

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated May 4, 2016, 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 his 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

### Evidence before the Ministry at Reconsideration

The evidence before the ministry at the time of the reconsideration decision included the Persons With Disabilities (PWD) Application comprised of the appellant's self-report (SR) dated November 17, 2015, a physician report (PR) dated November 10, 2015 completed by his general practitioner (the GP), who has known the appellant for 15-20 years and who has seen the appellant 2 to 10 times in the past 12 months, and an assessor report (AR) dated November 16, 2015 completed by Nurse PK (the Assessor), who has seen the appellant once, for the purpose of completing the assessment.

The evidence at reconsideration also included the following documents:

- Request for Reconsideration received by the ministry on April 12, 2016;
- April 26, 2016 questionnaire prepared by local MLA constituency assistant and completed by the GP. The GP's answers in the questionnaire are summarized as follows:
  - Additional information regarding the appellant's functional skills: *"difficulty concentrating, staying on track and keeping appointments (allergies cause disorientation). Balance is poor, at risk to fall (allergies in ear). Relies on assistance of outreach worker, advocate and housing manager to keep on track"*.
  - Reasons why the appellant has periodic difficulty with housework and mobility outside the home: *"allergies affect eyesight. can't read directions/correspondence etc. dust levels must be monitored at all times, can't keep up. Medication limits ability to complete tasks. Hand and motor skills are poor"*.
  - Additional information about the frequency of appellant's need for assistance with daily living activities (DLA): *"Outreach worker, advocate and supportive housing manager assist in keeping him oriented on a regular basis. Allergies are affecting eyesight, balance and cognitive skills"*.
- January 19, 2016 letter from the appellant's ophthalmologist to the GP, which details testing results and states: *"bilateral mild ocular allergy, continue eye drops daily. Subjective bilateral monocular diplopia. I cannot find a cause for the appellant's subjective sense of ghosting or doubling of vision in either eye"*.
- April 25, 2016 letter from a mental health outreach worker (L), who has been working with the appellant for 2 ½ years. She writes that she helped the appellant find housing and provides extensive support around his DLA – maintaining his apartment, shopping, laundry, appointments and assisting with finances.
- April 25, 2016 letter from supportive residential housing manager M stating that staff provides substantial support with finances, shopping and food preparation on a regular basis. M adds *"I anticipate that we will need to increase the level of support provided due to his continued increasing health issues"*.

The PWD application is summarized as follows:

### Diagnosis

In the PR the GP notes that the appellant has suffered from an immune disorder, namely severe environmental allergies, since 1990.

### Physical Impairment

In his SR the appellant wrote that he suffers from environmental allergies to trees, grass, dust, cats and dogs. His allergies are getting progressively worse, affecting eyesight, balance, bleeding from

sinuses, elevated heart rate, and shock.

In the PR the GP reported that the appellant:

- under “:Health History” :
  - has a severe allergy to grasses, dust mites cats and dogs;
  - severe daily symptoms but much worse in the summer; affecting nose, eyes and balance;
  - restricted to indoors during the summer, must avoid grass;
  - desensitizing treatment had failed due to worsening of symptoms and had to be stopped;
  - some of his prescribed antihistamines will cause him sedation
  - does not require aids or prostheses
- under “Degree of Impairment” the GP wrote that the appellant:
  - can walk less than 1 block and can’t walk outside in summer due to grass pollen;
  - can climb 5+ steps unaided, has no limitations in lifting;
  - has no difficulties in communication
- under “Additional Comments” the GP wrote: “he is dependent on antihistamine and steroid nasal sprays due to his severe symptoms”.

In the AR the Assessor reported that the appellant:

- has severe allergies, decreased vision
- under “Ability to Communicate” – has a good level of speaking and poor levels of vision (“vision is very poor”), writing and hearing (“ear infections and loss of equilibrium”) and comments: “unable to read prices and labels”.
- under “Mobility and Physical Ability” – is independent in walking indoors climbing stairs, standing, lifting, carrying and holding. For walking outdoors the Assessor writes “many days balance is affected”.

### **Mental Impairment**

In his SR the appellant stated that he suffered emotional damage from an abusive relationship, and isolates himself to protect himself from further abuse.

In the PR the GP noted no significant deficits with cognitive and emotional function and is not restricted with social functioning.

In the AR under “Cognitive and Emotional Functioning” the Assessor noted the degree to which the appellant’s mental impairment or brain injury impacts his functioning as follows:

- major impact in bodily functions (“sleeps to 3 am”), consciousness, emotion (“lost a close friend due to heart attack”), insight and judgement, and motivation;
- moderate impact in impulse control and other neuropsychological problems (eg. visual/spatial problems, psychomotor, learning disabilities), with the added comment: “very weak in math”;
- minimal impact on motor activity and language,
- in the areas of attention/concentration, executive and memory the Assessor writes: “memory loss is medication related due to being 7 times the regular dose”.

