

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated September 16, 2014 which found that the appellant did not meet four 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. However, the ministry was not satisfied that the evidence establishes that:

- the appellant's impairment is likely to continue for at least two years;
- 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,
- 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

The appellant did not attend the hearing. After confirming that the appellant was notified, the hearing proceeded under Section 86(b) of the *Employment and Assistance Regulation*.

The evidence before the ministry at the time of the reconsideration decision included the Person With Disabilities (PWD) Application comprised of the applicant information and self-report dated May 29, 2014, a physician report (PR) and an assessor report (AR) both dated July 11, 2014 and completed by the appellant's general practitioner of 3 years.

The evidence also included the following:

- 1) Summary dated May 22, 2012 from a physiotherapist at a Concussion Clinic;
- 2) Note of Amendment to the Summary, dated June 18, 2012; and,
- 3) Request for Reconsideration dated August 18, 2014.

### **Diagnoses**

In the PR, the appellant was diagnosed by the medical practitioner with post-concussive syndrome, with a date of onset of December 2011 and hearing impaired with onset in April 1995.

### **Duration**

- In the PR, the appellant's general practitioner checked "no" in response to the question whether the appellant's impairment is likely to continue for two years or more and the general practitioner did not provide an explanation.

### **Physical Impairment**

In the PR, the appellant's physician reported that:

- In terms of health history, the appellant has had a number of concussions over the past couple of years and she has been seen by the concussion clinic. She finds it very difficult to concentrate, fatigues easily and has frequent headaches. Pertinent documents have been attached.
- The appellant does not require an aid for her impairment.
- Functional skills are not limited as the appellant is assessed as able to walk 4 or more blocks, climb 5 or more stairs, with no limitations to lifting or remaining seated.
- In the additional comments, the general practitioner wrote: "She is motivated to improve but making very slow progress."

In the Summary dated May 22, 2012 from a Concussion Clinic, the physiotherapist wrote:

- The appellant had experienced two concussion injuries in the past 5 months which were then resulting in symptoms of headaches, fatigue, poor concentration, forgetfulness and irritability.
- She recently had an MRI which was reportedly negative.
- At the time, the appellant was reporting ongoing physical symptoms impacting her functioning, namely: headaches, dizziness and fatigue).
- The plan/recommendation is to get sufficient sleep, pace herself throughout the day and take regular brief breaks and to continue with some daily light aerobic activity.
- A follow-up appointment was scheduled on June 14, 2012 to review the appellant's progress.

In the AR, the general practitioner indicated that:

- The appellant is independently able to perform all aspects of mobility and physical ability, including walking indoors and outdoors, climbing stairs, standing, lifting and carrying and holding.
- In the section of the AR relating to assistance provided through the use of assistive devices, the general practitioner has not identified any items as being routinely used by the appellant.

In her self-report dated May 29, 2014, the appellant wrote:

- Her symptoms from post-concussion syndrome are unpredictable every day.
- Most days she gets headaches and “bad fatigue”.
- On ‘bad days’ she gets nausea, noise sensitivity, and compromised balance.
- She has severe hearing loss which makes life more challenging, in addition to the concussion symptoms.

### ***Mental Impairment***

In the PR, the general practitioner reported that:

- As set out in the health history, the appellant “has emotional lability” and dropped out of post-secondary studies due to the symptoms and “finds work difficult.” “She also suffers from significant depressive symptoms since her concussion that makes recovery slow.”
- There are no difficulties with communication. The general practitioner also indicated a sensory cause for difficulties with communication and wrote “hearing loss.”
- The appellant has significant deficits in cognitive and emotional function in 5 of the listed areas, namely: executive, memory, emotional disturbance, motivation, and attention or sustained concentration. There are no comments added by the physician.
- A checklist indicates that the appellant is restricted with her social functioning, with no indication of the degree of restriction as either continuous or periodic and no further comments added by the physician.

