

**PART C – DECISION UNDER APPEAL**

The decision under appeal is the Ministry of Social Development and Poverty Reduction (ministry) reconsideration decision dated 8 December 2017, which determined that the appellant was not eligible for persons with disabilities designation (PWD) because she had not met all of the legislated criteria under section 2 the *Employment and Assistance for Persons with Disabilities Act*. The ministry determined that the appellant had demonstrated that she has reached 18 years of age and her impairment, in the opinion of a medical practitioner, is likely to continue for at least 2 years. The ministry further determined that the appellant had not demonstrated that he has a severe mental or physical impairment; the appellant's severe mental or physical impairment, in the opinion of a prescribed professional, directly and significantly restricts her ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and as a result of direct and significant restrictions, she requires help to perform those activities.

**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 consisted of the following:

### **1. The appellant's PWD Application**

The Application contained:

- A Medical Report (MR) dated 4 November 2017, completed by the appellant's general practitioner (GP) who has seen the appellant 2-10 (8) times in the past 12 months and known the appellant for 14 years.
- An Assessor Report (AR) dated 4 November 2017, completed by the appellant's GP.
- A Self Report (SR) dated 31 October 2017, signed by the appellant.

The panel will first summarize the evidence from the PWD Application as it relates to the PWD criteria at issue in this appeal.

#### Diagnoses

In the MR, the GP specifies the following diagnoses as related to the appellant's impairment:

- Epilepsy
- Memory loss (short term severe)
- Depression with past hospital admission
- Lactose intolerance

#### Severity of mental impairment

MR:

The GP indicates that the appellant suffers from epilepsy, severe short-term memory loss and depression.

The GP reports that the appellant has are difficulties with communication other than lack of fluency in English and comments: *poor memory*.

Under Health History, the GP writes: 1) *epilepsy prevents driving & requires cognitive effecting meds*, 2) *memory loss quite severe with major impact on learning skills – to see brain injury program soon*, 3) *anxiety/mood disorder with paranoia*.

The GP indicates that the appellant had significant deficits with cognitive and emotional functioning in the areas of executive, memory and emotional disturbance.

For Additional Comments the GP writes: *cannot drive, new learning restricted, short term memory poor*.

AR:

The GP describes the appellant's impairments as *memory/mood/anxiety*

The GP assesses the appellant's ability to communicate as good in the areas of speaking, reading, writing and hearing.

The GP assesses the appellant's cognitive and emotional functioning as having no impact in the areas of bodily control, impulse control, motor activity, language, psychotic symptoms and other emotional or mental problems. The GP assesses minimal impacts on daily functioning in the areas of consciousness, insight and judgement, motivation and other neuropsychological problems. Moderate impacts on daily functioning are assessed in the areas of emotion, attention/concentration and executive. Major impacts are assessed in the area of memory.

SR:

The appellant reports that she suffers from a seizure disorder, memory problems and memory loss. She states that she loses her memory when she has seizures. She explains that a very bad car accident in 2013 that caused her to lose her memory and this has impacted her relationship with her family. She reports that her family has turned

against her. She states that she can care for herself but has lost jobs due to difficulty with reading, spelling and pronouncing peoples' names. She states that she tried and accounting and payroll course, but it was very difficult for her to learn as she had to go over things repeatedly.

#### Severity of physical impairment

MR:

For functional skills, the GP indicates that the appellant can walk 4+blocks unaided, climb 5+ steps unaided, lift with our limitation and remain seated without limitation.

The GP indicates that the appellant does not require any aids or prostheses.

AR:

The GP indicates the appellant's mobility and physical ability as independent for walking indoors and outdoors, climbing stairs, standing, lifting and carrying and holding.

SR:

The appellant states that a very bad car accident in 2013 that caused problems in her knees; she reports that she cannot stand for long periods, carry heavy things or walk fast any more.

#### Ability to perform DLA

MR:

The GP indicates that the appellant has been prescribed medication that interferes with her ability to perform DLA and provides: *Dilantin affects cognition*.

