

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of September 18, 2015, which found that the appellant did not meet four 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. However, the ministry was not satisfied that:

- in the opinion of a medical practitioner, the appellant’s impairment is likely to continue for at least 2 years;
- 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

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

## PART E – Summary of Facts

The appellant did not attend the hearing. Having confirmed that the appellant 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 March 28, 2015; a physician's report ("PR") signed by the appellant's general medical practitioner (the "physician") dated March 30, 2015, and an assessor's report ("AR") signed by the physician dated May 4, 2015.
- A letter from the physician dated September 9, 2015.

### ***Admissibility of Additional Information***

In a written statement submitted as part of his Notice of Appeal on October 15, 2015, the appellant provided information that was substantially reiterative of information that had been before the ministry at the time of reconsideration. This information was generally consistent with the original information. Accordingly, the panel has admitted the appellant's written statement into evidence in accordance with s. 22(4) of the *Employment and Assistance Act*.

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

### ***Duration of Impairment***

- In the PR the physician (who had known the appellant for 10 years and had seen him 2-10 times in the past year) responded "Unsure" to the question "Is the impairment likely to continue for two years or more from today?" She then commented "This depression has been present x 8 mo and so far has not responded to medication. There are meds still left untried so I cannot say improvement is impossible, but with each med failure & the passage of time the hope for improvement does fade."
- In her letter of September 9, 2015 the physician commented "I previously stated that I was unsure if [the depression] would be continue for 2 more years and I am still unsure. I hope it will improve but as time increases (and his depression has now been present for over 18 months) I am no longer as positive there will be much improvement. Generally duration of symptoms do not bode well for improvement."
- In his written statement the appellant commented that over the past couple of years he was betrayed, abused, and left in every way a broken person so that he is uncertain he will ever be the same again.

### ***Diagnoses***

- In the PR the physician diagnosed the appellant with "depression with anxiety." In her letter of September 9, 2015 the physician reported that the appellant had suffered a broken leg in a car accident in May. She reported that he continued to have significant pain in his leg, and that

there may yet be surgery needed on the leg.

### ***Physical Impairment***

- In terms of functional skills, the physician indicated in the PR that the appellant can walk 4+ blocks unaided on a flat surface, can climb 5+ steps unaided, and has no limitations in lifting or remaining seated. In the AR she reported that the appellant independently manages all aspects of mobility and physical ability.
- In her letter of September 9, 2015 the physician wrote that the leg injury from the car accident limits the appellant's ability to stand or walk any distance. She commented "He can walk only 1-2 blocks maximum and will have marked increase in his pain for having done that. He cannot carry/lift/push/pull any weight of significance. He is no longer using any assistive devices."
- In his written statement submitted with his Notice of Appeal the appellant reported that the lack of activity resulting from his mental condition is making him physically weak.

### ***Mental Impairment***

- In the PR the physician indicated the appellant has no difficulties with communication, but reported significant deficits with cognitive and emotional function in the areas of executive, memory, emotional disturbance, motivation, motor activity, and attention/concentration. The physician commented that "This gentleman has severe depression...Has also been having significant anxiety." She described symptoms of insomnia, low energy, poor appetite, low mood, a very difficult time coping, and impaired interpersonal relations as a result of irritability and impatience.
- In the AR the physician reported the appellant's ability to communicate is satisfactory in all respects. She reported major impacts in 4 of 14 categories of cognitive and emotional functioning (emotion, attention/concentration, memory and motivation). She also reported moderate impacts in the categories of bodily functions and executive, and minimal or no impacts in the remaining 8 categories. The physician commented "Not coping. Significant cognitive impairment – hard to learn, remember, organize. He has missed appointments, deadlines. Confusing things."
- In his self-report the appellant reported that over the past few years he has suffered a number of serious life changes including divorce, bankruptcy, loss of access to his child, and false allegations of criminal conduct leading to a criminal record. He described feeling great despair, anxiety that leaves him unable to speak to people, inability to focus or concentrate for more than a few minutes at a time, difficulty remembering, poor motivation, inability to sleep, and lack of appetite. He stated that he cannot do anything that makes him smile or be happy, and feels there is not much to live for as he has lost everything.

