

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the Ministry) reconsideration decision dated May 4, 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 her 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

The evidence before the Ministry at the time of the reconsideration decision included the PWD Application. The PWD Application comprised an applicant information and self report (SR) dated December 7, 2016, a physician report (PR) dated December 19, 2016 and completed by the Appellant's general practitioner (GP), and an assessor report (AR) also dated December 19, 2016 and also completed by the GP. In the AR the GP stated that he had known the Appellant for less than one year and indicated in both the PR and the AR that he had seen her 2 - 10 times in the past year.

The evidence also included the following document:

Request for Reconsideration (RFR) signed by the Appellant on May 3, 2017 stating that her reason for the RFR is that:

- Her GP did not include relevant additional information in Section E of the AR;
- She is restricted in her ability to perform DLA, including being unable to accomplish specific tasks that require her to be away from her home, such as shopping, taking out the garbage and attending doctor appointments, without assistance;
- Her DLA are also restricted by a sleep disorder which, together with her chronic anxiety, affects her physical health, including medical conditions, such as nausea, diarrhea, heartburn and menstrual pain which incapacitate her for an average of 30% of the time;
- She has seen specialists "without gaining any relief";
- Her GP does not seem to understand the degree to which she needs help with DLA because she has difficulties communicating with doctors about some of her problems and she would prefer to speak to a female doctor;
- She has such severe anxiety that she has "lost it", screaming irrationally on a number of occasions; and,
- She sees two counselors and a psychiatrist (the Psychiatrist) on a regular basis.

### ***Diagnoses***

In the PR, the GP diagnosed the Appellant with chronic anxiety and an unspecified personality disorder with a date of onset of 4 years ago.

### ***Physical Impairment***

In the PR, the GP states that the Appellant has not been prescribed any medications or treatments that interfere with her ability to perform DLA and that she does not require any prostheses or aids for her impairment. The GP also states that the Appellant's condition is likely to continue for two years or more. In terms of functional skills, the GP reports that the Appellant can walk 4 blocks or more on a flat surface unaided, can climb more than 5 steps unaided, can lift 5 - 15 lbs. and has no limitation as to how long she can remain seated.

In the AR, the GP reported that the Appellant is independent with all aspects of mobility and physical ability (walking indoors and outdoors, climbing stairs, standing, lifting and carrying and holding). In addition, the GP did not identify any impacts on bodily functions or motor activity.

In the SR, the Appellant did not identify any physical impairments.

## ***Mental Impairment***

In the PR, the GP reported that, in terms of health history, the Appellant has chronic anxiety exacerbated by personality components and that she requires ongoing support to “attain basic (DLA)”.

In the AR the GP rated the Appellant’s communication abilities as either good (speaking) or satisfactory (reading, writing and hearing). With respect to cognitive and emotional functioning, the GP stated that the Appellant’s mental impairment had a major impact on emotion; a moderate impact on impulse control, insight and judgement; a minimal impact on consciousness, attention/concentration, executive functions and motivation; and no impact on bodily functions, memory, motor activity, language, psychotic symptoms or other emotional or mental problems. The GP stated that the Appellant required periodic supervision with respect to making appropriate social decisions, developing and maintaining relationships, appropriate interactions with others, her ability to deal appropriately with unexpected demands and her ability to secure assistance from others. The GP did not provide any additional explanation nor describe the degree and duration of support or supervision required. The GP also indicated that the Appellant had marginal functioning with respect to her relationship with her immediate social network and with respect to extended social networks (but no further comments explaining specifically what he meant). The GP wrote “currently supported by (a community social services agency and the Psychiatrist)” as a description of the support or supervision required by the Appellant to help her maintain or improve her relationships with her immediate and extended social networks.

In the SR, the Appellant explained that her chronic anxiety keeps her from sleeping well. She said that she “sleeps all day all of the time” and cannot wake up easily. When she sleeps too long she gets so stressed out that she feels really sick when she wakes up. When she is awake during the day she is afraid to go out and needs to be accompanied by a friend because her anxiety makes her feel like she can’t be alone (she is told it’s separation anxiety). When she goes out she says that she is dizzy, light-headed, nauseous and too stressed to eat. The Appellant stated that, as she was feeling so sick all the time, she was seeing her doctor and her counselor a lot because she thought she might be really sick or dying. She now realizes that she is not physically ill and that she is not dying, but rather that she is suffering from chronic anxiety.

