

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision dated November 26, 2015 which found that the appellant did not meet two of the five statutory requirements of Section 2 of the *Employment and Assistance for Persons with Disabilities Act* for designation as a person with disabilities (“PWD”). The ministry found that the appellant met the age requirement and that she has a severe physical impairment that, in the opinion of a medical practitioner, is likely to continue for at least two years. However, the ministry was not satisfied that the evidence establishes that:

- the appellant's daily living activities (“DLA”) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and,
- as a result of these restrictions, the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

PART D – Relevant Legislation

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

PART E – Summary of Facts

The appellant did not attend the hearing. After confirming that the appellant had been 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 22, 2014], a physician's report ("PR") signed by the appellant's psychiatrist [dated September 19, 2014] and an assessor's report ("AR") signed by a registered audiologist on August 23, 2014 and by the psychiatrist on October 31, 2014.
- The appellant's Request for Reconsideration with her written statement dated November 10, 2015.

The registered audiologist and the psychiatrist both appear to have provided input into the AR at different times. The panel notes that a registered audiologist is not a prescribed professional for the purposes of section 2 of the EAPWDA. Though the professionals each appear to have initialed parts of the document, it is difficult for the panel to distinguish with certainty the psychiatrist's input from the audiologist's input in all cases, since the panel is dealing with photocopies rather than the original document. The panel has concluded that the psychiatrist (who is a medical practitioner and prescribed professional for purposes of the legislative regime) has endorsed the audiologist's input into the AR through his signature and initials on the document. The panel has not placed any lesser or greater weight on the AR because of the confusion, but notes for future reference that in its view the more helpful procedure would have been for the registered audiologist's input to have been provided in a separate submission.

The panel reviewed the evidence as follows:

Diagnoses

In the PR the psychiatrist provided diagnoses of deafness (since birth or early childhood injury) and major depressive disorder (recurrent since adolescence). He explained that "The disability is chronic and only partially corrected with hearing aids. Issues are complicated by low mood and anxiety related to depression." In the AR the impairment is described by the psychiatrist as "Client has a longstanding sensorineural hearing loss and is profound – uses American Sign Language and help reading to communicate, although this is still challenging." No limitations to physical functioning are reported in either the PR or AR except that the appellant can remain seated for less than one hour.

Mental Impairment

In the PR the psychiatrist reported that:

- The appellant has sensory difficulties with communication.
- She experiences significant deficits in 4 of 12 categories of cognitive and emotional function: language, emotional disturbance, motivation, and impulse control.
- The appellant has made two suicide attempts, the most recent in 2011.
- She has difficulty managing stress and the depression is worsened by barriers due to being deaf.

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- She continues to experience anxiety related to an abusive relationship which she has now left.

In the AR the psychiatrist reported that:

- The appellant's speaking and hearing are poor and reading/writing are satisfactory. "The client has no measureable hearing thresholds at the limits of the audiometer...client wears hearing aids, although these provide environmental awareness."
- The mental impairment causes a major impact in 1 of 14 categories of cognitive and emotional functioning (language), moderate impacts in 4 categories (emotion, insight/judgement, attention/concentration, and motivation.)
- There are minimal or no impacts to the remaining 9 categories.

DLA

In the PR the psychiatrist reported that:

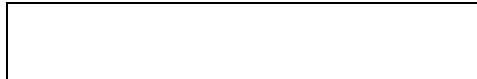
- The appellant has not been prescribed any medication or treatments that interfere with her ability to perform DLA.
- The appellant is unrestricted in the DLA of personal self-care, meal preparation, management of medications, daily shopping, and in indoor mobility.
- The appellant's impairments directly restrict her ability to manage five of the ten prescribed DLA: basic housework and management of personal finances (both periodically), mobility outside the home and use of transportation (both continuously), and social functioning (no indication of whether restriction is continuous or periodic.)
- Periodic is explained as "When depressed ability to manage self is more difficult."
- With respect to the DLA of social functioning "Ability to communicate and relate to others severely impacted by combination of communication and mood problems."

In the AR the psychiatrist reported that:

- The appellant independently manages the DLA of personal self-care, basic housekeeping, daily shopping, meal preparation, and management of medications.
- With respect to the DLA of managing personal finances, the appellant takes longer than typical with the tasks of banking and budgeting and requires periodic assistance paying rent and bills.
- The appellant independently gets in and out of vehicles, but take significantly longer than typical using public transit and transit schedules.
- In terms of social functioning, the appellant requires periodic assistance with most aspects but achieves marginal functioning in terms of both her immediate and extended social networks.
- "When depressed [DLA] often neglected due to lack of motivation."

