

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision dated October 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'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 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 April 7, 2014], a physician's report ("PR") signed by the appellant's general practitioner [dated May 2, 2014] and an assessor's report ("AR") also signed by the general practitioner [dated April 8, 2014].
- The appellant's Request for Reconsideration dated August 29, 2014 with his written statement, and attached letter from the appellant's psychiatrist also dated August 29, 2014.
- Admissions and discharge information from a psychiatric facility for the period December 2012 and January 2013 (the "Admission/Discharge Documents.")
- Various other medical reports, including an imaging report.

### Admissibility of Additional Information

Prior to the appeal hearing, the appellant submitted the following document to the offices of the Employment and Assistance Appeal Tribunal:

A letter from the appellant's psychiatrist, dated November 14, 2014. In this letter, the psychiatrist wrote that:

- The appellant's original PWD application had been completed by a different assessor and subsequent clinical information has become available since that time.
- In the psychiatrist's opinion, the appellant's mental disorder is directly impacting his social and occupational functioning.
- The appellant has to date declined recommended psychotic medication.
- Two psychological assessments by two psychiatrists have identified that the appellant has a psychotic disorder.
- The appellant is unable to work for several reasons.
- His psychotic symptoms directly interfere with his ability to interact and communicate appropriately with others.
- He experiences auditory hallucinations and other religious delusions.
- He is unable to "filter" his thinking, leading to impairments in concentration, executive functioning, and self-care.
- He requires the support of his treatment team at forensic psychiatric services and community corrections.

The appellant also provided oral testimony at the appeal hearing, as detailed in the review of the evidence below.

The appellant's oral testimony and the November 14, 2014 letter from the psychiatrist include information that is consistent with, and tends to corroborate, information that was before the ministry regarding the impacts the appellant is experiencing as a result of his mental condition. The panel has admitted this information respectively as oral and written testimony in support, in accordance with section 22(4) of the *Employment and Assistance Act*.

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

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The panel reviewed the evidence as follows:

### Diagnoses

- In the PR the general practitioner (the "GP") diagnosed the appellant has having post-traumatic stress disorder ("PTSD"), subdural bleed, sensory disorder (olfactory), mood disorders, and chronic fatigue syndrome. The GP reported that as a result of subdural hemorrhage, the appellant experienced post-concussive symptoms such as vertigo, decreased memory, decreased concentration, worsening of anxiety/depression, and bulimia.
- The Admission/Discharge Documents, completed by a different psychiatrist than the appellant's current psychiatrist, diagnose Axis I R/O religious type delusional disorder, Axis II Schizotypal Personality Disorder, Axis III skull fracture (healing) with brain contusion and a minor subdural bleed, and Axis V GAF-50.

### Physical Impairment

- In describing the appellant's physical functional skills in the PR the GP reported that the appellant can walk 4+ blocks unaided on a flat surface, climb 5+ stairs, and has no limitations in ability to lift or remain seated.
- In the Mobility and Physical Ability portion of the AR the GP reported that the appellant independently manages walking indoors and outdoors, climbing stairs, standing, lifting, and carrying/holding.
- In the Additional Information section of the AR the GP wrote that the appellant continues to have bouts of dizziness relating to post-concussive symptoms/subdural bleed.
- In his oral testimony the appellant said that he has had bulimia in the past. He stated that he was fasting for religious reasons while he was in custody and his fast was misinterpreted by the authorities as a hunger strike. The fasting caused him to get dizzy, fall down and injure his head. He said he suffers ongoing vertigo and loss of his sense of smell because of the head injury.

### DLA

- In the PR the GP reported that the appellant has not been prescribed any medication or treatments that interfere with his ability to perform DLA, and the appellant has no difficulty with communication.
- In the AR the GP commented that chronic fatigue and depression get in the way of ADL's and motivation to do things. The GP also wrote that depressive symptoms inhibit the appellant from performing any job that requires concentration/interaction with the public.
- In the AR the GP indicated that the appellant lives alone and that he independently manages all tasks related to the DLA of *personal self-care, daily shopping, meal preparation, management of personal finances* (pay rent and bills), *management of personal medications, and use of transportation*.
- The GP reported that the appellant takes significantly longer than typical with laundry-related tasks because he "cannot smell dirty clothes." Otherwise the GP indicated the appellant's impairment does not directly restrict his ability to manage the DLA of *basic housekeeping*.
- With respect to the DLA of *social functioning*, the GP reported the appellant independently

manages the tasks of making appropriate social decisions, interacting appropriately with others, and securing assistance from others. He assessed the appellant as requiring periodic support/supervision with respect to developing/ maintaining relationships (“PTSD from court case prevents him from developing meaningful relationships”) and dealing appropriately with unexpected demands (“impacted by depression, PTSD symptoms.”) The GP reported the appellant as having good functioning with respect to his immediate social network (“limited by his probation [conditions] – currently appealing this.”) and marginal functioning with his extended social network (“limited by probation orders – cannot go to church.”)

