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PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the "ministry") reconsideration decision of January 5, 2015, 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

EAPWDA, section 2
Employment and Assistance for Persons with Disabilities Regulation ("EAPWDR"), section 2

PART E – Summary of Facts

The ministry did not attend the hearing. Having confirmed that the ministry was notified, the panel proceeded with the hearing in accordance with section 86(b) of the Employment and Assistance Regulation.

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

- The appellant's PWD application form consisting of the appellant's self-report dated September 8, 2014; a physician's report ("PR") completed by the appellant's general practitioner (the "physician") on September 8, 2014; and an assessor's report ("AR") completed by a registered nurse on September 15, 2014.
- The appellant's Request for Reconsideration form with a brief reconsideration submission dated December 3, 2014.
- A psychiatric assessment dated May 11, 2010.
- A Record of Suspension from Duties dated February 23, 2005, received during employment with his university while he was a student.
- A Record of Written Discipline dated October 6, 2004, received during employment with his university while he was a student.

Admissibility of Additional Information

Prior to the hearing the appellant submitted the following documentation to the office of the Employment and Assistance Appeal Tribunal (the "Tribunal"):

1. A letter from the appellant to the ministry dated January 19, 2015, explaining that the appellant's current medical doctor (the "MD") had increased the dosage of two of the appellant's medications, and that the appellant had recently attended two workshops at a local medical health clinic.

2. Records showing that in 2004 the appellant had been pardoned by the National Parole Board for 1992 convictions for sexual assault with a weapon and forcible confinement.

Document 1 tends to support information in the AR with respect to the appellant's need for counselling. Document 2 corroborates information in the PR and the AR with respect to the prior criminal convictions and request for a pardon. Accordingly, the panel has accepted Documents 1 and 2 into evidence as written testimony in support, in accordance with section 22(4) of the *Employment and Assistance Act* ("EAA").

On March 6, 2015 the appellant submitted the following to the office of the Tribunal:

3. a handwritten note explaining that his application for the Canada Pension Plan disability pension (the "CPP pension") had been approved.

There is no evidence in the appeal record to indicate that information about the appellant's application for the CPP pension had been before the ministry at the time of reconsideration. However, Document 3 does tend to corroborate information in the PR regarding the appellant's difficulties maintaining paid employment. Accordingly, the panel has accepted it into evidence as

contemplated by section 22(4) of the EAA.

During his oral testimony the appellant explained that the physician who completed the PR had advised the appellant that he had been "laid off" from the clinic where he had been working one day a week. The appellant is currently seeing the MD. The appellant stated that rather than potential autism as proposed by the physician, the MD has given a potential diagnosis of attention deficit disorder ("ADD"). As this is a new diagnosis that was not before the ministry at the time of reconsideration, the panel finds this evidence is not admissible.

The balance of the appellant's oral testimony tended to corroborate information that was previously before the ministry, and it was accepted into evidence by the panel.

Diagnoses

In the PR the physician diagnosed the appellant with personality disorder ("likely autism spectrum disorder with impulse-anger management difficulties"), diabetes II, and obesity.

In the May 20, 2010 psychiatric assessment, the psychiatrist gave the reason for the referral as "longstanding issues with depression, anxiety, and emotional dysregulation", and commented that the appellant was suffering from chronic depressive symptoms. The psychiatrist diagnosed chronic dysthymia, situational anxiety disorder, and a dependent personality, and suggested that it is likely the appellant "will continue to require ongoing support and there is a distinct possibility that he may appear for mental health services in crises." The psychiatrist concluded that "No further psychiatric appointment has been established for [the appellant]."

Physical Impairment

- In the PR the physician (who had known the appellant for two months and had seen him 2-10 times) commented "Diabetes [and] obesity do not cause any significant impairment."
- In terms of physical functional skills the physician reported that the appellant can walk 4+ blocks unaided on a flat surface, can climb 5+ stairs unaided, has no limitation in lifting, and no limitation in remaining seated.
- The registered nursed (who had met the appellant once, for the purpose of completing the AR) reported the appellant independently manages walking indoors and outdoors, climbing stairs, lifting ("resolving frozen shoulder syndrome"), and carrying/holding. She indicated that the appellant is limited to standing 20-30 minutes, that his left leg is shorter than his right leg which requires him to wear a shoe lift, and that the appellant has some difficulty with lower back pain when standing on concrete.