In her self-report the appellant stated that:

- She is the single mother of two young children.
- For her safety she relies on her hearing aids and other equipment for the hearing impaired, but she has no funds for repairs to these devices.
- She often needs assistance from a third person to make and receive phone calls.
- She constantly needs an interpreter for interactions with doctors, school officials and other social activities.
- She can't hear honking when driving.



- She experiences discrimination in employment when she can't use a phone in the work place.
- She can't sleep properly because without specialized alarm equipment for deaf persons, she is afraid of not waking up in an emergency such as fire or break-in
- She requires a guide dog.

In her reconsideration submission the appellant wrote that:

- Employment is the biggest factor that affects her due to being a single mother with no support system.
- She has undergone a lot of traumatic experiences and is seeking PWD designation to "settle down." She lives in fear of no hearing aids and no equipment for the deaf.
- She is currently undergoing therapy due to mental illness breakdown over the past four years.

Help

In the PR and AR the psychiatrist noted that the appellant requires assistive devices in the form of hearing aids (she currently uses hearing aids but the ear molds are too small so she cannot wear them), and "a tactile alerting system for phone, alarm, doorbell, etc."

The psychiatrist did not respond to the question in the AR as to whether the appellant has an assistance animal.

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On appeal the ministry relied on its reconsideration decision and provided no additional evidence.

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 mental impairment, and that in the opinion of a prescribed professional the appellant's impairments do not directly and significantly restrict her from performing DLA either continuously or periodically for extended periods, and that as a result of those restrictions the appellant does not require help to perform DLA?

The relevant legislation is as follows:

EAPWDA:

2 (1) In this section:

"assistive device" means a device designed to enable a person to perform a daily living activity that, because of a severe mental or physical impairment, the person is unable to perform;

"daily living activity" has the prescribed meaning;

"prescribed professional" has the prescribed meaning.

(2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act if the minister is satisfied that the person has a severe mental or physical impairment that

(a) in the opinion of a medical practitioner is likely to continue for at least 2 years, and

(b) in the opinion of a prescribed professional

(i) directly and significantly restricts the person's ability to perform daily living activities either

(A) continuously, or

(B) periodically for extended periods, and

(ii) as a result of those restrictions, the person requires help to perform those activities.

(3) For the purposes of subsection (2),

(a) a person who has a severe mental impairment includes a person with a mental disorder, and

(b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires

(i) an assistive device,

(ii) the significant help or supervision of another person, or

(iii) the services of an assistance animal.

EAPWDR section 2(1):

2 (1) For the purposes of the Act and this regulation, "**daily living activities**" ,

(a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following activities:

- (i) prepare own meals;
- (ii) manage personal finances;
- (iii) shop for personal needs;
- (iv) use public or personal transportation facilities;
- (v) perform housework to maintain the person's place of residence in acceptable sanitary condition;
- (vi) move about indoors and outdoors;
- (vii) perform personal hygiene and self care;
- (viii) manage personal medication, and

(b) in relation to a person who has a severe mental impairment, includes the following activities:

- (i) make decisions about personal activities, care or finances;
- (ii) relate to, communicate or interact with others effectively.

(2) For the purposes of the Act, "**prescribed professional**" means a person who is

(a) authorized under an enactment to practise the profession of

- (i) medical practitioner,
- (ii) registered psychologist,
- (iii) registered nurse or registered psychiatric nurse,
- (iv) occupational therapist,
- (v) physical therapist,
- (vi) social worker,
- (vii) chiropractor, or
- (viii) nurse practitioner, or

(b) acting in the course of the person's employment as a school psychologist by

- (i) an authority, as that term is defined in section 1 (1) of the *Independent School Act*, or
- (ii) a board or a francophone education authority, as those terms are defined in section 1 (1) of the *School Act*,

if qualifications in psychology are a condition of such employment.

Severe Mental Impairment

The appellant did not expressly advance an argument with respect to having a severe mental impairment, though she referred to living with anxiety and depression, and to having experienced trauma.

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The ministry's position is that a severe mental impairment has not been established as there is no evidence of significant restrictions to DLA.

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 psychiatrist noted that the appellant's communication skills are satisfactory other than speaking and hearing. The evidence indicates that the deficits with speaking and hearing are physical in nature rather than mental. The only major impact to cognitive and emotional functioning noted by the psychiatrist in the AR is with respect to language, which again appears to be linked to the appellant's deafness rather than to a mental disability. The psychiatrist has provided no evidence as to any treatment the appellant has been prescribed for her mental impairment or its prognosis.