- In his oral testimony the appellant, through his advocate (a forensic social worker), explained that the appellant finds it challenging to interact with others and to develop a relationship. The advocate said that the appellant is very pleasant to speak with, but in time his delusions and persistent religious themes are challenging for other people. The advocate stated that the appellant will not be able to be employed full time in the community for several years.
- The appellant said that previous allegations of criminal conduct made against him are well-known in the community where he resides and he has been subject to name-calling and shunning.
- In response to questions from the panel the appellant stated that:
  - He does his own grocery shopping and also goes to the food bank.
  - He looks after his own financial affairs and pays his own bills.
  - Walking is pretty much his sole means of getting around. He takes public transportation (a ferry) to attend his medical appointments.
  - The loss of his sense of smell challenges him socially since he can't ever be sure whether he has an inappropriate level of body odour. He was at lunch with two friends at a restaurant when one friend told him he didn't want to sit with the appellant because of his body odour. The other friend told him he couldn't detect any odour.
  - He has trouble sleeping – if he wakes up in the night his mind gets active.

### Help

- In the PR the GP reported that the appellant does not require any prostheses or aids for his impairment. In the AR the GP indicated that the appellant receives assistance for DLA from friends (“helps with social functioning.”) He identified no assistive devices being used by the appellant, 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 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 did not advance an argument with respect to severe physical impairment, but did refer to the vertigo and loss of sense of smell resulting from the head injury he received while in custody.

The ministry's position, as set out in its reconsideration decision, is that the information provided is

not sufficient to demonstrate that the appellant has a severe physical impairment. It said that the appellant independently manages all areas of mobility and physical ability, and that there is no evidence to indicate that the appellant's difficulty with hearing high notes is a severe 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. The legislation makes it clear that the determination of severity is at the discretion of the minister, taking into account all of the evidence. However, the legislation is also clear that the fundamental basis for the analysis is the evidence from a prescribed professional – in this case, the GP, the admissions/discharge psychiatrist, and the appellant's current psychiatrist.

In the appellant's case, the GP has not indicated any limitations to the appellant's physical functional skills. The GP reported that the appellant independently manages the tasks related to mobility and physical ability, while noting the difficulty the appellant has with hearing high notes and also the limitations on the appellant's sense of smell. The GP's evidence on these points has not been challenged.

As discussed in more detail in these reasons for decision under the heading Significant Restrictions to DLA, the limitations to the appellant's physical functioning do not appear to have translated into significant restrictions to his ability to manage DLA.

For the foregoing reasons, the panel finds that the ministry reasonably determined that the evidence falls short of establishing that the appellant has a severe physical impairment.

### **Significant Restrictions to DLA**

The appellant argued that at the time of reconsideration, his psychiatrist had not completed his psychological assessment. He stated consideration of the psychiatrist's letter of November 14, 2014 supports his position that his mental impairment, in conjunction with the symptoms of dizziness and loss of sense of smell, significantly restricts him from managing his DLA. He particularly emphasized his difficulties with personal hygiene and with social functioning.

The ministry's position is that the evidence is not sufficient to demonstrate that the appellant's impairment significantly restricts his ability to perform DLA either continuously or periodically for extended periods. The ministry stated that there is no evidence with respect to how much longer than typical it takes the appellant to manage the task of doing laundry, or the degree or duration of support/supervision required for social functioning.

### 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. 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 appropriate for the ministry to require evidence of the duration and frequency of the restriction in order to be "satisfied" that this legislative criterion is met.

In the appellant's case, although the GP wrote that the appellant's chronic fatigue and depression get in the way of performing ADL's, the GP reported that the appellant lives alone and independently manages virtually all tasks related to all DLA. The psychiatrist's letter of November 14, 2014 does not substantially conflict with the GP's assessment on this point.

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 GP's evidence indicates that the appellant is not significantly restricted with respect to *decision making* in that he independently manages the decision making aspects of *meal preparation* (meal planning), *daily shopping* (making appropriate choices), *manage personal medication* (filling/refilling/taking as directed), *manage personal finances* (banking, budgeting) and *social functioning* (appropriate social decisions). This conclusion is supported by the evidence of the appellant's psychiatrist, who indicated in the November 14, 2014 letter that the appellant has sufficient mental competence that the psychiatrist has been respecting the appellant's decision not to take recommended antipsychotic medication.

The evidence of the GP is that the appellant has good functioning with respect to his immediate social network, and marginal functioning with respect to his extended social network. Limitations noted by the GP are related to PTSD, depression, and probation orders. The GP wrote that depressive symptoms inhibit the appellant from performing any job that requires concentration/interaction with the public. At the hearing, the advocate emphasized the clinical opinion that the appellant's mental health condition impacts his social and occupational functioning and makes it unlikely that he will be employed full-time in the community for several years. The psychiatrist indicated that the appellant's delusions and religiosity tend to put people off, making it difficult for him to establish and maintain relationships. The appellant also emphasized the social barriers that the criminal allegations against him have caused in his local community. However, on balance, the evidence (including the GP's evidence about the appellant's communication skills) indicates that the appellant is managing to satisfy his basic needs in terms of interacting with others.



The panel notes that one's ability to participate in paid employment is not a statutory criterion for designation as a PWD. The focus of the legislation is whether a severe impairment significantly restricts a person from managing his DLA independently. This differentiates the disability assistance regime from the Canada Pension Plan disability pension where employability is a key consideration.

Considering the evidence as a whole, the panel concludes that the ministry reasonably determined that the evidence falls short of demonstrating that the appellant's ability to perform his DLA is significantly restricted either continuously or periodically for extended periods.

### **Help with DLA**

The appellant's position is that he requires help with DLA due to the restrictions he experiences. In particular, he argued that he relies on support and supervision of his psychiatrist for social functioning.

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**

A finding that a severe impairment directly and significantly restricts a person's ability to manage his 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 his ability to function. However, having reviewed and considered all of the evidence and the relevant legislation, the panel finds that the ministry's decision 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.