The Appellant explained that she has sad thoughts and worries that tend to present themselves to her as bad dreams. She said that she sometimes wakes up screaming and calling out for help and that sometimes she is too afraid to be able to go back to sleep after such an episode. She stated that she sees a counselor as often as she can and has been seeing the same one for 5 years now. She explained that her anxiety affects her relationships with other people, and that she will sometimes beg a friend not to leave her alone and she ends up screaming and crying, which affects her sleep and her appetite.

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

In the PR, the GP reported that the Appellant has not been prescribed any medication or treatments that interfere with her ability to perform DLA.

In the AR, the GP reported that the Appellant is independent with respect to all aspects of DLA except for making appropriate choices when shopping and paying the rent and bills. In both cases the GP indicates that the Appellant requires the periodic assistance of another person, but does not explain the frequency or duration of the periodic assistance, and does not offer any further information.

In her SR, the Appellant wrote that it's hard for her to get anything done, including going to doctor and counselor appointments, going to school, or getting groceries and essentials. If she doesn't make a list she is too flustered to remember why she went out. She stated that it usually takes her days of planning for a short trip out of her home. She explained that when she goes out she has too much anxiety to talk to people. If she knows the cashier in a store it sometimes relieves some of her anxiety. She stated that she struggles with DLA like remembering to drink water, doing her dishes, eating properly, cleaning up and doing the laundry, and that the simplest tasks are hard to complete.

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

In the PR, the GP said that the Appellant did not require any prostheses for her impairment.

In the AR, the GP wrote that the Appellant's help with DLA is provided by her family, health authority professionals and community service agencies, and that the Appellant does not have an assistance animal or use any assistive devices.

### ***Additional Information Submitted after Reconsideration***

In her Notice of Appeal (NOA) dated May 12, 2017, the Appellant wrote that her chronic anxiety affects her physical health on a daily basis and that she believes her challenges are severe in nature and drastically affect her normal functioning and her ability to perform DLA.

She also stated that her GP did not include information in Section E of the AR which she believes is relevant. (Section E asks for additional information "that may be relevant to understanding the nature and extent of the applicant's impairment and its effect on (DLA)", and this section was left blank by the GP.)

In her NOA, the Appellant reiterated several points which were made in her RFR, specifically that:

- She is restricted in her ability to perform DLA;
- Her DLA are restricted by a sleep disorder which, together with her chronic anxiety, affects her physical health, including causing medical conditions, such as nausea, diarrhea, heartburn and menstrual pain which incapacitate her for an average of 30% of the time;
- She has seen specialists without gaining any relief;
- Her GP does not seem to understand;
- She has difficulties communication with doctors about some of her problems and she would prefer to speak to a female doctor;
- She has such severe anxiety that she has "lost it" on numerous occasions; and,
- She sees a psychiatrist and two counselors on a regular basis.

At the hearing, the Appellant's advocate (the Advocate), speaking for the Appellant, stated that she had assisted the Appellant with her PWD application, but was unaware at the time that the AR could be completed by a prescribed professional other than the Appellant's GP, and that if she had known this she would have suggested to the Appellant that she have someone from the community services agency at which the Advocate works complete the AR section of the PWD application. The Advocate also stated that the Appellant was not happy with her GP. She explained that the community in which the Appellant lives does not have a lot of options for family medical care, and that the Appellant relies on these services from the community clinic. She stated that the GP appears to be a good doctor but "was not a good fit for (the Appellant)". By way of example, the Advocate stated that, when the Appellant arrived at the appointment with her GP to complete the PWD application in December 2016, the GP had pointed out to the Appellant that she had arrived at the appointment on her own.

The Advocate explained to the panel that this was not true as the Advocate had driven the Appellant to the appointment but was not able to stay with the Appellant during the appointment as she usually did because she had an important matter to attend to.

The Appellant also explained at the hearing that the GP had not completed some important parts of the PR and the AR. She provided the example of the diagnosis, where the GP had written the code for “personality disorder” but had not written down the name of the specific diagnosis in the space provided. In addition, the Appellant indicated that the GP had ticked the “no impact” box on the page of the AP opposite “bodily functions” when in fact the Appellant argued that her impairment has a severe impact on her bodily functions.

The Advocate also explained that the Appellant sees another counselor and the Psychiatrist, and that the Psychiatrist had told the Appellant that she (the Psychiatrist) did not want to add or change anything in the PR, or provide a letter providing a professional opinion in support of the Appellant’s PWD application. She explained that, when asked, the GP had refused to change anything and the Advocate felt like “he couldn’t be bothered”.