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 psychiatrist's evidence indicates that the appellant is not significantly restricted with respect to decision making in that she independently manages the decision making aspects of personal self-care (regulating diet), daily shopping (making appropriate choices), meal preparation (meal planning), and managing personal medication (filling/refilling/taking as directed). The psychiatrist reported that the appellant requires periodic support/supervision with making appropriate social decisions, but there is no evidence as to the source, type, or frequency of the support/supervision. On balance the panel concludes that the evidence indicates the appellant is not significantly restricted in decision making.

With respect to social functioning, the evidence is that the appellant does manage this DLA, albeit marginally.

The ability to work at paid employment is not a statutory criterion for PWD designation. The legislation instead focuses on the ability to manage DLA independently. Paid employment generally requires a higher level of functioning than DLA. As discussed in more detail in the subsequent section of this decision under the heading Significant Restrictions to DLA, the appellant's mental condition does not appear to have translated into significant restrictions in her ability to manage her DLA independently.

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

Significant Restrictions to DLA

The appellant's position is that she experiences physical and mental impairment to such a degree that her ability to function independently is severely limited. She argued that "disabled" means a loss of one or more senses, and that her deafness is a disability which results in barriers to connecting with various communities, gaining access to services which causes depression, frustration and mental health issues. She argued that interpreters are hard to come by, and that public buildings should all have equipment installed for the hearing impaired.

The ministry's position is that the appellant's impairment does not directly and significantly restrict her DLA either continuously or periodically for extended periods. The ministry argued that the evidence is unclear about the amount of assistance the appellant requires because of deficiencies in the evidence.

Panel Decision:

The legislation – s. 2(2)(b)(i) of the EAPWDA – requires the minister to substantially assess direct and significant restrictions of DLA in consideration of the opinion of a prescribed professional. This doesn't mean that other evidence shouldn't be factored in as required to provide clarification of the professional evidence, but the legislative language makes it clear that the prescribed professional's opinion is fundamental to the ministry's determination as to whether it is "satisfied".

The legislation requires that a severe impairment directly and significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods. The term "directly" means that there must be a causal link between the severe impairment and the restriction. The direct restriction must also be significant. Finally, there is a component related to time or duration. The direct and significant restriction may be either continuous or periodic. If it is periodic it must be for an extended time. Inherently, any analysis of periodicity must also include consideration of the frequency. All other things being equal, a restriction that only arises once a year is less likely to be significant than one which occurs several times a week. Accordingly, in circumstances where the evidence indicates that a restriction arises periodically, it is appropriate for the ministry to require evidence of the duration and frequency of the restriction in order to be "satisfied" that this legislative criterion is met.

In the appellant's case, the psychiatrist's evidence indicates that the appellant independently manages all tasks related to the DLA of personal self-care, basic house-keeping, daily shopping, meal preparation, and management of medications. For the reasons described above under the heading Severe Mental Impairment, the evidence indicates that the appellant is not significantly restricted with the DLA of decision-making and social functioning. The appellant also independently manages her personal finances, though taking significantly longer than typical with banking and budgeting. The psychiatrist has not provided any information about why this DLA is restricted or to what extent it is restricted. Regarding the DLA of use of transportation, the psychiatrist indicated that the appellant independently manages public transit and transit schedules, though taking significantly longer than typical. The appellant's evidence indicates that she still is capable of driving a vehicle.

The psychiatrist also indicated that though chronic, the appellant's mental impairment is episodic in nature, as he described it in the PR as "recurrent", and he stated in the AR that her DLA are impacted by lack of motivation "when depressed." The physician has provided no evidence as to the frequency or duration of episodes of depression.

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

Help with DLA

The appellant's position is that she requires help with DLA due to the restrictions she experiences. In particular, she argued that she needs a number of electronic devices designed to assist persons with hearing impairment.

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.

Panel Decision

A finding that a severe impairment directly and significantly restricts a person's ability to manage her DLA either continuously or periodically for an extended period is a precondition to a person requiring "help" as defined by section 2(3)(b) of the EAPWDA. For the reasons provided above, that precondition has not been satisfied on the balance of probabilities in this case.

Accordingly, the panel finds that the ministry reasonably concluded it could not be determined that the appellant requires help with DLA as defined by section 2(3)(b) of the EAPWDA.

Conclusion

The panel acknowledges that the appellant's medical conditions affect her ability to function. However, having reviewed and considered all of the evidence and the relevant legislation, and for the above-noted 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.