The GP indicates that the appellant's impairment does directly restrict her ability to perform DLA. Specifically, the GP indicates that use of transportation and social functioning are continuously restricted. With respect to social functioning the GP states: *poor memory and low mood/anxiety*. With respect to the degree of restriction, the GP provides: *cannot drive*. In response with the assistance required for DLA the GP writes: *none*.

AR:

The AR indicates that the appellant is independent in all listed personal care activities; all basic housekeeping activities; all shopping activities; all meals activities; all rent/bills activities; all medications activities and all transportation activities.

#### Section 2(1)(b) DLA

The following DLA are applicable to a person who has a severe mental impairment:

##### *Make decisions about personal activities, care or finances*

AR:

The AR indicates that the appellant is independent with shopping activities of readings labels, making appropriate choices, and paying for purchases; the meals activities of meal planning and safe storage; all rent/bills activities; all medications activities; and all transportation activities.

##### *Relate to, communicate or interact with others effectively*

MR:

The GP indicates that the appellant has difficulties with communication due to poor memory and her social functioning is continuously restricted due to poor memory and low mood/anxiety.

AR:

The GP assesses the appellant's ability to communicate as good in the areas speaking, reading writing and hearing.

In assessing social functioning activities, the AR indicates that the appellant is independent with appropriate social

decisions; developing and maintaining relationships; interacting appropriately with others; dealing appropriately with unexpected demands; and securing assistance from others. The GP writes: *Although independent there is difficulty with all of the above*. The GP indicates that the appellant has very disrupted functioning in her immediate social network, with the comment: *complete family rejection*. The GP indicates that the appellant has marginal functioning in her extended social networks.

#### Help required

MR:

The GP indicates that the appellant does not require any aids or prostheses and that the assistance the appellant requires for DLA is 'none'.

AR:

In response to the prompt to specify what help is required but there is none available, the GP writes: *needs psychological support – to see brain injury program soon*.

The GP does not indicate any assistance provided through assistive devices.

The AR indicates that the appellant does not receive assistance from assistance animals.

## **2. Request for Reconsideration**

The appellant's Request for Reconsideration, dated 22 January 2018 is accompanied by

- 2-page typed letter dated 14 January 2018 from the appellant. In the letter the appellant states that she is reapplying for PWD in her own words because the ministry turned down her doctor's application. She provides details of her car accident, reporting that she woke up with her head on the steering wheel. She explains that her children are now strangers to her. She also explained the impacts of the car accident on her knees in terms of her ability to do things. She describes jabbing pain, her knees giving out backwards and a feeling of bone on bone. She states that she had meningitis as an infant and has epilepsy as a result; her memory is affected by the medications and this has created some trouble for her in her employment. She explains that she has to keep a diary because she has no memory of what she did 2 days ago. She also describes communication difficulties with one of her children over the holidays resulting in a misunderstanding and she has not heard from him since. She reports that she feels badly about her memory problem and not stays away from people and her family.
- 1-handwritten page containing two journal entries from July 2015. One of these entries described her knee pain and difficulty she had with stairs that day. The other entry describes the appellant's observation of birds from her deck, her family turning against her and her siblings' unwillingness to show her their father's will.

Additional information before the panel on appeal consisted of the following:

#### **Notice of Appeal**

In the Notice of Appeal dated February 2018, the appellant wrote as reasons for appeal: *Because what my Dr. said was wrong about me*.

