

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of November 29, 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 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:

- Letter from the appellant's general practitioner (the "physician") dated January 20, 2016
- The appellant's PWD application form consisting of the appellant's self-report form that he chose not to complete dated June 23, 2016 ("SR"), a physician's report dated May 26, 2016 ("PR") and an assessor's report dated June 29, 2016 ("AR") both completed by the physician.
- Letter from the physician dated November 2, 2016
- The appellant's Request for Reconsideration ("RFR") form dated November 3, 2016 indicating that he disagrees with the reconsideration decision
- Letter from a legal advocate dated November 15, 2016
- Help Sheet 2 – The PWD Application Checklist of DLA dated December 7, 2016 (the "Checklist") completed by the appellant

### Diagnoses

- In the PR the physician indicates that the appellant has been diagnosed with hepatitis C (date of onset unknown), atrial septal defect ("ASD") (date of onset January 2016), bronchiectasis, fetal alcohol spectrum disorder ("FASD"), and is hearing impaired (date of onset all unknown). In the AR the physician indicates that he has known the appellant for 7 months and seen him 2-10 times during that period.
- In the physician's letter dated January 20, 2016, the physician indicates that the appellant has a hole in his heart that has probably been there since birth.
- In his letter dated November 2, 2016 the physician indicates that the appellant has been diagnosed with FASD, which is a lifelong condition.

### Physical Impairment

- In the physician's letter dated January 20, 2016, the physician indicates that the hole in the appellant's heart is probably causing some shortness of breath and that he has referred the appellant for a surgical consult to see if it can be repaired.
- In the Health History portion of the PR the physician indicates that the appellant has multiple medical conditions. The physician indicates that his hepatitis C is stable and he is awaiting consult with an infection disease specialist. His ASD is newly diagnosed and he is awaiting assessment by an adult congenital heart disease clinic to determine if surgical treatment is necessary.
- In terms of physical functioning, the physician reported in the PR that the appellant can walk 4+ blocks unaided, can climb 5+ steps unaided, and that his limitations with respect to lifting and remaining seated are unknown.
- In the AR the physician reports that the appellant is independent with all aspects of mobility and physical ability including walking indoors, walking outdoors, climbing stairs, standing, lifting, and carrying and holding. The physician comments that that the appellant does not have any mobility/physical restrictions.

### Mental Impairment

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- In the Health History portion of the PR the physician indicates that the appellant's FASD results in the appellant having difficulty with speech and explaining himself and that he struggles with executive functioning and planning. The physician indicates that this affects the appellant's ability to be employable.
  - In the Functional Skills section of the PR, the physician indicates that the appellant has difficulties with communication due to cognitive causes.
  - In the Functional Skills portion of the PR the physician indicates that the appellant has significant deficits with cognitive and emotional function in the areas of executive, language and memory, commenting that the appellant struggles with speech and comprehension.
  - In the AR the physician indicates that the appellant's ability to communicate with writing is satisfactory but that with speaking, reading and hearing it is poor. The physician indicates that the appellant's FASD affects his ability to read and write and that he is waiting for hearing aids.
  - In the AR the physician indicates the following with respect to cognitive and emotional functioning: the appellant has one major impact to other neuropsychological problems; four moderate impacts to the areas of attention/concentration, executive, memory and language; three minimal impact to the areas of impulse control, insight and judgment, and motivation; and no impact to the remaining areas of bodily functions, consciousness, emotion, psychotic symptoms and other emotional or mental problems. The physician comments that the appellant has no physical issues that prevent him from managing DLA's but he has significant difficulty with executive planning and memory, which makes it difficult for him to remember appointments and do problem solving.
  - In his letter dated November 2, 2016 the physician indicates that the appellant's FASD causes impairment in the appellant's cognitive and emotional functioning. The physician indicates that when he went through the PWD application form he wondered if the appellant fully understood the questions being asked of him. The physician indicates that as a result of his FASD the appellant lacked the insight and comprehension to appropriately respond to many of the questions on the form. The physician indicates that the appellant struggles with comprehension and it takes multiple attempts at explaining something for him to eventually understand. When asked a specific question, he often responds with a tangential and inappropriate answer. His speech is difficult to understand, as he has trouble with articulation. The physician states that the appellant's FASD is a lifelong issue that is not expected to improve, that the appellant has significant impairments in multiple areas and he should qualify as a PWD.
  - The advocate's letter states that the appellant does not have access to a designated assessor or other supports such as a life skills worker or community worker in their small, remote community. The advocate states that with respect to the PWD application form the appellant advised that he did not really understand the questions the physician was asking him and has become accustomed to coping by answering inappropriately or in a way that does not answer the question being asked. The advocate states that this significant impairment in communication is consistent with the appellant's impairment in all of their encounters with him. The advocate also notes that the ministry workers have also reported to the advocate that the appellant has problems with communication and understanding what is said to him and that he requires assistance. The advocate indicates that the appellant reports that his severe mental impairment causes him a great deal of stress, frustration, and anxiety.
  - On the Checklist the appellant indicates that he struggles with motivation regarding his personal care routines, keeping his home clean, remembering to take medications and meal

