

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (“ministry”) reconsideration decision dated May 9, 2016 in which the ministry found the appellant was not eligible for designation as a Person With Disabilities (“PWD”) because he did not meet all of the criteria in Section 2(2) of the *Employment and Assistance for Persons with Disabilities Act* (“EAPWDA”). The ministry was satisfied that the appellant has reached 18 years of age and that his impairment is likely to continue for at least 2 years. However, based on the information provided in the PWD Designation Application (“PWD application”) and Request for Reconsideration, the minister was not satisfied that:

- the appellant has a severe mental or physical impairment; and
- the impairment, in the opinion of a prescribed professional, directly and significantly restricts his ability to perform daily living activities (“DLA”) either continuously or periodically for extended periods; and
- as a result of these restrictions, the appellant requires help to perform those activities through an assistive device, the significant help or supervision of another person, or the services of an assistance animal.

## PART D – Relevant Legislation

*Employment and Assistance for Persons with Disabilities Act* – EAPWDA - section 2

Employment and Assistance for Persons with Disabilities Regulation – EAPWDR - section 2

PART E – Summary of Facts

The evidence before the ministry at the reconsideration consisted of the following:

1. A PWD application comprised of the Applicant Information and Self-report (not completed), and a Physician Report (“PR”) and Assessor Report (“AR”) both dated November 16, 2015 and both completed by the appellant’s general practitioner (“the physician”) who has known the appellant for more than 20 years and has seen him 2-10 times in the past year. The physician completed the forms by way of an office interview, file/chart information, and information from the appellant's family.

The PWD application included the following information:

**Diagnoses**

PR and AR

The appellant is diagnosed with Mood disorder and Anxiety disorder in the PR and "significant anxiety and panic disorder since 2002." The physician did not fill in any information for Health History. In the AR, the physician wrote that depression and anxiety are the impairments that impact the appellant's ability to manage DLA. The physician reports that the appellant is unable to work due to his medical conditions.

**Functional Skills**

PR

The physician provided the following information regarding any functional limitations:

- The appellant can walk 4+ blocks unaided on a flat surface;
- climb 5+ steps unaided;
- has no limitations in lifting or remaining seated;
- has no difficulties with communication; and
- has significant deficits with cognitive and emotional function in 5 out of 12 listed areas: Executive, Memory, Emotional disturbance, Motivation, and Attention with the comment, "unable to hold down a job, panic attacks."
- Under *Additional Comments* at the end of the PR the physician wrote. "Unable to go to work, he "freezes. Each new job is a challenge, and his ability to cope with any change or life event is too stressful."

AR

The physician provided the following information for *Mental or Physical Impairment (Abilities)*:

- Ability to Communicate: Speaking, Reading, Writing, and Hearing - *Good*;
- Mobility and Physical Ability: No check marks are provided; comment, “no physical limitations”;
- Cognitive and Emotional Functioning: The appellant’s impairments impact his functioning in 9 out of 13 areas. One area, Emotion, was not rated. The other 13 areas were rated as follows:

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- Bodily functions, Attention/ concentration, Executive, Memory, Motivation, and Motor activity - *Moderate impact*;
- Consciousness, Impulse control, and Insight and judgment - *Minimal impact*;
- Language, Psychotic symptoms, and Other neuro-psychological problems are marked *No impact*;
- Comments: "Very teary, panicked and unable to survive without his family (son and ex-wife support) emotionally and socially, otherwise will isolate himself."

### **Daily Living Activities (DLA)**

#### PR

- The physician checked Yes, the appellant has been prescribed medication/ treatment that interferes with his ability to perform DLA (explanation left blank) and his medications are for "duration of lifetime,"
- In Part E - *Daily Living Activities*, the physician check marked that the appellant's impairment directly restricts his ability to perform DLA and provided the following information:
  - 5 out of the 10 listed DLA are marked as not restricted: Personal self-care, Basic housework, Mobility inside the home, Mobility outside the home, and Use of transportation;
  - 3 DLA are marked Unknown: Meal preparation, Daily shopping, and Management of Finances; and
  - 2 DLA are periodically restricted: Management of medications, and Social functioning with the following explanations: "when he is distressed which is often, finances are poor, his father is dying, and overall unable to manage his life." For Social functioning the physician wrote: "withdraws from family, 1-2 times monthly or becomes really dependent on ex-wife and parents."