With respect to assistance required with DLA, the Appellant stated that she has a lot of “social anxiety” and cannot go out by herself. If she has to go out of the home for groceries she has to make a list first so she remembers why she is going out, and that she will usually need a friend, partner, neighbour or the Advocate to go with her. She stated that if she is having a bad day she won’t go out at all and that even her best days are challenging. As a result, it is impossible for her to plan outings in advance because she doesn’t know if she will be fit enough to go on a future date. She limits her grocery shopping to 2 or 3 times a month because she finds it difficult to go out more often.

At the hearing, the Ministry relied on its reconsideration decision and stated that the Ministry makes its decision as to whether or not an applicant qualifies for a PWD designation based on the information available when the decision is made. The Ministry explained that apart from the GP’s diagnosis of chronic anxiety, the medical conditions described by the Appellant in her SR and RFR have not been confirmed by the Appellant’s GP or any other prescribed professional, and that the GP has indicated that he sourced information from the Psychiatrist, friends, family and the Appellant’s community social services agency. The Ministry also stated that the GP did not provide a diagnosis related to any physical impairment, and that with respect to mental functioning, all impacts, where they exist, except for emotion which has a major impact, are described as having minimal or moderate impact with no description of degree and duration of support required.

### ***Admissibility of Additional Information***

Section 22(4) of the *Employment and Assistance Act* (EAA) provides that panels may admit as evidence (i.e. take into account in making its decision) the information and records that were before the minister when the decision being appealed was made and “oral and written testimony in support of the information and records” before the minister when the decision being appealed was made – i.e. information that substantiates or corroborates the information that was before the minister at reconsideration. These limitations reflect the jurisdiction of the panel established under section 24 of the EAA: to determine whether the Ministry’s reconsideration decision is reasonably supported by the evidence or a reasonable application of the enactment in the circumstances of an Appellant. That is, panels are limited to determining if the Ministry’s decision is reasonable and do not have authority to act as decision-makers of the first instance.

The panel notes that the written testimony contained in the NOA contains the same information that the Appellant provided in the RFR. Therefore, the panel admitted this additional testimony as being

in support of information and records that were before the Ministry at the time of the reconsideration, in accordance with Section 22(4)(b) of the EAA.

## PART F – Reasons for Panel Decision

The issue on the appeal is whether the Ministry's reconsideration decision, which found that the Appellant is not eligible for 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. The Ministry found that the evidence does not establish that the Appellant has a severe mental or physical impairment and that her DLA are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods. Also, as a result of those restrictions, the Ministry found that it could not be determined that 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 criteria for being designated as a PWD are set out in Section 2 of the EAPWDA as follows:

### **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.

(4) The minister may rescind a designation under subsection (2).

The EAPWDR provides as follows:

### **Definitions for Act**

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 ...

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### **Severity of Physical Impairment**

In its reconsideration decision, the Ministry was not satisfied that the information provided established a severe physical impairment.

The Appellant argues that her anxiety manifests itself physically which has an adverse effect on her DLA.

#### *Panel Decision*

The panel notes that the GP, as the prescribed professional, does not provide a diagnosis relating to a physical impairment.

The panel finds that the Ministry's determination that there is not sufficient evidence to establish that the Appellant has a severe physical impairment which directly and significantly restricts the Appellant's ability to perform DLA either continuously, or periodically for extended periods pursuant to Section 2(2) of the EAPWDA, was reasonably supported by the evidence before the Ministry at reconsideration.

### **Severity of Mental Impairment**

The Appellant's position is that her GP did not include all of the relevant additional information in the PR or the AR . She says she is restricted in her ability to perform DLA, including being unable to accomplish specific tasks that require her to be away from her home, such as shopping and attending



doctor appointments, without assistance. She also says that her DLA are restricted by a sleep disorder which, together with her chronic anxiety, affects her physical health, and that her GP does not understand the degree to which she needs help with DLA.

In its reconsideration decision, the Ministry found that the GP's assessments in the PR provided evidence of significant deficits with respect to cognitive and emotional functioning in the areas of emotional disturbance, executive functioning, motivation, impulse control and attention or sustained concentration, but no significant deficits with respect to the other areas of cognitive and emotional functioning (consciousness, language, memory, perceptual psychomotor, psychotic symptoms or motor activity). In the AR, the Ministry noted that the GP indicated major impacts to one area of cognitive and emotional functioning (emotion), whereas he describes all other areas as having moderate, minimal or no impact to the Appellant's daily functioning. The Ministry also notes that the GP has indicated (in the AR) that he had sourced information from the Psychiatrist, friends of the Appellant, family members, and the social services agency that assists the Appellant.