planning. He states that because of his mental health disability he experiences a lot of anxiety, agitations, stress or depression, experiences a lot of confusion, has difficulty making decisions and planning ahead, has difficulty remembering information, difficulty asking for help when he needs it and difficulties with communication.

#### DLA

- In the PR the physician indicates that the appellant has not been prescribed medications that interfere with his ability to perform DLA.
- In the PR the physician indicates that the appellant is not restricted with respect to personal self-care, meal preparation, basic housework, mobility inside the home or mobility outside the home. The physician indicates that the appellant's ability with respect to management of medications, use of transportation and management of finances is unknown. The physician indicates that the appellant's restriction with social functioning is continuous, explaining that the appellant has trouble speaking, understanding and difficulty with executive function and planning. With respect to the degree of restriction the physician indicates that it is lifelong.
- In the AR the physician indicates that the appellant is independent with all aspects of personal care, basic housekeeping, shopping, meals, paying rent and bills, medications and transportation, noting that the appellant does not have any issues with any aspects of DLA. With respect to social functioning the physician indicates that the appellant is independent in all listed areas and that he has good functioning with respect to his immediate and extended social networks. The physician comments that despite FASD the appellant is very social and interacts well with others.
- In his letter dated November 2, 2016 the physician indicates that the appellant requires reminders from the physician's medical office assistant to attend his medical appointments and that the assistant has had to assist the appellant in arranging his transfers and accommodations for medical appointments outside of their community. The physician indicates that the appellant frequently attends his office with forms and letters from the government requiring assistance to interpret them. The physician states that he believes that the appellant is independent with his "ADLs" but he questions whether the appellant is fully competent to be managing his "IADLs" such as shopping and finances. The physician states that he has observed many qualities in the appellant that should make him qualify as a PWD.
- The advocate letter states that the appellant has trouble remembering items at the store, understanding finances and requires help managing and being aware of time. The advocate reports that in terms of social relationships he is easily taken advantage of and has troubles with boundaries, responding appropriately, requires repetition from others to understand them, and is difficult to understand. The advocate states that these impairments occur in all aspects of the appellant's life including stores, at the college where he is pursuing adult basic education, the bank, with family members who are trying to assist him and informal social relationships. The advocate states that this does not demonstrate independent social functioning and demonstrates that the appellant has significantly impaired social and emotional functioning.
- In the Checklist the appellant indicates that he has trouble remembering or having the motivation to do at least basic hygiene daily, difficulties understanding recipes, remembering to take food off the stove or out of the oven, remember or having the motivation to eat regular meals and healthy foods, remembering to get prescriptions filled and take medications, keeping his home clean, shopping for personal needs, managing personal finances and community with others due to difficulty hearing and difficulty making others understand what

he is saying.

