

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of July 28, 2016 which found that the appellant did not meet four 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 but 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 or mental impairment;
- the appellant’s daily living activities (“DLA”) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and that
- as a result of those restrictions, the appellant requires the significant help or supervision of another person, an assistive device, or the services of an assistance animal.

PART D – Relevant Legislation

EAPWDA, section 2

*Employment and Assistance for Persons with Disabilities Regulation* (“EAPWDR”), section 2

## PART E – Summary of Facts

The 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 February 25, 2016 ("SR"), a physician's report ("PR") completed by the appellant's general practitioner (the "physician") dated January 27, 2016, and an assessor's report ("AR"), completed by the appellant's psychiatrist (the "psychiatrist") dated February 22, 2016.
- Letter from a nurse dated June 23, 2016 indicating that the appellant is not seeing the psychiatrist again until August 31, 2016 and requesting an extension until that time in order for the psychiatrist to make a decision upon the resubmission of the PWD application.
- The appellant's Request for Reconsideration ("RFR") form dated June 28, 2016 in which he states that he suffers from mental illness, substance abuse and addiction and that he did not know what was wrong with him and he started drinking alcohol to deal with his issues. The appellant states that he was abused as a child and it is very difficult for him to talk about his past history. He states that his doctor diagnosed him with depression, anxiety, panic attacks, mood disorder and schizophrenia and that he gets panic attacks in public, especially around men, and suicidal thoughts. He reports that he cannot eat and sleep. He takes medications but is dizzy, drowsy, nervous, and has headaches. He states that he shakes all the time and has no motivation to do anything. He states that he cannot function like a normal person and needs help with performing DLA.

### Diagnoses

- In the PR the physician (who has known the appellant for four months and seen him 11 or more times during that period) diagnosed the appellant with depression (onset approximately 2005) and alcoholism (onset in the 1990's).
- In the AR, the psychiatrist, who has known the appellant since December 11, 2015 and seen him 2-10 times in the last year, indicates that the appellant's impairments that impact his ability to manage DLA are major depressive disorder, substance induced depression and alcohol dependency.

### Duration

- In the PR, the physician indicates that the appellant's impairment is not likely to continue for two or more years. The physician indicates that the duration of the impairment was expected to be 3-6 months with significant improvement expected with counseling, Alcoholics Anonymous (AA) meetings, and anti-depressant medication.

### 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 and has no limitations with respect to lifting or remaining seated.
- In the AR, the psychiatrist indicates that the appellant is independent with all aspects of mobility and physical ability.

### Mental Impairment

- In the Health History portion of the PR the physician indicates that the appellant has depressed mood, poor sleep, fatigue, and anorexia that affect his ability to focus and concentrate in order to work.
- In the PR, for Section D – Functional Skills, the physician indicates that the appellant does not have any difficulties with communication other than a lack of fluency in English.
- In the PR, the physician indicates that the appellant has significant deficits with cognitive and emotional function in the areas of emotional disturbance, motivation and attention.
- In the AR, for Section B, question 2 regarding the appellant's ability to communicate, the psychiatrist indicates that the appellant's ability to communicate is satisfactory in all areas.
- In the AR, the psychiatrist indicates that the appellant has major impact in the areas of consciousness and impulse control, moderate impact in the areas of bodily function (sleep disturbance), emotion (depression), insight and judgment, attention/concentration (secondary to depression) and motivation, minimal impacts in the areas of executive and memory, and no impact in the areas of motor activity, language, psychotic symptoms, other neuropsychological problems and other emotional or mental problems. The psychiatrist comments that the appellant drinks until he is passed out and uses despite negative outcomes.

### DLA

- In the PR the physician indicated that the appellant has not been prescribed medication or treatment that interferes with his ability to perform DLA. The physician indicates that the appellant's impairment does not directly restrict his ability to perform DLA.
- In the AR, the psychiatrist indicates that the appellant is independent with most aspects of DLA but that he requires periodic assistance with regulating diet, laundry, basic house keeping and going to and from stores, depending on his level of depression. With respect to social functioning the psychiatrist indicates that the appellant is independent with making appropriate social decisions but requires periodic supervision with developing and maintaining relationships, interacting appropriately with others, dealing appropriately with unexpected demands, and securing assistance from others.
- The assessor indicates that the appellant has very disrupted functioning with his immediate and extended social networks, commenting that he is isolated and lonely.

### Help

- In the PR, the physician does not provide any information about assistance that the appellant may require with DLA.
- In the AR, the psychiatrist does not provide any information about assistance provided by other people or need for assistive devices and indicates that the appellant does not have an assistance animal. Where asked to describe the support/supervision required which would help the appellant to maintain in the community, the psychiatrist indicates that the appellant is not functioning at present.