#### AR

The physician provided the following information:

- The appellant is independent with all areas of Personal care and Basic housekeeping;
- No check marks are provided for the below DLA but comments are provided as follows:
  - Shopping: "has no money, dependent on family";
  - Meals: "independent, mostly depends on family to provide him with food"; and
  - Pay rent and bills: "No banking."
- The appellant requires periodic assistance from another person with all areas of Medications: Filling/ refilling prescriptions, Taking as directed, and Safe handling/ storage;
- For Transportation, he is independent in two areas, Getting in/ out of a vehicle, and Using public transit. He requires periodic assistance from another person with Using transit schedules and arranging transportation;
- For Social functioning he requires support in all areas as follows:
  - Able to develop/ maintain relationships, and Interacts appropriately with others - periodic support;
  - Appropriate social decisions, Able to deal with unexpected demands, and Able to secure assistance from others - continuous support/ supervision.
  - The physician checked that the appellant has marginal functioning with both his immediate and

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extended social networks. The physician did not identify any safety issues, or fill in comments for *Additional Information*.

### ***Need for Help***

#### PR

- The physician check marked *No*, the appellant does not require any prostheses or aids for his impairment.
- For additional comments regarding the degree of the appellant's restrictions he wrote, "cannot manage his affairs independently, needs family and his children to guide and support him."
- For assistance with DLA the physician wrote, "none other than financial and emotional for psychological support."
- Under *Additional Comments*, the physician wrote, "he needs his family constantly for care, support, and financial support."

#### AR

- The physician indicates the appellant lives alone.
- To be maintained in the community, the physician reports that the appellant's "family can provide support, he needs financial support primarily, his (teenaged child) cannot provide financial support."
- Assistance is provided by family, and there are no check marks for assistance provided through the use of assistive devices.
- The physician checked *No*, the appellant does not have an assistance animal.
- In response to the question, *If help is required but none is available, please indicate what assistance would be necessary* the physician wrote, "Patient is on welfare assistance."

**2.** A Request for Reconsideration in which the appellant lists his medications: one that he takes every day "just to try and handle things", and another that he takes 2-3 times a week to help him sleep. He reports that a close family member recently passed away after 7 years of serious illness including several operations, and this has hit the appellant very hard. The appellant worked for most of his life but his life has taken a bad turn due to the recent death in the family. He states that he has been going to therapy for his problem, has been seen at two hospitals, and has spoken to psychiatrists.

He also attached two submissions as follows:

**(a)** A letter from a hospital employee, Group Therapy Services, dated April 16, 2016 confirming that the appellant is currently a client who participated in a healthy living group and a depression group and is scheduled to re-start the depression group.

**(b)** A typed submission from the appellant dated April 25, 2016 in which he provides his argument which the panel will address in *Part F - Reasons for Panel Decision*.

#### *Additional submissions*

The tribunal granted the appellant's request to adjourn the hearing from an earlier date due to another recent death of a close family member. Subsequent to the reconsideration decision, the appellant filed his Notice of Appeal in which he states that he has depression and anxiety every day, his health is not good, and he has an appointment with his doctor (in May 2016) because he is not doing well.

At the hearing, the appellant provided a confirmation of a referral to a specialist (“specialist referral”) from his physician for a medical screening test, appointment scheduled in January, 2017. The appellant stated that he could have the same illness that his father recently died from but a diagnosis has not been confirmed at this time.

The panel finds that the Notice of Appeal corroborates the appellant’s information in his reconsideration submissions and admits it under section 22(4)(b) of the *Employment and Assistance Act* (“EAA”) as evidence in support of the information and records that were before the minister at the time the decision being appealed was made. The panel does not admit the specialist referral because it relates to an investigation for a condition/ potential diagnosis that was not before the minister at the reconsideration.

In his oral testimony, the appellant summarized his recent loss of close family members and reported that another relative is currently ill. His anxiety worsened upon his divorce and he has lost too many family members in the past two years and this has affected his health and he has physical symptoms as well as depression and anxiety. He checks in with his doctor every three months but does not get better. He saw a psychiatrist who changed his medications (when the appellant was feeling suicidal). He reports that he is adjusted to his medications but his condition is a lot worse in the mornings as he does not sleep well. He can travel to appointments but has to schedule them in the late afternoon, and he sometimes has trouble with following the route in getting there.

