

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of May 3, 2016, which found that the appellant did not meet one 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 had a severe mental impairment that directly and significantly restricted the appellant’s daily living activities (DLA). The ministry also found that the appellant required assistance with DLA as a result of significant restrictions. However, the ministry was not satisfied that the appellant’s impairment is likely to continue for at least two years or that he has a severe physical impairment.

## 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 11, 2015 ("SR"), a physician's report ("PR") completed by the appellant's psychiatrist dated October 18, 2015 and an assessor's report ("AR"), completed by a social worker on December 4, 2015.
- The appellant's Request for Reconsideration ("RFR") form dated April 21, 2016 with attached letter, hospital PCI Report dated June 30, 2011 (the "PCI Report") and information regarding celiac disease.

### Diagnoses

- In the PR the physician (who has known the appellant since 2010 and seen him once in the past 12 months) diagnosed the appellant with chronic depression (date of onset not indicated), lifelong borderline personality disorder, and alcohol and cocaine use disorder, onset 2009.

### 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 indicates that the appellant can walk 4+ blocks unaided on a flat surface, can climb 5+ steps unaided, has no limitations with respect to lifting or how long the appellant can remain seated. In the AR, the assessor indicates that the appellant is independent with all listed mobility and physical ability tasks.
- The PCI report indicates that the appellant has collagenous colitis.

### Mental Impairment

- In the Health History portion of the PR the physician indicates that the appellant has had difficulties with alcohol abuse since 2002, was in remission for 7 years then relapsed to the point of losing everything, including his family. The physician indicates that the appellant has chronic depression, feelings of emptiness, fatigue, hopelessness as well as guilt and shame. In the PR, for Section D – Functional Skills the physician indicates that the appellant has significant deficits with cognitive and emotional function in the areas of executive, memory, emotional disturbance, motivation, impulse control and attention or sustained concentration. The physician comments that the appellant's mood is up and down, he is highly impulsive, has poor planning skills and is disorganized.
- In the AR, the assessor states that the appellant's physical or mental impairments that impact his ability to manage DLA are chronic depression, borderline personality disorder, substance misuse, gluten allergies and lactose intolerance.
- In the AR, for Section B, the assessor indicates that the appellant's ability to communicate with speaking is good, reading and writing are poor and hearing is satisfactory.
- For Section B, question 4, Cognitive and Emotional Functioning, the assessor indicates that the appellant has major impact to the areas of bodily function, consciousness, emotion, impulse control, insight and judgment, attention/concentration, executive, memory and motivation. The assessor indicates that the appellant has moderate impact to the areas of

motor activity, language and psychotic symptoms and no impact to the areas of other neuropsychological problems or other emotional or mental problems.

### DLA

- In the PR the physician indicated that the appellant has continuous restrictions to management of finances and social functioning, periodic restrictions to personal self care, meal preparation, management of medications, basic housework and daily shopping and no restrictions with respect to mobility inside or outside the home or use of transportation. The physician indicates that the appellant has not been prescribed medication or treatment that interferes with his ability to perform DLA.
- In the AR, the assessor indicates that the appellant is independent with toileting, feeding self and transfers but requires periodic assistance with dressing, grooming bathing and regulating diet, and basic housekeeping. The assessor indicates that the appellant is independent with reading prices and labels, paying for purchases and carrying purchases home but requires periodic assistance with going to and from stores and making appropriate choices. The assessor indicates that the appellant is independent with cooking, getting in and out of a vehicle and using transit schedules but requires periodic assistance with meal planning, food preparation, cooking and using public transit. The assessor indicates that the appellant requires continuous assistance with banking, budgeting, paying rent and bills, filling/refilling prescriptions and taking medications as directed. The assessor comments that the appellant “negates self-care”, has poor self-concept, is not motivated, has periods of binge eating, and that his medication makes him lethargic.
- The assessor indicates that the appellant requires periodic supervision with making appropriate social decisions, interacting appropriately with others and securing assistance from others and continuous supervision with developing and maintaining relationships and dealing appropriately with unexpected demands. The appellant has marginal functioning with respect to his immediate and extended social networks.

### Help

- In the PR the physician reports that the appellant needs regular counseling and help learning life skills given his inability to stabilize over the last four years.
- In the AR the assessor indicates that the appellant requires psychiatric services, drug and alcohol programs and receives assistance from Health Authority Professional and is attending therapy with a psychiatrist. He does not require any assistive devices or use of an assistance animal.

