

PART C – Decision under Appeal

The decision under appeal is the reconsideration decision dated December 7, 2015 made by the Ministry of Social Development and Social Innovation (the ministry) which 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* (EAPWDA) for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement and that her 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,
- that the appellant's mental or physical impairment, in the opinion of a prescribed professional, directly and significantly restricted daily living activities (DLA) either continuously or periodically for extended periods, and
- 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

The relevant legislation is section 2 of the EAPWDA and section 2 of the *Employment and Assistance for Persons with Disabilities Regulation* (EAPWDR).

## PART E – Summary of Facts

The evidence before the ministry at the time of the reconsideration decision consisted of:

- (1) a physician's report (PR) dated July 10, 2015, completed by a physician who had been the appellant's physician for 15 years and had seen the appellant 11 or more times in the past 12 months,
- (2) an assessor's report (AR) dated July 10, 2015, completed by the appellant's physician,
- (3) A self report (SR) in which the appellant indicates that she chooses not to complete the report, although she has written in it: "I have bad anxiety, depression. Can't go out on own just with someone," and
- (4) a 3-page reconsideration submission prepared by the appellant's advocate (RS), including two pages from the AR with additional comments added by the appellant's new physician and a statement by the appellant's mother dated October 28, 2015.

The PR indicates that the appellant has been diagnosed with anxiety and panic disorder, hypertension, dyslexia – learning disorder and mood disorder depression. The appellant's functional skills are generally good being able to walk 4+ blocks, climb 5+ stairs and no limits on lifting, although she cannot sit for more than 1 hour, has difficulties with communication and has significant deficits with cognitive and emotional functioning in the areas of language, perceptual psychomotor, emotional disturbance and motivation due to dyslexia, depression and anxiety. DLAs that are restricted by the appellant's medical condition are daily shopping, use of transportation and management of finances, the first on a continuous basis, the latter two being indicated both continuous and periodic. The physician goes on to comment: "Problem with crowds (shopping). Also difficult catching the bus (can do them with family/friends," and "Anxiety causes problems with others & strangers & public transportation," and indicates that the appellant requires "Help from friends or family – mother".

The AR indicates that the appellant suffers from dyslexia, anxiety and depression. Her ability to communicate is stated to be good for speaking and hearing but poor and unable for reading and writing due to her dyslexia. The appellant is independent in terms of mobility. Cognitive and emotional functioning shows no impact on daily functioning for 8 of 14 items, minimal impact on 3 items, moderate impact on 4 items and major impact on 1 item. Moderate impact is indicated for impulse control, attention/concentration, motivation and other neuropsychological problems (specifically visual/spatial problems and learning disabilities). Major impact is indicated for emotion, with comments "Severe depression & anxiety lead to poor control of eating and eats excessively." The assessor also comments: "Attention and concentration affected by anxiety & depression. Motivation affected by depression. Visual special & hearing disabilities – due to dyslexia." The appellant is stated to be independent in all personal care DLAs except regulating her diet; is independent in basic housekeeping; requires periodic or continuous assistance in all but one item under shopping; is independent in preparing meals; requires continuous or periodic assistance paying rent and bills; requires periodic assistance filling prescriptions but is independent in taking and handling them; and requires continuous assistance using public transit and transit schedules. Finally, the assessor indicates that the appellant is independent in all social functioning DLAs and has good functioning with both immediate and extended social networks, with help from family and friends.

The RS argues that:

- (1) The ministry does not give due weight to the number of impacts that the AR indicates are 'minimal' or 'moderate' rather than 'none' or 'major'. Although only one impact is identified as

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'major', there are many identified as 'minimal' or 'moderate' the cumulative impact of which the ministry should have, but did not, take into consideration when assessing the appellant's overall situation.

