



PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the “Ministry”) reconsideration decision dated January 16, 2019 which held that the appellant did not meet 3 of the 5 statutory requirements of section 2 of the Employment and Assistance for Persons with Disabilities Act (“EAPWDA”) for designation as a person with disabilities (“PWD”). The Ministry found that the appellant meets the age requirement and that a medical practitioner confirms that the appellant’s impairment is likely to continue for at least 2 years.

However, the Ministry was not satisfied 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 those restrictions, in the opinion of a prescribed professional, the appellant requires an assistive device, the significant help or supervision of another person, 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 and 2.1
Employment and Assistance Act (“EAA”), section 22(4)

PART E – SUMMARY OF FACTS

On August 31, 2018, the Ministry received the appellant's PWD application comprised of a Medical Report (MR) completed by a physician (the "Physician") on July 26, 2018 and an Assessor Report (AR) completed by a registered nurse ("RN") on August 17, 2018. The appellant completed a Self-report (SR), dated August 3, 2018. The appellant also provided an August 1, 2018 letter written from a friend, a July 11, 2018 letter provided by the Physician and a second physician (the "Second Physician"), a July 11, 2018 hearing assessment and audiogram completed by the Second Physician, and an August 17, 2018 letter from the RN.

The appellant's request for PWD designation was denied on November 6, 2018. On January 16, 2019, the Ministry reviewed the appellant's Request for Reconsideration ("RFR").

In his RFR, the appellant included a three-page statement, undated, describing his impairment and summarizing his MR and AR.

At the start of the hearing the appellant provided an additional letter from the Physician dated Feb 6, 2019 which states that the appellant has severe hearing loss as per attached audiogram (which is the audiogram in the appeal record). The Physician confirms that the appellant's hearing loss causes a severe safety risk and great difficulty for the appellant. The Physician confirms that the appellant is compliant with current steps and audiology recommendations and is being considered for cochlear implants. The Ministry does not object to the entry of the letter into evidence. The panel finds that the letter from the Physician is information that was already before the Ministry at reconsideration. The panel therefore finds the evidence to be admissible pursuant to s.22(4) EAA.

Summary of Relevant Evidence

Diagnosis

The Physician diagnoses the appellant with hearing loss (onset 1990), tinnitus (onset 1998), migraine headaches (onset 1996)

Physical Impairment

The Physician states in 2-B of the MR: "severe and worsening hearing loss. Pending cochlear implant with audiology review. 1st for trial hearing aids, "decrease in speech – enunciation", and "reports severe tinnitus and migraine headaches".

In 2-D of the MR the Physician states that the appellant can walk 4 plus blocks unaided, can climb 5 plus steps unaided, has no limitations in lifting, and no limitations in remaining seated. The Physician states that the appellant has severe hearing loss and cannot hear certain frequencies and telephone.

The RN in the AR indicates that the appellant has hearing loss – migraine headaches 2-3 times per week with nausea, seating, rocking; lasting for 8 hours, dizziness, vertigo, constant ringing in his ears. The RN states that the appellant requires periodic assistance from another person when walking outdoors, difficulty walking outdoors due to vertigo, also traffic increases tinnitus. The appellant is independent walking indoors, climbing stairs, standing, lifting, carrying and holding.

The appellant's SR states that he suffers from severe hearing loss in both ears, tinnitus, migraine headaches, vertigo, depression, and anxiety. He required help in completing the application due to an inability to concentrate. He required help from his advocate to complete his SR

The July 11, 2018 audiogram indicates that the appellant has profound hearing loss in his right and left ears and that he has hearing difficulty, noise exposure, constant tinnitus, difficulty understanding conversation, and difficulty hearing the television and phone.

Mental Impairment

The MR states that the appellant has difficulties with communication and significant deficits with cognitive and emotional functioning in areas of memory, emotional disturbance and attention. The Physician states that the appellant's interactions with others are impaired. The Physician states that the appellant's social function is impaired continuously and cannot engage in daily decision making, interacting, relating and communicating with others.

