

**PART C – DECISION UNDER APPEAL**

The decision under appeal is the Ministry of Social Development and Poverty Reduction (“the ministry”) reconsideration decision dated August 28, 2020, which found that the appellant did not meet four 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. However, the ministry was not satisfied that the evidence establishes that:

- the impairment is likely to continue for at least two years;
- 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

### Preliminary Matter

The appellant is in hospital and was unable to attend the hearing. The appellant was represented by his sibling (A). Prior to the hearing a -Release of Information was executed authorizing A to attend the hearing as his advocate.

### Evidence before the Ministry at Reconsideration

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

- the appellant's PWD Application comprised of a Medical Report (MR) and an Assessor Report (AR) both dated June 1, 2020 and both completed by Dr. F, the appellant's hematologist, who has known the appellant since 2017 and who has seen the appellant between 11 or more times in the past 12 months;
- the appellant's request for reconsideration submitted August 18, 2020;
- letter from Dr. F dated August 18, 2020 summarized as follows:
  - the appellant was diagnosed with Acute Lymphoblastic Leukemia (ALL) in April 2017;
  - once in remission the appellant received a stem cell transplant in August 2017;
  - in June 2019 the appellant developed a skin rash. Further testing indicated that the appellant's ALL was out of remission with further disease in abdomen and groin;
  - at the time of writing the appellant was receiving additional immunotherapy (IT) in the United States;
  - the appellant's functional status should be quite good following treatment but the appellant will continue to be immunocompromised and will require assistance with shopping.

### PWD Application Summary

#### Diagnosis

In the MR the GP noted that the patient suffers from ALL, date of onset 2017.

#### Physical Impairment

In the MR Dr. F wrote that the appellant can walk 4 or more blocks, climb 5+ stairs without assistance, lift 2-7 kilograms and remain seated without limitation. Dr. F noted that that the appellant remains immunocompromised and experiences general fatigue. Treatment duration is expected to be 6-12 months. In Dr. F's opinion the impairment is not likely to continue for more than two years.

In the AR Dr. F noted that the appellant is independent in all areas of mobility and functional ability but requires help with shopping.

#### Mental Impairment

No mental impairment in cognitive or emotional functioning was noted in either the MR or AR.

#### Daily Living Activities

In the AR Dr. F noted that the appellant is independent in performance of daily living activities (DLA) in all areas except shopping-related DLA: going to/from stores, reading prices/labels, making appropriate choices, purchasing goods and carrying them home. (*"immune compromised"*).

Dr. F assessed the appellant was assessed as independent in all areas of cognitive and social functioning and having good functioning with immediate and extended social networks.

#### Assistance Required

In the AR Dr. F noted that the appellant requires help from family to perform DLA (*"needs assistance with out of home activities"*).

#### Information Received after Reconsideration

In the Notice of Appeal dated September 2, 2020 the appellant provided the following information:

- major depression and anxiety have taken over, hopelessness, helpless, anger, memory issues, insomnia,

extreme fatigue, no desire, lack of energy;

- medication to control Graft vs Host Disease (GVHD) makes [me] tired, sick, causes frequent need to use the bathroom;
- the skin rash caused by ALL leaves [my] legs constantly sore, swollen and sometimes with open wounds;
- my sister helps in many ways, including: shopping, driving [me] to/from appointments and helping prepare meals. When she is not available [my] grandmother helps.

#### Oral Evidence

A provided the following update concerning the severity of the appellant's illness:

- the appellant has been receiving IT in a US hospital since July 27, 2020;
- at the beginning of July the appellant received a donor infusion of stem cells;
- more cancer cells have been found in the appellant's blood, leg and abdomen;
- the appellant has now become severely ill with GVHD, causing significant inflammation in the stomach, gut and colon that doctors have been unable to bring under control;
- GVHD has now appeared on the appellant's skin;
- the appellant now has no immune system, and risks death from even a minor infection;
- the appellant is receiving morphine and oxycontin to control the pain;
- the appellant's electrolytes are too low, which may lead to brain damage or a heart attack;
- the appellant has lost 23 pounds in the past 3 weeks and must receive nourishment intravenously;
- the appellant is experiencing significant memory loss. Prior to the current hospital admission the appellant was unable to remember to take prescribed medication and needed regular medication reminders from A;
- of significant concern to A is the extent of depression and anxiety felt by the appellant;
- the only support persons available to the appellant are A and their grandmother.

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

The ministry representative did not object to the admissibility of any of the additional written or oral evidence submitted after reconsideration.