In the AR, the general practitioner indicated that:

- Regarding her ability to communicate, she is good with speaking, reading and writing and poor with hearing (note: “hearing impaired”).
- There are no major impacts to the appellant’s cognitive and emotional functioning, but moderate impacts in 3 of the listed areas, namely: emotion, attention/concentration, and motivation. There are minimal impacts or no impact to the remaining 11 areas of functioning. There are no comments added by the general practitioner.
- The appellant is able to independently perform all areas of social functioning, with good functioning with her immediate social networks and marginal functioning with her extended social networks.

In her self-report dated May 29, 2014, the appellant wrote:

- Most days she gets extreme mood swings and, on bad days, she is easily irritated and has an inability to recall normal routine.
- After productive days, she gets exhausted which leads to slow decision making, “foggy thinking”, and difficulty concentrating.
- She struggles with memory, concentration, and reading skills.
- She struggles with minor depression because she has to think about her health first before anything else. Socializing can be very challenging for her because it is exhausting.

- She has a hard time keeping stable relationships with her friends and family.

**Daily Living Activities (DLA)**

In the PR, the general practitioner indicated that:

- The appellant has not been prescribed medications that interfere with her DLA.
- The appellant is not restricted in any listed DLA, with the exception of social functioning. She is not restricted with personal self care, meal preparation, management of her medications, basic housework, daily shopping, mobility inside and outside the home, use of transportation, and management of finances.

In the AR, the general practitioner reported that:

- The appellant independently performs all tasks of all listed DLA, namely: personal care, basic housekeeping, shopping, meals, pay rent and bills, medications, and transportation.

In her self-report dated May 29, 2014, the appellant wrote:

- Her disability affects her job, daily activities and her social life.
- She is unable to attend post-secondary studies due to her concussion symptoms.
- She can only work 2 to 3 days a week and up to 4 hours a shift.
- Before she had her concussion, she was a very active person and loved snowboarding, dancing and doing many other activities. She misses being able to do all these activities and enjoy her hobbies.
- She cannot do any physical sports.

**Need for Help**

The general practitioner reported in the AR that:

- The appellant lives alone and help required for DLA is provided by her family and friends.

In her Notice of Appeal dated September 23, 2014, the appellant expressed her disagreement with the ministry's reconsideration decision and wrote that:

- She is struggling with her everyday activities and life due to her previous injuries and she needs income support.

The ministry relied on its reconsideration decision, as summarized at the hearing.

## PART F – Reasons for Panel Decision

The issue on the appeal is whether the ministry's reconsideration decision, which found that the appellant is not eligible for designation as a person with disabilities (PWD), was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. The ministry found that the appellant does not have a severe mental or physical impairment that, in the opinion of a medical practitioner, is likely to continue for at least 2 years. The ministry also found that her daily living activities (DLA) are not, 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, it could not be determined that 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.

The criteria for being designated as a person with disabilities (PWD) are set out in Section 2 of the EAPWDA as follows:

### Persons with disabilities

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.

(4) The minister may rescind a designation under subsection (2).

Section 2(1)(a) of the EAPWDR defines DLA for a person who has a severe physical or mental impairment as follows:

### Definitions for Act

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.

### **Duration**

The appellant's position is that her disability affects her job, daily activities and her social life and that this will likely continue for 2 years.

The ministry's position is that the appellant's general practitioner has not confirmed that the appellant's impairment will continue for two years or more.

### ***Panel Decision***

Section 2(2)(a) of the EAPWDR requires that there must be the opinion of a medical practitioner indicating that the appellant's impairment is likely to continue for at least two years. In response to the question in the PR whether the appellant's impairment is likely to continue for two years or more, the general practitioner checked "no" and did not write any qualifying comments. The panel finds that the ministry's determination that the medical practitioner had not confirmed that the appellant's impairment will continue for two or more years from the date of the application was reasonable.