The AR states that the appellant has a speech impediment and anxiety. He is unable to hear, he is poor to satisfactory with the ability to speak. He has a good ability with reading and writing. The appellant has major impacts to cognitive and emotional functioning in the areas of bodily functions, consciousness, emotion, and attention/concentration. He has moderate impacts to cognitive and emotional functioning in the areas of motivation, language and other emotional and mental problems. He has no impacts to the remaining seven listed areas of cognitive and emotional functioning.

The RN also states in a separate letter that the appellant has anxiety which causes frustration – increases confusion, and leads to social isolation. The RN also reports depression due to life style changes from hearing loss, constant headaches, inability to sleep, social isolation, and loss of independence. The appellant feels sad all the time, has poor attention and concentration. He has poor motivation and can't go out alone. He has pain and headaches and often doesn't leave the house. The appellant's speech is poor which makes him upset and angry and causes him to have to withdraw from people.

DLA

The MR indicates that the appellant's impairment affects his DLA. The only DLA the Physician marks as restricted is the social functioning DLA. The Physician states that this is restricted continuously.

The AR indicates that the appellant must live with family, friends, and caregivers because he can't hear the telephone, alarms or doorbells. The AR states that the appellant requires continuous assistance with laundry and going to and from stores. The AR confirms that he has a friend that does his laundry and that he rarely goes out alone because of safety concerns. The AR confirms that the appellant requires periodic assistance with basic housekeeping due to the noise of certain appliances. The appellant will avoid using certain electric kitchen appliances required for basic housekeeping due to the noise that they make. The AR confirms that the appellant requires periodic assistance with meal planning and food preparation. The AR confirms that the appellant is independent in the other areas of his DLA

The letter from the friend confirms that she lives with the appellant. She confirms that he does not respond to the fire alarm, he cannot hear the buzzer when people buzz into their apartment. The friend indicates that he can't hear a car horn, or make a telephone call.

The appellant's RFR states that he does have a severe physical impairment that restricts his DLA. He states he has severe hearing loss in both ears and he suffers from tinnitus, migraine headaches, vertigo, depression and anxiety. The appellant states there are safety issues as he cannot hear or use the telephone, doorbell, or smoke alarm. He regularly misunderstands or misinterprets what other people say. He cannot clearly enunciate or articulate. He becomes extremely anxious and uncomfortable when conversing with people. The appellant states that he sleeps poorly due to tinnitus and he rarely sleeps more than 2-3 hours per night. 1-2 times per month the ringing is so bad that it brings him to tears.

The appellant cannot use his own household appliances due to the tinnitus. He cannot do his laundry, vacuuming or use the microwave to prepare meals.

Every 2-3 days he suffers from migraine headaches that can last up to 8 hours where the only thing he can do is lay down in a dark room with a cool cloth over his face.

HELP

The Physician states in the MR that the appellant requires prostheses or aid for his impairment. The Physician states that a hearing implant may not assist the appellant. The AR indicates that the appellant obtains assistance with family and friends and needs proper hearing aids and cochlear implants.

At the hearing:

At the hearing, the Ministry relied on its reconsideration decision. The Ministry did not make further submissions at the hearing. The Ministry did comment on the fact that if the appellant obtains his cochlear implant he may no longer have the issues that are before the panel. The panel clarified to the Ministry that whether or not the appellant was obtaining the cochlear implant was not at issue before the Ministry today.

The appellant's advocate argued on the appellant's behalf. Throughout the hearing the appellant's advocate also had to relay information to the appellant by repeating the information to the appellant while looking at him so that the appellant could read her lips. The Advocate stated that the appellant's DLA are profoundly affected by his impairment. It is a real serious safety issue. The appellant doesn't know what is going on around him. He can't live independently because of his hearing loss. He can't socialize with friends or be a part of the conversations. He can't be in a social setting because the background noises affect his ability to socialize.