Mental Impairment

- In the Health History portion of the PR the physician reported that the appellant's personality disorder "has caused significant social [and] legal difficulties because of problems with anger management [and] impulse control [and] so was incarcerated by legal process [secondary] to this." He noted the mental impairment "Is improved with [medications] but unlikely to improve further."

- The physician reported that the appellant has no difficulties with communication and that the appellant has significant deficits with three of twelve categories of cognitive and emotional deficit: motivation, impulse control, and anger management. The physician indicated that the appellant had lost "a number of jobs because of verbal altercations with other staff."
- The registered nurse indicated that the appellant's communication skills are satisfactory in all respects, but commented that he has difficulty completing tasks and staying focused on one goal.
- The registered nurse reported the appellant as having major impacts in eight of fourteen categories of cognitive and emotional functioning: *bodily functions* (eating and sleeping disturbances), *emotion* (depression), *impulse control* (anger issues), *insight/judgement*, *executive* (difficulty prioritizing, discerning), *motivation, motor activity* (decreased goal-oriented activity), and "*other*" (hostility). She also reported moderate impacts in *attention/concentration* and *language* (some misunderstanding of social cues).

In his self-report the appellant wrote that:

- He can't concentrate so he writes options on paper.
- He sleeps too much and he overeats.
- He exercises poor judgement and experiences anger leading to bullying and verbal abuse – and sometimes physical abuse – of others.
- He has occasionally isolated himself from family and friends since 2006.

In his reconsideration submission the appellant wrote that his condition has worsened since the psychiatric consultation in 2010.

In his oral testimony the appellant stated that:

- He had a "dry run" at suicide in December, 2014. He called a mental help line and was referred to his current MD.
- He understands the ministry's point of view that the CPP pension is related to paid employment whereas PWD designation hinges on the ability to manage DLA.

In response to questions from the panel, the appellant stated that:

- His long term family doctor and the physician retired fairly close together in time, which prompted the appellant's suicide attempt in December as he felt he had no one to talk to.
- The appellant was with the physician when the physician completed the PR.
- The MD has not yet referred the appellant for a follow-up psychiatric consultation regarding ADD or autism. The MD has told the appellant that he has not been able to find a psychiatrist who specializes in ADD. Since only the physician ever diagnosed autism, and only the MD ever diagnosed ADD, the appellant doesn't know for sure whether he actually has either condition.
- He has recently attended workshops at the local medical health and substance abuse clinic.

DLA

- In the PR the physician indicated that the appellant has not been prescribed any medication or treatment that interferes with his ability to perform DLA.
- The physician reported that the appellant has no direct restrictions in the eight prescribed DLA

of *personal self-care, meal preparation, management of medications, basic housework, daily shopping, mobility indoors and outdoors, use of transportation*, and *management of finances*. He reported the appellant is continuously restricted with respect to the DLA of *social functioning*, commenting that "Loss of impulse control [and] poor anger management have made him lose all long term social [and] employment relationships" and "Assaulted current partner over…unexpected expense."

- The registered nurse indicated that the appellant independently manages the DLA of *daily shopping* ("chooses a quiet hour in the store to shop") and *use of transportation* ("drives own vehicle").
- The registered nurse reported that he takes significantly longer than typical, or needs periodic or continuous assistance, with all aspects of *personal self-care* except for transfers in/out of bed and on/off chairs. She also reported that the appellant requires continuous assistance and takes one and a half to two times longer than typical with *basic housekeeping* ("physically able motivation low [secondary to] depression"). She indicated that the appellant requires periodic assistance with some tasks related to *meal preparation*, *management of finances* (poor judgement with respect to budgeting), and *management of medications* (skips meds when he feels better).
- Regarding the DLA of *social functioning*, the registered nurse indicated that the appellant requires continuous support/supervision with all aspects except that he independently is able to deal appropriately with unexpected demands.