Help

- In the PR, the physician indicates that the appellant requires hearing aids for his impairment.
- The physician also indicates that the appellant often requires the physician's medical office assistant to call to remind him about appointments.
- In the AR the physician indicates that help required for DLA is provided by community service agencies. The physician further comments that no help is provided for "ADL's" but that the appellant does need help with remembering to attend appointments and explaining himself. The physician notes that the appellant unfortunately does not have a social worker to help him but he is working on establishing this for him. The physician indicates that the appellant does not require any assistance equipment or devices. The physician indicates that the appellant does not have an assistance animal.
- The appellant's advocate states that she has assisted the appellant several times in the past year on different matters as he has required assistance to place phone calls and to communicate with other agencies and family members. The advocate states that the appellant's niece asserts that the appellant needs assistance in understanding what is required of him, and with taking instructions from others as he needs instructions broken down and assistance with completing steps.
- In the Checklist the appellant indicates that he gets or needs help from community agencies, counselors, family members, friends, health professionals, volunteers and other (random people including bank teller, person at till at store, or neighbors). He also indicates that he needs hearing aids.

In his Notice of Appeal dated December 7, 2016 the appellant states that the reconsideration decision did not consider or acknowledge all the information. The appellant states that the physician stated that his impairments are severe and that the ministry representatives acknowledged that the appellant needs assistance with DLA's and understanding requests. The panel has accepted the information in the Notice of Appeal as argument.

The appellant did not attend the hearing. Having confirmed that the appellant was notified of the hearing, the panel proceeded with the hearing pursuant to EAR section 86(b).

At the hearing, the ministry relied on the reconsideration decision. The ministry representative stated that he had spoken with the EAW whom the appellant deals with occasionally. The EAW advised him that once when the appellant had to travel to another city for a medical appointment, the ministry funded an escort for the trip. The ministry representative note that this need for help was under unusual or exceptional circumstances.

## 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 physical or mental impairment, and 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:**

#### **Persons with disabilities**

**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 is in a prescribed class of persons or that the person has a severe mental or physical impairment that

(a) in the opinion of a medical practitioner or nurse 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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### **Severe Physical Impairment**

The ministry's position, as set out in its reconsideration decision, is that the information provided is not evidence of a severe physical impairment. The ministry states that in the PR the physician indicates that the appellant can walk 4+ blocks unaided and can climb 5+ steps unaided and that the appellant's limitations with respect to lifting and remaining seated are unknown. The ministry acknowledges that the physician indicates that the appellant's ability to communicate is poor due to the FASD and need for hearing aids but that the appellant is reported to be independent with all DLA and does not take significantly longer with any physical activities. The ministry's position is that as the physician has not reported any mobility or physical restrictions, the information provided does not indicate that the appellant has a severe physical impairment.

The appellant's position is that he has a severe lifelong physical impairment resulting from FASD, hepatitis C, atrial septal defect, and being hearing impaired. The appellant's position is that the

information provided by the physician supports a finding that he has a severe physical impairment.

### *Panel Decision*

A diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a severe impairment. An impairment is a medical condition that results in restrictions to a person's ability to function independently or effectively. Likewise the use of the word "severe" in and of itself does not establish a severe impairment.

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 information provided demonstrates that the appellant has been diagnosed with hepatitis C, atrial septal defect, bronchiectasis, FASD and is hearing impaired. However, despite these medical conditions, the physician indicates that the appellant is able to walk 4+ steps unaided, can climb 5+ steps unaided, and that his limitations with respect to lifting and remaining seated are unknown. The physician indicates that the appellant is independent with all DLA's and in the AR the physician specifically states that the appellant has no mobility or physical restrictions.

The panel finds that based on the information as a whole, the ministry reasonably determined that the information provided speaks to a moderate rather than severe physical impairment.

### **Severe Mental Impairment**

The ministry's position is that although the PR indicates that the appellant has significant deficits in with cognitive and emotional functioning in the areas of executive functioning, language and memory and that the appellant struggles with speech and comprehension and that his FASD affects his ability to read and write, the physician indicates that despite the appellant's FASD he is very social and interacts well with others. The ministry notes that in the AR, the physician indicates that the appellant's mental impairment has moderate impacts to attention/concentration, executive thinking, memory, and language and one major impact in the area of other neuropsychological problems, but that the physician did not provide an explanation as to what this is, nor was a learning disability diagnosed.

