

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated February 8, 2017, which found that the appellant did not meet three of the five statutory requirements of Section 2 of the *Employment and Assistance for Persons with Disabilities Act* for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement and that his impairment is likely to continue for at least two years. However, 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,
- as a result of these restrictions, the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

## 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

### **Evidence before the Ministry at Reconsideration**

The evidence before the ministry at the time of the reconsideration decision included the PWD Application comprised a physician report (PR) dated September 7, 2016 completed by the appellant's general practitioner (the GP), who has seen the appellant once in the past year and who has known the appellant for one month, due to retirement of the appellant's former family doctor. The appellant did not complete a self report.

The evidence at reconsideration also included the appellant's request for reconsideration received by the ministry on January 20, 2017 with the following attachments:

- January 6, 2017 letter from the appellant, summarized as follows:
  - as a person with high-functioning Autism he has social problems because he looks at things from a different perspective, which also causes him to think differently from others;
  - he was treated as a special needs student in school, where he was excluded by other students. As a result he avoids social contact;
  - he finds it difficult to make eye contact and use body language;
  - he may experience high anxiety when under pressure;
  - he struggles every day to understand social protocols and fears that he may not be able to function on his own when his parents die;
  - he has experienced depression, anxiety and paranoia, and sometimes thinks about suicide.
- January 6, 2017 letter from the appellant's father, summarized as follows:
  - the appellant has several issues, including emotional and social disabilities and chronic asthma, that prevent him from holding a job;
  - he sees the difficulties experienced by the appellant daily which affect every aspect of his life;
  - he worries about who will support the appellant after his death.

### **Diagnosis**

In the PR the GP notes the following diagnoses related to the appellant's impairment: Autism Spectrum Disorder (onset 1997), Asthma (onset not noted).

### **Physical Impairment**

In the PR the GP reported that the appellant:

- walks 4+ blocks unaided;
- climbs 5+ steps unaided;
- has no limitations in lifting;
- has no limitation to remaining seated.

The GP also noted that dust at a veneer plant where the appellant once worked exacerbated his asthma. He added that the appellant does not require prostheses or aids

In the AR the GP did not answer Question #1 asking for a description of the appellant's mental or physical impairments. The GP reported that the appellant:

- has a good ability to communicate (speaking, reading, writing, hearing);
- is independent with mobility and physical ability (walking indoors and outdoors, climbing stairs, standing, lifting, carrying and holding).

## **Mental Impairment**

In the PR the GP noted that the appellant has significant deficits in cognitive and emotional functioning in the following 4 areas: Executive (planning, organizing, sequencing, calculations, judgment), Emotional disturbance (depression, anxiety), Motivation (loss of initiative or interest) and Attention or sustained concentration. The GP also commented: *“above marked [areas] affected significantly; needs to be careful with overstimulation”*.

In the AR the GP assessed the appellant’s ability to communicate as good for speaking, reading, writing, and hearing. In the area of cognitive and emotional functioning the GP noted that the appellant has the following impacts:

Major impact: emotion, attention/concentration, executive

Moderate impact: memory

Minimal impact: bodily functions, psychotic symptoms

No Impact: consciousness, impulse control, insight and judgement, motor activity, language, other neuropsychological problems, and other emotional or mental problems.

The GP commented: *“Spends a lot of time in isolation. Short term memory affected. Mild paranoia.”*

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

In the AR the GP noted that the appellant is independent in all areas of personal care, shopping, meals, paying rent and bills, medications (taking, handling and filling/refilling prescriptions) and transportation but requires periodic assistance from another person in basic housekeeping, meal planning, food preparation and cooking, commenting: *“Dad does most of the cooking. [The appellant] gets around using bicycle/walking. does not have a driver’s licence – scared to drive.”*

In the category of social functioning the GP noted that the appellant requires continuous support/supervision in the following areas:

Appropriate social decisions (including avoiding situations dangerous to self or others, good social judgement);

Ability to develop and maintain relationships;

Interacting appropriately with others (eg. understands and responds to social cues; problems solves in social context);

Ability to deal appropriately with unexpected demands.