### **Severe Physical Impairment**

The appellant's position is that a severe physical impairment is established by her post-concussive symptoms and her hearing impairment. The appellant wrote that her symptoms from post-concussion syndrome are unpredictable every day and most days she gets headaches and "bad fatigue and, on 'bad days,' she gets nausea, noise sensitivity, and compromised balance. The appellant wrote that her disability affects her job, daily activities and her social life.

The ministry's position is that there is not sufficient information from the general practitioner to confirm that the appellant has a severe physical impairment. The ministry argued that the PWD application is not intended to assess employability or vocational abilities as employability is not an eligibility criterion for designation as a PWD. The ministry argued that the general practitioner reported that the appellant is independent in all aspects of mobility and physical abilities.

### ***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, the ministry must consider both 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 the ability to perform DLA is

restricted. In making its determination the ministry must consider all the relevant evidence, including that of the appellant. However, the legislation is clear that the fundamental basis for the analysis is the evidence from a prescribed professional – in this case, the appellant's general practitioner.

The general practitioner, who has known the appellant for 3 years, diagnosed the appellant with post-concussive syndrome and hearing impairment. In terms of health history, the general practitioner wrote that the appellant finds it very difficult to concentrate, fatigues easily and has frequent headaches and the Summary dated May 22, 2012 from a physiotherapist at a Concussion Clinic. Pertinent was attached. The Summary described the appellant's recent experience of two concussion injuries, which is well over 2 years ago. The appellant had an MRI which was reported as negative. The physiotherapist made several recommendations for the appellant's recovery and a follow-up appointment was scheduled on June 14, 2012 to review the appellant's progress. Neither an update from the follow-up appointment or any further reports were provided by the appellant. Her general practitioner reported that the appellant does not require an aid for her impairment. As well, her functional skills are not limited as she is assessed as able to walk 4 or more blocks, climb 5 or more stairs, with no limitations to lifting or remaining seated.

The appellant wrote in her self-report that her disability affects her job, daily activities and her social life and the panel notes that the ability to search for, accept, or continue in employment is not listed as one of prescribed DLA, and employability is not a factor in assessing eligibility for PWD designation. In the AR, the general practitioner indicated that the appellant is independently able to perform all aspects of mobility and physical ability, including walking indoors and outdoors, climbing stairs, standing, lifting and carrying and holding. In her self-report, the appellant referred to 'bad days' when she gets nausea, noise sensitivity, and compromised balance, on top of the usual headaches and "bad fatigue." In the additional comments to the PR, the general practitioner wrote: "she is motivated to improve but making very slow progress." The panel finds that the evidence from the general practitioner is that the appellant's physical functioning is independent in all respects and is expected to improve, albeit slowly, over time. In the absence of evidence from the general practitioner regarding any exacerbated impacts to the appellant's current physical functioning, the panel finds that the ministry reasonably determined that there is not sufficient evidence to establish that the appellant has a severe physical impairment, pursuant to section 2(2) of the EAPWDA.

### **Severe Mental Impairment**

The appellant's position is that a severe mental impairment is established by the evidence of the impacts from her depression. The appellant wrote that most days she gets extreme mood swings and, on bad days, she is easily irritated and has an inability to recall normal routine.

The ministry's position is that there is insufficient evidence to establish that the appellant has a severe mental impairment. The ministry argued that while the general practitioner reported that the appellant has significant deficits with cognitive and emotional functioning in the areas of executive, memory, emotional disturbance, motivation and attention or sustained concentration; however, the impacts assessed are mostly moderate.

### ***Panel Decision***

In the PR, the general practitioner did not diagnose a mental disorder but wrote in the health history that the appellant has emotional lability and dropped out of post-secondary studies due to the symptoms and "finds work difficult." "She also suffers from significant depressive symptoms since her concussion that makes recovery slow." The difficulty identified with communication relates to a

sensory loss of hearing and is otherwise good. While the general practitioner assessed significant deficits to the appellant's cognitive and emotional function in 5 of the listed areas, there are no major impacts to daily functioning and moderate impacts in emotion, attention/concentration, and motivation. There are minimal impacts or no impact to the remaining 11 areas of functioning and no further comments have been added by the general practitioner.

