

## **PART C – DECISION UNDER APPEAL**

The decision under appeal is the Ministry of Social Development and Poverty Reduction (“the ministry”) reconsideration decision dated March 5, 2018 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 appellant was not in attendance at the hearing. After confirming that the appellant was notified, the hearing proceeded under Section 86(b) of the Employment and Assistance Regulation.

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

The evidence before the ministry at the time of the reconsideration decision included:

- Persons With Disabilities (“PWD”) Application comprised of the appellant’s self-report dated October 21, 2017 (“SR1”), a medical report (“MR”) and an assessor report (“AR”) both dated August 3, 2017 and both completed by the appellant’s family physician (“the GP”), who has known the appellant for 11 years and who has seen the appellant 2 to 10 times in the past 12 months;
- Appellant’s Request for Reconsideration received by the ministry on February 2, 2018 in which the appellant requested an extension to the reconsideration period until March 5, 2018. The Request for Reconsideration contained the following enclosures:
  - appellant’s Section 3 self-report dated January 15, 2018 and appellant’s handwritten note dated February 21, 2018 (together referred to as “SR2”) handwritten by the appellant;
  - 1 page letter from the appellant’s partner (“E”) dated January 29, 2018.

### **PWD Application**

#### **Diagnoses**

In the MR the GP noted that the appellant suffers from the following medical conditions:

- anxiety/ panic attacks (onset May 2006)
- depression (onset May 2006)
- traumatic head injury (December 2013)
- sensory disorder hyperacusis (extreme sensitivity to sound) (onset December 2014)

#### **Physical Impairment**

In the MR the GP noted that the appellant can walk 2-4 blocks unaided (“*unlimited*”), climb 5+ steps unaided, has no limitations with lifting or remaining seated.

In the AR the GP indicated that the appellant is independent in all areas of mobility and physical ability.

In her SR1 the appellant reported that she suffers from IBS/D problems, shortness of breath and fatigue. In her SR2 she reported that she suffers from foot issues, including “gouty arthritis”, which limits her ability to walk to only a few minutes. As a result she requires orthotics, cab and gas money and cider vinegar. Additional tests have been undertaken but the results are as yet unknown.

In his January 29, 2018 letter E noted that he needs to help the appellant get to her appointments because she can barely walk a block due to her foot problems.

#### **Mental Impairment**

In Section B (“Health History”) of the MR the GP described the severity of the appellant’s mental conditions, noting that she sustained a concussion with extended loss of consciousness that led to prolonged recovery. The GP added that the most prominent complication arising from the concussion is hyperacusis and an inability to tolerate noisy environments. The appellant’s pre-existing anxiety and depression have become even more aggravated; the appellant has become withdrawn and mostly housebound, avoiding people and social gatherings. The GP also indicated that the appellant has several significant deficits in cognitive and emotional functioning, namely: emotional disturbance, executive, motivation, impulse control and attention or sustained concentration. She commented: “*affected by noise, distracted easily. Unable to concentrate in noisy environment – distracted.*”

In the AR the GP indicated that the appellant experiences major restrictions/impacts to cognitive and emotional functioning in the areas of emotion and motivation and moderate impact in the area of attention/concentration. Impacts to all remaining areas were either minimal or none.

In the area of social functioning the GP indicated that the appellant requires periodic support/supervision in making appropriate social decisions, developing and maintaining relationships, interacting appropriately with others and dealing appropriately with unexpected demands.

In her SR1 the appellant noted that as a result of her head injury she suffers:

1. hypersensitivity to sound which causes eye aches, earaches, headaches and sometimes migraines;
2. continued anxiety and depression which affects her ability to concentrate and causes insomnia, nightmares, agoraphobia and difficulty enjoying social situations.

In her SR2 the appellant noted that she failed at furthering her education and has had difficulty maintaining employment due to anxiety, depression and panic attacks. Her earaches and headaches occur almost daily. At times she has felt suicidal, although her GP has not considered her risk of suicide to be significant enough to refer her to a psychiatrist.

In his January 29, 2018 letter E wrote that the appellant's head injury has completely changed their lives, particularly in the area of hearing sensitivity, which pervades every part of their daily life, even minor daily noise in the home.

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

In the MR the GP noted that the appellant has not been prescribed medications that interfere with her ability to perform DLA. The GP indicated that the appellant has periodic restrictions in her ability to manage self-care, basic housework and management of finances (*"all restrictions exacerbated with episodes of depression and anxiety"*) and social functioning (*"avoiding crowds to avoid noise and social anxiety"*).

In the AR the GP indicated that the appellant is independent with all listed areas of DLA except basic housekeeping, with which she requires periodic assistance from another person, and paying rent and bills with which she requires continuous assistance. The GP noted that the appellant requires periodic support/supervision in all areas of social functioning except securing assistance from others, and has marginal functioning in both her immediate and extended social networks.

In her SR1 and SR 2 the appellant wrote that her daily life is a struggle and she has not showered for a month due to depression. E wrote that he does what he can to help on the many days when the appellant needs to sleep due to headaches and migraines. E also assists her with getting to and from appointments and with grocery shopping because she can barely walk a block due to her foot problems.

#### **Assistance Required**

In the MR the GP reported that assistance is provided by the appellant's partner E.

In the AR the GP indicated that the appellant receives assistance from family and friends.

## PART F – REASONS FOR PANEL DECISION

The issue in this appeal is whether the ministry decision of March 5, 2018 which 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 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.

