

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (“Ministry”) reconsideration decision dated October 1, 2015 in which the Ministry found that the Appellant was not eligible for designation as a Person With Disabilities (“PWD”) because she did not meet all of the requirements for PWD designation in Section 2(2) of the *Employment and Assistance for Persons with Disabilities Act* (“EAPWDA”). The Ministry was satisfied that the Appellant has reached 18 years of age and that her impairment is likely to continue for at least two years. However, based on the information provided in the PWD Designation Application (“PWD application”) and Request for Reconsideration, the Ministry was not satisfied that:

- The Appellant has a severe mental or physical impairment; and
- The impairment, in the opinion of a prescribed professional, directly and significantly restricts her ability to perform daily living activities (“DLA”) either continuously or periodically for extended periods; and
- As a result of these restrictions, the Appellant requires help to perform those activities through an assistive device, the significant help or supervision of another person, 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 evidence before the Ministry at the reconsideration consisted of the following:

1. A Request for Reconsideration signed by the Appellant on September 16, 2015 in which she provided a submission with the following information:

- She is a deaf person with hyperthyroid and anemia.
- There is a possibility of Carpal Tunnel syndrome in her wrist that could affect lifting.
- She has three small children and requires assistive monitors that need to be replaced quite often. She had them replaced three times already and it costs money.
- She relies on visual aids such as a doorbell (with flashing lights), and she completely needs hearing aids to hear her children, other people, and especially on the job. These cost much money and also need to be replaced often.

The Appellant's submission also included her argument for the reconsideration, which the panel will address in Part F – Reasons.

2. Information from the Ministry record indicating the Appellant is part of a two-parent unit in receipt of Employment and Assistance for Persons with Disabilities.

3. A PWD application comprised of the Applicant Information and self-report completed by the Appellant on May 27, 2015, and a Physician Report ("PR") and Assessor Report ("AR"), both dated May 28, 2015 and both completed by the Appellant's family physician. In the PR, the physician indicated the Appellant has been her patient for 5 years and she has seen the Appellant 11 or more times in the past 12 months "for pre-natal care". In the AR, the physician indicated that she completed the form by way of an office interview with the Appellant, has followed the Appellant through her 3 pregnancies, and has known her for 3 years. She is providing the Appellant with maternity care and another physician is her regular family MD.

The PWD application included the following information:

### ***Diagnoses:***

- In the PR, the Appellant was diagnosed with deafness, onset since birth.
- In the AR, the physician wrote that deafness is the *mental or physical impairment that impacts* (the Appellant's) *ability to manage Daily Living Activities*.

### ***Physical or Mental Impairment:***

In the PR, under *Health History*, the physician wrote "totally deaf: communicates well with sign language and written output. But cannot speak at all."

### ***Functional Skills***

#### PR

- The physician check marked that the Appellant is able to walk 4+ blocks unaided on a flat surface; climb 5 or more steps unaided; and has no limitations in lifting or remaining seated. The physician

reported that she has sensory difficulties with communication with the comment “deafness”. She has significant deficits with cognitive and emotional function in the area of language with the comment, “no oral language as deaf”.

- Under *Additional Comments*, the physician wrote, “Well motivated to work but cannot respond to auditory cues, unable to use telephone, unable to talk to co-workers, neighbours, etc.”

#### AR

- The physician check marked *Unable for Ability to Communicate - Speaking and Hearing*, with the explanation, “deaf”, and the comment, “totally deaf”. The physician check marked *Good for Reading and Writing*.
- The physician check marked that the Appellant is independent in all areas of *Mobility and Physical Ability*. Under *Cognitive and Emotional Functioning*, the physician checked that the Appellant has *No impact* for 11 out of 14 areas. A *Moderate impact* was reported for executive function, and a *Major Impact* was reported for language. No information about any impact was provided for the area of *Other emotional or mental problems*. Under *Comments*, the physician wrote, “Totally deaf, no speech, good use of sign language and written language”. For executive function, the physician wrote, “impacted as unable to use telephone or speak with co-workers, colleagues.”

#### Self-report

- The Appellant wrote that she is deaf and has problems finding a job due to “disability discrimination”. She cannot hear doorbells, the telephone ringing, or her own children.