The appellant wrote that most days she gets extreme mood swings and, on bad days, she is easily irritated and has an inability to recall normal routine. Also, after productive days, she gets exhausted which leads to slow decision making, "foggy thinking", and difficulty concentrating. She struggles with minor depression because she has to think about her health first before anything else and socializing can be very challenging. The general practitioner reported in the AR that the appellant is able to independently perform all areas of social functioning, including making appropriate social decisions, developing and maintaining relationships and interacting appropriately with others. The appellant is assessed with good functioning in her immediate social networks and marginal functioning with her extended social networks. Given the lack of evidence of impacts to the appellant's mental and social functioning, the panel finds that the ministry reasonably determined that a severe mental impairment was not established under section 2(2) of the EAPWDA.

#### **Restrictions in the ability to perform DLA**

The appellant's position is that her physical and mental impairments directly and significantly restrict her ability to perform DLA on an ongoing basis to the extent that she requires the significant assistance of another person, namely her family and friends.

The ministry's position is that there is not sufficient evidence from the prescribed professional to establish that the appellant's impairment significantly restricts her ability to perform DLA either continuously or periodically for extended periods of time. The ministry argued that the general practitioner indicated that the appellant is independent in all aspects of her DLA including all aspects of social functioning.

#### ***Panel Decision***

Section 2(2)(b) of the EAPWDA requires that a prescribed professional provide an opinion that an applicant's severe impairment directly and significantly restricts her DLA, continuously or periodically for extended periods. In this case, the general practitioner is the prescribed professional. DLA are defined in section 2(1) of the EAPWDR and are also listed in the PR and, with additional details, in the AR. Therefore, a prescribed professional completing these forms has the opportunity to indicate which, if any, DLA are significantly restricted by the appellant's impairments continuously or periodically for extended periods.

In the appellant's circumstances, the general practitioner indicated in the PR that the appellant has not been prescribed medications that interfere with her DLA. The general practitioner also reported that the appellant is not restricted in any listed DLA with the exception of social functioning. In the AR, the general practitioner also reported that the appellant independently performs all tasks of all listed DLA, namely: personal care, basic housekeeping, shopping, meals, pay rent and bills, medications, and transportation, and did not identify any need for support or supervision in the aspects of social functioning. In her self-report dated May 29, 2014, the appellant wrote that her disability affects her job, daily activities and her social life. She can only work 2 to 3 days a week and up to 4 hours a shift and she misses being able to do all the activities she did before, such as physical sports. While the appellant has perceived a reduction in her ability to perform some the



physical activities she once enjoyed, the panel finds that the ministry reasonably concluded that there is not enough evidence from the general practitioner, as the prescribed professional, to establish that the appellant's impairment significantly restricts her ability to manage her DLA either continuously or periodically for extended periods, thereby not satisfying the legislative criterion of Section 2(2)(b)(i) of the EAPWDA.

### **Help to perform DLA**

The appellant's position is that she requires the significant assistance of another person to perform DLA.

The ministry's position is that because it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required. The ministry argued that no assistance devices or the services of an assistance animal are required.

### **Panel Decision**

Section 2(2)(b)(ii) of the EAPWDA requires that, as a result of direct and significant restrictions in the ability to perform DLA, a person requires help to perform those activities. Help is defined in subsection (3) as the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform a DLA.

The general practitioner did not report, in either the PR or the AR, that the appellant requires assistance or that any assistive devices are used. The panel finds that the ministry reasonably determined that as direct and significant restrictions in the appellant's ability to perform DLA have not been established, it cannot be determined that the appellant requires help to perform DLA as a result of those restrictions, as defined by section 2(3)(b) of the EAPWDA.

### **Conclusion**

Having reviewed and considered all of the evidence and relevant legislation, the panel finds that the ministry's reconsideration decision which determined that the appellant was not eligible for PWD designation was reasonably supported by the evidence, and therefore confirms the decision.