

## PART C – Decision under Appeal

The Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated 19 September 2014 determined 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 his impairment was likely to continue for at least 2 years. However, the ministry was not satisfied that the appellant had a severe mental or physical impairment and that the appellant's mental or physical impairment, in the opinion of a prescribed professional, directly and significantly restricted his daily living activities (DLA) either continuously or periodically for extended periods. The ministry was also not satisfied that as a result of those restrictions, in the opinion of a prescribed professional, the appellant required help 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 was not in attendance at the hearing. After confirming that the appellant was notified, the hearing proceeded under s. 86(b) of the Employment and Assistance Regulation.

The following evidence was before the ministry at the time of reconsideration:

- A 3 page PWD Application – Applicant Information dated 28 February 2014 and signed by the appellant before his physician acting as a witness was left blank but an attachment bearing the same date and signed by the appellant indicated that he suffered from anxiety, depression, eating disorder and severe skin condition when in contact with certain chemicals. Because of his depression, his motivation and ability to function daily is greatly affected and he does not eat properly, does not make regular meals but binge eats and he is unable to cook meals and prepare food. He stated that cleaning his home was also a challenge and he forgets taking medications. He indicated he had a temper that isolated him further and that he found it difficult to stay on track with his responsibilities. He was afraid of taking the bus and obsesses or worries about certain things. He needed support from others, particularly in terms of counselling.
- A 8 page Physician Report (PR) dated 28 February 2014 completed and signed by the appellant's physician indicated the following:
  - Specific diagnosis: depression and anxiety since August 2013.
  - Health history: he has been unable to work because of a bad contact dermatitis involved in handling chemicals in his past employment. For the previous 2 years he was unable to work which worsened his depression and anxiety. Was doing counselling for the previous 4 months and he was not looking after himself as he had decreased motivation to do anything.
  - No medication or treatments interfere with the appellant's ability to perform daily activities.
  - The appellant did not require prostheses or aids for his impairment.
  - The impairment was likely to continue for 2 years or more from that date but the physician indicated he was unable to estimate accurately the duration.
  - In terms of functional skills, the appellant did not have identified limitations other than not being able to lift more than 7 kg and remain seated more than 1 hour.
  - In terms of significant deficits with cognitive and emotional functions, the physician identified 4 areas: executive, emotional disturbance, motivation and attention or sustained concentration and commented "Vegetative symptoms of depression".
  - In terms of daily living activities, the physician did not answer the question "Does the impairment directly restrict the person's ability to perform Daily Living Activities?" but identified 4 activities that were restricted continuously: personal self care, meal preparation, basic housework and daily shopping. The 5 other activities (management of medications, mobility inside or outside the home, use of transportation and management of finances were not restricted and he left blank "Social functioning". He commented: "He has no assistance but could benefit from help with shopping, meals, housework, etc."
  - In terms of general additional comments, the physician stated that the appellant was not hospitalized and he had started counselling a few months before. He added that the appellant was socially isolated, that he could not work in his profession due to allergic reaction and he could not afford antidepressant medication and consequently he did not expect much improvement with his depression.
  - The appellant had been his patient for 3 years and he had seen him 2 to 10 times during

the previous 12 months.