### **Additional information provided**

In his Notice of Appeal dated August 12, 2016, the appellant states that his psychiatrist is out of the country and he cannot see her until August 31, 2016 to get more documents about his mental health.

He states that the ministry went ahead and made its decision even though he was given an extension until August 31, 2016 to send in more documents.

At the hearing the appellant provided oral evidence that he used to be a truck driver but due to anxiety attacks, suicidal thoughts and paranoia, he had to stop driving. He states that he has a severe addiction to alcohol and drugs, shakes all the time, and that his addiction has destroyed his life. He states that he cannot function at all due to the combination of his conditions. He states that one of his sisters helps with his DLA, bringing him some meals, calling to see if he is okay, helping with cleaning, and taking him to appointments as he is afraid to leave his home.

The appellant stated that although he has a long time family physician he did not feel comfortable talking to his family doctor about his condition because he was deeply ashamed of his past abuse, mental impairment and alcohol dependency, and he did not want his family members to know about his problems. Because of that, the appellant states that he saw the physician, a new doctor that he has not seen very much, and neither she nor the psychiatrist, have his whole history. The appellant stated that he saw the psychiatrist two days before the hearing and while she prescribed him with a new medication for his nightmares, she did not provide any further documentation in support of his PWD application. He stated that she gave him a note indicating that he should not work for two years but he did not have the note with him. The appellant stated that he has now gone back to his family physician and explained his situation but he did not have any further documentation from her to support his PWD application.

### **Admissibility of New Information**

The ministry did not object to the new information. The panel has admitted the appellant's oral 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 impairment, ability to perform DLA, and help needed. The panel has accepted the information in the Notice of Appeal as argument.

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 he does not have a severe physical or mental impairment, that in the opinion of a prescribed professional the appellant's impairments do not directly and significantly restrict him from performing DLA either continuously or periodically for extended periods, and that as a result of those restrictions the appellant does not require help to perform DLA?

The relevant legislation is as follows:

### **EAPWDA:**

2 (1) In this section:

**"assistive device"** means a device designed to enable a person to perform a daily living activity that, because of a severe mental or physical impairment, the person is unable to perform;

**"daily living activity"** has the prescribed meaning;

**"prescribed professional"** has the prescribed meaning.

(2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act if the minister is satisfied that the person has a severe mental or physical impairment that

(a) in the opinion of a medical practitioner is likely to continue for at least 2 years, and

(b) in the opinion of a prescribed professional

(i) directly and significantly restricts the person's ability to perform daily living activities either

(A) continuously, or

(B) periodically for extended periods, and

(ii) as a result of those restrictions, the person requires help to perform those activities.

(3) For the purposes of subsection (2),

(a) a person who has a severe mental impairment includes a person with a mental disorder, and

(b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires

(i) an assistive device,

(ii) the significant help or supervision of another person, or

(iii) the services of an assistance animal.

## **EAPWDR section 2(1):**

2 (1) For the purposes of the Act and this regulation, "**daily living activities**" ,

(a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following activities:

- (i) prepare own meals;
- (ii) manage personal finances;
- (iii) shop for personal needs;
- (iv) use public or personal transportation facilities;
- (v) perform housework to maintain the person's place of residence in acceptable sanitary condition;
- (vi) move about indoors and outdoors;
- (vii) perform personal hygiene and self care;
- (viii) manage personal medication, and

(b) in relation to a person who has a severe mental impairment, includes the following activities:

- (i) make decisions about personal activities, care or finances;
- (ii) relate to, communicate or interact with others effectively.

\*\*\*\*\*

### **Duration**

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 and that the physician indicated that it would last 3-6 months, expecting significant improvement with counseling, AA and anti-depressant medications, 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.

The appellant's position is that the physician and psychiatrist have not been treating him very long and do not know his whole history. The appellant states that he has had longstanding depression and addiction issues, and that they have already continued eight months since the time the PR was completed and are not yet improving, so it is reasonable to expect they will continue longer than two years. The appellant's position is that the ministry made its decision without waiting for further information from the psychiatrist and that was not reasonable.

### *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 physician, in the PR indicates that the appellant's impairment is not likely to continue for more than two years. The physician explains the appellant's condition will continue for 3-6 months and that significant improvement was expected with counseling, AA meetings, and anti-depressant medications.

While the appellant argues that the ministry was not reasonable in making its decision prior to

obtaining further information from the appellant's psychiatrist who was out of the country and he was not able to see until August 31, 2016 the appellant did not provide any new information from the psychiatrist for the panel to consider and the appellant did not seek an adjournment to allow time to provide further documentation regarding his PWD application. Although the appellant states that the psychiatrist gave him a note indicating that he should not work for two years, the appellant did not submit the note to the ministry or the panel. However, even if he had provided the note, the panel notes that employability is not a criterion for PWD designation.

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 does not provide any other information with respect to duration, the panel finds that the ministry's decision was a reasonable application of the legislative criteria in the circumstances of the appellant.