### ***DLA***

- In the PR the physician indicated that the appellant has not been prescribed any medication or treatments that interfere with his ability to perform DLA.
- The physician reported that the appellant's impairment does not restrict his ability to manage the DLA of personal self-care, management of medications, mobility inside and outside the home, use of transportation, or management of finances. She indicated that four DLA are

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directly and continuously restricted: meal preparation, basic housework, daily shopping, and social functioning. Regarding social functioning she commented: "Very poor coping & very little motivation. Irritable."

- In the AR the physician commented that the appellant is physically capable of performing DLA, but that he finds it very hard to get himself to do things and consequently they don't get done. She indicated that he independently manages all tasks related to the DLA of personal self-care, basic housekeeping, daily shopping, managing personal finances (pay rent and bills), managing medications, and use of transportation. Regarding the DLA of meal preparation, she reported that he requires periodic support with meal planning, food preparation, and cooking, though he independently manages the task of safe storage of food. She commented "He can cook, shop but lacks energy, motivation, planning and rarely does so. Does not have anyone to help with this." Regarding the DLA of social functioning, the physician reported that the appellant independently makes appropriate social decisions, he interacts appropriately with others, and is able to secure assistance from others, but he requires periodic support in developing/maintaining relationships and dealing appropriately with unexpected demands. She indicated that he has marginal functioning with respect to both his immediate and extended social networks.
- In his self-report the appellant stated that he used to be very social but now he has a hard time going out in public because he freezes up and has a hard time speaking. He reported that his personal grooming suffers, and he feels too weak both physically and mentally to engage in physical activities he used to enjoy.

### ***Help***

- In the PR the physician indicated that the appellant does not require any prostheses or aids for his impairment, and in the AR she confirmed that he does not have an assistance animal.
- In the PR and AR the physician indicated that the appellant receives help with DLA from friends and family. She stated that he needs assistance in the form of counselling, a life skills group, meal service, and a gym membership.

## 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 section 2 of the EAPWDA in the circumstances of the appellant. In particular, was the ministry reasonable in determining that

- the evidence does not establish that, in the opinion of a medical practitioner, the appellant's impairment is likely to continue for at least 2 years;
- the evidence does not establish that the appellant has a severe physical or mental impairment;
- the appellant's DLA are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and that
- as a result of those restrictions, the appellant does not require the significant help or supervision of another person, an assistive device, or the services of an assistance animal?

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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## **Duration of Impairment**

The appellant advanced no argument with respect to duration of the impairment, other than to observe that he is unsure if he will ever be the same again.

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

### **Panel Decision**

The legislation – section 2(2)(a) of the EAPWDA – does not permit the ministry to designate an applicant as a PWD unless it is satisfied that, in the opinion of a medical practitioner, the applicant's impairment is likely to continue for at least 2 years.

In the appellant's situation his physician has expressed uncertainty regarding the ultimate outcome and duration of the appellant's mental condition. She has not expressed the opinion that either the mental impairment (depression/anxiety) or the physical impairment (injured leg) is likely to last for at least two years.

Based on the foregoing evidence, the panel finds that the ministry reasonably determined that this legislative criterion has not been satisfied.

## **Severe Physical Impairment**

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

The ministry's position is that a severe impairment of physical functioning has not been established, as the physician did not diagnose a medical condition that would result in physical impairments and did not confirm that he had an impairment that is likely to continue for two years or more.

### **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 appellant's functional skills as described by the physician in the PR are at the high end of the scale. She subsequently reported in her letter of September 9, 2015 that as a result of a leg injury sustained in a car accident last May the appellant's functional skills were diminished, but she noted he is no longer using assistive devices, and she did not provide an opinion on the expected duration or outcome of the impairment.