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

In his SR the appellant noted on some days his vision is too impaired to drive, on some days he can't prepare food due to his bad eyesight, and he is unable to work. His hygiene is affected by his limited ability to do laundry. He lives in the bush because he has no money, and L helps him with food, obtaining income assistance, and finding housing.

In the PR the GP noted that the appellant is prescribed medications that interfere with his ability to perform DLA, and added: "some antihistamines will cause him sedation". The GP notes that the appellant's impairment directly restricts his ability to perform DLA in the following areas:

- basic housework
- daily shopping
- mobility outside the home
- use of transportation

The GP indicates that each of these restrictions is periodic in nature, not continuous, and writes "can't work or walk outside especially during the summer to avoid grass pollen". He adds that the restriction is severe, especially in summer. The appellant requires assistance with shopping, travel, and outside house jobs.

The GP indicated that the appellant is not restricted with personal self-care, meal preparation, management of medications, mobility inside the home and management of finances.

In the AR the Assessor noted that the appellant:

- is independent in personal self care ("poor eyesight affects eating and food preparation; simple diet/2x day"), meal preparation, management of medications, mobility inside the home and management of finances;
- is restricted with:
  - laundry – "in a bucket"
  - basic housekeeping – "very limited in the bush"
  - going to and from stores – "very seldom"
  - reading prices and labels – "can't read labels"
  - making appropriate shopping choices – "goes by pictures"
  - paying for purchases – "very difficult"
  - carrying purchases home - "very difficult"
  - meal preparation – "very difficult"
- is continuously restricted with using public transit, transit schedules and arranging transportation
- in additional comments the Assessor wrote: "many times he can't see well enough to prepare foods".

The Assessor also completed the section of the AR related to restrictions to DLA in relation to social functioning, and described the appellant as requiring continuous support/supervision in making appropriate social decisions, developing/maintaining friendships, interacting appropriately with others, dealing appropriately with unexpected demands, and securing assistance from others. She added that the appellant has "very disrupted functioning" in his immediate and extended social networks and commented: "very isolated – living in the bush".

### **Assistance Required**

In the PR the GP noted that the appellant requires help with shopping, travel and outside house jobs.

In the AR the Assessor noted that the appellant had received assistance from his mother (now deceased) and currently from a mental health outreach worker.

### **Additional Information at the Hearing**

At the hearing the appellant provided the following oral evidence:

- he has seen his ophthalmologist 4 times. Extensive testing has been done on his eyes, but no surgeries or other procedures are available. He was prescribed a medication that he could not tolerate and had to discontinue because it burned and caused severe headaches. On a “good day” he can read, with really thick glasses. The ophthalmologist has recommended removal of his driver’s license but because he scored 3/5 on his eye test and has agreed that he won’t drive on “bad days” the ophthalmologist has not sought cancellation of his license.
- he reported his vision has “ghosting” (2 images at once).
- he has balance issues and had one dizzy spell on the morning of the hearing.
- “bad days” are 6 days/week in summer, 4-5 days/week in early fall, 3-4 days/week in winter when dust mites are the primary allergen. His allergies are also bad in spring. The best time of the year for the appellant is late fall.
- he receives daily support from M at the transitional housing where he now lives. He can’t read well and his memory is not the best. With the recent death of his mother he has to deal with estate issues, which places additional stress on M’s time to help with the reading.

The appellant added that he believes his allergies affect his nervous system because he experiences elevated heart rate and anxiety even without high doses of medication.

### **Evidence of Witness L:**

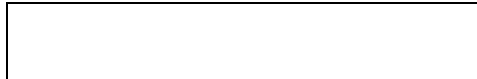
L is an outreach worker employed by Canadian Mental Health Services through BC Housing. She has known the appellant for 3 years. She discovered him living in the bush. He was homeless, had no income and was living in a tent. L took food to him regularly and helped move him into transitional housing in November of 2015. In the time she has known the appellant his limitations have worsened, particularly since his mother’s death, because the mother supported him a lot. Currently L connects with the appellant daily on weekdays and frequently on weekends. She helps him with shopping, getting his medication and driving him to his appointments. She notices that he gets “foggy” either from the medication or from the allergies themselves. She buys his food because he doesn’t do well in stores.

