APPEAL #

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development (the ministry) reconsideration decision of August 23, 2012, which found that the appellant did not meet three of five 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 met the age requirement and that in the opinion of a medical practitioner his impairment is likely to continue for at least two years. However, the ministry was not satisfied that the evidence establishes that he has a severe physical or mental impairment. The ministry was also not satisfied that 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. As the ministry found that the appellant is not significantly restricted with DLA, it could not be determined that he requires help as defined in section 2(3)(b) of the EAPWDA.

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

As a preliminary matter the panel considered a potential conflict issue. One of the panel members advised the parties that during previous employment in the public school system the subject panel member had had some knowledge of the appellant but had never had personal contact or dealings with the appellant. The parties were invited to make submissions as to whether they perceived a conflict requiring the subject panel member to stand down. Neither party had an objection to the subject panel member remaining on the panel. The panel chair decided to have the hearing continue with the participation of the subject panel member.

The appellant has been designated as a person with persistent multiple barriers to employment (PPMB) under the *Employment and Assistance Act* since 2007. He applied for designation as a PWD under the EAPWDA in May, 2012, which designation was denied in July, 2012.

The information before the ministry at the time of reconsideration included the following:

- The appellant's application for designation as a PWD. The application included a self-report (SR) signed by the appellant on April 10, 2012, a physician report (PR) signed by the appellant's physician and dated May 2, 2012, and an assessor report (AR) signed by the appellant's physician and dated May 25, 2012.
- A letter from the ministry to the appellant, dated July 25, 2012 advising the appellant that he had been found ineligible for designation as a PWD.
- The appellant's Request for Reconsideration form signed by the appellant on August 16, 2012.
- A Medical Report – Employability form completed by the appellant's physician, dated January 18, 2012. The physician described the appellant's restrictions as "unable to drive, unable to see computer screens, teaching guides, unable to read normal print."
- A progress/discharge note prepared by a physiotherapist dated simply "Jan". Based on the note's contents the panel concluded that it was prepared in January, 2012. The physiotherapist described the appellant's main complaints as medial pain in right ankle with walking greater than 1 km, and periodic anterior left knee pain. His right knee occasionally "locks" with the appellant being unable to bend or straighten it. The physiotherapist provided the appellant with a home exercise program and while noting that the appellant was not having significant knee pain at the time, she expressed the opinion that he would benefit greatly from orthotics for his "bilateral foot pronation" and that he has some instability in his right knee and possibly some meniscus damage. She suggested an orthopedic consult may be beneficial in the future.
- A post-operative examination report, dated September 24, 2010, prepared by a vision specialist reporting to the surgeon who had 13 months previously performed a penetrating keratoplasty (full-cornea transplant) on the appellant's left eye. The specialist reported the appellant as "not using any drops and has no complaints." He assessed the appellant's distance vision in the left eye as 20/200-1, and pinhole vision in the left eye as 20/50. The specialist concluded that the corneal transplant was stable, and recommended follow-up with another physician every 6 to 12 months.

- A written submission prepared by the appellant's advocate, dated August 22, 2012. Attachments to the written submission included a supplemental self-report (the SSR) endorsed by the appellant's physician on August 20, 2012 and a printout of an article about keratoconus from the Mayo Clinic website.

Information subsequently put before the appeal panel included the following:

- The Notice of Appeal dated August 29, 2012.
- A written submission prepared by the appellant's advocate, dated September 17, 2012.

In the SR the appellant described his disability as keratoconus, a deformation of the corneas which makes it difficult to see properly. He wrote that his disability affects his DLA in that he has to have his sister check items he has just cleaned because he can't see well and misses spots. He can't drive a vehicle so relies on others for transportation. When shopping he usually needs to ask the clerks for help because it's difficult to read the signs. The appellant expressed frustration at not being able to work or drive. He had been hoping the surgery he had on his left eye in 2009 might improve his situation. The appellant wrote that one of the worst effects of his impairment is the lack of depth perception, which makes it difficult to use stairs, step off sidewalks, or avoid bumping into stationary objects. It also prevents him from driving.

