

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of February 19, 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 had a severe mental impairment. However, the ministry was not satisfied that:

- the appellant’s impairment is likely to continue for at least two years;
- the evidence establishes that the appellant has a severe physical 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 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 form dated October 23, 2015 ("SR"), a physician's report ("PR" and an assessor's report ("AR"), both completed by the appellant's general practitioner (the "physician") on October 22, 2015.
- Letter from the appellant's psychiatrist (the "psychiatrist") dated January 21, 2016
- The appellant's Request for Reconsideration ("RFR") form dated January 28, 2016 asking for an extension to obtain the remaining letters to support her application.
- The appellant's subsequent RFR dated February 18, 2016 requesting reconsideration taking into account the additional information from the Physician, Psychiatrist and Social Worker.
- Letter from the appellant's social worker (the "social worker") dated February 1, 2016
- Letter from the physician dated February 18, 2016

### Diagnoses

- In the PR the physician (who has known the appellant for three months and seen her two to 10 times in the past 12 months) diagnosed the appellant with anxiety, onset July 2015 and depression, date of onset not indicated. In his letter dated February 18, 2016 the physician indicates that the appellant has a history of depression, anxiety and an associated eating disorder and that she likely has PTSD.
- The social worker states that the appellant has chronic, untreated post-traumatic stress disorder with psychotic features such as hallucinations and has been diagnosed with Major Depression, anxiety, dyslexia and anorexia, the latter two which are also untreated.
- The psychiatrist reports that the appellant suffers from severe mental health issues as detailed in the social worker's note, which he fully supports.

### Physical Impairment

- Neither the PR nor the AR provides any diagnosis of a physical impairment. In the PR, for Section D – Physical Functioning, the physician states "N.A.". In the AR, the assessor also states "N.A." for Section B, item 3, mobility and physical ability.
- The letter from the social worker states that the appellant has dealt with an alarmingly high number of injuries including hypoxia due to poisoning, a major motor vehicle accident that caused a concussion and permanently displaced her right shoulder, and multiple assaults. The social worker states that the appellant has chronic arthritis in both wrists, which limits her ability to carry and lift. The social worker indicates that the appellant's hips "slip" on a regular basis, which can essentially hamper any mobility temporarily.

### Mental Impairment

- In the Health History portion of the PR the physician indicates that the appellant's impairment was moderately severe, that the appellant had just escaped a physically and emotionally abusive relationship after several years. The physician notes that the appellant's ex-spouse has traced her to her new location and has had others harassing her at night at her home.

The appellant is anxious and worried about the safety of herself and her children. The physician states that the appellant has feelings of hopelessness and depression but denies suicidal intention, nausea or abdominal pain.

- In the PR, for Section D – Functional Skills the physician states “N.A.” and did not complete the sections relating to the appellant’s communication skills or the section asking whether the appellant suffers from cognitive deficits in the areas of cognitive and emotional function.
- In the AR, the assessor states that the appellant’s physical or mental impairments that impact her ability to manage DLA are marked anxiety associated with insomnia.
- In the AR, for Section B, question 2 regarding the appellant’s ability to communicate, the assessor states “N.A.”.
- For Section B, question 4, Mental or Physical Impairment, the assessor did not check off any impacts to the appellant’s daily functioning. In the comments section the assessor states that the appellant has marked anxiety that affects her job. The assessor states that the appellant is attempting full time work but requires time off frequently to attend counseling for herself and her children.

#### DLA

- In the PR the physician indicated that the appellant has not been prescribed medication or treatment that interferes with her ability to perform DLA.
- In the PR the physician reported that the appellant is not restricted with personal self-care, meal preparation, management of medications, basic housework, daily shopping, mobility inside or outside the home, use of transportation, or management of finances. The physician indicates that the appellant has periodic restrictions with respect to social functioning explaining that it is difficult for the appellant to work full time due to her and her children’s’ needs for counseling, visits and medical care. With respect to social functioning, the physician indicates that the appellant has marked anxiety and needs counseling for herself and her children. The physician also states that the appellant has a job but reported time off and that although her boss has been accommodating she has a financial loss.
- In the AR, the assessors states “N.A.” for DLA except social functioning where he notes that the appellant is independent with ability to develop and maintain relationships and interacting appropriately with others. The assessor indicates that the appellant needs periodic support/supervision with making appropriate social decisions, dealing appropriately with unexpected demands and securing assistance from others.
- The assessor indicates that she has good functioning with her immediate social networks and marginal functioning with extended social networks, noting that she is new to the area.