The Appellant asked the panel to consider the audiogram which shows that the appellant can't hear at 120 decibels which is the level of sound of a siren or a railroad crossing. The Advocate stated that some days the appellant is capable of independently performing his DLA, but on the days that he has severe migraines, which occur about every 2 – 3 days as confirmed by the RN, the appellant cannot do any basic DLA. The only thing the appellant can do on the days that he has the migraines is lay in a dark room for hours. The Advocate confirmed that the appellant's tinnitus never goes away. The advocate confirmed that the appellant requires the assistance of another person and also the assistive device being his hearing aids to function in his daily life.

The Advocate confirmed that the appellant's friend (who is now his common law partner) has lived with him for about six months. She assists him with his DLA. The appellant confirmed that there are 20 or 30 stairs to get to his apartment from the outside and when he is suffering from vertigo he cannot go up and down those stairs.

PART F – REASONS FOR PANEL DECISION

Issue on Appeal

The issue on appeal is whether the ministry's decision to deny the appellant designation as a PWD was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. In particular, was the ministry reasonable in determining that:

- a severe physical or mental impairment was not established;
- the appellant's DLA are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and
- as a result of those restrictions, in the opinion of a prescribed professional, the appellant does not require an assistive device, the significant help or supervision of another person, or the services of an assistance animal to perform DLA?

The legislation provides:

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 severemental 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 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).

EAPWDR

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, 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.
- (3) The definition of "parent" in section 1 (1) applies for the purposes of the definition of "dependent child" in section 1 (1) of the Act.

Panels of the tribunal to conduct appeals – EAA

22 (1) If a person commences an appeal in accordance with section 21 (1), the chair must appoint a panel consisting of up to 3 members of the tribunal to hear and determine the appeal.

(2) If a panel consists of more than one member, the chair must designate a chair of the panel from among the members of the panel, and if a panel consists of one member, that member is the chair of the panel.

(3) A panel must conduct a hearing into the decision being appealed within the prescribed period either

(a) orally, or

(b) with the consent of the parties, in writing.

(4) In a hearing referred to in subsection (3), a panel may admit as evidence only

(a) the information and records that were before the minister when the decision being appealed was made, and

(b) oral or written testimony in support of the information and records referred to in paragraph (a).

(5) Evidence referred to in subsection (4) may be admitted whether or not it would be admissible as evidence in a court of law.

(6) The panel chair is responsible for deciding any question of practice or procedure that arises during a hearing and is not provided for in the regulations or in the practices and procedures of the chair under section 20 (2) (a) [powers and duties of the chair].

The panel finds:

Severe Physical or Mental Impairment

The legislation provides that the determination of severity of impairment is at the discretion of the minister, taking into account all of the evidence including that of the appellant. However, the legislation is also clear that the fundamental basis for the analysis is the evidence from a prescribed professional respecting the nature of the impairment and its impact on daily functioning. While the legislation does not define "impairment", the MR and AR

[Redacted]

define "impairment" as a "loss or abnormality of psychological, anatomical or physiological structure or functioning causing a restriction in the ability to function independently, effectively, appropriately or for a reasonable duration."

While this is not a legislative definition, and is therefore not binding on the panel, in the panel's opinion, it reflects the legislative intent and provides an appropriate analytical framework for assessing the degree of impairment resulting from a medical condition.

When considering the evidence provided respecting the severity of impairment, the Ministry must exercise its decision-making discretion reasonably by weighing and assessing all of the relevant evidence and cannot simply defer to the opinion of a prescribed professional as that would be an improper fettering of its decision-making authority.

The evidence of the RN shows that the appellant is not able to function independently for a reasonable duration. The RN describes the appellant as a person who has constant ringing in his ears that prevents him from communicating in his day to day life. She states that his hearing is so bad that he can't hear traffic or the telephone. She describes a situation where his hearing loss creates a daily safety concern for him when he is alone. The RN describes his difficulties in sleeping and the intense migraines that he suffers from every 2-3 days. She describes that he can't do many of his DLA including shopping and housework without periodic or continuous assistance from another person. He cannot plan meals or do food preparation without the periodic assistance of another person.