### **Additional information provided**

In his Notice of Appeal dated May 5, 2016 the appellant states that the physician filled out the portion of the PWD application in error and he would like an extension of time to provide an explanation from the physician.

At the hearing the appellant provided a note from the physician dated June 8, 2016 confirming that the appellant suffers from depression, which will last more than two years. The appellant provided oral evidence that he provided the note to the ministry and that it confirms that the physician just made an error on the PR and accidentally ticked off the wrong box.

The appellant's advocate stated that as the physician has provided confirmation that the appellant's impairment will last longer than two years, that this is an "open and shut case" and the appellant definitely qualifies for PWD designation.

### **Admissibility of New Information**

The ministry did not object to the new information. The panel has admitted the physician's note, the appellant's oral testimony, and the advocate's testimony, as 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 clarifies information in the PR regarding the duration of the appellant's impairment.

At the hearing the ministry representative stated that as the physician's note confirms that the appellant's impairment is likely to last longer than two years, the ministry supports the appellant's PWD application and encourages the panel to accept that the appellant qualifies for PWD designation.

## 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 as required by EAPWDR section 2(2)(a) or that he does not have a severe physical impairment?

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 the physician made an error in the PR by ticking off the wrong box indicating that his impairment is unlikely to last more than two years, but has now confirmed in the note dated June 8, 2016, that he has depression that will continue for more than two years.

The ministry's position as set out in the reconsideration decision is that the appellant's physician indicated that the appellant's impairment was not likely to continue for more than two years so the appellant did not meet the legislated criteria set out in EAPWDA section 2(2)(a). At the hearing however, the ministry representative stated that as the physician's note confirms that the appellant's impairment will continue more than two years, the ministry supports the appellant's PWD application and encourages the panel to accept that the appellant qualifies for PWD designation.

### *Panel Decision*

As the physician has provided confirmation that the appellant's impairment will continue for at least two years and as the ministry representative stated that the ministry would now support the appellant's application for PWD designation the panel finds that the ministry's reconsideration decision finding that the appellant's impairment is not likely to continue for more than two years was not reasonable.

### **Severe Physical Impairment**

In the SR the appellant states that his arthritis and joints are constantly debilitating, very painful and he cannot rest or sleep properly. He states that he is tired, sore and in constant pain with no means

to improve or maintain his health. At the hearing the appellant did not argue that he has a severe physical impairment.

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 in the PR, the physician indicated that the appellant can walk 4+ blocks unaided, can climb 5+steps unaided, has no limitations with lifting and no limitations with remaining seated and that the assessor indicates that the appellant is independent with all listed areas of mobility and physical ability. The ministry's position is that although the PCI Report indicates that the appellant has collagenous colitis, the information provided does not establish that the appellant has a severe impairment of his physical functioning.

### *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.

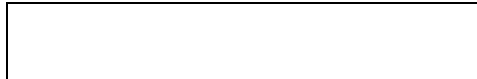
In the SR the appellant states that he has arthritis that is debilitating and causes him constant pain but the information provided in the PR and AR with respect to his physical functioning does not support the information provided by the appellant. For example, the physician, in the PR, did not diagnose a physical condition giving rise to a severe physical impairment and for section D – Functional Skills, the physician indicates that the appellant can walk 4+ blocks unaided, can climb 5+ steps unaided, has no limitations with lifting and no limitations with respect to remaining seated. In the AR the assessor indicates that the appellant is independent with all listed areas of mobility and physical ability.

While the PCI Report indicates that the appellant has collagenous colitis, diagnosed in 2011, and the AR indicates that the appellant has gluten allergies and is lactose intolerant, the information provided by the appellant and the information in the PR and AR does not indicate how this condition indicates the appellant's functioning.

As there is no physical diagnosis other than collagenous colitis and no information from the physician regarding a diagnosis of arthritis giving rise to a 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.

### **Conclusion**

The panel finds that the ministry reasonably determined that the appellant does not have a severe physical impairment. However, as the evidence establishes, and the ministry now accepts that the appellant's severe mental impairment will continue for more than two years as required by EAPWDA section 2(2)(a), 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, was not reasonably supported by the evidence and was not a reasonable application of the legislation in the appellant's circumstances. The panel therefore rescinds the ministry's decision with respect to the



determination that the appellant's impairment is not likely to continue for two years or more. The appellant is successful in his appeal.