

### PART C – Decision under Appeal

The decision under appeal is the ministry's reconsideration decision dated January 9, 2015, which held that the appellant did not meet 3 of the 5 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 her impairment is likely to continue for at least two years. However the ministry was not satisfied that the appellant has a severe physical or mental impairment or that her daily living activities (DLA's) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods. The ministry also found that as the appellant is not significantly restricted with her DLA's, it could not be determined that she requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform her DLA's.

### PART D – Relevant Legislation

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

## PART E – Summary of Facts

The appellant's son attended the hearing to provide language translation and clarification for the appellant as needed.

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

- A physician's report completed by the appellant's physician of one year dated September 17, 2014. The physician's report diagnoses the appellant with moderate to severe hearing loss. The physician writes:
  1. She is taking medications that interfere with her ability to perform her DLA's however no details are provided.
  2. The appellant requires no prostheses or aids for her impairment.
  3. She can walk 2-4 blocks unaided, climb 5+ stairs unaided, lift 2-7kg, and remain seated 1-2 hours.
  4. She has no difficulty communicating (other than a lack of fluency in English).
  5. The physician notes she has significant deficits with cognitive and emotional functioning in language, memory, emotional disturbance, motivation, and attention or sustained concentration.
  6. The physician checked off both that the appellant is independent and requires continuous assistance to perform self-care and meal preparation. He checked that she is independent in managing medications, basic housework, and mobility inside and outside the home. He checked that she is restricted on a continuous basis in performing shopping and social functioning, and is restricted on an unspecified basis with using transportation, and managing her finances.
  7. The physician writes she receives assistance from her family and friends.
  8. In the additional comments section the physician writes that most spheres of her life have been affected by the hearing loss as she indicated in her previous self-report.
- An assessor's report completed by the appellant's physician dated September 17, 2014.
  1. The physician diagnoses her with hearing loss.
  2. The physician indicates her speaking, reading, and hearing is poor, and that she is unable to write. There are no comments to explain how her hearing loss affects these activities.
  3. The physician indicates she is independent walking indoors, requires continuous assistance walking outdoors, and requires periodic assistance climbing stairs, standing, lifting, carrying, and holding. The physician comments that she has become isolated due to her hearing loss and somewhat results in depression.
  4. In the area of the report designated for an applicant with an identified mental impairment the physician indicates her condition has no impact in the areas of bodily functions, impulse control, motor activity, and psychotic symptoms. He indicates she has minimal impact in consciousness, insight and judgment, while she has moderate impacts in the areas of attention/concentration, executive, memory, motivation, other neuropsychological problems, and other emotional problems. He indicates that emotion and language have major impacts. He comments "most of the defects above are related to the hearing loss."
  5. Regarding her DLA's the physician writes she is independent in all areas of personal care, basic housekeeping, meal planning/preparation, however she requires continuous assistance with shopping, paying bills/rent, medications, transportation, and social functioning.

6. The doctor indicates that her mental impairment is very disruptive to her social functioning within her immediate social network as well as her extended social network. The physician does not provide further comments about her social functioning.
  7. Regarding the assistance she requires, the physician indicates she receives help from her friends and family and writes that she needs assistance with shopping, banking and prescriptions.
  8. Regarding assistive devices the physician writes, "Hearing Aids?"
- A self-report completed by the appellant dated September 3, 2014. The appellant writes that she suffers from major hearing loss. She writes that because of her hearing loss she cannot hear people talking to her, she gets scared because she cant hear people approaching, people avoid her because they don't want to scream at her, if she turns up her TV so she can hear it her neighbors complain, she feels unsafe leaving the house because she can't hear what's going on around her, and that she gets depressed because she feels people avoid her and therefore she avoids opening conversations.
  - The Request for Reconsideration dated December 22, 2014 in which the appellant wrote that she needs an assistive device in order to perform DLA and support herself. She cannot buy groceries because she is afraid to walk outdoors since she is not able to detect danger like car horns or having the cashiers talk to her. She does not leave the house because people do not want to talk to her since they have to scream all the time, She is only applying to be able to have hearing aids so she can live normally.
  - An audiology report dated June 10, 2014, that provided the technical results of her hearing tests.