In response to questions regarding the physician’s information in the PWD application, the appellant explained that his social functioning is probably impaired more than “1-2 times per month” as was reported, because he keeps a lot to himself, has lost his sense of humour, no longer attends sporting/ or other social events, and does not use technology and only recently got a cell phone for emergencies. Regarding his daily functioning, he stated that he wakes up, throws up, has other physical symptoms, does not breathe as he should, and takes awhile to get going. He has trouble figuring things out and knowing what to say, and he cannot function without his medications.

He explained that his doctor may have omitted checking off (in the AR) that his impairment has an impact in the area of Emotion, because the appellant’s dad was dying and he did not know what to do or say and his doctor was focused on talking to him about that. He reported that he does not shop much as he does not like standing in lines or being in stores and he has to rely on his children to remind him to pay important bills. He explained that although he can do meal planning he does not eat much due to his physical symptoms and even though he can dress and groom himself, he has difficulty just getting up in the morning and then his anxiety kicks in.

The panel finds that the appellant’s testimony adds detail about his symptoms and his limitations as presented in his submissions for the reconsideration. The panel admits the oral submissions under section 22(4)(b) of the EAA as evidence in support of the information and records before the minister when the decision being appealed was made. The ministry summarized its argument per the reconsideration record and did not provide any additional evidence. The panel will address both parties’ arguments in the next section, *Part F - Reasons for Panel Decision*.

## PART F – Reasons for Panel Decision

The issue in this appeal is whether the ministry's reconsideration decision of May 9, 2016, which found that the appellant was not eligible for PWD designation, was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. Based on the information provided in the PWD application and Request for Reconsideration, the ministry was not satisfied that the following criteria in EAPWDA section 2(2) were met: the appellant has a severe mental or physical impairment; and the impairment, in the opinion of a prescribed professional, directly and significantly restricts his ability to perform DLA either continuously or periodically for extended periods; and, as a result of these restrictions, he requires help to perform those activities.

The eligibility criteria for PWD designation are set out in section 2(2) of the EAPWDA as follows:

- (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.

The "daily living activities" referred to in EAPWDA section 2(2)(b) are defined in section 2 of the EAPWDR:

### **Definitions for Act**

**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;

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.

#### *Decision*

The panel provides the following analysis for the legislative criteria that the ministry found were not met:

#### ***Severe mental or physical impairment***

The diagnosis of a serious medical condition does not in itself determine PWD eligibility or provide evidence of a severe impairment. To satisfy the requirements in section 2(2) of the EAPWDA, evidence of how, and the extent to which, a medical condition restricts daily functioning must be considered. This includes the evidence from the appellant and from a prescribed professional regarding the nature of the impairment and its impact on the appellant's ability to manage the DLA listed in section 2(1) of the EAPWDR. However, section 2(2)(b) of the EAPWDA clearly sets out that the fundamental basis for the analysis of restrictions is the evidence from a prescribed professional - in this case, the physician.

#### *Appellant's position - Severe mental impairment*

The appellant submits that his mental impairment has a severe impact on his life for the following reasons:

- His anxiety and mood disorders have impacted his ability to provide for his family. His inability to manage his anxiety in order to hold down a job played a huge part in the separation from his wife and children which in turn manifested in more anxiety issues. He struggles to get out of bed every day and do the things that most people take for granted. Simple things upset him as well.
- Every new challenge, new situation, or new job causes debilitating effects including shaking, vomiting, severe chest pain, light-headedness/ dizziness and his thoughts wander to the worst case scenario.
- In addition to having trouble sleeping and eating, his attention span is short, he struggles with decisions, and his memory is not what it used to be. He is also afraid to get in his car for fear of having an anxiety attack that could cause an accident or something far worse.
- His family has been a huge support both emotionally and financially but he is still unable to function daily without feeling the effects of both anxiety and depression.

#### *Ministry's position - Severe mental impairment:*

The ministry noted that no additional information from the appellant's physician or another prescribed professional was provided with the Request for Reconsideration. The ministry argues that the information provided establishes a moderate rather than severe impairment, noting the following evidence:

- The physician reports significant deficits in 5 out of 12 areas listed for cognitive and emotional function in the PR, and in the AR he indicates that the appellant's impairment has moderate and

minimal impacts on his cognitive and emotional functioning in 9 out of 13 of the rated areas and no impacts in the remaining rated areas.

