant (through her friend) stated that the physician provided her own opinion rather than accepting what the appellant was telling her. Since the legislative criterion requires the opinion of a prescribed professional, where the physician's evidence differs from that of the appellant the panel has given the physician's evidence greater weight.

Considering the evidence as a whole – including the evidence that the appellant has not yet seen a psychiatrist - and while acknowledging a degree of restriction, the panel concludes that the ministry reasonably determined that the evidence is insufficient to show on the balance of probabilities that the appellant's ability to perform her DLA is significantly restricted either continuously or periodically for extended periods.

### **Help with DLA**

The appellant's position is that she requires help from her friend to perform all DLA that require her to leave her home.

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 that a severe impairment directly and significantly restricts a person's ability to manage her DLA either continuously or periodically for an extended period is a precondition to a person requiring "help" as defined by section 2(3)(b) of the EAPWDA. For the reasons provided above, that precondition has not been satisfied on the balance of probabilities in this case.

Accordingly, the panel finds that the ministry reasonably concluded it could not be determined that the appellant requires help with DLA as defined by section 2(3)(b) of the EAPWDA.

### **Conclusion**

The panel acknowledges that the appellant's medical conditions affect her ability to function. However, having reviewed and considered all of the evidence and the relevant legislation, the panel finds 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.