PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the "ministry") reconsideration decision of February 4, 2016, which found that the appellant did not meet three 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 and that in the opinion of a medical practitioner the appellant's impairment is likely to continue for at least two years. However, the ministry was not satisfied that:

- 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

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 August 13, 2015; a physician's report ("PR") completed by the appellant's general practitioner (the "physician") on September 10, 2015; and an assessor's report ("AR") completed by a physiatrist/medical doctor (the "assessor") on September 14, 2015.
- A "To whom it may concern" letter from the physician dated January 25, 2016.

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

The panel assessed the evidence as follows:

Diagnoses

In the PR the physician diagnosed the appellant with:

- Cervical spondylosis/numbness left arm and fingers (onset August 2013).
- General anxiety disorder (onset August 2013).
- Post-traumatic stress disorder ("PTSD") (onset August 2013).
- Alcohol and substance abuse in the past (not currently).
- Tension headaches/poor sleep (onset not specified).

In his letter of January 25, 2016 the physician stated that the appellant is also "very depressed."

Physical Impairment

In the PR the physician reported that:

- The appellant has been his patient since August 2103 and that he has seen the appellant 11 or more times in the past year.
- The appellant has been homeless since May 2015 which "…has made his situation precarious."
- The appellant was involved in a motor vehicle accident in August 2013. The resulting injury to his neck and back, along with stress of the accident, "has caused a lot of grief and slow recovery and has never recovered well enough to return to work." He experiences neck pain and numbness in his left arm/fingers.
- He can walk 4+ blocks unaided on a flat surface, can climb 5+ steps unaided, can lift 5 to15 pounds, and has no limitations in remaining seated.

In the AR the assessor reported that:

- "General Degenerative Disc Disease and spondylosis has resulted in mechanical and myofascial axial pain."

- The appellant independently walks indoors and outdoors, climbs stairs, and stands (“spondylotic pain with axial load or impact”). He requires periodic assistance from another person with carrying/holding and continuous assistance from another person or unable to lift.

In his self-report the appellant stated that:
- “Horrible” upper back and neck pain radiates to numbness down his left arm. He constantly drops things from his left hand.
- He can’t sleep, and walks “crooked, limping in pain.”

In his letter of January 25, 2016 the physician stated that:
- Homelessness has caused a great deal of difficulty for the patient accessing his rehab program, so he is not progressing but has regressed.
- The appellant’s pain management is inadequate as he cannot afford the medications.
- “The ability to consistently walk 4 blocks and carry 15 pounds has been reduced to at least 50% of the time.”

Mental Impairment

In the PR the physician reported:
- The appellant has no difficulties with communication.
- He has significant deficits in 6 of 11 areas on cognitive and emotional function: executive, memory, emotional disturbance, motivation, motor activity, and attention/sustained concentration.

In the AR the assessor indicated that:
- The appellant’s speaking and hearing are good, and that reading/writing are satisfactory.
- In terms of cognitive and emotional functioning, the appellant experiences:
  - Moderate impacts in 4 of 14 categories: emotion, attention/concentration, executive, and “other.”
  - Moderate to minimal impacts to motivation (“variable”).
  - Minimal impacts to bodily functions, insight/judgment, and memory.
  - No impact to consciousness, impulse control, motor activity, language, or other neuropsychological problems.
  - Unaware of any psychotic symptoms.
  - “…longstanding challenges with carryover/insight/executive function due to classic prior history of substance abuse…No acute brain impairment/trauma.”
- The appellant provided “self described” symptoms of PTSD, and has had a history of suicidal ideation.

In his self-report the appellant stated that:
- He is suicidal, manic, and has a lack of concentration.
- He is in need of constant medication for his mental and physical conditions.

In his letter of January 25, 2016 the physician stated that:
- The appellant “is stressed out from a psychiatric point of view, i.e. is very depressed, sad and has a lack of motivation. Patient can make simple decisions but for complicated issues and

making executive functions, he seeks assistance. Since he has stopped seeing [name of a third professional] patient seems to have gotten worse and has been referred for urgent psychiatric care at this time."
- The appellant "is a very depressed patient and will need extensive help to make progress and get back into the rehab program as soon as possible."