At the hearing the appellant presented two new pieces of evidence. The first piece of evidence was the summary report from her audiology report that she had already submitted to the ministry. She originally submitted the technical results from the tests but didn't submit the audiologist's analysis. In this letter dated June 14, 2014 the audiologist writes the appellant's results suggest, "early wave activity may reflect cochlear microphonic," and "possibility of auditory neuropathy spectrum disorder. Cannot rule out retrocochlear involvement." The audiologist recommends she follows up with ENT, pending medical consultation she may try binaural amplification or consider assistive listening devices such as FM system, continue to monitor hearing ability, and in the future she may benefit from cochlear implant. This first piece of evidence was admitted as evidence as per the Employment and Assistance Act section 22 (4). The panel found that the evidence contained in the summary report is in support of evidence that was before the ministry at the time of the reconsideration. The summary report was accepted because it is part of the original audiologist's report that had been submitted with her original application. At the hearing the ministry had no objections to the summary report being accepted as evidence.

The second piece of evidence was a letter from a registered hearing instrument practitioner dated July 25, 2014 recommending a hearing aid for the appellant at a cost of \$1895.00. This second piece of evidence was admitted as evidence as per the Employment and Assistance Act section 22 (4). The panel found that the evidence contained in the document is in support of evidence that was before the ministry at the time of the reconsideration. The letter was accepted because it provided a recommendation from a hearing professional to help correct her hearing loss and tended to corroborate the evidence available to the ministry at reconsideration. At the hearing the ministry had no objections to the letter being accepted as evidence.

The other evidence submitted by the appellant prior to the hearing included:

1. A letter prepared by the appellant's advocate and completed by the physician where he writes the appellant's condition is likely to last more than 2 years, diagnoses the appellant with general anxiety disorder, hearing impairment, depression, arthritis, and ear disease (dizziness). The physician also confirms that the appellant requires significant help with her DLA's as a result of her conditions.
2. A letter written by the appellant's advocate dated February 10, 2015. The letter provides a summary of the appellant's position and argues that the new evidence provided by the physician answers the questions the ministry had about how the appellant's hearing loss affected DLA's that were not related to hearing.
3. A self-report from the appellant dated January 29, 2015. In the report the appellant discussed her anxiety, depression, isolation, and her difficulty with communication with others. She also writes that she is taking high blood pressure medication, her mobility issues are due to arthritis that she has had since 2000, and that her hearing loss, arthritis and dizziness cause her to be depressed and anxious. She is taking medications that cause her to sleep 12-15 hours a day, gives her stomach pains and causes diarrhea. She continues that her depression, dizziness and pain make it difficult to dress and groom herself at times. Her physical impairments preclude her from doing housework, and her mental impairments keep her from going out in public alone or taking public transportation.

The advocate argued that the new diagnoses should be admitted as evidence because it connects some of the restrictions the physician had indicated in the Assessor's report with a more obvious condition. For example, the physician noted that the appellant's hearing loss restricted her ability to shop or prepare meals which made the reader question the cause and effect, however, with the new diagnoses of depression, anxiety, dizziness/vertigo and arthritis, the restrictions are more reasonable. The ministry had no objections to these documents being accepted as evidence.

The physician's letter and parts of the appellant's new self-report were not accepted as evidence as per the Employment and Assistance Act section 22 (4). The panel found that the evidence contained in these documents was not in support of evidence that was before the ministry at the time of the reconsideration. The physician's letter introduces 4 new medical conditions, general anxiety disorder, depression, arthritis, and ear disease (dizziness). These are new physical and mental conditions that the ministry did not have the benefit of reviewing when the appellant's application was reconsidered. While the physician wrote in the Assessor Report that the appellant has become isolated due to her hearing loss and "somewhat resulting depression", the physician had not made a mental health diagnosis at that time and had not identified the nature of any mental impairment. The parts of the new self-report that relate to conditions other than hearing loss are not in support of evidence before the ministry at reconsideration. The letter from the advocate is intended to explain the reasons why the physician noted the restrictions he did in the Assessor and Physician's reports however these reports were completed in relation only to her hearing loss. At the hearing the ministry had no objections to the physician's letter and the new self-report being accepted as evidence. The panel considered the advocate's letter as argument on behalf of the appellant and not as evidence.