The GP added that the appellant’s mental impairment impacts his immediate social network (eg. partner, family, friends) with very disrupted functioning (aggression or abuse: major withdrawal; often rejected by others), commenting: *“Withdrawn; does not have social network outside his family”*, and impacts his extended social networks (overly disruptive behaviour: major social isolation) with very disrupted functioning as well: (*“social isolation”*).

## **Assistance Required**

In the AR the GP noted that help for DLA is provided by family, and that the appellant does not require an assistive device or an assistance animal.

## **Notice of Appeal**

With his Notice of Appeal dated February 17, 2017 the appellant appended 28 pages of documents providing additional details from his pediatrician (1999), school psychologist, learning assistance

provider and coordinator of special education. The documents provided additional details of the impact of the appellant's mental disorder upon his education from preschool to high school and his failure to develop peer to peer relationships.

### **Additional Information at the Hearing**

The appellant was present at the hearing but was uncomfortable with speaking or answering questions. He asked that his family members offer evidence on his behalf.

### **Evidence of the Appellant's Father ("F")**

F stated that the appellant has lived with him since he finished school, approximately 4 years ago. He has to supervise the appellant constantly, for a number of reasons:

- he piles up large amounts of toilet paper in the kitchen, bedroom and bathroom, without regard to fire. F is always worried that the appellant will start a fire. It is one of his worst fears, and he must be vigilant at all times. When he tells the appellant not to put paper around the stove the appellant gets angry.
- the appellant does not retain information/instructions given to him by F;
- the day before this hearing F woke up to a burning smell. The appellant left a plastic handle on a hot element and set the handle on fire;
- F cannot leave him alone overnight;
- F supervises the administration of the appellant's medications;
- the appellant is able to shop on his own and pay his phone and internet bills;
- the appellant is able to attend to his personal hygiene when prompted, but does not appreciate the need to clean up the bathroom or bedroom. F leaves the mess alone in the hope that the appellant will realize that cleaning up is a necessary chore, but most of the time F does it himself;
- the appellant spends most of his time in his room. He gets mentally tired.

### **Evidence of the Appellant's Mother ("M")**

M stated that the appellant is unable to care for himself and requires supervision every day. Because he can't communicate appropriately he is misunderstood by the people he encounters, and can't hold a job. He can cook something simple, like macaroni and cheese, but only under supervision. M added that he panics when something goes wrong, for example when he plugged in an electric item while the floor was wet, despite being told not to do so by M.

M also explained that they had delayed making a PWD application on the appellant's behalf because they were hopeful that he might be able to manage his life with job and life skills training. In the meantime the appellant's family doctor retired, and there are no family doctors taking patients in the city where they reside. For this reason they have had only 2 meetings with the GP, who practices out of a walk-in clinic. M believes that the GP wrongly concentrated on the appellant's asthma, and minimized the appellant's ability to perform DLA, and that he is moderately impacted in the areas of toileting, impulse control, judgement, motivation, language (trouble expressing himself). M acknowledged that she was present while the GP conducted the PWD interview/assessment.

### **Evidence of the Appellant's Sister ("S")**

S told the panel that she is 3 years younger than the appellant but had to help him to get through school because he couldn't do presentations alone. He can't understand sarcasm, and the family has to explain ahead of time when they are about to tell a joke. She added that he feels threatened

by people, and has to have conversations explained to him later in order to understand what the conversation was about.

**Admissibility of Additional Information**

The Ministry representative did not object to the admission of the documentary evidence submitted with the appellant's notice of appeal or to the oral evidence of the witnesses F, M and S.

The panel considered the documentary evidence and admitted it under EAA Section 22 (4) (b) as evidence in support of the information before the ministry at reconsideration because it provided a historic foundation related to the appellant's diagnosis of Autism Spectrum Disorder.

The panel also admitted the oral evidence of witnesses F, M and S because it provided greater detail of the severity of the mental impairment that was reviewed by the ministry at reconsideration and its impact on his ability to perform DLA.