In the PR the physician indicated the appellant had been her patient for 1 year and that she had seen him 2-10 times in the past 12 months. The physician diagnosed the appellant's impairment as keratoconus, with the date of onset being December 2004. The impairment is likely to continue for 2 years or more and is described by the physician as "chronic and progressive". Asked to indicate the severity of the relevant medical conditions, the physician described a "severe" reduction in vision, which limits the appellant's reading and writing skills, and limits his movement in unfamiliar environments and on uneven surfaces. In terms of functional skills the physician said the appellant can walk 4+ blocks and can climb 5+ steps unaided, but he needs assistance if the area is unfamiliar. The appellant has no limitations in lifting or in remaining seated. The physician indicated the appellant has no difficulties with communication and no significant deficits in cognitive and emotional function. Regarding DLA, the physician indicated the appellant's impairment does directly restrict his ability to perform 4 of 10 activities. Meal preparation, basic housework, daily shopping, and mobility outside the home are shown as being continuously restricted. Asked to provide additional comments regarding the degree of restriction the physician wrote that "visual impairment causes problems most in unfamiliar environment." The physician indicated that the appellant requires prostheses or aids for his impairment, with the comment "may need visual aids/care." She described the assistance required by the appellant as "family assists with reading, appliances, cleaning, labels."

In the AR the physician described the appellant's impairments as keratoconus and knee pain/locking right knee. The appellant's ability to communicate is "good" in terms of speaking and hearing, but "poor" in terms of reading and writing, with the comment "must have large print". The physician reported the appellant as independent in 5 of 6 categories of mobility and physical ability (walking indoors, climbing stairs, standing, lifting, carrying/holding), but as needing periodic assistance with walking outdoors, specifically in unfamiliar areas. Section B.4 of the AR is to be completed if there is an identified mental impairment or brain injury – the physician has marked section B as "N/A", or not

applicable. Similarly, the Social Functioning section of the form is to be completed only if the applicant has an identified mental impairment or brain injury. The physician has left this section of the form blank. Regarding DLA, the physician reported the appellant as independent in personal care, paying rent and bills, and medications. She indicated the appellant requires periodic assistance with laundry and basic housekeeping "if new machine, area, for sorting". The appellant is described as independent in 2 of 5 shopping activities (making appropriate choices, carrying purchases home), as requiring periodic assistance in 2 of 5 shopping activities (going to and from stores, paying for purchases), and as requiring continuous assistance in 1 of 5 shopping activities (reading prices and labels). The physician reported the appellant as independent in 3 out of 4 categories of activities related to meals (planning, food preparation, and safe storage of food), but as needing periodic assistance "if unfamiliar". The appellant's ability to get in and out of a vehicle, and to use public transit, is reported as taking significantly longer than typical due to knee pain. The appellant is described as independent with respect to using transit schedules and arranging transportation. Regarding assistance provided for the appellant, the physician indicated that the appellant requires help from "family", but has reported no use of assistive devices or assistance animals.

The SSR of August 20, 2012 consists of 6 pages and appears to have been a generic questionnaire prepared by the appellant's advocate's office. On it the appellant has written extensive comments regarding the impacts his impairment has on his ability to perform DLA. For example, with respect to meal preparation the appellant wrote that he has often peeled the skin off his fingers with peelers, he has a hard time standing because of his legs, his eyes make it very difficult to read small print, and looking at clocks for timing cooking puts strain on his eyes. Regarding shopping he writes that walking around stores is difficult because of his knees and ankles and he can't see everything, reading labels and prices is often challenging and frustrating, and carrying groceries is painful and puts strain on his ankles and knees. The appellant's physician endorsed the SSR with the pre-printed statement that "I agree that the above assessment is an accurate assessment of my patient's overall physical condition and his/her current circumstances. After reviewing this information, I can confirm that [the appellant's] disabling condition will continue to persist and is severe enough to restrict his/her daily living activities to the point where he/she requires significant assistance from other people and/or takes considerably longer than normal to perform." The physician then penned in the comment that "I have reviewed this document + discussed it with [the appellant]. He expresses that he is limited in the areas outlined. I have only seen him in an office setting and cannot confirm."