#### ***Daily Living Activities (DLA):***

#### PR

- The physician check marked *No*, the Appellant has not been prescribed medication/treatment that interferes with her ability to perform DLA.
- The physician indicated that that following DLA are not restricted: Personal self-care, Meal preparation, Management of medications, Basic housework, Daily shopping, Mobility inside the home, Mobility outside the home, Use of transportation, and Management of finances.
- The physician check marked that Social Functioning is restricted continuously, with the comment, “deaf, unable to communicate with speech but able to communicate with writing or sign language”. Under *Additional comments* regarding the degree of restriction, the physician wrote, “some lip reading”.

#### AR

- Under *Daily Living Activities*, the physician check marked that the Appellant is independent in all areas of Personal care, Basic housekeeping, Shopping, Meals, and Medications. Under *Additional comments* (identification of any safety issues), the physician did not provide any information.

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- The physician indicated restrictions for the following tasks of three DLA:
    - Pay rent and bills: The Appellant requires periodic assistance from another person for Banking and Pay rent and bills with the comment, “hearing impaired”. The Appellant is independent with Budgeting.
    - Transportation: The Appellant requires periodic assistance with Using public transit and Using transit schedules and arranging transportation with the comment, “hearing impaired”. The Appellant is independent with Getting in and out of a vehicle.
    - Under *Additional comments*, the physician wrote, “cannot ask for directions so needs another person to assist with same. No auditory cues for traffic, warnings - verbal cues”.
    - Social Functioning: The Appellant requires periodic support/supervision with Development/maintenance of relationships, Interacts appropriately with others (social cues, problem solves in social context), Deal appropriately with unexpected demands, and Able to secure assistance from others. The physician left the *Explain/Describe* section blank, and reported the Appellant as independent in Appropriate social decisions.
    - The physician check marked that the Appellant has good functioning in both her immediate and extended social networks.

#### Self-report

- The Appellant wrote that she is able to do everything “like a normal person would do” except hearing.

#### ***Need for Help:***

#### PR

- The physician check marked *No* regarding any prostheses or aids required for the Appellant’s impairment.

#### AR

- Under *Support/supervision required* that would help maintain (the Appellant) in the community, the physician wrote, “again, hearing notated”.
- Under *Assistance provided by other people*, the physician check marked that help is provided by family and friends.
- Under *What assistance would be necessary if help is required but there is none available*, the physician wrote, “would be able to more fully participate in community if translators for deaf available.”
- The physician left blank the section on *Assistance provided through the use of assistive devices* and check marked *No*, the Appellant does not have an assistance animal.

#### Self-report

- The Appellant wrote that she needs technology such as a doorbell with flashing lights, a TTY to communicate or even a video-phone, and an emergency contact if needed.

### *Additional submissions*

Subsequent to the reconsideration decision, the Appellant filed a Notice of Appeal, signed on October 15, 2015. Attached was a letter from her physician dated October 15, 2015 (“physician’s letter”). In addition to providing argument (to be addressed in Part F – Reasons), the letter contained the following information regarding the Appellant’s circumstances and day to day restrictions:

- The Appellant is the mother of three small children and her husband is also deaf.
- It takes the Appellant 2-3 times longer than someone without her disability, to perform daily activities, in particular keeping track of her children. She has to go back and forth between rooms frequently since she cannot hear what they are doing, nor can she deal with them verbally. Communicating with them is especially difficult as they are too young to read or write and have a limited vocabulary for sign language.
- Tasks that would take a hearing person 5 minutes, would easily take the Appellant 20-30 minutes, especially in stores, banks, and government offices when she has to ask for assistance by writing things down, then wait for a written response. Communicating nuances is especially difficult for her.
- Her communication difficulties create a great deal of stress and anxiety, which further impacts her ability to perform DLA and interact socially.
- While the Appellant is mobile, she must be hyper-vigilant for safety reasons, especially when she is out with her children and cannot warn them verbally. There is constant danger, as she cannot hear warnings regarding a problem with her children or hazards such as boiling pots on the stove, a car suddenly coming up behind her, or a smoke detector in case of a fire.
- Office appointments with the physician can take 2-3 times longer than for a hearing patient as everything must be written down.

### *Admissibility*

The Ministry had no objections to admitting the physician’s letter of October 15, 2015 as evidence. The panel finds that the information in the letter is admissible because it is evidence in support of the Appellant’s circumstances and restrictions as a deaf person, which were before the minister at the reconsideration. The panel therefore admits the physician’s letter under section 22(4)(b) of the *Employment and Assistance Act* as evidence in support of the information and records that were before the minister at the time the decision being appealed was made.