The ministry notes that the physician reports minimal to no impact in all other areas of cognitive and emotional functioning and states that he believes that the appellant is independent with "ADL's" but questions whether he is fully competent to manage his "IADL's" such as shopping and finances. The ministry's position is that while the appellant has identified mental impairments, he lives independently, does not require help with the majority of his DLA's, and the majority of his cognitive and emotional functioning is not majority affected. The ministry's position is that while it appears that the appellant gets some help with executive functioning and planning, it has not been established that he has a severe mental impairment.

The ministry also states that while it is reported that FASD affects the appellant's employability, that is not a factor when determining the PWD designation.



The appellant's position is that the information from the physician demonstrates that he has a severe mental impairment and that even the ministry workers have acknowledged that he needs help and have provided him with some assistance. The appellant also argues that the reconsideration decision did not consider or acknowledge all of the information provided by the physician.

*Panel Decision*

In the PR, the physician indicates that the appellant has significant deficits with cognitive and emotional function in the areas of executive, language, and memory, commenting that the appellant struggles with speech and comprehension. However, in the AR the physician indicates that the appellant has only moderate impact in the areas of attention/concentration, executive, memory and language. While the physician indicates in the AR that the appellant has only one major impact in the area of other neuropsychological problems the physician does not provide further explanation of this aspect of the appellant's impairment. The physician comments that the appellant has significant difficulty with executive planning and memory, which makes it difficult for him to remember appointments and do problem solving.

In the letter from the physician dated November 2, 2016 the physician states that the appellant's FASD causes impairment in the appellant's cognitive and emotional functioning. The physician indicates that when he went through the PWD questionnaire with the appellant, he was alone answering the questions for himself without assistance and the physician wondered at times if the appellant fully understood the questions being asked of him. The physician indicates that as a result of his FASD, the appellant lacks the insight and comprehension to appropriately respond to many of the questions on the form. While the physician states that he has observed many qualities in the appellant that should make him qualify for PWD designation, the physician has only indicated that the appellant has a major impact to one area of cognitive and emotional functioning. The physician indicates that the appellant has required assistance from the physician's medical office assistant in remembering appointments and in arranging transportation to other medical appointments. In the panel's view, the information provided in the physician's letter seems to indicate a more serious impairment than indicated in the PR and the AR, but the physician has not provided any further information or explanation for the inconsistencies between his letter and the information provided in the PR and the AR.

In addition, while the physician indicates that the appellant struggles with speech and comprehension and that his FASD affects his ability to read and write, the physician also indicates that despite the appellant's FASD, he is very social and interacts well with others.

While the information provided by the appellant in the Checklist is partially corroborated by the physician's information, there are several items reported by the appellant that are either not corroborated by the physician or are inconsistent with the information provided by the physician. For example, the appellant indicates that he experiences a lot of anxiety, agitation, stress or depression, and he reports considerable difficulty with socializing without becoming anxious or scared, and that he has difficulty interacting with friends, family and strangers.

While it may be that the appellant did not understand the questions asked of him by the physician in completing the PWD application form, the inconsistencies in the information make it difficult to determine the extent of the appellant's impairment.

The panel notes that the ministry did not go through a detailed analysis of the information provided with the RFR, particularly the physician's letter, the letter from the advocate and the Checklist. While that would be helpful for the appellant to understand the ministry's position, the reconsideration decision does indicate that the ministry did review the information provided in the PWD application and the RFR.

Given the information provided, the panel finds that the ministry was reasonable in determining that the cumulative impact to cognitive and emotional functioning is not indicative of a severe mental impairment.

### **Significant Restrictions to DLA**

The reconsideration decision states that the minister is not satisfied that the appellant has a severe impairment that, in the opinion of a prescribed professional, directly and significantly restricts his ability to perform DLA continuously or periodically for extended periods. The ministry's position is that the information provided demonstrates that the appellant functions primarily independently and that his impairment has not been demonstrated to be a direct and significant restriction to his overall functioning continuously or periodically for extended periods.