- An 11 page Assessor Report (AR) dated 2 April 2014, completed and signed by a bereavement counsellor who is also a social worker indicated the following:
  - The appellant lives alone.
  - The appellant has a high level of stress and deep sense of grief and loss regarding his mother's death.
  - The appellant's ability to communicate by speaking, reading, writing and hearing was good.
  - In terms of mobility and physical ability, he was independent walking indoors, outdoors, climbing stairs and standing but took significantly longer than typical for lifting and carrying & holding, with the comment "not lifting due to sore back". She commented: "Back pain increases with increase in stress".
  - In terms of cognitive and emotional functioning, his mental impairment impacted his daily functioning as follows: a moderate impact for emotion, impulse control, executive and motor activity; minimal impact for bodily functions, consciousness, insight & judgment, attention / concentration, memory, motivation, language, psychotic symptoms and other emotional or mental problems; there were no impact on other neuropsychological problems. She added that because of his losses (death and others) he experienced confusion, sleep disturbance and anger with a court situation.
  - In terms of daily living activities, he was independent except for the following activities where he took significantly longer than typical:
    - Grooming: "When more stressed, less grooming".
    - Laundry & housekeeping: "When more stressed, less able to do these things".
    - Going to & from stores, reading prices & labels, making appropriate choices, paying for purchases & carrying purchases home: "Level of stress impedes these activities".
    - Meal planning, food preparation, cooking, safe storage of food, banking, budgeting and pay rent & bills: "More challenged due to stress & grief".
    - Filling / refilling prescriptions, taking as directed and safe handling & storage: "Not able to pay for medication that Dr. is advising".
    - She provided the additional comment that due to stress & grief, daily living activities were more challenging.
  - His mental impairment was described as impacting his relationship with his immediate and extended social networks as marginal functioning with the comment that he had minimal relationships / community connection due to stress.
  - She indicated he would require counselling as help to maintain him in the community.
  - The appellant had assistance from family but he was "mostly isolated" and she indicated that some assistance would be necessary:
    - Support in cleaning & cook healthy meals.
    - Financial support.
  - No assistance device was required and no assistance animal.
  - No additional information was provided other than that the information used by the counsellor to complete the AR came from office interview with him and counselling sessions for bereavement.
  - The counsellor had known the appellant for approximately 5 months and had seen him 2 to 10 times during the previous year.
  - She described the type and duration of service provided by her or her organization as providing bereavement counselling and that the appellant had had 3 sessions up to then

and was entitled to 3 more.

With his Notice of Appeal dated 9 October 2014 and signed by him, the appellant attached a note from his physician dated 17 September 2014 stating: "This patient is currently unfit for work".

The ministry did not object to the admissibility of the additional documentary evidence and the panel determined it was admissible under s. 22(4) of the Employment and Assistance Act as it was in support of the records before the minister at reconsideration, confirming again that the appellant was unfit for work, however, the panel gave it little weight as ability to work is not one of the criteria set out at s. 2 of the EAPWDA.

## PART F – Reasons for Panel Decision

The issue under appeal is whether the ministry's determination that the appellant has not met all of the eligibility criteria for designation as a PWD because it was not satisfied that the appellant had a severe physical and/or mental impairment that, in the opinion of a prescribed professional, directly and significantly restricts his ability to perform DLA either continuously or periodically for extended periods resulting in the need for help to perform DLA was either a reasonable application of the legislation or reasonably supported by the evidence. The ministry determined that the age requirement and that his impairment was likely to continue for at least 2 years had been met.

The criteria for being designated as a person with disabilities are set out in s. 2 of the EAPWDA and s. 2 of the EAPWDR. Section 2 of the EAPWDA states:

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;

"**health professional**" repealed

"**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 of the EAPWDR provides further clarification:

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.

The ministry acknowledged that the appellant meets 2 of the conditions for PWD designation in that he is at least 18 years of age and that his impairment is likely to continue for at least 2 years. However, the ministry argued that he does not meet the other 3 criteria.

*Severe physical impairment:*

The ministry argued that there is no medical evidence of any physical impairment and no evidence from the appellant's self report as well, thus it cannot be said that the appellant suffers from a severe physical impairment.

The appellant did not argue that he had a physical impairment.

The panel finds the only evidence of physical impairment can be found in the AR completed by the bereavement counsellor who stated that "back pain increases with increase in stress" to explain why the appellant cannot lift or carry anything without taking significantly longer than typical. Yet, this evidence is not substantiated by the appellant and his physician and the panel finds the ministry reasonably determined the appellant had not established a severe physical impairment.

*Severe mental impairment:*

The ministry argued that the evidence is not sufficient to determine a severe mental impairment because the physician did mention the appellant being continuously restricted for doing a number of activities but then commented that he had no assistance but could benefit from help in those areas. Secondly, the counsellor in the AR did not identify any major impact in the appellant's emotional functioning and only marginal impact in social functioning. The ministry also argued that while the physician indicated the appellant was unfit for work, this is not a criterion relevant to a PWD

designation.

The appellant argued that his depression, anxiety, eating disorder and severe skin condition impacted negatively on his eating habits and that he did not cook for himself and tended to binge eat, affecting his health. He is so depressed he cannot clean his home for lack of motivation and he forgets to take his medication. He has a temper that isolates him and has few friends and is afraid of taking the bus, being too anxious. He finally argued that his condition prevented him from working.