#### Help

- In the PR the physician reports that the appellant does not require prosthesis or aids for her impairment. The physician indicates that the appellant’s ex-mother in law assists with childcare.
- In the AR the assessor indicates that the appellant receives assistance from family, commenting that the mother in law, from a previous relationship helps with childcare. The assessor states that financial assistance is required as the appellant has difficulty reporting for her full time job.

#### **Additional information provided**

In her Notice of Appeal the appellant states that she disagrees with the ministry's reconsideration decision because she has a chronic lifelong mental illness and she is always scared, doesn't trust anyone, pushes people away with anger, pretends to be "okay" when she is not, relies on multiple community services to help her with her daily struggles, avoids leaving the house, is a shell of who she used to be, and needs help.

At the hearing the appellant provided oral evidence that she applied for PWD designation because she has no other choice. The appellant states that although she has been working one to two days per week, her doctor has recommended that she stop working as she needs counseling for herself and her children. She has two children and does not eat or sleep and has no help. The appellant described her fear of being found by her ex-partner. The appellant stated that she has to talk herself into doing things and that sometimes her housework takes a few hours and at others times it takes a few days. The appellant states that she has struggled to ask for help in the past and now that she is asking for help she is being denied the help she desperately needs and she does not know what else to do. The appellant described that when her oldest child is at school and her youngest child is at daycare and she is at home, she just sits and waits for something to happen. She occasionally goes for walks or does some household tasks but does not read or watch television. The appellant explained that she has been hurt a lot physically in the past, has severe soft tissue damage with ongoing pain in her neck, shoulders, back, hip, knees and joints.

The appellant's advocate stated that the appellant accesses supports from several community resources, that she is not coping well in almost all areas, has poor appetite, is not sleeping well and has auditory hallucinations about her ex-partner coming to get her, and does not trust anyone because of her past trauma. He also explained that the appellant is easily triggered and has to decrease stimulus as interacting with others can raise her anxiety and she can become hostile. Due to concerns about her ability to parent her children the appellant now receives assistance from a family preservation worker, which began in or around mid December 2015.

### **Admissibility of New Information**

The ministry did not object to the new information. The panel has admitted the appellant's oral testimony and the advocate's testimony, as it is evidence in support of information and records that were before the ministry at the time of reconsideration, in accordance with section 22(4) of the *Employment and Assistance Act*. In particular, the new information corroborates the information regarding the appellant's impairments, ability to perform DLA and help needed.

The ministry relied on the reconsideration decision.

## 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's impairment is unlikely to continue for two or more years, that she does not have a severe physical impairment, 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.

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## **Duration**

The appellant's position is that although her physician initially reported that her impairment would not last more than two years, the psychiatrist subsequently confirmed that her impairment will last longer than two years. The appellant's position is that the social worker confirms that the depth of her trauma is likely to prevent any ability to recovery for a number of years and that the psychiatrist states that he fully supports the information detailed in the letter from the social worker. The appellant's position is that this information must be considered.

The ministry's position is that the appellant's physician did not confirm that the appellant's impairment was likely to continue for two or more years so the appellant did not meet the legislative criteria. The ministry's position is that it considered all of the additional information at the time of reconsideration but was of the opinion that the information when considered together was not clear.

## ***Panel Decision***

In order for EAPWDR section 2(2)(a) to be met, there must be an opinion from a medical practitioner confirming that the appellant's impairment is likely to continue for at least two years. In this case, the appellant's physician, in the PR indicates that the appellant's impairment is not likely to continue for more than two years. The physician explains that "...*after getting temporary counseling and financial support very well motivated to work (as she is already doing)*". The appellant's social worker states that the "...*depth of her trauma is likely to prevent any ability to recovery for a number of years*" but

the social worker is not a medical practitioner. The letter from the psychiatrist indicates that the appellant suffers from severe mental health issues as detailed in the social worker's letter, which he fully supports, but the psychiatrist states that he "... *does not believe her circumstances will change significantly in the foreseeable future*". As the psychiatrist has not explained the length of time that he means by the phrase "foreseeable future" it is not clear if the psychiatrist's opinion is that the appellant's impairment is likely to continue for more than two years. The panel also notes that although the physician provided another letter after the PR, he does not provide any further information regarding his opinion regarding the duration of the appellant's impairment.

As the information from the physician does not indicate that the appellant's impairment is likely to last more than two years and as the information from the psychiatrist is not clear with respect to duration, the panel finds that the ministry's decision was not an unreasonable application of the legislative criteria in the circumstances of the appellant.