- While the appellant isolates himself and is “unable to survive” without family support, the physician reports further along in the AR that the appellant “needs financial support primarily.”
- Also in terms of social functioning, the physician reports that the appellant is “unable to manage his life 1-2 times monthly” but that he has no difficulties with communication.
- Further, while the physician provides several comments regarding the appellant’s inability to work and his need for financial support, the ministry notes that employability or ability to work are not taken into consideration in determining PWD eligibility. The ministry suggested at the hearing that the appellant look into applying for Canada Pension Plan disability if he is unable to manage at a job.

*Panel’s decision - Severe mental impairment*

The panel finds the ministry reasonably determined that the information provided does not establish a severe mental impairment due to inconsistencies between the PR and the AR and incomplete information provided in these reports. The physician reports “significant” deficits in cognitive and emotional functioning in the PR including Emotional disturbance, but in the AR, Emotion and Other emotional/ mental problems are not reported to be impacted by the appellant’s impairment. While minimal and moderate impacts are indicated for some areas of cognitive and emotional functioning in the AR including Insight/ Judgment, Memory, and Motivation, no rating was provided for Emotion and no major impacts are reported.

Further, while the appellant isolates himself socially, requires support in all areas of the DLA of social functioning, and is also reported to have marginal functioning in his social networks, the physician indicates in the PR that the appellant has only periodic restrictions with Social Functioning, with additional information in the AR that he is “unable to manage his life 1-2 times monthly” and he primarily needs financial support. In addition, the physician reports no difficulties with communication, and no safety issues were identified. While the appellant indicates that he is impaired by anxiety and depression every day, especially in the mornings, and that the deaths in his family have left him barely able to function, the physician’s information does not corroborate that level of severity. The panel therefore finds that the ministry reasonably determined that the information provided to the ministry at the reconsideration establishes a moderate rather than severe impairment to function.

Moreover, a major focus of both the appellant’s and physician’s information is the appellant’s inability to work. As noted by the ministry, employability or ability to work are not criteria for determining PWD eligibility, nor is the appellant’s financial need a criterion in the legislation. The legislation requires evidence of a severe impairment characterized by significant functional deficits. As the evidence indicates no major impacts to cognitive and emotional functions, and contradictory information regarding emotional disturbance (significant versus not check marked at all) the panel finds that the ministry reasonably determined the criterion of a severe mental impairment in section 2(2) of the EAPWDA was not met.

*Appellant’s position – Severe physical impairment*

The appellant is not claiming a severe physical impairment although he reports physical symptoms including throwing up and other digestive problems, as well as trouble with eating and sleeping. He is also worried about his physical health because of diseases that run in his family.



*Ministry's position - Severe physical impairment:*

The ministry submits that a severe physical impairment is not established by the information in the PWD application and at the reconsideration. The ministry notes that the physician's assessment of functional skills indicates the appellant can walk 4 or more blocks unaided, climb 5 or more steps, and has no limitations with lifting or remaining seated. Further, the physician stated in the AR, "no physical limitations."

*Panel's decision – Severe physical impairment*

The panel finds that the ministry reasonably determined a severe physical impairment has not been established by the information provided. The appellant is not diagnosed with a physical impairment and the physician both check marks and specifically states that the appellant has no physical limitations. The only physical symptoms that are reported in the medical reports are the appellant's sleep problems, and that his impairment has a moderate impact on Bodily Functions. The legislation requires evidence of a severe impairment that significantly impacts daily functioning, and the physician's information that the appellant has no restrictions to his mobility and other physical functions does not meet the legislative test. The panel therefore finds that the ministry reasonably determined a severe physical impairment under section 2(2) of the EAPWDA was not established.

***Restrictions in the ability to perform DLA***

*Appellant's position*

The appellant submits that while he can independently do DLA including Personal care, Meals, and Transportation, he is sick every day, especially in the mornings, and it is hard for him to get going and do anything. Although he can shop, he is not comfortable in line ups or in stores, and his family reminds him to pay important bills because he does not like using technology, his memory is not what it used to be, and he relies on their financial support as well. His Social Functioning is impaired because he cries easily, including at his doctor's appointments, and tends to isolate himself even when he knows it is bad for his conditions to do so.