The Ministry found that, based on the GP's assessment, which it considers takes into account information presented to the GP from all sources during the completion of his assessments, the cumulative impact on cognitive and emotional functioning was not indicative of a severe impairment to mental functioning.

#### *Panel Decision*

A diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a "severe" impairment. Section 2(2) of the EAPWDA requires that in determining whether a person may be designated as a PWD the Ministry must be satisfied that the individual has a severe physical or mental impairment.

An "impairment" is a medical condition which results in restrictions to a person's ability to function independently or effectively. To assess the severity of an impairment, the Ministry must consider both 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. In making its determination the Ministry must consider all the relevant evidence, including that of the Appellant. However, the legislation is clear that the fundamental basis for the analysis is the evidence from prescribed professionals – in this case the Appellant's GP.

Section 2(2)(b)(i) of the EAPWDR requires that a mental or physical impairment directly and significantly restrict the person's ability to perform DLA either continuously or periodically for extended periods.

The panel notes that, while the GP, as the prescribed professional, acknowledges that the Appellant has deficits with cognitive and emotional function with respect to emotional disturbance, executive functioning, motivation, impulse control and attention or sustained concentration, and that a major impact only exists with respect to emotion, he does not provide any additional information or commentary which would allow the Ministry to assess the degree, nature or extend of the Appellant's impairment.

Therefore, the panel finds that the Ministry reasonably determined that a severe mental impairment was not established pursuant to Section 2(2) of the EAPWDA.

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

The Appellant's position is that her anxiety makes her feel like she cannot be alone, and that as a result she cannot perform DLA such as shopping or attending appointments without having friends, family or a counselor accompany her on most occasions when she has to leave her home.

The Ministry's position is that while the Appellant requires periodic assistance from another person to manage her finances and make appropriate choices, she is able to manage all other DLA without assistance. In addition, no information has been provided to describe the degree and frequency of the assistance she requires for those activities.

### *Panel Decision*

Section 2(2)(b) of the EAPWDA requires that the Ministry be satisfied that a prescribed professional has provided an opinion that an applicant's severe impairment *directly* and *significantly* restricts her DLA, continuously or periodically for extended periods. In this case, the GP is the prescribed professional. DLA are defined in Section 2(1) of the EAPWDR and are also listed in the PR and, with additional details, in the AR. Therefore, the prescribed professionals completing these forms have the opportunity to indicate which, if any, DLA are significantly restricted by the Appellant's impairments either continuously or periodically for extended periods, and to further elaborate so that the nature and extent of the restrictions to DLA are clear. (Prescribed professionals are specifically asked in the instructions provided in the application forms to elaborate on the nature and extent of the limitations or restrictions. For example, in Part C of the AR the assessor is instructed to identify whether assistance is required in each case with respect to the full range of DLAs, and if the applicant is not independent, to describe the type and amount of assistance required.)

The panel notes that the GP reported that the Appellant was independently able to perform all DLA except for making appropriate choices and payment of rent and bills, for which she is periodically restricted. Despite being prompted to explain and describe the nature of the periodic assistance required, the panel further notes that the duration and frequency of the periodic restrictions is not explained by the GP in the PWD application.

The panel finds that the Ministry reasonably concluded that there is not enough evidence from the prescribed professional to establish that the Appellant's impairment *significantly* restricts her ability to manage her DLA either continuously or periodically for extended periods, thereby not satisfying the legislative criterion of Section 2(2)(b)(i) of the EAPWDA.

## **Help with DLA**

The Appellant's position is that she is usually too anxious to leave her home unless she is accompanied by a friend, a family member, or a counselor.

In its reconsideration decision, the Ministry states that it cannot be determined that significant help is required because it has not been established that DLA are significantly restricted.

### *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.

The panel finds that the Ministry reasonably determined that, as direct and significant restrictions in the Appellant's ability to perform DLA have not been established, it cannot be determined that she requires help to perform DLA as a result of those restrictions, as defined by Section 2(3)(b) of the EAPWDA.

### **Conclusion**

Having reviewed and considered all of the evidence and relevant legislation, the panel finds that the Ministry's reconsideration decision, which determined that the Appellant was not eligible for PWD designation under Section 2 of the EAPWDA, was reasonably supported by the evidence and was a reasonable application of the EAPWDA in the circumstances of the Appellant, and therefore confirms the decision. The Appellant's appeal, therefore, is not successful.