APPEAL #

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the "ministry") reconsideration decision dated June 4, 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 hearing was held in writing in accordance with section 22(3) 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 and hand-written attachment *[dated October 24, 2013]*, a physician's report ("PR") signed by the appellant's psychiatrist *[dated October 15, 2013]* and an assessor's report ("AR") signed by a social worker *[dated October 28, 2013]*.
- The appellant's Request for Reconsideration dated March 31, 2014 with an attached, undated reconsideration submission prepared by his mental health outreach worker (the "outreach worker").
- An outpatient psychiatric consultation report dated February 20, 2013.
- X-ray and bone-density reports dated November 26, 2012 and February 27, 2013 respectively.

Admissibility of Additional Information

For purposes of this appeal, the appellant submitted the following documents:

- A typewritten submission prepared by the appellant's outreach worker *[dated July 1, 2014]*.
- A four-page submission handwritten by the appellant, and received by the Tribunal on July 8, 2014.

The panel has accepted both documents as going to argument.

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

* * *

The panel reviewed the evidence as follows:

Diagnoses:

- In the PR the psychiatrist, who had seen the appellant once, diagnosed the appellant with generalized anxiety disorder, obsessive compulsive disorder ("OCD"), panic disorder with agoraphobia, depressive disorder NOS, osteoporosis and pain (back). She also wrote that the appellant is under investigation for hemochromatosis by an internist. She commented that longstanding anxiety and OCD usually respond sub-optimally even with the best treatment.
- In the outpatient psychiatric consultation report, a physician described the appellant as having generalized anxiety disorder with panic attacks, OCD, recurrent major depression (in partial remission); OCD personality traits (conscientious, hardworking and performance-oriented); osteoporosis and broken bones; described stressors; and GAF (Global Assessment of Functioning) of 55.

Physical Impairment

In the PR the psychiatrist reported that:

- The appellant had seen a psychiatrist from age 16 to 19 but no treatment was consistently given due to many moves.
- In terms of physical functional skills the psychiatrist reported that the appellant can walk 4+ blocks unaided on a flat surface, climb 5+ steps unaided, his limitations in lifting are unknown (needs investigation for osteoporosis), and his ability to remain seated is unknown (needs physical assessment by rheumatologist).
- In the AR the social worker – who had seen the appellant 2 to 10 times in six months - reported that the appellant independently manages all aspects of mobility and physical ability but all take significantly longer than typical. With respect to climbing stairs the social worker commented "Must use wall or rails – one step at a time." Regarding lifting, the social worker commented "pain in shoulder/back neck – pain in knees." Regarding carrying/holding – "Pain in shoulder/back – knee and neck. He carries for short distances ½ block app. then has to rest."
- In the outpatient psychiatric consultation report a physician reported that the appellant has osteoporosis and had a bone density scan booked. "He has easily broken ribs in the past and recently broke his jaw, which required wiring on December 3, 2012. There has been no other surgery, medication allergies, unconsciousness or seizures."
- The x-ray report identified an oblique fracture of the right jaw.
- The bone mineral density report indicated a density below the expected range for the appellant's age in the lumbar spine and femoral neck, and noted that "10 year fracture risk is not applicable." The second page of the report is not included in the appeal record.
- In his self-report the appellant wrote that he has low bone density in his lower back.
- In the reconsideration submission prepared by the outreach worker, the outreach worker wrote that the appellant gets anxious on stairs for fear of breaking bones. She wrote that what would normally be a 15 minute walk may take almost ½ hour as the appellant stops frequently to rest his shoulder, back, neck and knee due to chronic pain.

DLA

- The psychiatrist indicated that the appellant has been prescribed medication that interferes with his ability to perform DLA. In response to a question as to the anticipated duration of the medication, the psychiatrist wrote "Long term until [illegible] anxiety minimized - CBT – may be lifelong depending on response to CBT [cognitive behavioral therapy] or length of OCD i.e. > 10 yrs."
- In the PR the psychiatrist reported that the appellant independently manages the 3 DLA of *management of medications, mobility inside and outside the home,* and *management of finances.* She indicated that he has continuous restrictions with respect to the 6 DLA of *personal self care, meal preparation, basic housework, daily shopping, use of transportation,* and *social functioning.*
- The psychiatrist wrote that the appellant's OCD can trap him inside the house (rituals). She reported "[DLA] severely restricted by anxiety/OCD" and described a fear of germs and people.
- The psychiatrist indicated that the appellant has cognitive difficulties with communication, commenting "Anxiety/OCD/Panic/Depression all impair socialization memory/concentration significantly."