### *Oral testimony*

The Appellant attended the hearing with her spouse as a support person, and a sign language interpreter who translated the proceedings. The Appellant was able to make a few sounds but did not say any words. She testified that the physician’s letter is a more accurate description of her circumstances. Her physician provides pre-natal and maternity care and does not know a lot about needs and equipment for the deaf. They did not discuss these when the PWD medical reports were filled out, nor did they discuss the Appellant’s Carpal Tunnel syndrome, which has not been formally diagnosed.

The Appellant reported that she is currently a stay-at-home mom with three children under the age of three. Her baby monitor is not working right now and she has to watch every couple of minutes to make sure the children are all right since she cannot hear a baby’s cry. She gave examples of every day challenges that she encounters as a deaf person, including safety risks such as not hearing a car

coming. She related an incident in which she had to leave her two youngest children unattended in a stroller in order to rescue her eldest child from traffic. She has no access to environmental information such as a fire alarm. She is trying to make sure that her children learn sign language but at such a young age they do not understand the difference between a deaf and a hearing person. She explained that interacting with staff in stores and offices is difficult because they often do not know how to deal with a deaf person. She noted that “it’s about 50/50” that they will be able to communicate with her.

In response to questions, the Appellant elaborated on her need for assistive devices. She uses a baby monitor to ‘hear’ her children but she cannot depend on it because even when it is working it sometimes goes off by itself. She has looked at different models but it is difficult to find an affordable one that meets her needs. She explained that she does not use a hearing aid but that isn’t because she doesn’t need one. Her doctors over the years have recommended either a hearing aid or cochlear implant.

She testified that she needs a hearing aid because it would raise the level of decibels she is able to hear. She had one in the past but it broke and she never got it replaced because they are very expensive. She has a video-phone but can only use it when people have compatible technology. She stated that TTY technology is not very useful because it is outdated. Currently, she uses an i-pad as her main assistive device.

The Ministry reviewed the reconsideration decision and emphasized that both sources of information (the physician’s and the Appellant’s) were used to arrive at the decision, and employability is not a criterion for PWD designation. In response to questions, the Ministry stated there is no information on the record to indicate that the Ministry ever discussed with the Appellant her need for communication devices to take care of her children; however, she may be eligible for a crisis supplement for “other” to obtain a replacement baby monitor. The Ministry stated that it considered hearing loss as both a physical and mental impairment, adding that it is primarily a physical impairment but can have an impact in mental areas.

#### *Admissibility*

The panel finds that all of the oral testimony is admissible because it corroborates the Appellant's communication difficulties and elaborates on her reported need for assistive devices as outlined in the Request for Reconsideration. The panel therefore admits the testimony under section 22(4)(b) of the *Employment and Assistance Act* as evidence in support of the information and records that were before the minister at the time the decision being appealed was made.

## PART F – Reasons for Panel Decision

The issue in this appeal is whether the Ministry's reconsideration decision of October 1, 2015, which found that the Appellant is not eligible for PWD designation, was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the Appellant. Based on the information provided in the PWD application, the Ministry was not satisfied that the following criteria in EAPWDA section 2(2) were met: the Appellant has a severe mental or physical impairment; and the impairment, in the opinion of a prescribed professional, directly and significantly restricts the Appellant's ability to perform DLA either continuously or periodically for extended periods; and, as a result of these restrictions, the Appellant requires help to perform those activities.

The eligibility criteria for PWD designation are set out in section 2(2) of the EAPWDA as follows:

- (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.

The "daily living activities" referred to in EAPWDA section 2(2)(b) are defined in section 2 of the EAPWDR as:

### **Definitions for Act**

**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;

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.

### **Severe mental or physical impairment**

#### *Appellant's position*

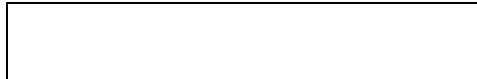
In her submission for the reconsideration, the Appellant submitted that her daily life is impacted due to difficulties finding employment, the high cost of visual aid devices, and the stress she faces mentally, physically, and socially in being a deaf person within the community. In her self-report as well, she cited employment difficulties due to discrimination. Her physician argued that the impairment is severe due to a lack of speech, creating difficulties in the areas of communication, executive function, and social interaction. The physician's letter reported that the Appellant takes 2-3 times longer to supervise her children as she has to watch them visually. When in stores, banks, or offices, communication can take 4-5 times longer than for a hearing person (20-30 minutes vs. 5 minutes) because the Appellant has to write things down and wait for a written reply. The physician argued that the impairment also creates stress and anxiety due to safety concerns from being unable to hear warnings or danger signals.