*Ministry's position*

The ministry acknowledges that the appellant has certain limitations resulting from anxiety. The ministry argues, however, that most of his limitations are due to a lack of finances and not due to his mental impairment and there is not enough evidence to confirm the legislative criteria. The ministry concludes that the limitations resulting from anxiety do not represent a significant restriction to the appellant's overall functioning, noting that he is reported in the AR as independent with Personal Care, Basic Housekeeping, and Meals but relies on his family for shopping and food due to his finances. The ministry notes that the physician does not explain his comment, "No banking" in the AR and he indicates in the PR and AR that the appellant's ability to manage his medications is periodically restricted and periodic support is needed for Medications, as well as for Using transit schedules/ arranging transportation.

*Panel's decision – Restrictions to DLA*

Subsection 2(2)(b)(i) of the EAPWDA requires the minister to be satisfied that in the opinion of a prescribed professional an applicant's severe impairment directly and significantly restricts DLA either continuously, or periodically for extended periods. In this case, the appellant's physician is the prescribed professional. DLA are defined in section 2(1) of the EAPWDR and are also listed in the PR, with additional details in the AR. Therefore, a prescribed professional completing these forms has the opportunity to indicate which, if any, DLA are significantly restricted by the appellant's impairments either continuously or periodically for extended periods.

The panel finds that the ministry reasonably determined the evidence does not establish that the appellant's DLA are directly and significantly restricted either continuously, or periodically for extended periods. As noted earlier, a severe impairment that significantly restricts function was not established because the appellant's functional abilities are reported as moderately, not severely, impaired. Further, while the appellant is taking medication, and the physician indicates that the medication interferes with his ability to perform DLA, the physician provided no explanation and the appellant reports that he has adjusted to his medications and cannot function without them.

In the PR, only Management of Medications and Social Functioning are reported as restricted and these restrictions are periodic. There is no information in the AR on how often the appellant requires periodic support/ supervision with medications, or with transportation schedules/ arrangements. The evidence regarding Shopping, Meals, and Pay rent and bills is that the appellant primarily requires financial assistance with these DLA and as noted by the ministry, the physician has not confirmed that they are restricted on account of his impairment.

Given the evidence provided, the only DLA that nears the threshold of being significantly restricted due to a severe impairment is Social Functioning although in the PR, the restriction does not meet the legislative threshold of periodic for extended periods as the physician specifically states that Social Functioning is restricted only once or twice per month. In the AR, while the appellant requires periodic or continuous support with all areas of Social Functioning, the physician confounds the appellant's need for psychological support with his need for financial support, reporting that financial assistance is the primary type of support required to maintain the appellant in the community. The legislation requires significant restrictions to DLA either continuously or periodically for extended periods as a result of the applicant's impairment, and not because of their financial situation. The panel finds that the ministry reasonably determined the information provided by the prescribed professional does not confirm that these criteria in subsection 2(2)(b)(i) of the EAPWDA were met.

***Help to perform DLA***

*Appellant's position*

In his reconsideration submissions the appellant submits that he will continue to seek help as needed but he does not feel that he will ever be fully capable of holding down a job. The frustration of continuing to try has made him feel like a failure and doubt himself and the financial effects have been devastating and he does not feel he can ever truly cope without medical and family support.

*Ministry's position*

The ministry argues that as it has not been established that DLA are significantly restricted, it cannot be determined that *significant* help is required from other persons.

*Panel's decision – Help to perform DLA*

Subsection 2(2)(b)(ii) of the EAPWDA requires a prescribed professional to confirm that as a result of significant restrictions to DLA, the person requires help to perform an activity. Where another person is providing the help, the level of assistance or supervision required must be significant as set out in subsection 2(3)(b)(ii) of the EAPWDA. While the physician indicates that the appellant relies on his family for help and support, the panel found that the ministry reasonably determined the information provided did not confirm significant restrictions to DLA as a result of the appellant's impairment. The panel therefore finds that the ministry reasonably determined the criterion for help under EAPWDA subsection 2(2)(b)(ii) was not met.

*Conclusion*

The panel finds that the ministry's reconsideration decision denying the appellant PWD designation under section 2 of the EAPWDA was a reasonably supported by the evidence. The panel confirms the decision pursuant to sections 24(1)(a) and 24(2)(a) of the *Employment and Assistance Act*.