At the hearing the appellant's advocate told the panel that the Assessor's report does include

restrictions to her DLA's and that the ministry could have made an attempt to contact the appellant's physician if there were any questions about his reports. The advocate continued that it appears the physician's opinion is being questioned simply because he did not provide details or comments and that the physician has indicated that many of her DLA's are affected continuously or for extended periods.

The advocate told the panel that the physical limitations noted in the Assessor's report related to shopping are a result of the appellant's arthritis although the physician writes in the same report that the shopping limitations are "all due to hearing loss." The appellant also has language issues and does not speak English well. The communication issues also result in her being unable to concentrate when reading prices and labels. The DLA of paying rent and bills is affected by her anxiety and depression as well as the physical aspect of not being able to stand in line for long. The appellant and her son stated that she applied on the basis of her hearing loss because the appellant wanted to get hearing aids but the physician reported based on all of the symptoms of her medical conditions. The appellant told the panel she is on many medications for her high blood pressure and vertigo. She added that she cannot take the bus due to pain from her arthritis and that she cannot write due to her dizziness/vertigo.

At the hearing the ministry told the panel that the information contained in Assessor and Physician's report appeared to be incomplete and inconsistent as a result the ministry wasn't satisfied that the appellant has a severe impairment or that she was directly and significantly restricted in her DLA's. The ministry told the panel that the reports indicated many restrictions that were not reasonably related to hearing loss and that the physician had completed sections of the reports that are intended for applicants who have an identified mental impairment. The ministry added that she was not aware of the official ministry policy regarding contacting physicians to clarify details of an application and it appeared that in the appellant's case the ministry did not attempt to contact the physician and instead relied on the evidence provided.

## PART F – Reasons for Panel Decision

The issue under appeal is whether the ministry reasonably determined that the appellant's impairment is not severe, in the opinion of a prescribed professional her impairment does not directly and significantly restrict her daily living activities either continuously or periodically for extended periods of time and, as a result of those restrictions, it could not be determined that she requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform her DLAs.

To be considered a person with disabilities the legislation requires a person to provide evidence to satisfy the legislative criteria. These are detailed in EAPWDA Section 2 (2):

- (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.

The definitions for the above legislation are contained in the 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 practice 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.

The appellant argues that her impairment is severe, it directly and significantly affects her daily living activities either continuously or periodically for extended periods of time and that she requires assistance of another person, in particular she relies on her husband and son to make decisions, and needs a hearing aid as an assistive device. She argues that the criteria listed in EAPWDA Section 2 (2) must be interpreted broadly and to the benefit of the appellant and that significant weight must be placed on the appellant's evidence. The advocate argued that the reconsideration decision did not appear to consider the appellant's self report or give it sufficient weight even though the physician referred to it in his report and seems to be certifying that it is true

It is the ministry's position that the appellant meets the age requirement and that her impairment is likely to last more than two years. The ministry maintains there is insufficient evidence to establish that her impairment is severe, and in the opinion of a prescribed professional directly and significantly restricts her daily living activities either continuously or periodically for extended periods to the extent that she requires the aid of an assistive device or another person. The ministry maintains that the information contained in the Physician and Assessor's reports was unclear as to the appellant's restrictions and was insufficient to satisfy the legislated criteria.

### **Severe Physical Impairment**

A diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a severe impairment. "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. 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 physician.