At the appeal hearing the appellant's evidence was that he applied for PWD status at the suggestion of a ministry worker who had asked him about the restrictions he faces. He said that he can only wear his glasses for 30 to 40 minutes before he develops pain in his left eye and has to take the glasses off for an hour or two. He experiences this eye pain daily. The image from his left eye is on a slant, so he sees 2 images trying to merge into one. The appellant said that he has no depth perception and that even in his own home he has to take time holding the stair bannister because he feels unbalanced. He tends to bump into stationary objects and people. He often trips when crossing the street in unfamiliar areas. At Christmas dinner last year he went to pour water into his cup but missed and spilled onto the table instead. The appellant wears sunglasses even on dull days because light hurts his eyes. His peripheral vision is poor – he doesn't see things coming at him until the last second. He misses spots when cleaning and shaving. The appellant was an accomplished musician in high school but now can't follow up because he can't see to read sheet music anymore. On questioning about the extent of his knee impairment, the appellant explained that his main issue is his eyes. He's had knee problems since age 11 which have subsequently been exacerbated by falls.

He also has a problem with his hip which causes his right foot to point right. He has problems getting out of bed in the morning and has to hang onto his dresser. On questioning about the statement by the physiotherapist that the appellant gets ankle pain after walking more than 1 km, the appellant says it is only on good days that he doesn't have ankle pain even before walking 1 km. He feels that he most likely dislocated his right knee recently, but his physician is still trying to determine what the problem actually is with his knee. In response to a question regarding his follow-up examinations with his eye specialist, the appellant said that he had last seen him in March or April of this year. The specialist wants to wait before doing any surgery on the appellant's right eye – it is not sufficiently severe to warrant the risks of surgery at this time. His right eye is starting to get a little worse. If a decision to do surgery is made, it may thereafter take an indefinite period of time to find a suitable tissue match.

The evidence of the appellant's father was that the appellant has poor depth perception. When the appellant does any cleaning his father or sister has to go over it because the appellant misses spots. When shopping he has to hold labels within an inch or two of his eyes in order to read them. The appellant can't drive and his eye problem is progressively worse. It did not improve after surgery. His peripheral vision is not good – anything coming at the appellant from the side is a surprise to him. On questioning regarding the family's shared living arrangement, the appellant's father said that everyone takes turns cooking and that the appellant tries his best to contribute. His father can't see the appellant being able to live on his own. He said that the restrictions caused by the appellant's impairment are continuous, not just periodic.

The evidence of the ministry's representative was that she had called the office of the appellant's vision specialist and was told that the specialist had not seen the appellant since September 2010. She said that she was also told that a person with 20/50 vision in one eye can drive as long as they wear refractive lenses. Otherwise, the ministry relied on its reconsideration decision.

The testimonies of the appellant, his father and the ministry provided new information that supply more detail on the medical conditions that were before the ministry at the time of reconsideration. The panel has admitted this new information as oral testimony in support of the information and records that were before the ministry at the time of reconsideration in accordance with s. 22(4) of the EAA. The appellant's written submission dated September 17, 2012 is accepted as argument.

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PART F – Reasons for Panel Decision

The issue on this 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 the appellant does not have a severe physical or mental impairment, and that in the opinion of a prescribed professional the appellant's impairments do not directly and significantly restrict him from performing DLA either continuously or periodically for extended periods, and that as a result of those restrictions the appellant does not require help to perform DLA?

The relevant legislation is as follows:

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 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 section 2(1):

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 authorized under an enactment to practice the profession of

(a) medical practitioner,

(b) registered psychologist,

(c) registered nurse or registered psychiatric nurse,

(d) occupational therapist,

(e) physical therapist,

(f) social worker,

(g) chiropractor, or

(h) nurse practitioner.

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Severe Mental Impairment

The appellant has not expressly stated a position on whether he has a severe mental impairment.

The ministry's position, as set out in its reconsideration decision, is that the appellant's physician has not reported a mental health diagnosis, and has not identified any deficits to cognitive and emotional functioning or impacts on DLA. Accordingly the ministry concluded that it was not satisfied that the appellant has a severe mental impairment.

On the evidence the physician did not diagnose a mental impairment in the PR. Of the 2 sections of the AR that are specifically meant to address mental impairment, the physician noted one was "N/A",

and left the other blank. Based on the foregoing the panel finds that the ministry was reasonable in determining that the appellant does not have a severe mental impairment.