### **Severe Physical Impairment**

The appellant's position is that she has a severe physical impairment as she has experienced significant physical abuse with soft tissue damage and has pain in her neck, shoulders, back, hips, knees and joint pain that interferes with her ability to perform DLA. The appellant refers to the letter from the social worker states that the appellant has dealt with an alarmingly high number of injuries including hypoxia due to poisoning, a major motor vehicle accident that caused a concussion and permanently displaced her right shoulder, and multiple assaults. The social worker states that the appellant has chronic arthritis in both wrists, which limits her ability to carry and lift. The social worker indicates that the appellant's hips "slip" on a regular basis, which can essentially hamper any mobility temporarily.

The ministry's position is that the information provided does not support a finding that the appellant has a severe physical impairment. The ministry notes that the physician did not diagnose the appellant with a physical impairment in the PR, notes "N.A." in response to the questions regarding the appellant's functional skills with respect to mobility and physical ability. The ministry notes that the social worker indicates that the appellant has a permanently displaced right shoulder, chronic arthritis in both wrists which affects her ability to carry and lift, and that her hips "slip" regularly affecting her mobility temporarily. However, the ministry's position is that as the appellant's medical practitioner has not diagnosed a physical condition giving rise to an impairment and has indicated N/A in the section regarding her mobility and physical functioning, the ministry cannot determine that the appellant has a severe physical impairment.

### *Panel Decision*

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 legislation makes it clear that the determination of severity is at the discretion of the minister, taking into account all of the evidence and that the fundamental basis for the analysis is the evidence from a prescribed professional.

The physician, in the PR, did not diagnose a physical condition giving rise to a severe physical impairment. In the PR, section D – Functional Skills, the physician does not provide any information

regarding the appellant's physical and mobility skills, simply noting "N.A." In the AR, the physician notes the appellant's anxiety but has not provided any information regarding a physical impairment.

Although the social worker states that the appellant has a permanently displaced right shoulder, chronic arthritis in both wrists which affects her ability to carry and lift, and that her hips "slip" regularly affecting her mobility temporarily, the physician does not provide any additional information indicating that the appellant has a physical impairment, the physician's subsequent letter does not provide any additional information indicating that the appellant has a severe physical impairment. While the physician explains that the appellant has a history of physical, sexual and emotional trauma and that she has significant social and emotional limitations that restrict her in obtaining employment, there is no diagnosis of a physical impairment.

Given the lack of information from the physician regarding any physical diagnosis or severe physical impairment, the panel finds that the ministry reasonably determined that the information provided does not demonstrate that the appellant has a severe physical impairment.

### **Significant Restrictions to DLA**

The appellant's position is that due to her trauma and anxiety she is not coping well in almost all areas of DLA and has significant social struggles, easily becoming hostile and irritated with others. The appellant states that she has difficulty managing DLA and struggles to complete her housework. The appellant states that her inability to perform DLA is also significantly impacting her children and she does not eat or sleep. She states that she has to talk herself into doing her DLA and sometimes it takes her a couple of hours to complete and at other times DLA do not get done. The appellant states that she often sits at home on her couching, just sitting and waiting for something to happen.

The appellant's position, as described in the letter from the social worker, is that the letter from the social worker confirms that the appellant's mental impairment hinders her daily functioning, that the appellant hardly sleeps at night and her ability to plan and execute significant activities is massively suppressed. The appellant's position is that her marginal social functioning with exaggerated hostility and distress seriously impact her relationships with others including her children and past employers, and that her capacity to manage even basic interactions is stunted and she is constantly at a high risk of becoming volatile. The appellant's position is that the information from the psychiatrist supports her position as he states that he fully supports the note provided by the social worker.

The ministry's position is that it has reviewed all the information of the physician, social worker and psychiatrist. In particular the ministry notes that the social worker indicates that the appellant has "*dyslexia, and anorexia that are untreated and hinder her daily functioning and ability to plan and execute significant activities is massively suppressed*". The ministry also notes that the psychiatrist indicates that the appellant has very poor frustration tolerance and an inability to stay focused consistently, with extremely high anxiety levels, which chronically make it difficult for the appellant to appropriately interact with people/public. The ministry's position is that although the appellant has certain limitations resulting from her severe mental impairment, the information provided does not establish that the appellant has a severe impairment that significantly restricts DLA continuously or periodically for extended periods.

*Panel Decision*



The legislation – s. 2(2)(b)(i) of the EAPWDA – requires that the minister be satisfied that in the opinion of a prescribed professional, a severe mental or physical 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 extended periods. 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.