#### *Ministry's position*

Severe mental impairment: The Ministry argued that the physician's information does not establish a severe impairment in mental functioning and noted discrepancies in the information: For example, the physician reported that the Appellant has difficulties/deficits with communication, cognitive and emotional functioning (due to having no oral language), and continuous restrictions with social functioning. However, the physician also indicated the Appellant can communicate well with writing and sign language as well as some lip reading; is not impacted in most of the areas of cognitive and emotional functioning; is independent with social decisions; and has good functioning with her social networks. The Ministry acknowledged that the information shows limitations in the areas of language and executive function but argued that the physician's reports in conjunction with the Appellant's self-reports, do not establish a severe mental impairment.

Severe physical impairment: The Ministry acknowledged that the Appellant is limited with regard to her ability to communicate, but was not satisfied that a severe impairment in her physical functioning has been established. The Ministry based its opinion on the physician's information that indicated the Appellant can communicate well with sign language/ written output (has good ability in the areas of reading and writing); can perform physical activities (as listed in the PWD medical reports) unaided and without limitations; and is independent in all areas of mobility and physical activity. Regarding the physician's information relating to the Appellant's function in a work setting, the Ministry noted that employability or ability to work are not taken into consideration for the purposes of determining PWD eligibility.





### *Panel's decision*

The diagnosis of a serious medical condition does not in itself determine PWD eligibility or provide evidence of a severe impairment. To satisfy the requirements in section 2(2) of the EAPWDA, evidence of how, and the extent to which, a medical condition restricts daily functioning must be considered. This includes the evidence from the Appellant and from a prescribed professional regarding the nature of the impairment and its impact on the Appellant's ability to manage the DLA listed in section 2(1) of the EAPWDR. However, section 2(2)(b) of the EAPWDA clearly sets out that the fundamental basis for the analysis of restrictions is the evidence from a prescribed professional - in this case, the Appellant's physician.

Although the physician reported restrictions in the PR: "totally deaf", has no oral language, and cannot respond to auditory cues, in both the PR and AR, the physician indicated that the Appellant is able to communicate and socialize well with sign language, written exchanges, and some lip reading. Further, as noted by the Ministry, the physician's information in the PR and AR indicated that only Social Functioning is continuously restricted and that language is the only area of Cognitive and Emotional Functioning with a major impact. Despite being "continuously restricted" in her social functioning, she nevertheless was reported to have good functioning in her social networks. As well, the Appellant can perform most DLA independently and requires only periodic assistance with DLA that were noted as restricted.

The physician's letter, which the panel admitted, emphasized the impact of the Appellant's hearing impairment in caring for her children, as well as safety concerns in her every day activities. The physician stated that "all her daily living activities take significantly longer to perform". The panel notes that watching children, and attention to traffic, fire alarms or other warnings are not listed as DLA under the EAPWDA and the physician's statement does not provide information on specific activities as listed in the PR and AR. Also, in this letter, the physician has not corroborated the Appellant's self-reported need for assistive devices.

The panel therefore finds that the Ministry reasonably determined that a severe mental or physical impairment is not established by the information provided. The panel finds that the Ministry reasonably determined that the criterion under EAPWDA section 2(2) was not met.

### **Restrictions in the ability to perform DLA:**

#### *Appellant's position*

In her submission for the reconsideration, the Appellant stated that she is "able to do everything except hearing like a normal person would do". Her physician argued in the AR, that due to her hearing impairment and lack of speech, the Appellant is restricted in her executive function and language, and requires periodic assistance with banking, paying rent and bills, using public transit, and engaging in social relationships and appropriate interactions. In the appeal submission (physician's letter), the physician elaborated on the Appellant's day to day restrictions, arguing that childcare and communication in stores, banks and government offices, take the Appellant significantly longer than a hearing person (at least 2-3 times longer), and create stress and anxiety and safety concerns especially when she is out in the community unable to hear warnings or danger signals.

### *Ministry's position*

The Ministry argued that there was not enough information in the physician's reports to establish that the impairment significantly restricts DLA either continuously or periodically for extended periods. The Ministry noted that the majority of DLA are performed independently and no information was provided "to explain the frequency and duration of the periodic assistance you require" in areas where restrictions were noted: banking, paying rent/bills, and transportation. The Ministry noted that no medications/treatments were reported to interfere with DLA and although social functioning was reported to be continuously restricted, the Appellant is able to communicate with writing, sign language, and some lip reading as well.