- In the AR the social worker reported that the appellant lives alone. She described the appellant's ability to communicate as being good in all respects.
- In the PR the psychiatrist reported the appellant as having significant deficits with 8 of 12 areas of cognitive and emotional function: executive, language, memory, emotional disturbance, motivation, impulse control, motor activity, and attention/concentration.
- In the AR the social worker reported the appellant as having major impacts in 3 areas of cognitive and emotional function – bodily functions, emotion, and impulse control. She reported moderate impacts with respect to consciousness, motivation, and motor activity.
- The social worker reported the appellant independently manages virtually all tasks related to all DLA, though indicated that some tasks take significantly longer than typical. With respect to the DLA *use of transportation*, regarding public transportation the social worker wrote "must be almost emergency to use bus – anxiety (tremors – chest pains – shortness of breath – perspiration – fright kicks in).
- Regarding the DLA relate to, communicate or interact with others effectively (*social functioning*), the social worker indicated that the appellant manages all tasks independently except for needing periodic support/supervision with developing/maintaining relationships. She described the appellant as being marginally functional with respect to his immediate and extended social networks.
- In the outpatient psychiatric consultation report, a physician wrote that the appellant described himself as being good at communication. The physician wrote that there are no signs of mania or psychosis, and described memory and decisiveness as "normal". The physician described options for medication and CBT.
- In his self-report the appellant wrote that he only goes out if necessary for doctor's appointments, social worker, and food. He also wrote that he has an uncontrollable fear/nervousness of crowded places, vehicles and public transportation. He reported that he has a drivers licence, but always felt extremely anxious when trying to drive. He stated he sometimes gets physical symptoms from anxiety: chest pains, tremors, uncontrollable sweating, shortness of breath, nausea, problems concentrating, and insomnia.
- The appellant described obsessively cleaning himself and organizing/cleaning his room. He described his social life as "difficult" all his life with family, friends, and employers because he is constantly worrying what others think of him. The appellant wrote that he is hoping to get his life in order with medication and CBT. He also wrote that he has joined a mental health association clubhouse in the hopes of meeting others in his situation and getting support from people who understand.
- In his reconsideration submission, which was prepared with the help of the outreach worker, the outreach worker wrote that the appellant's anxiety is "definitely more than just generalized it is almost debilitating." She wrote that "He has no social life as his anxiety prohibits such."
- The outreach worker wrote that when the appellant leaves his residence alone as requested by his physician, the appellant goes out early in the morning to avoid people, and stated "Goes out to survive only (immediate necessities of life)". She said when it comes to communication levels "he does do ok, only once a bond of trust has been established, which may take hours and months of building up that trust with the individuals almost always are professionals." She stated he will write and rewrite written communications.
- The outreach worker reported that most days are spent dealing with OCD rituals.

Help with DLA

- In describing the assistance required by the appellant to perform DLA, the psychiatrist wrote

"Mental Health have provided a care worker to help [illegible] says kitchen/food [illegible] as cannot do above [DLA] good."

- In response to a question in the AR asking for a description of the type and amount of assistance required with DLA the social worker wrote "In stores if he goes in and little # of people ok However if he is alone and #'s of people increase will leave the line and the store."
- When asked to indicate what assistance is provided to the appellant by other people, the social worker responded "community service agencies". She did not indicate that the appellant requires any prostheses or aids for his impairments, and reported that the appellant does not have an assistance animal.

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:

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's position is that his osteoporosis and chronic pain constitute a severe physical impairment. He argued, through his outreach worker, that while he is independent in most things it is because he will not ask for help. He noted that the professionals indicated it takes him significantly longer to complete physical tasks and that he also has a fear of physical tasks because of anxiety

about breaking bones.

The ministry's position is that there is not enough evidence to establish a severe physical impairment. The ministry argued that the social worker indicated that the appellant independently manages his mobility and physical activities, and provided no evidence as to how much longer these tasks take him.

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 psychiatrist and social worker are generally in the mid-to-upper range of functionality. The social-worker's evidence is that the appellant takes significantly longer than typical with most functions but provided no detail as to how much longer. Details provided by the appellant and the outreach worker indicate that the appellant takes a little less than twice as long than typical with respect to walking. The evidence indicates that while some of the slowness is related to chronic pain, other aspects (such as taking extreme care on stairs) is caused by his mental impairment (anxiety). Also, the panel notes that the bone-density report does not specify an elevated risk of fracture due to the appellant's lower- than-expected bone density.