The panel considered the appellant's written and oral evidence and determined that all of it should be admitted under EAA Section 22(4) because it relates directly to the severity of the appellant's impairment, functional ability and ability to perform DLA. The panel also determined that admission of the additional evidence is reasonably required for a full and fair disclosure of all matters related to the decision under appeal.

## PART F – REASONS FOR PANEL DECISION

The issue in this appeal is whether the ministry reasonably determined that the appellant was ineligible for designation as a PWD. The ministry determined that the appellant did not meet all of the required criteria for PWD designation set out in the *Employment and Assistance for Persons with Disabilities Act*, Section 2. Specifically, the ministry determined that the information provided did not establish that:

- the impairment is likely to continue for at least two years;
- 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 or nurse practitioner is likely to continue for at least 2 years, and

(b) in the opinion of a prescribed professional

(i) directly and significantly restricts the person's ability to perform daily living activities either

(A) continuously, or

(B) periodically for extended periods, and

(ii) as a result of those restrictions, the person requires help to perform those activities.

(3) For the purposes of subsection (2),

(a) a person who has a severe mental impairment includes a person with a mental disorder, and

(b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires

(i) an assistive device,

(ii) the significant help or supervision of another person, or

(iii) the services of an assistance animal.

### EAPWDR:

2 (1) For the purposes of the Act and this regulation, "daily living activities",

(a) in relation to a person who has a severe physical impairment or a severe mental impairment,

means the following activities:

(i) prepare own meals;

(ii) manage personal finances;

(iii) shop for personal needs;

(iv) use public or personal transportation facilities;

(v) perform housework to maintain the person's place of residence in acceptable sanitary condition;

(vi) move about indoors and outdoors;

(vii) perform personal hygiene and self care;

(viii) manage personal medication, and

(b) in relation to a person who has a severe mental impairment, includes the following activities:

(i) make decisions about personal activities, care or finances;

(ii) relate to, communicate or interact with others effectively.

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

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

(i) medical practitioner,

(ii) registered psychologist,

- (iii) registered nurse or registered psychiatric nurse,
- (iv) occupational therapist,
- (v) physical therapist,
- (vi) social worker,
- (vii) chiropractor, or
- (viii) nurse practitioner, or
- (b) acting in the course of the person's employment as a school psychologist by
  - (i) an authority, as that term is defined in section 1 (1) of the *Independent School Act*, or
  - (ii) a board or a francophone education authority, as those terms are defined in section 1 (1) of the *School Act*, if qualifications in psychology are a condition of such employment.

### **Panel Decision**

To be eligible for designation as a PWD an applicant must meet all of the 5 legislative criteria set out in EAPWDA Section 2 (2). The ministry found that the appellant had met the first criterion, namely that he is at least 18 years of age. At reconsideration the ministry found that the remaining 3 criteria were not met, namely that:

2. the impairment is likely to continue for at least 2 years;
3. the appellant has a severe (A) physical or (B) mental impairment;
4. in the opinion of a prescribed the severe impairment directly and significantly restricts ability to perform DLA either continuously or periodically for extended periods, and
5. as a result of those restrictions the person requires help in the form of an assistive device, the significant help of another person or the services of an assistive animal.

This appeal decision will address Criteria 2, 3, 4 and 5.

### **2. Duration of Impairment**

The appellant argues that the impairments ALL and GVHD will continue for at least 2 years beyond the date of the PWD application.

The ministry's position is that the evidence does not support a finding that the impairment will last for more than 2 years.

#### Panel Decision

In Section 2-C of the MR Dr. F answered "No" to the question: "Is the applicant's impairment likely to continue for 2 years or more from today?" and noted that the impairment is likely to continue for 6-12 months.

Although the evidence demonstrates that the appellant's impairment has worsened since the application for PWD designation was filed on July 22, 2020 neither the appellant nor a medical professional submitted additional evidence to contradict or vary Dr. F's opinion set out in the MR. The panel therefore finds that the ministry reasonably determined that the information provided does not establish that the appellant's impairment is likely to continue for 2 or more years.

### **3 A. Severe Physical Impairment**

The appellant argues that the recurrence of ALL and recent onset of GVHD constitute a severe physical impairment.

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

#### 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. It 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, including the evidence of the appellant. Significant weight is attributed to the evidence from a medical practitioner or a “prescribed professional” – in this case, Dr. F. The legislation requires that for PWD designation, the minister must be satisfied that the person has a severe mental or physical impairment.