### **Severe Physical Impairment**

The reconsideration decision states that neither the physician nor the psychiatrist has diagnosed a medical condition. The ministry notes that the physician indicates that the appellant can walk 4+ blocks and climb 5+ stairs unaided and has no limitations with respect to lifting or remaining seated. In the AR, the psychiatrist indicates that the appellant is independently able to manage all activities requiring mobility and physical ability, including walking indoors, walking outdoors, climbing stairs, standing, lifting, carrying, and holding. The ministry's position is that the information provided does not support a finding that the appellant has an impairment of his physical functioning and that a severe physical impairment has not been established.

The appellant's position is that he has a severe physical impairment as he has a severe alcohol and drug addiction, shakes all the time and is not able to function.

#### *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 indicates that the appellant can walk 4+ blocks and climb 5+ stairs unaided and has no limitations with respect to lifting or remaining seated. In the AR, the psychiatrist does not diagnose a physical condition giving rise to a severe physical impairment. The psychiatrist indicates that the appellant is independently able to manage all activities requiring mobility and physical ability, including walking indoors, walking outdoors, climbing stairs, standing, lifting, carrying, and holding.

Although the appellant states that the physician and psychiatrist do not know his whole history and that his severe addiction causes him to shake all the time and is unable to function, and although the AR does indicate that the appellant is not presently functioning, there is no further information provided by either the physician or the psychiatrist indicating that the appellant has a severe physical

impairment.

Given the lack of information 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.

### **Severe mental impairment**

The ministry's position is that the appellant has been diagnosed with major depressive disorder, substance induced depression, and alcohol dependency and that while the ministry acknowledges that the appellant's cognitive and emotional functioning is negatively impacted, particularly in the area of social functioning, the information provided does not establish that the appellant has a severe mental impairment.

The ministry notes that the physician indicates that the appellant has significant deficits with his cognitive and emotional functioning in the areas of emotional disturbance, motivation, and attention or sustained concentration and that the psychiatrist indicates major impacts to the appellant's cognitive and emotional functioning in the areas of consciousness and impulse control, moderate impact in the areas of bodily function (sleep disturbance), emotion (depression), insight and judgment, attention/concentration (secondary to depression) and motivation, minimal impacts in the areas of executive and memory, and no impact in the areas of motor activity, language, psychotic symptoms, other neuropsychological problems and other emotional or mental problems. The psychiatrist comments that the appellant drinks until he is passed out and uses despite negative outcomes.

The ministry notes that while the AR indicates that the appellant does not require support/supervision with making appropriate social decisions, the appellant requires periodic support/supervision with all other aspects of social functioning but that the psychiatrist does not describe the nature, frequency, or duration of the periodic support/supervision that the appellant receives. The ministry's position is that without this information, it cannot be determined that the appellant requires significant support/supervision for extended periods of time with these activities.

The ministry's position is that the information provided does not indicate that the appellant requires significant assistance with activities requiring cognitive and emotional functioning, such as making decisions about personal activities, care, or finance.

The appellant's position is that he has a long-standing history of depression, severe alcohol and drug addiction, and that he cannot function. He states that he has difficulty communicating how he is feeling; particularly around men, and that the physician and psychiatrist do not have his whole history.

### *Panel Decision*

While the appellant states that the physician and psychiatrist do not have his whole history and have not fully described his situation the panel notes that the appellant has not provided any further documentation from either the physician or the psychiatrist to support his PWD application.

The panel finds that the information in the PR and the AR indicate that the appellant suffers from depression, poor sleep, fatigue and alcohol and drug dependency but that the ministry reasonably



determined that the information provided does not establish that the appellant has a severe mental impairment.

While the PR indicates that the appellant has significant deficits in the areas of emotional disturbance, motivation and attention or sustained concentration, the AR indicates that the appellant only has major impact to two areas of cognitive and emotional functioning being consciousness and impulse control. The remainder indicates that there are 5 areas of moderate impact moderate (bodily functions, emotion, insight and judgment, attention/concentration, and motivation), two areas of minimal impact (executive and memory) and 5 areas with no impact (motor activity, language, psychotic symptoms, other neuropsychological problems, and other emotional or mental problems).

There are significant inconsistencies between the information provided in the PR and the AR as the physician indicates that there are no significant deficits in the areas of consciousness or impulse control whereas the AR indicates the appellant's functioning in those areas is majorly impacted. While the PR indicates significant deficits in the areas of emotional disturbance, motivation and attention or sustained concentration the AR indicates those areas are only moderately impacted.

Both the physician and the psychiatrist indicate that the appellant's ability to communicate is satisfactory. In the AR, for Section B, question 2 regarding the appellant's ability to communicate, the psychiatrist indicates that the appellant's ability to communicate is satisfactory in all areas.