The appellant's family physician of one year diagnoses her with moderate to severe hearing loss and reports that she can, unaided, walk 2-4 blocks, climb 5+ steps, lift 2-7 kg, and remain seated for 1-2 hours. The physician reports both that she has no difficulties with communication other than a lack of fluency in English in the Physician's report while in the Assessor's report that her speaking, hearing and reading skills are poor and she is unable to write. He does not clarify if the communication difficulties she has are due to the hearing loss or lack of English proficiency. The appellant stated at the hearing that she couldn't write due to dizziness. The appellant told the panel at the hearing that the difficulties she has with most of her tasks such as using transportation, shopping, housekeeping, and meal preparation are not due to her hearing loss, but rather, these limitations are because of her arthritis, dizziness, and anxiety and depression. The appellant referred to impacts from her hearing loss only in her Request for Reconsideration and, while the appellant wrote in her original self-report that she is getting depressed over the impact of her hearing loss, the physician had not made a

mental health diagnoses at the time and had not identified any other medical conditions.

Based on the evidence provided by her physician regarding her diagnoses of hearing loss, the panel finds that the ministry reasonably determined that the evidence does not establish that the appellant has a severe physical impairment and was reasonable to determine that the criterion had not been met.

### **Severe Mental Impairment**

The appellant's family physician indicates in the Assessor's Report that the appellant experiences impacts to her daily functioning in 10 out of 14 areas of cognitive and emotional functioning. The areas of her DLA's that are most affected are in the mental impairment areas of cognitive and emotional functioning however the physician writes, "most of defects above are related to her hearing loss." The physician does not diagnose the appellant with a mental condition except to write as a comment relating to her physical ability that she has become isolated because of her hearing loss and "somewhat resulting depression." Although the physician indicated in the Assessor's report that the appellant requires continuous support/supervision in all aspects of social functioning, the appellant has not been diagnosed with an identified mental impairment and the physician has not provided an explanation for this degree of assistance.

Based on the evidence regarding mental impairment and due to the fact the physician has not diagnosed the appellant with a mental condition or disorder, 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**

As noted above, the physician states the appellant has moderate to severe hearing loss and as a result can walk 2-4 blocks, climb 5+ steps, lift 2-7 kg un-aided, and remain seated for 1-2 hours. The Assessor's report indicates the areas of her DLA's which are most affected are in the mental impairment areas of cognitive and emotional functioning however the physician writes, "most of defects above are related to her hearing loss." The appellant argues that the difficulties she experiences with tasks of using transportation, shopping, housekeeping, and meal preparation are not due to her hearing loss, but rather, these limitations are because of her arthritis, dizziness, and anxiety and depression. Although the physician notes some of the restrictions to her DLA's are continuous, the physician does not provide any information about how the physical impairments are linked to hearing loss. As a result it is unclear which areas are affected by the hearing loss and which areas are affected by other conditions. The information provided in the Physician Report is inconsistent as the physician reported that the DLA of personal care and meal preparation are not restricted and yet indicated that restrictions are continuous. In the Assessor Report, the tasks of the DLA personal care are all assessed as independent while all of the tasks of the DLA meals are assessed as requiring continuous assistance from another person.

The panel finds that the ministry reasonably concluded that there is not enough consistent evidence from the prescribed professional to establish that the appellant's impairment, hearing loss, directly and 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 evidence of the physician, as a prescribed professional, is that the appellant's family and friends provide the help required with DLA. In the physician's report the physician indicates little or no physical restriction to functions such as walking, climbing stairs, holding, lifting, and carrying. At the hearing the appellant and advocate explained that the physical limitations noted in the Assessor's report such as using transportation and shopping are due to arthritis rather than hearing loss. The appellant and advocate also explained to the panel that her anxiety and depression causes her to withdraw from social interactions and results in the mental impairments the physician listed in the Physician and Assessor's reports. The panel notes that in the evidence provided the physician has not diagnosed her with any conditions other than the hearing loss.

In terms of an assistive device the appellant currently does not use one however in the Assessor's report the physician writes "hearing aids?" in the area of the report for listing required assistive devices. In the additional evidence provided at the hearing the audiologist recommends she "follows up with ENT, pending medical consultation she may try binaural amplification or consider assistive listening devices such as FM system, continue to monitor hearing ability." The registered hearing instrument practitioner recommends a hearing aid for the appellant.

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.