

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of April 7, 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 and duration requirements but the ministry was not satisfied that:

- the evidence establishes that the appellant has a severe 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 September 17, 2015 ("SR"), a physician's report, completed by the appellant's general practitioner (the "physician") on September 22, 2015 (the "PR"), and an assessor's report ("AR"), completed by the appellant's counselor on September 28, 2015.
- Second assessor's report completed by the physician dated February 13, 2016 ("AR2").
- Letter from the physician dated March 10, 2016.
- The appellant's Request for Reconsideration ("RFR") form dated March 30, 2016 with attached letter from the appellant summarizing her background and providing information on the impacts of her post traumatic stress disorder (PTSD) including chronic fatigue, flashbacks, mistrust and bad dreams.

Diagnoses

- In the PR the physician (who has known the appellant for nine years and has seen her once in the past 12 months, noting that she lives five hours away) diagnosed the appellant with PTSD, present for decades.

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 indicates that the appellant can walk 4+ blocks unaided on a flat surface, can climb 5+ steps unaided, can lift 15 to 35 pounds, and can remain seated less than 1 hour.
- In the AR, for Section B, the counselor indicates that the appellant's mental or physical impairments that impact her ability to manage DLA are post-traumatic stress, noting chronic fatigue. For Section B, item 3, the counselor indicates that the appellant is independent with all mobility and physical ability tasks, namely walking indoors, walking outdoors, climbing stairs, standing, lifting and carrying and holding.
- In the AR2, the physician indicates that the appellant's PTSD results in chronic fatigue and indicates that the appellant is independent with all mobility and physical ability tasks.

Mental Impairment

- In the Health History portion of the PR the physician indicates that the appellant has moderately severe impairment of initiative, concentration, attention, and memory, which make meaningful employment very difficult. The physician also indicates that the appellant has intrusive flashbacks to traumatic events, avoidance of precipitating circumstances and hyper-vigilance at times.
- In the PR, for Section D – Functional Skills the physician indicates that the appellant does not have any difficulties with communication. The physician indicates that the appellant has significant deficits with cognitive and emotional function in the areas of emotional disturbance, motivation, motor activity, and attention or sustained concentration.
- In the AR and AR2, both the counselor and physician indicate that the appellant's mental

impairment that impacts her ability to manage DLA is posttraumatic stress symptoms including anxiety, depression, chronic fatigue, nightmares, flashbacks, regular triggered emotion and hyper vigilance.

- In the AR and AR2 the counselor and physician both indicate that the appellant's ability to communicate is good.
- For Section B, question 4, Mental or Physical Impairment, the AR and AR2 both indicate that the appellant has major impact to emotion, moderate impact to bodily functions and motivation, minimal impact to impulse control, insight and judgment, attention/concentration, executive, motor activity and psychotic symptoms. Both the AR and the AR2 indicate that the appellant has no impact in the areas of consciousness, memory, language, other neuropsychological problems or other emotional or mental problems.

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, basic housework, daily shopping, mobility inside or outside the home or use of transportation. With respect to management of medications and management of finances the physician reports "unknown". The physician indicates that the appellant has continuous restrictions with social functioning, noting avoidance of social situations, increased vigilance, easily stressed, emotional lability, and impaired concentration and attention.
- In the AR and AR2 the counselor and physician indicate that the appellant is independent with all tasks except developing and maintaining relationships where it is noted that she requires periodic support/supervision. Both the counselor and the physician indicate that if the appellant is triggered in a relationship then she tends to avoid the person involved to avoid negative emotions.
- The AR and AR2 both indicate that the appellant has marginal functioning with respect to her immediate social networks and extended social networks. The counselor comments that the appellant has good social skills and that the marginal functioning is due to triggers, anxiety and mistrust. The physician comments that the appellant has good social skills but functions on a marginal level due to anxiety, mistrust and frequent triggering events.
- In the physician's letter dated March 10, 2016 he indicates that the appellant's shopping are a real challenge for her but he is not aware of her at home DLA's being impaired.

Help

- In the PR the physician reports that the appellant does not require prosthesis or aids for her impairment. In response to the question asking what assistance his patient needs with DLA, the physician indicates "N/A".
- In the AR and AR2 the counselor and the physician indicate that the appellant does not require assistive devices or the use of an assistance animal. They both indicate that she attends regular counseling and that her current income is not sufficient to live alone.

Additional information provided

In her Notice of Appeal the appellant states that she has PTSD and that she disagrees with the ministry's decision that she does not have a severe physical or mental impairment and that her impairment does not restrict her ability.

Prior to the hearing the appellant's physician submitted a form dated May 6, 2016 providing additional information regarding the appellant's condition, noting his diagnosis of PTSD and the impacts of her impairment on her DLA (the "May 2016 Letter").

At the hearing the appellant provided oral evidence including information regarding her background and history of abuse while in foster care. The appellant explained that she has good and bad days but when she is triggered she will isolate herself and often does nothing for several days at a time. The appellant explained that she cannot predict when she will have good and bad days and that while she is not suicidal, she often wishes she could die as she just wants to escape the recurring, intrusive thoughts and flashbacks that occur when she is triggered. The appellant also explained that years ago someone at the ministry offered her disability but she did not want it at the time and she is only seeking PWD designation as she has not other choice and needs assistance. The appellant explained that she was very surprised when her application was denied given the previous offer of disability assistance.