## PART F – Reasons for Panel Decision

The issue in this appeal is whether the ministry decision of February 8, 2017 that determined that the appellant did not meet three of the five statutory requirements of Section 2 of the *Employment and Assistance for Persons with Disabilities Act* for designation as a person with disabilities (PWD) is reasonably supported by the evidence or is a reasonable application of the legislation in the circumstances of the appellant. The ministry found that the appellant met the age requirement and that his impairment is likely to continue for at least two years. However, 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,
- as a result of these restrictions, the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal 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 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:**

**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.

**(2)** For the purposes of the Act, "**prescribed professional**" means a person who is

(a) authorized under an enactment to practise the profession of

- (i) medical practitioner,
- (ii) registered psychologist,
- (iii) registered nurse or registered psychiatric nurse,
- (iv) occupational therapist,
- (v) physical therapist,
- (vi) social worker,
- (vii) chiropractor, or
- (viii) nurse practitioner, or

(b) acting in the course of the person's employment as a school psychologist by

- (i) an authority, as that term is defined in section 1 (1) of the *Independent School Act*, or
- (ii) a board or a francophone education authority, as those terms are defined in section 1 (1) of the *School Act*,

if qualifications in psychology are a condition of such employment.

**Severe Physical Impairment**

The position put forward by the appellant at the hearing is that although he suffers from asthma his daily functioning is not severely limited by his physical impairment.

The ministry's position is that the appellant's physical impairments are not severe because in the PR

[ ]

the GP indicates that the appellant can walk 4+ blocks unaided, climb 5+ stairs unaided, and has no restriction in lifting or remaining seated. In the AR the GP confirms that the appellant is independent with walking indoors, walking outdoors and standing, climbing stairs, lifting, carrying and holding. His ability to communicate (speaking, reading, writing, hearing) is also good.

Panel Decision

A diagnosis of a serious medical condition does not in itself determine PWD eligibility. Under the legislation, eligibility for PWD hinges on an “impairment” and its severity. “Impairment” is more than a diagnosed medical condition. An impairment is a medical condition that results in restrictions to a person’s ability to function independently, appropriately, effectively or for a reasonable duration.

To assess the severity of 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 the ability to perform 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. The legislation requires that for PWD designation, the minister must be “satisfied” that the person has a severe mental or physical impairment.

Although the appellant has indicated that he was unable to work at a veneer plant due to his asthma the PR and AR indicate that he is physically unrestricted. The evidence of the appellant and witnesses do not conflict with the findings of the GP. The panel therefore finds that the ministry was reasonable in determining that the assessments and evidence of the appellant and witnesses were not sufficient to establish a severe physical impairment.

**Severe Mental Impairment**

The appellant’s position is that he suffers from Autism Spectrum Disorder which has seriously affected his life since he was a small child. He has been unable to work with others or to associate with them socially. He misunderstands social cues and avoids eye contact with others. He has experienced severe depression, anxiety and paranoia, and has thought about suicide.

The ministry’s position is that the information provided by the GP in the PR and AR is insufficient to demonstrate a severe impairment in mental functioning.

Panel Decision

The evidence submitted by the appellant through witnesses F, M and S indicates that the appellant is profoundly impacted by his mental impairment. He is unable to make appropriate decisions and on more than one occasion has risked his own safety and the safety of others by unsafe fire-starting behaviours and by plugging in an electrical item while surrounded by a wet floor. The evidence of F and M indicates that he has difficulty retaining instructions, panics when faced with a sudden problem, requires supervision in the kitchen and cannot be left alone overnight.

In the PR the GP indicates that the appellant has significant deficits with cognitive and emotional functioning in the areas of executive, emotional disturbance, motivation and attention or sustained concentration, commenting that these areas are “*affected significantly; needs to be careful with overstimulation.*” In the AR the GP notes that the appellant’s mental impairment has major impacts in emotion, attention/concentration and executive functions, as well as a moderate impact in memory. The GP comments: “*Spends a lot of time in isolation. Short term memory affected. Mild paranoia*”. In



Part C he indicates that the appellant requires continuous support/supervision with all aspects of social functioning, including making appropriate social decisions, developing and maintaining relationships, interacting appropriately with others, and dealing appropriately with unexpected demands. He assesses the appellant's functioning with immediate and extended social networks as very disrupted.

In the reconsideration decision the ministry acknowledges that the appellant has a severe restriction in his ability to relate to, communicate and interact with others, and that his ability to manage social functioning is severely restricted, but finds that overall mental functioning is not severely impaired.