Severe Physical Impairment

The appellant's position, as asserted by his advocate, is that the physician has identified that the appellant suffers from a "severe reduction in vision" as a result of chronic and progressive keratoconus. The appellant also pointed out that the physician has indicated that the appellant's functional skills are limited in walking and using stairs in unfamiliar areas. The appellant appeared to argue, based on the advocate's interpretation of s. 2 of the EAPWDA and ministry policy, that "the opinion of a medical practitioner" and "the opinion of a prescribed professional" are determinative on the matter of severity. Finally, the appellant argued generally that the panel must apply various principles of statutory interpretation: a) that the words of the EAPWDA should be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme and object of the statute, and the intention of the legislature; b) that section 8 of the *Interpretation Act* requires that the EAPWDA be interpreted in a way so as to best ensure the attainment of its objects; c) that where social welfare benefits are concerned, ambiguities in the legislation should be resolved in favour of the claimant; and d) that the EAPWDA must be interpreted with a benevolent purpose in mind. As a general principle the panel acknowledges the foregoing principles and routinely applies them as appropriate. The appellant did not specify any particular provisions of the EAPWDA to which the application of the foregoing principles would resolve the issue in his favour.

The ministry argued that the post-operative examination report of September, 2010 shows that the appellant may be visually impaired, but not that he is "legally impaired" or "legally blind". The implication was that the impairment cannot therefore be "severe". The ministry also said that the issue is not the appellant's knees, since according to the ministry the physiotherapist's progress/discharge note doesn't confirm a knee problem.

The assessment of severity on appeal is seldom clear-cut. What is clear is that the expressed opinion of the medical professionals with respect to severity is not determinative of the matter – the ministry must be satisfied as to severity based on a reasonable assessment of the evidence, including the professional opinions. *Garbutt v. British Columbia (Social Development)*, 2012 BCXC 1276, paragraph 21; *Hudson v. British Columbia (Employment and Assistance Appeal Tribunal)*, 2009 BCSC 1461, paragraph 65.

The evidence – the SR, PR, AR and the SSR – shows that the appellant has two physical impairments, those being vision impairment caused by keratoconus and some mobility impairment due to various issues with knee, ankle and foot. On the evidence it is clear that the primary impairment is the appellant's vision. The leg-related issues are not identified at all in the SR or the PR, the appellant had to be prompted by the panel to address the leg-related issues during his oral testimony, and in response to that prompting the appellant stated that his main issue is his eyes. The physiotherapist confirmed that the appellant was not having significant knee pain at the time she saw him. Functionally, the evidence is that the appellant is capable of walking for at least 1 km and in the PR the physician noted that the appellant's ability to walk or to climb stairs unaided is limited only in unfamiliar areas, indicating to the panel that the limitation is due to the appellant's vision problem rather than his legs. The leg problems appear to be a relatively minor contributing factor to the

overall severity of the appellant's level of physical impairment.

With respect to his vision, the SR, PR, AR and SSR are reasonably consistent in identifying the restrictions experienced by the appellant as a result of his vision impairment, though the SSR goes into more detail than the other documents. However, there are two areas of inconsistency in the evidence that are of concern to the panel.

Firstly, the physician's handwritten caveat on the SSR reduces the weight that can be given not only to the SSR but also to the PR and AR, as the physician states that she cannot confirm the extent of the restrictions faced by the appellant since she has only seen the appellant in her office. The panel does not expect that a physician must necessarily observe an applicant in his or her home setting in order to form an opinion on the severity of an impairment or the significance of restrictions, but an express statement by the physician that she cannot confirm the appellant's restrictions does significantly diminish the weight that can be given to the opinions stated in the PR and AR.

Secondly, other than the physician's opinions in the PR and AR the only medical evidence as to the severity of the vision impairment is the post-operative examination report of September 24, 2010, in which the vision specialist reported that the appellant "...has no complaints..." and that the left corneal transplant was "stable". The appellant's evidence is that currently the vision in the left eye is "slanted" and that he experiences pain in the eye daily. He also says that he has virtually no depth perception and that his peripheral vision is negligible. The degree of vision impairment is something that can generally be fairly well quantified by medical professionals. The appellant should be able to readily provide empirical evidence in the form of current examination reports of the acuity of his vision in both eyes, his depth perception, and his peripheral vision. Instead the only empirical medical evidence indicates that the appellant's left eye was stable in 2010 and that he had no complaints. There is no medical confirmation that the vision in the post-operative left eye has deteriorated since 2010 such that the vision in that eye is "angled", and there is no quantifiable information at all about the vision in the appellant's right eye.