In his oral testimony the appellant stated that:

- He sometimes doesn't prepare his own meals – he'll often just microwave something from the fridge.
- With respect to management of finances, he is in arrears with his credit card debt, student loan debt, and MSP premiums.
- He can't do housework in a timely manner. He leaves papers and clothes on the floor, and doesn't clean the bathroom unless someone is coming over - sometimes not even then.
- He often leaves his personal hygiene – such as showering - undone for several days, and often stays in his pajamas all day.
- He often forgets to take his medications when he gets busy doing something else or when he gets feeling better. Sometimes he goes for weeks without taking them. He could use help from someone from the regional health authority to come in each morning to remind him to take his medications.

In response to questions from the panel, the appellant stated that:

- No one is currently helping him with his DLA.
- He has a good relationship with his mother by telephone, and got along well with his father and sister who died four months apart about eight years ago.
- He moved to his current community several months ago and hasn't developed a circle of friends since arriving. He has done some snow shoveling for a couple of neighbours, one of whom periodically invites him over for coffee. He maintains friendships with a former employer/friend (from the period 2000-2005), and with a former colleague (since the 1980's), both of whom live in the appellant's former community. People provide an emotional back stop for him. He may move back to his previous community in the summer.

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Help

- In the PR the physician reported that the appellant does not require any prostheses or aids for his impairment. In response to the question "What assistance does your patient need with [DLA]?" the physician wrote "None."
- The registered nurse indicated that the appellant does not routinely use any assistive devices (though she commented that the appellant uses mental health and psychiatric supervision and counselling), and that he does not have an assistance animal. She reported that the appellant has very disrupted functioning with his immediate social network (aggression) and marginal functioning with his extended social networks.
- The registered nurse reported that the appellant's mother provides him with emotional support, and that he requires psychiatric mental health assistance "but has fallen through the cracks", as well as dietary assistance, mood regulation, impulse control, medication supervision and counselling.

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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 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.

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Severe Physical Impairment

The appellant did not advance an argument with respect to severe physical impairment.

The ministry's position, as set out in its reconsideration decision, is that the information provided does not establish a severe physical impairment. The ministry argued that the majority of the appellant's application related to mental impairments, and the physician indicated no restrictions in any areas of physical functioning or to DLA related to physical functioning.

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. 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 appellant's physician, psychiatrist and registered nurse.

In the appellant's case, the physician has not indicated that the appellant has any restrictions with respect to physical functioning, and offered the opinion that the appellant's obesity and diabetes "do

not cause any significant impairment." The nurse has indicated that the appellant is somewhat limited in terms of standing, but that limitation is related to a back condition that was not diagnosed by a medical practitioner as required by EAPWDA section 2(2). There is no evidence that physical impairments translate into significant restrictions in the appellant's ability to manage DLA.

Based on the foregoing analysis and reasons, the panel finds that the ministry reasonably determined that the evidence falls short of demonstrating that the appellant has a severe physical impairment.

Severe Mental Impairment

The appellant's position is that his personality disorder and secondary depression, along with difficulty focusing his thoughts and concentrating, as well as problems with social functioning demonstrate a severe mental impairment. He argued that the ministry was wrong to give little weight to the evidence of the registered nurse and to the psychiatric assessment of 2010. He stated that there is nothing in the legislation or in the ministry's informational material to indicate that a prescribed professional has to be one who has known the appellant for a long time, or that documentary evidence has to fall within a specific time frame. Finally, the appellant argued that if he had known that time was a factor in the credibility of the information, he could have gone to a prescribed professional who had known him longer to get the application form completed.

The ministry's position is that, while acknowledging that the appellant experiences limitations as a result of his mental health impairments, the information does not establish a severe mental impairment. The ministry argued that the physician did not provide any evidence of where the appellant is placed on the spectrum of autism spectrum disorder, so severity cannot be confirmed. The ministry also argued that the 2010 psychiatric assessment did not diagnose autism spectrum disorder, and that the age of the assessment warrants giving it little weight. Finally, the ministry argued that little weight should be given to the AR because the registered nurse substantially based her assessment on one visit (which likely provides a reiteration of the appellant's own experiences) and on old documentation (the 2010 psychiatric assessment and the 2004/2005 disciplinary documents.)