As discussed in more detail in a subsequent section of this decision under the heading Significant Restrictions to DLA , any limitations resulting from the appellant's impairments do not appear to have translated into significant restrictions in his ability to manage his DLA independently. Considering the evidence as a whole, the panel concludes that the ministry reasonably determined that it does not demonstrate a severe physical impairment.

Significant Restrictions to DLA

The appellant's position is that his OCD, anxiety and depression significantly restrict his ability to perform DLA. The psychiatrist has described the restrictions to DLA as being "severe." The appellant argued that if the ministry believes that his mental impairment is severe, it cannot say that his impairment does not significantly affect his DLA. The appellant also argued that the ministry did

not give sufficient weight to the evidence of the outreach worker, stating that if the ministry is willing to consider the appellant's own evidence it should be willing to consider the evidence of the outreach worker who – while not a social worker – is a qualified person who works with clients on an almost daily basis. Finally, the appellant argued that the ministry put too much weight on the social worker's evidence as opposed to the psychiatrist's evidence. The appellant noted that the psychiatrist indicated that the appellant is continuously restricted with 6 of the 10 prescribed 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, and that the social worker had seen the appellant more often than the psychiatrist had. 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 argued 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 psychiatrist and social worker. 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 onus is on the appellant to prove on the balance of probabilities that he satisfies the statutory criteria for designation as a PWD. As discussed above, the ministry is required to substantially base its assessment on the evidence of prescribed professionals, such as the psychiatrist and the social worker. In the appellant's case, the psychiatrist has indicated that the appellant experiences restrictions in a number of DLA, but the additional detail provided by the social worker indicates that the restrictions primarily consist of taking significantly longer than typical to perform DLA. The extra time is due in some instances to chronic pain, and in other instances to OCD rituals or fear of people, germs or breaking bones. The only evidence before the panel with respect to how much longer DLA take is the outreach worker's statement that walking can take almost twice as long as typical – what should be a 15 minute walk can take almost half an hour, and that daily hygiene can take the appellant up to an hour (instead of 10 to 15 minutes). The outreach worker also speculated that unspecified tasks that "would 'normally' take maybe a few hours potentially could take [the appellant] days..."

The appellant has argued that the evidence of his outreach worker should be given significant weight. However, the legislation puts the emphasis on the evidence of prescribed professionals, and in the appellant's case the prescribed professionals have provided either conflicting evidence or evidence that does not demonstrate significant restrictions. An outreach worker is not included in the definition of "prescribed professional" in section 2(2) of the EAPWDR.

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 evidence indicates that the appellant is not significantly restricted with respect to *decision making* in that he independently manages the decision making aspects of *manage personal medications* (filling/refilling/taking as directed), *manage personal finances* (banking, budgeting, pay rent and bills), *meal preparation* (meal planning) and *social functioning* (appropriate social decisions). On balance the panel concludes that the evidence indicates the appellant manages his own *decision making*.

With respect to *social functioning*, the evidence of the social worker is that the appellant functions adequately to fulfill his basic needs, albeit at a marginal level. The appellant also indicated that he gets out on his own to manage DLA when it is necessary to do so, though it causes him significant anxiety and he sometimes delays doing so until "it is almost an emergency". The panel notes that the appellant reported being able to get out of his home in accordance with his psychiatrist's instructions, though going out early to minimize his contact with other people.

The evidence also indicates that while the appellant was receiving treatment for his mental impairments in his teens, there appears to have been a significant gap in treatment over many years, with treatment only recently beginning again. The appellant had apparently only seen his psychiatrist once at the time the PWD application was submitted, and the psychiatrist was still trying the appellant with different medications. The psychiatrist provided no specific prognosis with respect to potential treatment outcomes other than that the appellant's need for medication or treatment "may be lifelong" depending on his response to treatment, and that longstanding anxiety and OCD usually respond sub-optimally. In addition, the outpatient psychiatric consultation report suggested a number of treatment options and the appellant's evidence contained no comprehensive summary of which of these have been pursued and the outcome for each.

Viewing the evidence as a whole, the panel finds that the ministry reasonably concluded that the information provided 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.

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 reconsideration decision.