The panel also notes that there are inconsistencies in the AR in that with respect to social functioning, the psychiatrist states that the appellant is independent with making appropriate social decisions including avoiding situations dangers to self or others yet in the AR the psychiatrist comments that the appellant drinks until he is passed out and uses despite negative outcomes.

Given the inconsistent information provided by the physician and the psychiatrist and no further documentation to explain the inconsistencies, the panel finds that the ministry reasonably determined that the information provided does not demonstrate that the appellant has a severe mental impairment.

### **Significant Restrictions to DLA**

The ministry's position is that the information provided in the PR and the AR does not indicate that the appellant requires significant assistance with DLA. In particular, the ministry notes that the physician indicates that the appellant does not have any restrictions to his ability to manage DLA. While the psychiatrist in the AR indicates that the appellant requires periodic assistance with regulating diet, laundry and basic housekeeping, and going to and from stores, the nature, frequency and duration of the periodic assistance that the appellant receives is not described in order to determine whether he receives significant assistance for extended periods of time with these activities.

The ministry further notes that the psychiatrist indicates that the appellant is able to manage all other activities of DLA including: dressing, grooming, bathing, toileting, feeding self, transfers, reading prices and labels, making appropriate choices, paying for purchases and carrying purchases home when shopping; meal planning, food preparation, cooking and safe storage of food (depends on if depressed); management of finances, management of medications, getting in and out of a vehicle,

using public transit, using transit schedules and arranging transportation.

The ministry's position is that although the appellant has certain limitations resulting from his 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.

The appellant's position is that due to his past history of abuse, depression, anxiety, suicidal thoughts and alcohol and drug dependency he struggles to be around people, especially men, and is unable to function at all, requiring help from his sister with DLA.

#### *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 does not have any restrictions to his ability to manage DLA and that he has not been prescribed any medications that interfere with his ability to perform DLA. In the AR, of the 28 listed aspects of DLA, the psychiatrist indicates that the appellant is independent in 24 areas and only requires periodic assistance in 4 areas being regulating diet, laundry, basic housekeeping and going to and from stores. With respect to the 4 aspects in which he requires periodic assistance the psychiatrist notes that it depends on this level of depression and the nature, frequency and duration of assistance required is not described. With respect to social functioning the AR indicates that the appellant is independent with making appropriate social decisions but requires periodic assistance with the other four listed areas being developing and maintaining relationships, interacting appropriately with others, dealing appropriately with unexpected demands and securing assistance from others.

While the appellant states that the physician and the psychiatrist do not know his whole history and do not have a full understanding of his impairment or restrictions, the panel notes that the appellant saw the psychiatrist just two days before the hearing and while he advises that he obtained a note indicating that the psychiatrist advised him not to work for two years he did not provide a copy of the note. However, even if he had provided the note, employability is not a criterion for PWD designation. Accordingly while the physician and psychiatrist may not have a complete and accurate understanding of the appellant's restrictions with DLA, it is up to the appellant to obtain the necessary documentation to support his PWD application and if he is unable to obtain that information in time, then he can seek an adjournment of the hearing. In this case the appellant did not obtain further documentation in support of his PWD application and did not seek an adjournment of the hearing, so

[ ]

the panel finds that the ministry reasonably determined that the evidence is insufficient to show that the appellant's ability to perform his 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 he needs help to be able to function, to cook, shop, clean and to get out and function in the community. The appellant states that he is depressed, isolated and lonely and that one of his four sisters comes over once a week to help him as well as calling him to make sure that he is okay.

### *Panel Decision*

The physician indicates that the appellant does not require any prostheses or aids for his impairment but the physician does not provide any information about assistance that the appellant needs with DLA. In the AR, the psychiatrist indicates that the appellant does not have an assistance animal and is not functioning at present, but she does not provide any further information to describe what assistance the appellant needs with DLA.

Although the panel finds that the appellant has some help with some tasks from one of his sisters, a finding that a severe impairment directly and significantly restricts a person's ability to manage his DLA either continuously or periodically for an extended period is a precondition to a person requiring "help" as defined by section 2(3)(b) of the EAPWDA.

As the panel finds that the ministry reasonably determined that the appellant does not have a severe impairment that directly and significantly restricts his ability to manage his 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 his 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 mental or physical impairment that in the opinion of a medical practitioner is likely to continue for at least 2 years as required by EAPWDR section 2(2)(a) was reasonable. The panel also finds that the ministry's reconsideration decision which found that the information did not establish that the appellant has a severe mental or physical impairment that directly and significantly restricts his ability to perform DLA either continuously, or periodically for extended periods, and as a result of those restrictions requires help to perform DLA as required by



EAPWDR section 2(2)(b) was reasonable based on the evidence and was a reasonable application of the legislation in the circumstances of the appellant . The panel therefore confirms the ministry's decision and the appellant is not successful in his appeal.