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 appellant experiences no direct restrictions in any of the prescribed DLA except for social functioning. To explain the impact on social functioning the physician stated "Patient is too stressed. Has been homeless for 4 months and lack of financial support for meds and food." The physician did not specify whether the restrictions are periodic or continuous.
- To explain the degree of restriction the physician commented "Patient is homeless and lack of funds, medication made the depression worse."
- With respect to the DLA of meal preparation the physician commented "If these available", and regarding the DLA of basic housekeeping the physician commented "no house".

In the AR the assessor reported that:
- The appellant independently manages all tasks related to the DLA of personal self-care and use of transportation.
- Regarding the DLA of basic housekeeping the appellant is homeless, but formerly required periodic assistance due to pain.
- Regarding the DLA of daily shopping, the appellant independently manages to read prices/labels and to pay for purchases (other than being short of funds), but requires periodic assistance going to and from stores and making appropriate choices. The appellant requires continuous assistance carrying more than 7 pounds.
- The appellant requires periodic support/supervision with 3 of 5 tasks related to social functioning, and experiences marginal functioning in both his immediate and extended social networks.
- The assessor was unable to assess restrictions to the DLA of meal preparation, management of personal finances (pay rent and bills) and management of medications, commenting "unable to answer. Suspect significant challenges amplified as homeless and in financial distress."

In his letter of January 25, 2016 the physician reported that the appellant "is unable to shop for himself on a constant basis."

Help

In the PR the physician reported that the appellant does not require any prostheses or aids for his impairment. In responding to a question as to what assistance the appellant needs with DLA, the physician stated "Patient needs a home to stay and financial assistance."

In the section of the AR dealing with assistive devices, the assessor did not indicate that the appellant routinely uses any equipment or devices to help compensate for his impairment, but she commented

that the appellant requires a cane. She stated that the appellant does not have an assistance animal. The assessor reported that the appellant currently receives help from no one except the physician and the assessor, and that he requires help from community service agencies.

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 physical or mental impairment, and that in the opinion of a prescribed professional the appellant's impairments do not directly and significantly restrict him 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.

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Severe Physical Impairment

The appellant's position is that his cervical spondylosis and the resultant constant back and neck pain, along with numbness in his left hand, constitute a severe physical impairment. He argued that his physician and assessor have confirmed that his physical functioning is significantly restricted. He also argued that he requires full time medication and that none of his health issues will every go away.

The ministry's position, as set out in its reconsideration decision, is that the evidence does not establish a severe impairment of physical functioning. The ministry argued that the physician's description of the appellant's physical functional skills is not indicative of severe impairment. The ministry also argued that the physician did not describe in his letter of January 25, 2016 how much less than 4 blocks the appellant can walk or how much less than 15 pounds the appellant can carry when his abilities are reduced in these two areas.

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. A medical barrier to the appellant's ability to engage in paid employment is not a legislated criterion for severity. The legislation makes it clear that the determination of severity is at the discretion of the minister, and that the fundamental basis for the

analysis is the evidence from prescribed professionals – in this case, the physician and the assessor. The appellant's evidence must also, however, be considered.

The appellant's physical functional skills as reported by the physician are generally near the higher end of the scale and are not indicative of a severe physical impairment. This is consistent with the assessor's evidence who reported that the appellant is mostly independent with physical functioning. In his letter of January 25, 2016 the physician indicated that at least half the time the appellant can't walk the previously reported 4+ blocks or lift 15 pounds, but the physician provided no information as to how far below those thresholds the appellant's abilities lie.

There is a reference in the physician's evidence to the impact the appellant's medical conditions have on his ability to work at paid employment. The panel notes that employability is not a statutory criterion regarding PWD designation – unlike the CPP disability pension, the focus of the legislation is on the ability to perform DLA. 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 physical condition does not appear to have translated into significant restrictions in his ability to manage his DLA independently.

For the foregoing reasons, the panel has concluded that the ministry was reasonable in determining that the evidence has not established a severe physical impairment.

Severe Mental Impairment

The appellant's position is that his depression, anxiety, and PTSD constitute a severe mental impairment. He argued that he is "in and out of [the] psych ward," that he requires constant medication, and that his medical conditions will never go away.