### *Panel's decision*

Subsection 2(2)(b)(i) of the EAPWDA requires that the Ministry is satisfied that in the opinion of a prescribed professional an applicant's severe impairment directly and significantly restricts DLA, continuously or periodically for extended periods. In this case, the Appellant's physician is the prescribed professional. DLA are defined in section 2(1) of the EAPWDR and are also listed in the PR, with additional details in the AR. Therefore, a prescribed professional completing these forms has the opportunity to indicate which, if any, DLA are significantly restricted by the Appellant's impairments either continuously or periodically for extended periods.

Although the physician indicated in the PR that the Appellant is significantly restricted in language (also noted as a major impact in the AR) and Social Functioning, these restrictions are mitigated by the information that the Appellant communicates well with non-verbal methods and has good functioning in her social networks. The evidence indicates that sign language is not always feasible (the physician reported that the Appellant could use more community interpreters for the deaf), and that written exchanges take time. However, despite her communication difficulties, the physician's information does not confirm that her DLA are directly and significantly restricted by her impairment either continuously or periodically for extended periods.

In the AR, the physician indicated the Appellant requires periodic assistance with Banking, Pay rent and bills, and Using public transit (asking for directions, arranging transportation, and responding to auditory warnings). Periodic assistance was also indicated for most areas of Social Functioning including relationships, social cues, unexpected demands, and securing assistance from others. As noted by the Ministry, the physician provided no information on the frequency or duration of the periodic assistance required and also indicated that the Appellant does not use an assistive device. Despite reported safety hazards where the Appellant does not hear cars or other warnings, there is no evidence that the Appellant's physical mobility is impacted as she was reported in the PR as independent with Mobility and Use of transportation.

The physician's letter indicated that the Appellant takes 2-3 times longer to communicate with her children and it can take 4-5 times longer to communicate with store/office staff and 2-3 times longer for medical appointments as everything must be written down. However, the physician provided no additional information for specific tasks listed in the PR and AR and as noted in the preceding section, "2-3 times longer" is influenced by the Appellant's childcare duties. The EAPWDA requires the impairment to directly and significantly restrict DLA periodically or for extended periods, and as the Appellant is largely independent with DLA, the panel finds that the criterion in EAPWDA subsection 2(2)(b)(i) has not been met.

**Help to perform DLA:**

*Appellant's position*

In her self-reports, the Appellant submitted that she requires visual aid technology for communication and social interaction, including a doorbell with flashing lights, TTY or a video-phone, and a hearing aid, especially when employed. She needs assistive monitors for her children and she uses an i-pad as her main assistive device. In the AR, the physician indicated that the Appellant receives help from family and friends and could more fully participate in the community if there were translators available for the deaf.

*Ministry's position*

The Ministry's position is that although the Appellant relies on family and friends for assistance with communication, it has not been established that DLA are significantly restricted; therefore it cannot be determined that significant help is required. The Ministry noted that the physician did not indicate any requirement for prostheses or aids but stated that the Appellant would be able to participate more fully in the community if translators for the deaf were available.

*Panel decision*

Subsection 2(2)(b)(ii) of the EAPWDA requires that, as a result of direct and significant restrictions in the ability to perform DLA, a person requires help to perform those activities. Help is defined in subsection (3) as the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform a DLA.

The Appellant testified that her physician's focus is pre-natal and maternity care and they did not discuss the Appellant's need for assistive devices. Nevertheless, in section D of the AR, the physician has the opportunity to check mark "Communication devices" or "Interpretive Services". Further, the physician's letter was prepared specifically for the appeal and the physician still did not indicate a need for a hearing aid or other device that would be considered an "assistive device" under the EAPWDA. The panel notes that baby monitors and i-pads do not meet the definition of an "assistive device" in EAPWDA section 2(1) as they do not specifically enable the Appellant to perform a DLA as listed in the legislation.

While the physician noted in the AR, that the Appellant could more fully participate in the community if translators for the deaf were available, the evidence is that the Appellant is regularly out in the community with her children even without such assistance. Given that there was no evidence from the physician that assistive devices are required, and also that the information does not confirm direct and significant restrictions to DLA due to the Appellant's impairment, the panel finds that the Ministry reasonably determined that the criterion for help in EAPWDA subsection 2(2)(b)(ii) was not met.

*Conclusion*

The panel finds that the Ministry reconsideration decision, denying the Appellant PWD designation under section 2 of the EAPWDA, was a reasonable application of the legislation in the circumstances of the Appellant. The panel confirms the reconsideration decision.