The information before the ministry before reconsideration was based primarily on the assessments provided by Dr. F. The appellant did not complete the self-report section of the PWD application. Dr. F noted that the appellant could walk 2 or more blocks and climb 5 or more steps unaided, could lift 2-7 kilograms and could remain seated for unlimited periods of time. Dr. F also assessed the appellant as being independent in performance of almost every category of DLA. In the August 18, 2020 letter Dr. F wrote: “*I predict functional status to be quite good but [the patient] will be immunocompromised and would need support for shopping etc.*”

The appeal hearing took place 5 weeks after Dr. F. submitted the August 18<sup>th</sup> letter. The additional information provided by A establishes that the appellant’s functional ability, mobility and ability to perform DLA have deteriorated significantly. The appellant has not recovered sufficiently to be discharged from the US clinical research hospital to which the appellant was admitted on July 27, 2020. The cancer has spread and GVHD is causing significant, uncontrolled inflammation in stomach, gut and colon. Electrolytes are dangerously low and weight loss is significant. The appellant is very weak and is unable to leave the bed other than to use the bathroom.

Based on the additional information provided by the appellant in the Notice of Appeal and by A at the hearing the panel finds that the ministry’s determination that the appellant does not suffer from a severe physical impairment that significantly restricts mobility, functional ability and ability to perform DLA is not reasonably supported by the evidence.

### **3 B. Severe Mental Impairment**

The appellant argues that ongoing depression and anxiety constitute a severe mental impairment.

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

#### Panel Decision

In the MR Dr. F did not list a diagnosis of a mental disorder, and indicated that the appellant has no significant deficits with cognitive and emotional functioning. In the AR Dr. F indicated that there were no impacts to cognitive, emotional or social functioning. The additional information submitted after reconsideration establishes that the appellant is feeling depressed, anxious and hopeless. Both the appellant and A reported memory impairment, particularly in the area of ability to renew prescriptions and take medication as prescribed.

It is understandable that the appellant is experiencing feelings of depression, anxiety and hopelessness given the recurrence of the ALL, the failure of recent IT attempts and the escalation of GVHD. However, the information provided by Dr. F and the additional information submitted following reconsideration by the appellant and A do not establish a severe mental impairment. The panel therefore finds that the ministry reasonably determined that the appellant does not suffer from a significant mental impairment.

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

The appellant argues that ability to perform DLA is significantly restricted as a result of the appellant’s severe physical impairment.

The ministry’s position is that the information submitted by the prescribed professional is not sufficient to establish that the appellant’s ability to perform DLA is directly and significantly restricted either continuously or for extended periods.

#### Panel Decision

In the AR Dr. F noted that the appellant is independent in all listed areas of DLA except shopping (going to/from

stores, reading prices/labels, making appropriate choices, paying for purchases and carrying purchases home), in which the appellant is periodically restricted (*"immune compromised"*). Dr. F did not explain the frequency or duration of the appellant's shopping activity.

Additional oral information submitted at the hearing by A demonstrates that the appellant's ability to perform DLA has become significantly restricted. It is unlikely that the appellant is currently able to perform any DLA but the most basic personal hygiene. Even before the current hospital admission the appellant's memory impairment made it necessary for A to pick up the appellant's medication and ensure that it was taken as prescribed.

However, the legislative requirement respecting restrictions to DLA set out in section 2(2) (b) of the EAPWDA differs from the finding of severe impairment. Section 2(2)(b) requires that 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 this criterion is satisfied is dependent upon the evidence from prescribed professionals.

No additional information from a prescribed professional relating to the appellant's ability to perform DLA was submitted. The panel therefore finds that the ministry reasonably determined that the information submitted by Dr. F is not sufficient to establish that the appellant's ability to perform DLA is directly and significantly restricted either continuously or for extended periods as a result of severe impairment.

#### **5. Assistance in Performing DLA**

The appellant argues that the significant help of family members, namely A and the appellant's grandmother, is required 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

In the MR Dr. F did not answer the question: "What assistance does [your patient] need with DLA?" In the AR Dr. F indicated that the appellant receives help from family. No additional comments were made.

The oral evidence provided by A at the appeal hearing confirmed that the appellant requires A's help to perform important activities, including purchasing and management of prescribed medication and shopping/carrying purchases home.

However, the establishment of direct and significant restrictions to the performance of DLA is a precondition of the "need for help" criterion. Because 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 although the ministry's determination that the appellant does not suffer from a severe physical impairment (PWD Criterion 3A) was not reasonably supported by the evidence, the remaining ministry determinations, namely that PWD Criteria 2, 3B, 4 and 5 were not met, were reasonably supported by the evidence, and confirms the decision. The appellant is not successful on appeal.

APPEAL NUMBER 2020-00210

**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

Joan Bubbs

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2020/Sep/22

PRINT NAME

Wendy Marten

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2020/Sep/22

PRINT NAME

Bill Reid

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2020/Sep/22