The ministry, while acknowledging that the appellant is currently experiencing limitations to his cognitive and emotional functioning due to depression and anxiety, took the position that the information provided by the prescribed professionals and the appellant's self-report does not establish a severe mental impairment. The ministry argued that the physician noted no difficulties with communication, and that the assessor identified no major impacts to cognitive and emotional functioning. The ministry also argued that the assessor did not describe the frequency or duration of the periodic support/supervision the appellant requires with aspects of social functioning. Finally, the ministry argued that inconsistencies between the evidence of the physician and the assessor make it difficult to develop a clear and coherent picture of the degree of impairment.

Panel Decision:

In the PR the physician identified significant deficits in 6 categories of cognitive and emotional function (executive, memory, emotional disturbance, motivation, motor activity, and attention/concentration), but provided little or no information regarding the effects or degree of those deficits. The assessor indicated that the impacts were at most moderate (executive – moderate, memory – minimal, emotional disturbance – moderate, motivation – variable moderate to minimal, motor activity – no impact, attention/concentration – moderate.) This evidence of cognitive and emotional function is not indicative of severe impairment.

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).

In the PR physician indicated no restrictions with respect to decision-making. In the AR the assessor reported that while she suspected that homelessness and financial distress were affecting the appellant's ability to manage meal preparation, bill payment, and medications, she was unable to provide an assessment of these DLA that are primary indicators of decision-making ability. In his letter of January 25, 2016 the physician indicated that the appellant is capable of making "simple" decisions but that he needs assistance with "complicated issues and making executive functions." He noted that the appellant "seems to have gotten worse" since he stopped seeing the third professional, but there is no information about what services or treatment the third professional was providing. The physician stated that the appellant can make simple decisions but that he seeks assistance for "complicated" issues and executive (e.g. planning and problem solving) functions. Unfortunately, there are no details about the extent to which this affects the appellant's ability to make decisions about the aspects of decision-making (personal activities, care or finances) prescribed in the EAPWDR.

With respect to social functioning, the professional evidence indicates that while the appellant experiences some challenges, he functions marginally in both his immediate and extended social networks. The assessor indicated that the appellant needed periodic support/supervision for appropriate social decisions, ability to deal appropriately with unexpected demands and ability to secure assistance from others but provided no explanation or description of the type, degree or duration of the support/supervision required other than mentioning that PTSD and anxiety impacts him.

Based on the foregoing evidence and analysis, the panel concludes that the ministry reasonably determined that it falls short of establishing a severe mental impairment.

Significant Restrictions to DLA

The appellant's position is that his impairments significantly restrict his ability to manage his DLA. He argued that his DLA are impacted by constant pain and that he constantly drops items from his left hand. He also argued that he is significantly restricted by a lack of concentration and that he is in constant need of medication.

The ministry's position, as set out in its reconsideration decision, is that there is not enough evidence to establish that the appellant's impairments directly and significantly restrict his ability to perform DLA either continuously or periodically for extended periods. The ministry argued that the physician and the assessor did not provide any evidence regarding the frequency or duration of periodic restrictions.

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 and how long it lasts.

In the PR, the physician reported that the appellant does not experience direct restrictions to DLA except for social functioning. There is no indication as to whether the restriction to social functioning is periodic or continuous. The physician indicated that the restrictions to social functioning are caused by stress related to homelessness and lack of finances, rather than a medical condition. In his letter of January 25, 2016 the physician indicated that the appellant is now unable to shop for himself on a constant basis, but there is no information as to the cause, frequency, or duration of this inability, making it difficult to assess the significance of the restriction.

The assessor's evidence in the AR indicated restrictions to basic housekeeping, daily shopping, and social functioning, but as detailed above under the heading **Severe Mental Impairment** the evidence indicates that the appellant does manage to function socially, albeit marginally. Though the panel acknowledges the difficulty of making some of these assessments when the appellant is homeless, there is no information as to the frequency of the appellant's difficulties with basic housekeeping or daily shopping. Accordingly, it is difficult to conclude that these DLA are significantly restricted.

Based on the foregoing evidence that the appellant independently manages most DLA, and the identified gaps in the information about the restricted DLA, the panel finds that the ministry reasonably concluded that there is insufficient evidence to establish significant restrictions to DLA.

Help with DLA

The appellant's position is that he requires assistance to manage DLA.

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 conditions affect his functioning. However, having reviewed and considered all of the evidence and the relevant legislation and for the reasons provided above, 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.