#### **Appeal Submissions**

At the hearing, the appellant spoke at length about her knee pain and reiterated much of her reconsideration submission. She stated that she still has back and knee problems from her car accident despite 1 year of physiotherapy. She reports that her doctor told her she will need both knees replaced. She also recounted her difficulty managing her life due to her memory problems. She explained that she has to write everything down, including her parking stall numbers, because she cannot remember anything and only has bits and pieces of her life now. She explained that she cleans privately for work because it is the only thing she can do but that she has knee pain at night. She also reported that some of her clients have stopped calling when she tells them about her epilepsy because they are afraid she will have a seizure in their homes. As well, she explained that she cannot drive for 1 year after each seizure and this impacts her ability to do her work. She reports that her seizures are a 'sensation' and she can see things that will happen in the future, which she does not like. The appellant also explained an incident where police called her asking if she had struck another car while driving but she had not done so and didn't know how her fenders got scraped. She also reported that an officer from another police

organization phoned her to tell her that someone in her life is causing problems for her. The appellant also stated her disagreement with the doctor's indication of paranoia, stating that she does have surveillance cameras, but this is because she has had things stolen. She also stated that she does not have anxiety but isn't sure what it is.

The ministry relied on the reconsideration decision.

**Admissibility**

The panel finds that the information provided in the appellant's Notice of Appeal is argument and will be considered on that basis.

## PART F – REASONS FOR PANEL DECISION

The issue in this appeal is whether the ministry decision that determined that the appellant did not meet three of the five statutory requirements of Section 2 of the *EAPWDA* for PWD designation is reasonably supported by the evidence or is a reasonable application of the legislation in the circumstances of the appellant. Specifically, the ministry determined that the information provided did not establish that:

- the appellant has a severe mental or severe physical impairment;
- that the appellant's severe mental or physical impairment, in the opinion of a prescribed professional, directly and significantly restricts her ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and
- as a result of those restrictions, he requires help to perform those activities.

The following section of the *EAPWDA* applies to this appeal:

### 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 following section of the *EAPWDR* applies to this appeal:

**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.

### **Severity of impairment**

The legislation requires that for PWD designation, the minister must be "satisfied" that the person has a severe mental or physical impairment. The legislation makes it clear that the determination of severity is at the discretion of the minister, considering all the evidence, including that of the appellant. Diagnosis of a serious medical condition or the identification of mental or physical deficits does not in itself determine severity of impairment.

#### Severity of physical impairment

In the reconsideration decision, the ministry determined that it was not satisfied that the information established severe impairment. In making this determination, the ministry considered the functional skills assessment by the GP and the physical ability and mobility assessment in the AR. The ministry argued that the GP has not identified any limitations. The ministry concluded that the information in the PWD application and SR do not establish a severe impairment.

The panel finds that the ministry's determination was reasonable. The panel notes that the only physical diagnosis provided by the GP is lactose intolerance. As well, the panel notes, the assessments of the appellant's functional capacity and mobility and physical ability assessments in the MR and AR reflect an individual who is independent in all areas and functioning at the highest end of the assessment scale. However, the panel notes that the appellant's SR, Reconsideration submission and testimony at the hearing are not consistent these assessments. The appellant argues that her knees cause a lot of pain and restrict her ability to do things. The panel finds that while the appellant disagrees, the information from the doctor does not speak to a physical impairment. The panel finds that the ministry's determination, that a severe physical impairment has not been established, is reasonably supported by the evidence.

#### Severity of mental impairment

In the reconsideration decision, the ministry found that the information provided did not establish that the appellant has a severe mental impairment. The ministry noted that the appellant's diagnoses and the GP's assessment in the MR that the appellant has cognitive difficulties with communication. The ministry considered that in the MR the GP indicates deficits in the areas of executive, memory and emotional disturbance. The ministry also considered the GP's assessment of impacts to the appellant's cognitive and emotional functioning, noting 1 major impact, 3 moderate impacts, 4 minor impacts and 6 areas with no impact, finding that the cumulative impact is not indicative of a severe impairment. The ministry also considered the GP's assessment of social functioning DLA and concluded that it was difficult to establish a severe impairment based on the difficulties mentioned.