The appellant's position is that due to his impairments he has difficulty with DLA of personal care, preparing and eating meals, taking medications, housework, shopping, managing personal finances and communication. The appellant's position is that he meets the legislative criteria.

#### *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 applicant'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 of the restriction. 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 information in the PR indicates that the appellant is not restricted with respect to personal self care, meal preparation, basic housework, mobility inside the home, and mobility outside the home. The physician indicates that it is unknown if the appellant's impairment restricts his DLA of management of medications, use of transportation or management of finances. The physician indicates that the appellant has a continuous restriction with social functioning explaining that the appellant has trouble speaking and understanding and difficulty with executive function and planning. In the AR however, the physician indicates that the appellant is independent with all aspects of DLA commenting that there are "no issues". The physician also indicates that with respect to social

functioning the appellant has good relationships with his immediate and extended social networks and that despite his FASD he is very social and interacts well with others.

In the physician's letter dated November 2, 2016 he states that he believes the appellant is independent with his "ADLs" but he questions whether he is fully competent to be managing his "IADLS such as shopping and finances". However, the physician does not provide any further information to explain why he reported the appellant as independent with all aspects of shopping, finances, medications and transportation if he is unsure of the appellant's abilities or if he believes that the appellant is not independent in these areas.

The information from the ministry representative, the advocate, the appellant and the physician all indicate that the appellant requires assistance with making and remembering appointments and assistance with understanding information. The information from the appellant in the Checklist indicates that he has more difficulty with DLA, including difficulties with personal care routines, preparing and eating meals, remembering to take medications, doing housework, shopping, managing personal finances and communication but the information from the physician, the appellant's prescribed professional, does not corroborate the appellant's information making it difficult to obtain a clear picture of the appellant's level of independence with his DLA.

Given the inconsistencies between the appellant and the physician's information, the lack of further information from the physician regarding the appellant's restrictions to his DLA, and the physician's information which indicates that the appellant is independent with the majority of his DLA, the panel finds that the ministry reasonably determined that the appellant's impairment does not significantly restrict DLA either continuously or periodically for extended periods as required by EAPWDA section 2(2)(b)(i).

### **Help with DLA**

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

The appellant's position is that he requires help with DLA, particularly remembering to perform activities involving personal care, housework, meal preparation, taking medications, basic housework, shopping, managing personal finances and communication with others. The appellant also indicates that he needs hearing aids. In the Checklist, the appellant indicates that he gets or needs help from community agencies, counselors, family members, friends, health professionals, volunteers and other (random people including bank teller, person at till at store, or neighbors).

### ***Panel Decision***

In the PR, the physician indicates that the appellant requires hearing aids for his impairment. The physician also indicates that the appellant often requires the physician's medical office assistant to call to remind him about appointments.

In the AR the physician indicates that help required for DLA is provided by community service agencies. The physician further comments that no help is provided for "ADL's" but that the appellant

does need help with remembering to attend appointments and explaining himself. The physician notes that the appellant unfortunately does not have a social worker to help him but he is working on establishing this for him. The physician indicates that the appellant does not require any assistance equipment or devices. The physician indicates that the appellant does not have an assistance animal.

The appellant's advocate states that she has assisted the appellant several times in the past year on different matters as he has required assistance to place phone calls and to communicate with other agencies and family members. The advocate states that the appellant's niece asserts that the appellant needs assistance in understanding what is required of him, and with taking instructions from others as he needs instructions broken down and assistance with completing steps.

Although the appellant receives some assistance from his physician's medical office assistant, community advocate, friends and family, and requires hearing aids, 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.

The panel finds that the ministry's decision that the appellant did not satisfy the legislative criteria of EAPWDA section 2(3)(b) was therefore reasonable.

### **Conclusion**

The panel acknowledges that the appellant has FASD and other medical conditions that impact his functional ability and ability to perform some DLA. However, having reviewed and considered all of the evidence and the relevant legislation, the panel finds that the ministry's decision finding the appellant ineligible for PWD designation is reasonable based on the evidence and is a reasonable application of the legislation in the circumstances of the appellant.

The panel therefore confirms the ministry's reconsideration decision and the appellant is not successful in his appeal.