The panel notes that in the PR, the physician indicates that the appellant’s impairment does not directly restrict the appellant’s ability to perform DLA. With respect to periodic, the physician explains that the appellant’s social functioning is restricted periodically and he explains that the appellant has difficulty working full time due to the counseling needs for herself and her children. With respect to social functioning the physician explains that the appellant has marked anxiety as she needs counseling for herself and her children. The physician further explains that the appellant has a job but reported time off with an accommodating boss, but that she has suffered a financial loss due to time off work. The physician also indicates that the appellant has not been prescribed any medication that interferes with her ability to perform DLA.

In the AR, the physician indicates “N.A.” with respect to the DLA of personal care, basic housekeeping, shopping, meals, paying rent and bills, medications, and transportation. With respect to social functioning, the physician indicates that the appellant has good functioning with her immediate social network and marginal functioning with respect to her extended social networks, noting that the appellant is new to the area.

The panel finds that the letter from the social worker and the information provided by the appellant is quite different from the information provided by the physician in the PR and the AR. The appellant and the social worker indicate that the appellant’s untreated trauma and social hostility seriously impact her relationships with her children and past employers whereas the physician reported that the appellant has good social functioning with respect to her immediate social network. In addition, while the physician notes “N.A.” with respect to all other DLA the information from the social worker and the appellant indicate difficulties with the appellant’s ability to perform DLA of basic housekeeping and cooking due to both physical and mental impairments.

While the appellant stated that she has had difficulty trusting people and did not provide all the information to the physician at the time of her initial PWD application, the physicians’ subsequent letter, although providing a little more detail, The subsequent letter from the physician which indicates that the appellant has significant social and emotional limitations that restrict her obtaining employment at the present, especially the care of her children and ongoing psychotherapy, does not provide any further information regarding the appellant’s inability to perform DLA. In particular, there is little additional information as to whether any restrictions are continuous or periodic.

While the appellant and social worker report difficulties with DLA due to physical restrictions there is no information provided by the physician, in the PR, AR or his subsequent letter, indicating that the appellant has any restrictions with physical functioning, mobility or any of the tasks of DLA other than periodic restrictions to social functioning.

The letter from the psychiatrist indicates that he fully supports the information provided by the social worker, and in particular, the psychiatrist states that the appellant's severe emotional lability makes it impossible for her to consistently be involved in gainful employment, and difficult for her to appropriately interact with people/public.

While the panel also notes that the physician and psychiatrist indicate that the appellant has difficulty maintaining employment and/or needs time off work for counseling for herself and her children, employability is not a criterion for designation as PWD.

Given the inconsistencies between the information provided by the physician as compared with the social worker, and the minimal information detailing restrictions to DLA, the panel finds that the ministry reasonably determined that the evidence is insufficient to show that the appellant's ability to perform her DLA is significantly restricted either continuously or periodically for extended periods.

### **Help with DLA**

The ministry's position is that as it has not been established that DLA are significantly restricted; therefore, it cannot be determined that significant help is required from other persons.

The appellant's position is that she needs financial support and help with DLA including housework, counseling and financial support; that she obtains assistance from her mother in law and that she has several community supports and a family preservation worker assisting her at present.

### ***Panel Decision***

The physician indicates that the appellant does not require any prostheses or aids for her impairment and that the appellant's "ex" mother in law assists with child care. In the AR, the physician indicates that the appellant and her children need counseling. The letter from the social worker states that the appellant's ability to manage even basic interactions is stunted but there is no information provided by the social worker regarding the nature of help needed. The information provided by the appellant and her advocate is that she requires financial support, counseling and help from community resources including a family preservation worker and help from her mother in law. The letter from the psychiatrist and subsequent letter from the physician do not provide any further information regarding the appellant's need for help with DLA.

Although the panel finds that the appellant has some help with some tasks, 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.

As the panel finds that the ministry reasonably determined that the appellant does not have a severe

impairment that directly and significantly restricts her ability to manage her DLA either continuously or periodically for an extended period of time, the necessary precondition has not been satisfied 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 condition affects her ability to function. However, having reviewed and considered all of the evidence and the relevant legislation, the panel finds that the ministry's reconsideration decision, which found that the information did not establish that the appellant's impairment would last longer than two years, that the appellant's severe mental impairment did not significantly restrict her ability to perform DLA, and that as a result of significant restrictions she requires assistance with DLA, is a reasonable application of the legislation in the circumstances of the appellant. The panel therefore confirms the ministry's decision.