Panel Decision

The physician diagnosed a personality disorder that he thought was likely autism spectrum disorder, and indicated that the appellant has significant deficits in three areas of cognitive and emotional functioning: motivation, impulse control, and anger management. The psychiatrist diagnosed chronic dysthymia (depression), situational anxiety disorder, and a dependent personality. The registered nurse, in contrast to the physician, indicated that the appellant experiences moderate to major impacts in most areas of cognitive and emotional functioning. Because the physician knew the appellant for a longer period than the registered nurse did, and because the physician's evidence is more in keeping with that of the psychiatrist who felt that the appellant's condition was not sufficiently severe to warrant further psychiatric treatment at the time but could worsen at times of crisis, the panel has given more weight to the physician's evidence where it differs from that of the registered nurse. Despite the appellant's argument that the duration of an applicant's relationship or the age of a medical report are not factors set out in legislation or in the ministry's informational material, the panel believes these are reasonable factors to consider in assessing the weight to be given to the evidence.

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 he independently manages his finances, medications, and other personal care activities, despite the registered nurse and the appellant indicating that the appellant sometimes forgets or chooses to forego taking his medications, and that he is in arrears on some of his bills.

The evidence of the physician in the PR and the registered nurse in the AR indicates that the appellant does experience direct restrictions with his *social functioning*. However, with respect to his extended social networks the registered nurse indicated that the appellant is marginally functional in this area, that is, minimally able to fulfill his basic needs. This is consistent with the appellant's evidence that he does not get assistance with DLA such as daily shopping and managing his finances. Regarding his immediate social network, despite the physician indicating the appellant had lost "all long term social…relationships", and the registered nurse indicating that the appellant has very disrupted functioning in this area, the appellant's evidence is that he has a good relationship with his mother and has at least a couple of long-term friendships and a more recently-developed casual relationship in his current community.

Considering that:

- the appellant's ability to communicate is good or satisfactory in all respects,
- the appellant is not significantly restricted in terms of *decision making* and *social functioning*, and
- the physician's evidence indicates limited or no impacts to other DLA,

the panel concludes that the ministry reasonably determined that the evidence does not demonstrate a severe mental impairment.

Significant Restrictions to DLA

The appellant's position is that his impairments, primarily through lack of motivation and depression, significantly restrict his ability to manage his DLA such as *personal self-care, management of finances, management of medications*, *meal preparation* and *social functioning*. He argued that he does not perform most DLA until he has to, and that he self-isolates due to impulsivity and anger-management issues.

The ministry's position, as set out in its reconsideration decision, is that there is not enough evidence to confirm that the appellant's impairments directly and significantly restrict his ability to perform DLA either continuously of periodically for extended periods. The ministry argued that the information provided by the registered nurse is inconsistent as compared to that of the physician, that the prescribed professionals only knew the appellant for a short period of time, and that the psychiatric assessment and discipline letters were too old to be given significant weight.

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 physician and registered nurse. 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 provide evidence to establish that he satisfies the legislative criteria. The panel understands the appellant's frustration that he has experienced rapid turnover in his family physicians. It does not help his situation that the evidence of his prescribed professionals (the physician and the registered nurse) is in substantial conflict with respect to the degree of restriction he experiences in his ability to perform DLA. The physician provided the opinion that the appellant has no direct restrictions with any of his DLA except for *social functioning*, and emphasized this by responding to the question about help required by the appellant to perform DLA by stating "none." The registered nurse provided her opinion that the appellant requires continuous or periodic help with at least some tasks related to almost all DLA. For the reasons given above under the discussion of Severe Mental Impairment, the panel prefers the evidence of the physician to that of the registered nurse where the two differ.

Because *social functioning* is the only DLA which the physician felt was directly restricted, and based on the panel's reasoning with respect to the significance of that restriction provided under the heading Severe Mental Impairment above, the panel concludes that the ministry's was reasonable in concluding that there is not enough evidence to confirm that the appellant's impairments directly and significantly restrict his ability to perform DLA either continuously of periodically for extended periods.

Help with DLA

The appellant's position is that he requires significant assistance with DLA, though he is not currently receiving any assistance.

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. The ministry argued that no assistive devices are required.

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, the panel finds the evidence falls short of satisfying that precondition.

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.

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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.