In the circumstances where the physician who completed the PR and AR has subsequently expressly stated that she cannot confirm the extent of the limitations imposed by the visual impairment, and where medical evidence of the extent of the appellant's vision impairment should be readily available but has not been proffered, the panel has concluded that the ministry reasonably determined that the evidence does not demonstrate a severe physical impairment.

Direct and Significant Restrictions

The appellant's position, as expressed by his advocate, is that his impairment directly and significantly restricts his ability to perform DLA. The appellant said that the EAPWDA does not specify how many areas of DLA must be restricted to be eligible for PWD designation and he referred to the PR and said that the physician did in fact identify restrictions in 4 areas of DLA (meal preparation, basic housework, daily shopping, and mobility outside the home). In the AR the physician identified restrictions in reading, writing, walking outdoors, basic housekeeping, shopping, meals and transportation. The appellant argued that it is not reasonable for the ministry to infer that because the physician could not confirm the restrictions identified in the SSR that those restrictions do not exist, since the physician did in fact sign, date and stamp the SSR. He said that the ministry

failed to give any real meaning to the opinion of the physician as the prescribed professional.

The ministry's position is that the 4 DLA that are identified by the physician as being restricted, are restricted periodically because the restriction only occurs in unfamiliar areas and the appellant is not continuously in unfamiliar areas. The ministry said this does not support a finding of a significant restriction in the ability to perform these DLA.

In order for this statutory criterion to be satisfied, a restriction must be

- directly caused by a severe impairment,
- significant,
- either continuous, or periodic for extended periods.

In the PR the physician identified continuous restrictions to 4 DLA: meal preparation, basic housekeeping, daily shopping, and mobility outside the home. She noted no restrictions to "use of public or personal transportation". In the AR the physician noted restrictions to the same 4 DLA and also noted restrictions with respect to transportation, specifically in getting in and out of vehicles and to using public transit, both due to knee problems. Also related to the "transportation" DLA, the appellant's evidence is that he cannot drive due to his vision. In the AR, however, the physician identified most restrictions as being "periodic", with the periodicity being related to whether or not the appellant is in a familiar area.

On the evidence, the restrictions to meal preparation, basic housekeeping, and shopping cannot be said to be "significant". Regarding meal preparation, the physician notes the appellant is independent in 3 of 4 categories of activities (meal planning, food preparation, and safe storage of food), and requires periodic assistance with cooking "if unfamiliar". With respect to basic housekeeping, missing the occasional spot does not preclude a residence from being "in acceptable sanitary condition" as specified by EAPWDR s. 2(1)(a)(v). Regarding shopping, it is not a significant restriction to have to ask for occasional directions of store staff to find specific products. The appellant has difficulty reading labels, but his vision impairment does not preclude him from doing so. With respect to transportation, in the absence of confirmation from a prescribed professional regarding the appellant's inability to drive, and in view of the narrative from the physician regarding the qualified nature of the restrictions, a direct, significant restriction continuously or periodically for extended periods has not been established. Finally, with respect to the mobility DLA – "move about indoors and outdoors", the panel notes the appellant's otherwise good functional skills and the qualified nature of this restriction as occurring in "unfamiliar" situations.

Given the panel's conclusion as to whether the appellant has a severe impairment, and its analysis of the evidence with respect to restrictions of DLA, the panel finds that the ministry was reasonable in determining that this statutory criterion was not satisfied.

Help in Relation to DLA

The appellant's position is that the physician has confirmed that the appellant requires help with at least 4 DLA.

The ministry's position is that it has not been established that DLA are significantly restricted,

therefore it cannot be determined that significant help is required from other persons.

Regarding the need for help with DLA, the legislation requires that the need for assistance must arise from direct and significant restrictions in the ability to perform DLA that are either continuous or periodic for extended periods in the opinion of a prescribed professional. The panel finds that the ministry reasonably determined that since it has not been established that DLA are directly and significantly restricted, it cannot be determined that help is required as set out in section 2(2)(b)(ii) of the EAPWDA.

Conclusion

Having reviewed and considered all of the evidence and the relevant legislation, the panel finds that the ministry's decision declaring the appellant ineligible for PWD designation was reasonably supported by the evidence and was a reasonable application of the legislation in the circumstances of the appellant, and therefore confirms the ministry's decision.