As discussed in more detail in the subsequent section of this decision under the heading Significant

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Restrictions to DLA , the appellant's physical condition does not appear to have translated into significant restrictions in his ability to manage his DLA independently.

Accordingly, the panel has concluded that the ministry reasonably determined that the evidence falls short of establishing that the appellant has a severe physical impairment.

### **Severe Mental Impairment**

The appellant's position is that his depression and anxiety constitute a severe mental impairment. The physician referred to his depression as "severe" and indicated that it has caused numerous impacts and deficits in the appellant's cognitive and emotional functioning.

The ministry's position is that there is not enough evidence to establish a severe mental impairment. The ministry argued that based on the physician's assessments and the appellant's self-report, his mental condition may be situational in nature as a result of his divorce.

### **Panel Decision**

In terms of mental functional skills, the evidence of the physician in the PR and AR indicates that the appellant's communications skills are satisfactory in all respects. The physician noted significant deficits and impacts in a number of areas of cognitive and emotional function, but since the physician has not provided the requisite opinion of the duration of impairment, it is difficult to find that the impairment is "severe" as required by the legislation. The panel notes that the physician described the appellant's depression as "severe". However, in exercising its decision-making responsibility the ministry cannot merely defer to the opinion of the professionals with respect to whether the statutory requirements are met as that approach would constitute an improper fettering of discretion.

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 evidence indicates that the appellant is not significantly restricted with respect to decision making in that he independently manages his medications and his personal finances. He also independently manages the decision-making components of the DLA of daily shopping (making appropriate choices), and social functioning (appropriate social decisions). The physician did indicate that the appellant could use some periodic assistance with meal planning since he lacks the energy and motivation.

With respect to social functioning, while the physician and the appellant have indicated there is a degree of impairment, the physician reported that the appellant is at least marginally functional with respect to both his immediate and extended social networks.

Considering the evidence that :

- the appellant has satisfactory communication skills,
- his decision making and social functioning are not significantly restricted, and
- the prognosis for his mental impairment has not been established for the requisite two year period,



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the panel concludes that while the appellant clearly does experience impacts with respect to his mental health 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 cause significant restrictions to his ability to manage his DLA. He argued that his physician confirmed that he is restricted in a number of DLA.

The ministry's position 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 or periodically for extended periods.

### **Panel Decision**

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. In circumstances where the evidence indicates that DLA are directly restricted, it is appropriate for the ministry to require evidence as to whether the restriction is continuous or periodic and – if periodic – of how frequently the restriction arises.

In the PR the physician indicated that the appellant's impairments directly and continuously restrict his ability to manage four DLA independently – meal preparation, basic housework, daily shopping, and social functioning. The AR provides a more detailed breakdown of the DLA into discrete tasks which provide some evidence of the significance of the restrictions. In the AR the physician indicated restrictions to and the need for periodic assistance with some tasks related to only two DLA – meal preparation and social functioning. She commented that the appellant is physically able to perform DLA but his mental condition causes him to be low in energy and motivation. In her letter of September 9, 2015 she reported that the appellant's mobility is restricted as a result of his car accident, but she did not indicate that the impairment is likely to last for the requisite two years.

Considering the foregoing, the evidence does not present a compelling picture of an individual whose ability to manage his DLA is significantly restricted as contemplated by the legislative scheme. Accordingly, the panel concludes that the ministry reasonably determined that the appellant's ability to manage his DLA independently is not significantly restricted either continuously or periodically for extended periods.

### **Help with DLA**

The appellant's position is that he requires help in the form of counselling, meal service, and a gym membership, and from family and friends.

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, 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.

**Conclusion**

The panel acknowledges that the appellant's medical condition currently affects his ability to function. However, having reviewed and considered all of the evidence and the relevant legislation and for the foregoing reasons, 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.