The advocate, the appellant, and the appellant's friend confirm and corroborate the RN's evidence. They describe his struggles with the same DLA. They describe in more detail his migraines, which occur every 2-3 days and last up to 8 hours causing him to be completely debilitated during those times with no hope of completing his DLA.

The Ministry states that the RN does not describe the frequency and duration of the periodic assistance the appellant requires when walking outdoors. However, the panel finds that the evidence from the RN about the appellant's safety should be accepted as meaning that anytime the appellant walks outdoors on his own he is at a huge safety risk. The Physician also confirms that the appellant's hearing loss causes a severe safety risk for the appellant. This is also clear by the evidence from the RN that the appellant requires continuous assistance in going to and from stores. The Ministry says that the Physician and the RN also indicate that the appellant is largely independent with DLA. The panel finds that this is not actually the evidence of the RN. The RN clearly states that the appellant requires the help of a person to walk outdoors, prepare meals, do laundry and go shopping. The panel finds that on looking at all of the evidence, including the appellant's self report which corroborates the evidence of the RN, it was not reasonable for the Ministry to determine that this appellant does not have a severe physical impairment. The appellant's hearing loss has a profound affect on his normal functioning that prevents him from functioning independently

The appellant has no diagnosis of a mental impairment. The appellant's physical impairment causes him mental distress in many ways. The panel finds that the appellant's struggles with his mental health relate primarily to his physical impairment. The panel finds that the physical impairment is what causes the appellant the largest impact on being able to function in his daily life. The panel therefore finds that the Ministry's determination that the appellant did not have a severe mental impairment to be a reasonable determination.

The Ministry argues that the RN and the Physician determine that the appellant is independent with DLA. The panel, after reviewing the RN's evidence finds that the evidence shows that the appellant needs at least continuous assistance with shopping, and periodic assistance with preparing his meals, doing housework, and moving about indoors and outdoors. The RN was able to give specific examples of things that he couldn't do: the sound of the washing machine and the sound of small kitchen appliances are not tolerable for the appellant. Both the Physician and the RN confirmed the safety concern involved with not being able to hear loud sounds. The panel finds that it was not reasonable for the Ministry to determine that there were not significant restrictions to the appellant's ability to complete his DLA either continuously or periodically for extended periods.

The Ministry's analysis on help only refers to the appellant's future hearing aids or cochlear implants, which he doesn't yet have. The Physician states that it is unclear if these hearing aids or cochlear implants will even be able to help the appellant. The evidence from the appellant's friend and from the RN is that the appellant relies

significantly on his friend to go shopping, do his laundry (house work), and prepare meals. The panel finds that it was not reasonable for the Ministry to ignore the evidence of the appellant's continuous use of his friend for assistance in his DLA.

Conclusion

For these reasons, the panel finds the Ministry's decision was not reasonably supported by the evidence or a reasonable application of the applicable enactment in the circumstances of the appellant and rescinds the decision.

PART G – ORDER

THE PANEL DECISION IS: (Check one) UNANIMOUS BY MAJORITY

THE PANEL CONFIRMS THE MINISTRY DECISION RESCINDS THE MINISTRY DECISION

If the ministry decision is rescinded, is the panel decision referred back to the Minister for a decision as to amount? Yes No

LEGISLATIVE AUTHORITY FOR THE DECISION:

Employment and Assistance Act

Section 24(1)(a) or Section 24(1)(b)

and

Section 24(2)(a) or Section 24(2)(b)

PART H – SIGNATURES

PRINT NAME

MEGHAN WALLACE (by telephone)

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

February 11, 2019

PRINT NAME

LAURIE KENT

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

February 11, 2019

PRINT NAME

LINDA SMERYCHYNSKI

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

February 11, 2019