Admissibility of New Information

The ministry did not object to the new information. The panel has admitted the appellant's oral testimony and the May 2016 Letter, as they are 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 relates to the information regarding the appellant's impairments, ability to perform DLA and help needed.

The ministry relied on the reconsideration decision. At the hearing the ministry representative also provided information on the ministry's position including pointing out various inconsistencies between the information provided by the physician between the PR and the AR2, noting that the information provided was very confusing. The ministry representative also stated that the ministry does not offer PWD without the application process noting that the appellant may have been offered a PWD application form to complete and submit.

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 impairment, that in the opinion of a prescribed professional the appellant's impairment does 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.

Severe Physical Impairment

The ministry's position is that the information provided does not establish that the appellant has a severe physical impairment. The ministry relied on the PR in which the physician indicated that the appellant is able to walk 4+ blocks unaided on a flat surface, can climb 5+ stairs unaided, can lift 15 to 35 pounds and can remain seated for less than one hour. The ministry also found that the physician indicated that the appellant is independently able to manage all activities.

The ministry's position is that the AR was not accepted as the professional credentials of the counselor who completed the AR did not meet the definition of "prescribed professional" under EAPWDA section 2(2).

The appellant did not argue that she has a severe physical impairment although she indicates that when she is triggered she has chronic fatigue, "sleep is her friend" and she often stays in bed for several days.

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.

EAPWDA section 2(2) states that a prescribed professional means a person who is authorized under

an enactment to practice the profession of medical practitioner, registered psychologist, registered nurse or registered psychiatric nurse, occupational therapist, physical therapist, social worker, chiropractor, or nurse practitioner. The panel notes that in his letter dated March 10, 2016 the physician states that the appellant's problem is one primarily of a psychological nature and not easily summarized by a physician who has a chance to see the appellant for perhaps 15 minutes one or two times per year. The physician indicates that the appellant would be better served by the ministry accepting input from the counselor, as the appellant sees the counselor on a regular basis and delves into the issue at hand in much more depth than the physician is able to.

While the panel appreciates the physician's comments regarding his limited knowledge of the appellant's conditions, the panel finds that the ministry was reasonable in finding that the AR completed by the counselor did not meet the legislative criteria as the counselor is not a prescribed professional as required by EAPWDA section 2(2).

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 indicates that the appellant can walk unaided 4+ blocks on a flat surface, can climb 5+ steps unaided, can lift 15 to 35 pounds and can remain seated less than 1 hour.

The panel notes that the information in the AR2 appears to be almost identical to the information in the AR and that the physician appears to have reiterated the information provided on the AR. Both the AR and AR2 indicate that the appellant is independent with walking indoors and outdoors, climbing stairs, standing, lifting, and carrying and holding. In the AR and the AR2, both the counselor and the physician note that the plaintiff suffers from chronic fatigue but this appears to be related to her PTSD symptoms and not a separate physical diagnosis.

Given the lack of information from the physician regarding a physical diagnosis, severe physical impairment and minimal functional limitation, combined with the appellant's evidence that she suffers from a mental, not physical impairment, the panel finds that the ministry reasonably determined that the information provided does not establish that the appellant has a severe physical impairment.

Severe Mental Impairment

The ministry's position is that the information provided does not establish that the appellant has a severe mental impairment. The ministry notes that while the physician indicates that the appellant encounters significant deficits in the areas of emotional disturbance, motivation, motor activity and attention, the AR only indicates one major impact in the area of emotion (anxiety and depression); two moderate impacts in the areas of bodily functions (sleep disturbance) and motivation; and six minimal impacts in the areas of impulse control, insight and judgment, attention/concentration, executive, motor activity and psychotic symptoms (disorganized thinking), with no impact to the remaining areas. The ministry also notes that the physician indicates that the appellant's level of ability with speaking, reading, writing and hearing is good, that the appellant does not have any problems with communication.

The ministry also notes that while the physician indicates that the appellant requires periodic support with developing and maintaining relationships as she avoids people if she is triggered, the physician also indicates that she has good social skills but functions on a marginal level due to anxiety, mistrust

[]

and frequent triggering events. The ministry's position is that while the appellant's PTSD impacts her to some degree the information does not establish that she has a severe mental impairment.

The appellant's position is that she has good and bad days but she cannot predict when the triggering events are going to happen and when they do, she isolates and often lays at home in bed for several days, suffering from disrupted sleep, chronic fatigue, anxiety and emotional despair. The appellant reports that she sleeps a lot as it seems to be the only way she can forget all the pain and suffering in her life. In the SR, the appellant states that she also gets severe flashbacks and she gets ill where she vomits a lot. The appellant also states that she really needs to have her PWD application approved because she is not able to work. The appellant states that PTSD is complicated and that the ministry does not see the impairment she has but they do not have to live her life.