Relevant legislation:

### 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 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 appellant argues that she suffers from foot problems, shortness of breath, IBSD and fatigue which severely impair her functional skills, mobility and ability to perform daily tasks.

The ministry's position is that the physical impairments described by the appellant and her GP are insufficient to establish a severe physical impairment.

### 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. However, the legislation is also clear that the fundamental basis for the analysis is the evidence from a medical practitioner or a "prescribed professional" – in this case, the appellant's GP. The legislation requires that for PWD designation, the minister must be satisfied that the person has a severe mental or physical impairment.

The appellant indicated that her foot problems cause excruciating pain and significantly restrict her mobility and physical ability. E noted that the appellant barely can walk a block because of her foot problems. This information is inconsistent with the GP's assessments. In the MR the GP did not include any physical conditions in the list of the appellant's diagnoses, and no restrictions to walking, climbing, lifting or remaining seated were identified. In the AR the appellant was assessed as independent in all activities requiring mobility and physical ability. The panel notes that the GP did not amend or expand upon her assessments prior to reconsideration despite the appellant's attempts to obtain additional medical information to support the severity of her impairment.

The panel therefore finds that the ministry reasonably determined that the information provided by the prescribed professional fails to establish a severe physical impairment.

### **Severe Mental Impairment**

The appellant argues that she suffers from hyperacusis, anxiety and depression, which severely impair her cognitive and emotional functioning.

The ministry's position is that the information provided does not establish a severe mental impairment.

#### Panel Decision

In her SR1 and SR2 the appellant reported that she suffers from chronic headaches, earaches and eye aches and has difficulty socializing and shopping ("*once or twice a week*"). Anxiety and depression have negatively impacted her ability to work, furthering her education and attending to personal hygiene.

In the MR the GP noted that the appellant suffers from anxiety/panic attacks, depression, traumatic brain injury and hyperacusis with significant deficits to cognitive and emotional functioning in the areas of emotional disturbance, executive, motivation, impulse control and attention or sustained concentration. She commented that the appellant is "*affected by noise and is distracted/unable to concentrate in a noisy environment*".

In the AR the GP indicated that all but 2 of the 14 listed areas of cognitive and emotional functioning fall within the Moderate (1), Minimal (5) and No Impact (6) ranges of functioning. She confirmed that the appellant's mental conditions and/or traumatic brain injury have a Major impact on daily functioning in the areas of emotion and motivation. The GP did not provide any additional comments in Section B of the AR to describe the severity of the major impacts to emotion and motivation, and did not explain the discrepancy between her assessments of cognitive and emotional functioning in the MR and AR. In Section C of the AR the GP indicated that the appellant requires periodic support with social functioning in the areas of making appropriate social decisions, developing and maintaining relationships, interacting with others and dealing appropriately with unexpected demands, but did not explain the degree or duration of support needed where requested on the form. The GP indicated that the appellant has marginal functioning with both immediate and extended social networks, which supports a finding of moderate impairment.

The GP did not provide additional information or clarify her assessment prior to reconsideration despite the appellant's attempt to obtain further medical evidence as noted in her Notice of Appeal, and there is no indication that the appellant has been referred to a psychiatrist or other specialist for treatment of any of her mental diagnoses, which would be expected in the case of a severe mental impairment.

The panel therefore finds that the ministry reasonably determined that the information provided is insufficient to establish that the appellant suffers from a severe mental impairment.

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

The appellant argues that her ability to perform DLA is significantly restricted as a result of her severe physical and mental conditions.

The ministry's position is that a severe impairment has not been established that directly and significantly restricts the appellant's ability to perform DLA, and that the information submitted by the prescribed professional is not sufficient to establish that the appellant's DLA are directly and significantly restricted either continuously or for extended periods.

#### 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. While other evidence may be considered, 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 MR the GP indicated that the appellant experiences periodic restrictions in her ability to perform DLA in 4 areas: personal self care, basic housework, management of finances and social functioning: “*all restrictions exacerbated with episodes of depression and anxiety. Withdrawn, avoids crowds to avoid noise and social anxiety*”. The GP did not explain the degree of restriction experienced by the appellant or the frequency and duration of the appellant’s episodes of depression and anxiety.

In the AR the GP indicated that the appellant is independent with most DLA, although in the area of personal care she has “*poor motivation, decreased interest, poor self-hygiene in periods of depression*”. The GP noted that the appellant requires periodic assistance with basic housekeeping and continuous assistance with paying rent and bills but did not describe the type and amount of assistance required. The GP also noted that the appellant requires periodic support/supervision in all areas of social functioning except securing assistance from others, but provided no description of the degree and duration of support required.

A severe impairment was not established in the appellant’s circumstances. Since this precondition was not met and because insufficient evidence was provided to explain the degree, frequency and duration of restrictions to DLA the panel finds that the ministry reasonably determined that the information fails to establish that the appellant suffers from a severe impairment that in the opinion of a prescribed professional directly and significantly restricts DLA continuously or periodically for extended periods.

### **Help in Performing DLA**

The appellant argues that she requires the significant help of her partner E to perform DLA.

The ministry’s position is that because the information did not establish that the appellant’s DLA are significantly restricted it cannot be determined that an assistive device or significant help is required.

### Panel Decision

The establishment of direct and significant restrictions with DLA is a precondition of the need for help criterion. Since 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 ministry’s reconsideration decision, which determined that the appellant was not eligible for PWD designation, was reasonably supported by the evidence, and confirms the decision. The appellant is not successful on appeal.