- (2) The ministry incorrectly minimized the amount of assistance required by the appellant based on the fact that she receives the assistance she requires from a family member in finding that: "Although the physician indicated that the applicant's restrictions ranged from continuous to periodic, the applicant is able to perform these tasks with the help of family/friends, therefore it does not represent a continuous restriction."
- (3) The additional comments added to the AR ("Patient lives with her mother and she needs her assistance almost daily." And "Mother helps with cooking on a regular basis.") establish that the appellant requires significant assistance with DLAs.
- (4) The appellant's mother's statement that the appellant has had a learning disability since she was 5 years old, suffers from anxiety/depression, has difficulty coping and with crowds, cannot take public transportation or drive, relies upon her for shopping and attending appointments indicates that the appellant requires significant assistance with DLAs.

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 of section 2 of the EAPWDA for designation as a PWD was either a reasonable application of the legislation or reasonably supported by the evidence. The ministry was not satisfied that:

- the appellant had a severe mental or physical impairment,
- the appellant's mental or physical impairment, in the opinion of a prescribed professional, directly and significantly restricted DLAs either continuously or periodically for extended periods, and
- as a result of those restrictions, in the opinion of a prescribed professional, the appellant required help to perform DLAs.

The ministry determined that the age requirement and that her 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 APPELLANT'S POSITION

In her notice of appeal the appellant writes: "I believe the decision showed that the information was not interpreted correctly. I am sure I meet PWD criteria."

At the hearing the appellant was represented by her advocate. The appellant's mother appeared as a witness. The advocate submitted the name of the appellant's new physician in order to address the ministry's issue that the additional comments on the AR submitted with the RS were from an unidentified source.

The appellant's mother testified that she has cared for the appellant all of her life, that she was found to have learning disabilities in grade 4 and has received assistance in that regard. She helps with the appellant's two young children. She assists the appellant shopping (reading labels), with her banking, budgeting, laundry, housework and cooking. She stated that if she were not to help her daughter with these things she feels they would not get done as her daughter is disorganized and easily frustrated.

The appellant testified that she is uncomfortable being outside the house with strangers and in crowds. That she panics on the bus and in the grocery store unless she is there with someone she knows and trusts such as her mother. She stated that she has few friends other than a close girlfriend

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and that she could not manage without the assistance of her mother who helps her with her children, shopping, housework and cooking.

The advocate reiterated the arguments advanced in the RS.

### **THE MINISTRY'S POSITION**

- (1) The additional comments on the AR as submitted in the RS were by an unidentified individual and therefore cannot be accorded any significant weight.
- (2) **PHYSICAL FUNCTIONING:** There is no indication in the materials before the ministry that the appellant suffers from a severe physical impairment.
- (3) **MENTAL FUNCTIONING:** The appellant suffers from dyslexia, depression and anxiety. However, while the PR indicates significant deficits with cognitive and emotional functioning in the area of language and perceptual psychomotor, the AR indicates no impacts in the areas of language and motor activity. While the PR indicates significant deficits with cognitive and emotional functioning in the area of motivation, the AR indicates minimal/moderate impacts in the area of motivation. Furthermore, while AR indicates major impacts to one area of cognitive/emotional functioning in one section, it indicates moderate, minimal and no impacts to the vast majority of impacts in another. These inconsistencies make it difficult to establish a severe impairment to mental functioning. Finally, the AR indicates that the appellant is independent in all areas of social functioning and has good functioning in both immediate and extended social networks which does not indicate a severe mental impairment.
- (4) **IMPACTS ON DLAs:** The PR indicates that 3 of the 10 listed DLAs are impacted by the appellant's medical condition: daily shopping continuously, while use of transportation and management of finances are indicated both continuous and periodic. As there is no explanation as to the frequency and duration of the assistance required and both continuous and periodic are indicated, it is difficult to establish whether the restrictions are significant. The AR indicates that the appellant requires periodic assistance with regulating her diet, making appropriate choices and paying for purchases when shopping and filling prescriptions; continuous assistance going to and from stores and reading price and labels; and both periodic and continuous assistance banking, budgeting and paying rent and bills. All other DLAs are independent, including social functioning. The AR does not explain the frequency and duration of the assistance required and, again, both continuous and periodic are indicated which makes it difficult to establish whether the restrictions are significant. Overall, there is not enough evidence to establish that the appellant's ability to perform DLAs is significantly restricted continuously or periodically for extended periods.
- (5) **HELP TO PERFORM DLAs:** The PR indicates that the appellant does not require a prosthesis. As it has not been established that daily living activities are significantly restricted, it cannot be determined that significant help is required.