Panel Decision

The panel notes that in the PR, Section B, Health History, the physician indicates that the appellant's impairment makes meaningful employment very difficult. However employability is not a criterion for designation as PWD.

As identified by the ministry representative, there are numerous inconsistencies between the information provided by the physician in the PR and as between the PR and the AR2. For example, in the PR Section B – Health History, the physician indicates that the appellant has a moderately severe impairment of initiative, concentration, attention and memory. However, in the PR Section C, the physician indicates that the appellant has significant cognitive deficits with cognitive and emotional function in the areas of emotional disturbance, motivation, motor activity and attention or sustained concentration but has not indicated that she has significant deficits with respect to memory.

In the PR Section B the physician indicates the appellant has moderately severe impairment in the area of attention but in the AR2, section 4, the physician indicates that the appellant has minimal impact to attention/concentration and motor activity and no impact to her memory. In the AR2 the physician indicates that the appellant's impairment has a major impact in the area of emotion, underlining anxiety and depression, and moderate impacts to the areas of bodily functions and motivation. The AR2 only notes two areas of moderate impact being bodily functions and motivation, and six areas of minimal impact, being impulse control, insight and judgment, attention/concentration, executive, motor activity and psychotic symptoms. The physician indicates that the appellant has no impact to the areas of consciousness, memory, language, other neuropsychological symptoms or other emotional or mental problems.

In the May 2016 Letter the physician states that the appellant is "severely affected in her functioning on a daily basis". However, the physician does not provide any explanation to indicate the difference between the information provided in the PR and the AR2 as compared with the May 2016 Letter. Without further explanation or clarification the information does not provide a clear picture of the impact of the appellant's mental impairment.

The panel finds that the ministry's determination that the information provided does not establish that the appellant has a severe mental impairment as required by EAPWDA section 2(2) was reasonable.

Significant Restrictions to DLA

The ministry's position is that while the appellant has certain limitations resulting from feeling stressed and overwhelmed in public situations, the frequency and duration of these periods is not described in order to determine if they represent a significant restriction to her overall level of functioning. The ministry notes that in the AR2 the physician indicates that the appellant is independently able to manage all DLA with the exception of using public transit due to social factors and an overwhelmed feeling, and that shopping can be difficult. The ministry's position is that the information provided by the physician does not establish that a severe impairment significantly restricts the appellant's DLA either continuously or periodically for extended periods.

The appellant's position is that due to her PTSD and triggering events she is not coping well and has significant social struggles, becoming isolated and sleeping a lot to avoid her feelings. The appellant's position is that the information provided by the physician and counselor should support a finding that she qualifies for PWD designation.

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 directly restricts the appellant's ability to perform DLA of social functioning continuously, noting avoidance of social situations, increased vigilance, easily stressed, emotional lability and impaired concentration and attention. However, the physician indicates that the DLA of personal self-care, meal preparation, basic housework, daily shopping, mobility inside and outside the home and use of transportation are not impacted. The physician indicates that it is unknown whether her DLA of management of medications or management of finances is restricted. In the AR2 the physician indicates that the appellant is independent with all DLA except social functioning with respect to developing and maintaining relationships. In the AR2 the physician comments that the appellant has difficulty with activities such as shopping that require contact with others, as they can be stressful and overwhelming, leading to self-isolation.

In the May 2016 Letter, the physician indicates that the appellant has periodic restrictions with respect to DLA of meal preparation, managing personal finances, shopping for personal needs, using private transportation, performing housework, moving about indoors and outdoors, personal hygiene and self care, managing personal medication, making decisions about personal activities, care or

finances and relating to, communicating or interacting with others effectively. However, the physician did not provide additional information to indicate why the AR2 indicates that the appellant was independent with these DLA and what changed between the time he completed the AR2 and the May 2016 Letter. The panel appreciates the comments provided in the physician's letter dated March 10, 2016 where he indicates that he cannot easily summarize her problems when he has only had a chance to see her for perhaps 15 minutes one or two times per year. However, without further explanation the additional information provided in the May 2016 Letter results in further inconsistencies between the information provided by the physician. In particular, while the May 2016 Letter indicates periodic restrictions not previously identified, the physician has not provided information to indicate the frequency or duration of the periodic assistance needed.

In addition, in the May 2016 Letter the physician indicates that the appellant is continuously restricted with respect to using public transportation as she does not tolerate crowds, whereas in the AR2 the physician indicated that she was independent in this area, while noting that she becomes overwhelmed.

Given the numerous inconsistencies in the information provided by the physician and the minimal 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, counseling and help from a friend when her PTSD symptoms are triggered.

Panel Decision

In the PR the physician indicates "N/A" in response to the question asking what assistance the appellant needs with DLA. The physician also indicates that the appellant does not require any prostheses or aids for her impairment. In the AR2 the physician indicates that the appellant requires regular counseling, does not need any assistive devices and does not have an assistance animal.

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 mental impairment, specifically PTSD symptoms, 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 has a severe physical or mental impairment that significantly restricts her ability to perform DLA either continuously or periodically for extended periods, 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.