Considering the GP's assessment of *significant* deficits with cognitive and emotional functioning in the PR and *major* impacts to 3 areas of cognitive and emotional functioning in the PR, and taking into consideration the details provided by the appellant (in his January 6, 2017 letter) and by F and M to illustrate these deficits, the panel finds the ministry was not reasonable in determining that the information provided was insufficient to establish a severe mental impairment.

### **Restrictions in Ability to Perform DLA**

The appellant's position is that as a result of his severe mental impairment he is restricted in performing several aspects of DLA, including basic housekeeping, meal planning, food preparation, cooking and all areas of social functioning.

The ministry's position is that the GP has not provided sufficient information to establish that the appellant's ability to manage his DLA is significantly restricted either continuously or periodically for extended periods of time.

### *Panel Decision*

The legislative requirement respecting DLA set out in section 2(2)(b) of the EAPWDA is that the minister be satisfied that as a result of a severe physical or mental impairment a person is, in the opinion of a prescribed professional, directly and significantly restricted in the ability to perform DLA either continuously or periodically for extended periods. Consequently, while other evidence may be considered for clarification or support, the ministry's determination as to whether or not it is satisfied, is dependent upon the evidence from prescribed professionals. DLA are defined in section 2(1) of the EAPWDR and are listed in both the MR and the AR sections of the PWD application with the opportunity for the prescribed professional to check marked boxes and provide additional narrative.

In the appellant's case the GP is the sole prescribed professional providing an opinion regarding ability to perform DLA. The GP indicates that the appellant is independent in all areas of DLA except basic housekeeping and meals (meal planning, food preparation, cooking), with which he requires periodic assistance, and social functioning, with which he requires continuous support/supervision. The GP does not explain how frequently the appellant requires assistance with basic housekeeping and meals, commenting only that "*Dad does most of the cooking*". Although the GP indicates that the appellant requires continuous support in all areas of DLA related to social functioning, he does not include any explanatory comments respecting the degree of supervision required.

The GP also indicates that the appellant's mental impairment causes very disrupted functioning in his immediate and extended social networks. While this information is helpful in determining the severity of the appellant's mental impairment it is not by itself sufficient to establish that overall the appellant's

[ ]

severe mental impairment directly and significantly restricts the person's ability to perform DLA either continuously or periodically for extended periods.

At the hearing the panel heard compelling evidence from F and M that the appellant's mental impairment directly and significantly restricts his ability to perform DLA. However, the legislation clearly states that information concerning direct and significant restrictions to DLA must come from the prescribed professional. In this instance, the panel finds that the ministry reasonably determined that the information provided by the prescribed professional does not establish that the appellant's mental impairment significantly restricts his ability to perform DLA either continuously or periodically for extended periods as required by section 2(2)(b)(i) of the EAPWDA.

### **Help in Performing DLA**

The appellant's position is that he requires the assistance of his family to perform many of his DLA, including housekeeping, meal planning, preparation, cooking and all areas of social functioning.

The ministry's position is that because it has not been established that DLA are significantly restricted, it cannot be determined that help is required.

### *Panel Decision*

Section 2(2) (b) (ii) of the EAPWDA requires that, as a result of direct and significant restrictions in the ability to perform DLA, a person requires help to perform those activities. Help is defined in subsection (3) as the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform a DLA.

In the PR the GP does not answer the question: "What assistance does your patient need with DLA?" In the AR the GP indicates that help with DLA is provided by family, but offers no additional information or comments.

The establishment of direct and significant restrictions with DLA is a precondition of the need for help criterion. As the panel found that the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established, the panel also finds that the ministry reasonably concluded that it cannot be determined that the appellant requires help to perform DLA as required by section 2(2)(b)(ii) of the EAPWDA.

### **Conclusion**

Having reviewed and considered all of the evidence and relevant legislation, the panel finds that the portion of the ministry's reconsideration decision which determined that the appellant does not have a severe mental impairment was not reasonably supported by the evidence. Notwithstanding the panel's finding on the severity of the appellant's mental impairment, the panel finds that the remainder of the reconsideration decision, which determined that the appellant was not eligible for PWD designation because the remaining criteria for eligibility set out in EAPWDA Section 2 (2)(b)(i) and (ii) were not met was reasonably supported by the evidence, and therefore confirms the decision. The appellant is not successful on appeal.