The panel finds that the ministry's determination that a severe mental impairment has not been established was not reasonable. The panel notes the appellant's argument that the major impact to her memory indicated by the GP is like having brain damage and learning is a major impact for her. The panel finds that the ministry was unreasonable in concluding that the cumulative impact to the appellant's cognitive and emotional functioning is not indicative of a severe impairment. The panel finds that the ministry's calculation of cumulative impacts does not reflect a global assessment of all of the information in the MR, AR, SR and Reconsideration materials. The panel finds that the sum of the information before the ministry is indicative of a severe impairment. The panel notes, in addition to the assessment of cognitive and emotional functioning, the presence of information in the MR and AR reflecting medications that interfere with cognitive processes, cognitive difficulty with communication due to poor memory,

severe short term memory loss/poor short term memory, major impacts to learning and restrictions to new learning, significant deficits to cognitive and emotional function, continuous assistance required for social functioning, a referral to the brain injury program and severely disrupted functioning in her immediate social network. The panel notes the information provided by the appellant also indicates that she has a number of serious problems with mental functioning that have caused her to lose her relationships with family and become dependent on reminders and scheduling aids. The panel finds that the appellant's evidence aligns with the GP's assessments and is reflective of a severe mental impairment. The panel finds that the ministry's conclusion that the information provided does not establish a severe mental impairment and that this criterion was not met is not reasonably supported by the evidence.

#### **Direct and significant restrictions in the ability to perform DLA**

The legislation specifies that the minister assess direct and significant restrictions in the ability to perform DLA in consideration of the opinion of a prescribed professional. This does not mean that other evidence should not be considered, but it is clear that a prescribed professional's evidence is fundamental. At issue in this assessment is the degree of restriction in the appellant's ability to perform the DLA listed in section 2(1)(a) and (b) of the EAPWDR applicable to a person with a severe mental or physical impairment.

The ministry was not satisfied that the appellant has a severe impairment that, in the opinion of a prescribed professional, directly and significantly restricts her ability to perform DLA continuously or periodically for extended periods. In reaching this conclusion, the ministry noted that the GP has indicated in the MR that the appellant has been prescribed medication that interferes with her ability to perform DLA and is continuously restricted with transportation and social functioning. The ministry also considered the GP's assessment in the AR which indicates that the appellant is independent in all listed DLA. The ministry noted that the areas assessed as continuously restricted in the MR had been assessed as independent in the AR.

The panel finds that the ministry's determination that the information provided does not establish that a severe impairment significantly restricts the appellant's ability to perform DLA continuously or periodically for extended periods was reasonable. The panel notes the conflicting assessments in the MR and AR with respect to transportation and social functioning. The panel also notes that the appellant's evidence also conflicts with these assessments of restrictions to her ability to perform DLA. However, the panel notes that the legislation requires that direct significant restrictions to DLA must be in the opinion of a prescribed professional. The panel finds that, because the only restrictions assessed are in areas that have also been assessed as independent in another part of the application, there is not sufficient information to establish direct and significant restrictions to DLA as required by the legislation. Given the limitations in the information before the ministry, the panel concludes that the ministry's determination that this criterion has not been met is reasonably supported by the evidence.

#### **Help required**

The legislation requires that, as a result of being directly and significantly restricted in the ability to perform DLA either continuously or periodically for extended periods, a person must also require help to perform those activities. The establishment of direct and significant restrictions under section 2(2)(b)(i) is a precondition of meeting the need for help criterion. Help is defined in subsection (3) as the requirement for an assistive device, significant help or supervision of another person, or the services of an assistance animal in order to perform a DLA.

In the reconsideration decision, the ministry determined that as it had not been established that appellant's ability to perform DLA were significantly restricted, it cannot be determined that significant help is required. While the information provided demonstrates that the appellant does rely on memory and scheduling aids, and requires psychological supports, the panel has concluded that the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established. As such, the panel finds that the ministry reasonably concluded that under section 2(2)(b)(ii) of the EAPWDA it cannot be determined that the appellant requires help to perform DLA.

#### **Conclusion**

The panel finds that the ministry's reconsideration decision, determining that the appellant had not met all of the legislated criteria for PWD designation, was a reasonable application of the legislation in the circumstances of the appellant and reasonably supported by the evidence. The panel confirms the ministry's reconsideration decision. The appellant is not successful on appeal.