### **THE PANEL'S DECISION**

The panel agrees with the ministry's position that at the time of the reconsideration decision the

additional comments on the AR as submitted in the RS were by an unidentified individual and therefore could not be accorded any significant weight. Verbal evidence as to the identity of the individual submitted by the advocate at the appeal is new evidence not before the ministry, and not in support of the information before the ministry at the time of the reconsideration decision. In accordance with section 22(4) of the *Employment and Assistance Act* the panel determines that the advocates evidence as to the identity of individual who wrote the additional comments is not admissible.

#### SEVERE PHYSICAL IMPAIRMENT

The appellant makes no argument that she suffers from a physical impairment.

#### SEVERE MENTAL IMPAIRMENT

The appellant suffers from dyslexia, depression and anxiety. This diagnoses in and of itself does not establish a severe mental impairment. The ministry looks to the sections of the PR and AR to determine the severity of the impairment. As the ministry notes, there are material inconsistencies between the sections of the PR and AR and within the AR itself which make it difficult to assess the severity of the appellant's mental impairment. As well, the AR lists only one impact on daily functioning due to the appellant's mental impairment as major, some being moderate, some minimal and the majority having no impact. This is not indicative of a *severe* mental impairment. The panel accepts the appellant's advocate's argument that it is reasonable for the ministry to consider the cumulative impact of all the minimal, moderate and major impacts. Nevertheless, the legislative standard that must be met is a *severe* mental impairment. A majority of 'no impacts' and only one 'major impact' is not indicative of a *severe* mental impairment. There is also no evidence that the ministry did not consider the cumulative impact. The panel finds that the ministry's determination that there is not enough evidence to establish that the appellant suffers from a severe mental impairment was reasonably supported by the evidence.

#### IMPACTS ON DAILY LIVING ACTIVITIES

The PR and AR indicate that the appellant suffers some restrictions in relation to regulating her diet, shopping, managing her finances and using public transit. Otherwise the appellant is stated to be independent. The ministry has pointed out that a number of these DLAs are indicated to require both periodic and continuous assistance. This is difficult to understand without some explanation, which is not offered. At the hearing, the appellant and her mother gave evidence as to the amount of assistance required. Having considered this testimony, the panel finds that it supports the information provided in the PR and AR but does not establish that significant assistance is required. Nor was this information before the ministry at the time of the reconsideration decision. Lastly, the appellant's advocate argues that the ministry in its reconsideration decision minimized the amount of help required by the appellant because it is provided by the appellant's family. The panel cannot see that this is the case, or, at the least, that the ministry's decision turned on this. Rather, the ministry pointed out inconsistencies and a lack of information as to the frequency and duration of the help required as reasons for not being able to establish that significant help is required. The panel finds that the ministry's determination that there is not enough evidence to establish that the appellant's mental impairment significantly impacts on his ability to carry out DLAs was reasonably supported by the evidence.

#### HELP IS REQUIRED TO PERFORM DLAS

The legislative requirement is that the appellant require help as a direct result of the restrictions on performing DLAs caused by a severe physical or mental impairment. As the panel has found that the ministry's determination that there is not enough evidence to establish that the appellant suffers from a severe mental impairment was reasonably supported by the evidence, this criterion is not applicable.

## **CONCLUSION**

The panel finds that the ministry's decisions that:

1. the appellant does not have a severe physical or mental impairment;
2. the appellant's impairment does not directly and significantly restricts DLAs, and
3. the appellant does not require assistance with DLAs were reasonable.

Accordingly, the panel concludes that the ministry's decision that the appellant does not qualify for PWD was reasonable based on the evidence before it, and confirms the ministry's decision.