The panel notes that the physician's diagnosis is mostly based on the fact that the appellant cannot work because of a bad contact dermatitis, worsening depression / anxiety while the counsellor puts the emphasis on the passing away of his mother as a major factor for his depression and anxiety. This is not surprising since the counsellor works as a bereavement counsellor and seems to have focused on support and counselling for the appellant as a result of his mother's death. However, this also suggests the impairment is situational and when the AR was completed approximately 9 months prior to the hearing, the author mentioned that the appellant had 3 bereavement sessions in December, January and February and that he was entitled to 3 more sessions; there is no evidence whether those 3 latter sessions took place.

While the panel acknowledges that the appellant faces challenges in terms of depression and anxiety, the reports do not provide the evidence required to establish that his impairment is severe – for instance the AR does not identify any major impact on the appellant's daily functioning but rather moderate and minimal impacts for most. The PR puts the emphasis on the fact that the appellant is unable to work and he lacks motivation but provides no explanation as to how his mental impairment affects his daily activities continuously for a number of items. For a PWD designation, being unable to work is not one of the legislative criteria. The panel also noted that there is an inconsistency between the appellant's self report where he stated he is afraid to take the bus and the fact that the PR identifies no restriction in terms of "Use of transportation" and the AR indicated he was independent for the 3 items under the heading "Transportation", which includes using public transit. Finally the panel notes that in terms of social functioning, the evidence does not support a severe impairment.

The panel finds the ministry reasonably determined the information provided from the appellant's self report and the PR and the AR did not establish a severe mental impairment.

*Daily living activities:*

The ministry took the position that while there are a number of daily activities that are impacted by the appellant's impairment, these are situational and take significantly longer when he is stressed, but fails to provide any explanation as to how much longer it takes or how often he is stressed and to what degree it impedes his daily living activities.

The appellant argued that his depression affected his daily living activities to the extent he could not cook his meals, that he lacks motivation to clean his home and that he forgets taking his medications. He has difficulties with his memory and his temper isolates him.

While the evidence is clear that the appellant's mental condition leaves him with little if any motivation to do anything the evidence also shows that he performs his daily living activities nonetheless, albeit

less often or with taking longer than typical. The panel notes that when the AR identifies difficulties in performing daily activities, it only mentions that it takes significantly longer than typical, when he is stressed, and there is no item where the appellant would need periodic or continuous assistance from another person or where he is unable to perform any of those activities. This is confirmed by the PR where the physician mentioned the appellant had no assistance in terms of daily living activities “but could benefit from help”. In terms of medications, the AR stated that he takes significantly longer than typical because he is not able to pay for the medication his doctor has advised – this is not a physical or mental limitation, it is financial and not relevant for a PWD designation. The panel already noted that there is an inconsistency between the 2 reports on the one hand when it is stated that the appellant is independent for public transit and, on the other hand, the appellant’s self report that he is afraid to take the bus. As well, the panel notes that he is independent in terms of social functioning.

Consequently, the panel finds that based on the evidence provided in particular by the medical practitioner and the social worker, both prescribed professionals, the ministry reasonably determined there was not enough information to establish that the appellant’s impairments significantly restricted his daily living activities either continuously or periodically for extended periods.

*As a result of those restrictions, help required to perform DLA:*

The ministry argued that since DLA are not significantly restricted, it cannot be determined that significant help is required from other persons and that no assistive device is required.

The appellant argued that he needs emotional and outreach support from others and that he needs counselling that he was receiving at the time.

Given the evidence as described above, the panel finds that while there is evidence the appellant could benefit from the assistance of others, particularly for cleaning and, as mentioned in the AR, “cook healthy meals”, such assistance is not required to perform his daily activities and finds the ministry reasonably determined the appellant did not meet the legislative test for the need for help arising from significant restrictions to perform daily living activities either continuously or periodically for extended periods.

*Conclusion:*

The panel acknowledges the appellant’s difficulties, particularly after his mother’s death, and that it does have an impact on his daily functioning. However, based on the above analysis and evidence, the panel comes to the conclusion that the ministry reasonably determined that based on the opinion of a medical practitioner, the appellant does not have a severe physical or mental impairment and that the prescribed professional did not establish that an impairment directly and significantly restricted his ability to perform daily living activities either continuously or periodically for extended periods and that, as a result of those restrictions he required help to perform those activities under s. 2(2) of the EAPWDA. Consequently, the panel finds the ministry’s decision was reasonably supported by the evidence and was a reasonable application of the enactment in the circumstances of the appellant and confirms the decision.