### **Admissibility of Additional Information**

The ministry did not object to the admissibility of the appellant’s oral (documentary) evidence, but objected to any information from Witness L that stemmed from factors outside the diagnosis of environmental allergies, on the basis that this information was new and not before the ministry at reconsideration.

The panel admitted all of the appellant’s oral evidence under EAA Section 22 (4)(b) as evidence in support of the information that was before the ministry at reconsideration because it provided greater detail to information he had already provided to the ministry prior to reconsideration.

The panel also admitted Witness L’s information because it provided additional detail to matters she



had referred to in her letter of April 25, 2016 which was considered by the ministry at the time of reconsideration.

The ministry relied on the reconsideration decision.

## PART F – Reasons for Panel Decision

The issue in this appeal is whether the ministry decision of May 4, 2016 that 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 his 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.

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:**

**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 a he suffers from a severe physical impairment because his environmental allergies affect his eyesight to the extent that on his "bad days" he cannot drive, read labels or prices,



or prepare food. He also experiences “ghosting” (double vision). His ear is distended due to allergic reaction, and his balance is so severely affected he is afraid of falling. He requires assistance in his daily functioning, including assistance with housekeeping, food preparation, management of his personal affairs (his mother’s estate) and being driven to stores and appointments. His allergies are at their worst in the summer, when he cannot go out of doors due to grasses and pollens, but continue to be severe in the other seasons, due to dust mites.

In the reconsideration decision the ministry based its determination that the appellant’s allergies were not a severe impairment on the information provided by the appellant’s GP in the PR and questionnaire and on the letter from the appellant’s ophthalmologist. The ministry also considered the AR but noted that the Assessor’s responses were inconsistent with the responses of the GP, and observed that the Assessor met the appellant for the first time when she completed the AR, whereas the GP had known the appellant for 15 to 20 years. The ministry noted the following responses of the GP in the PR: the appellant can climb 5+ steps unaided, has no limitations in lifting or remaining seated, can walk less than 1 block unaided (“can’t walk outside in summer due to grass pollen”). The ministry was not satisfied that the appellant’s ability to walk outside unaided during the other seasons was addressed by the GP. The ministry also based its determination on the ophthalmologist’s finding that the appellant suffered from a bilateral “mild” ocular allergy and that the “ghosting” was a subjective complaint for which he could not find a cause.

On the subject of the appellant’s balance problems the ministry also noted that in the questionnaire the GP did not describe the frequency or duration of periods in which the appellant was at risk of falling, and the Assessor did not describe the frequency or duration of days in which the appellant’s balance was affected, and noted that the Assessor rated the appellant as independent in 5 of 6 listed areas of mobility and physical ability.

#### Panel Decision

A diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a “severe” impairment. An impairment is a medical condition that results in restrictions to a person’s ability to function independently or effectively. To assess the severity of an impairment, the ministry must consider both 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. In making its determination the ministry must consider all the relevant evidence, including that of the appellant, the outreach worker and the housing manager. However, the legislation is clear that the fundamental basis for the analysis is the evidence from a prescribed professional – in this case, the appellant’s GP, who has treated the appellant for 15 – 20 years, the Assessor, a prescribed professional (nurse) who has met the appellant only once and who has completed the AR on the basis of that single meeting and from information provided to her from a mental health worker, and the ophthalmologist. The legislation also clearly states that the determination of the severity of an impairment is at the discretion of the minister.

In the PR the physician diagnosed the appellant as suffering from a severe allergy which affects his nose, eyes and balance, and which causes him to remain indoors during the summer. Other than the appellant’s impaired ability to walk outside unaided during the summer the GP indicates that the appellant is minimally restricted in other functions, including climbing 5+ steps unaided and able to lift and sit without limitation. In the questionnaire the GP indicates that the appellant is at risk of falling but does not comment on how frequently the appellant is at risk, or if he has fallen. The ophthalmologist describes the ocular allergy as mild, and the ghosting experienced by the appellant

as subjective without a known cause. The Assessor describes the appellant's balance problems as "bad", but does not indicate the frequency or duration of the episodes of poor balance. She also indicates that the appellant is independent in five of the six listed areas of mobility and physical ability.

The panel acknowledges that the appellant suffers from environmental allergies that impair his daily functioning. However, given the information provided by the 3 prescribed professionals – the GP, the Assessor, and the ophthalmologist – the panel finds that the ministry reasonably determined that there is insufficient evidence to establish that the appellant suffers from a severe physical impairment as a result of his environmental allergies.

### **Severe Mental Impairment**

In his SR and oral evidence the appellant indicated that he has memory problems, emotional damage from an abusive relationship, and isolates himself to protect himself from abuse. He also believes that his allergies have affected his nervous system, causing anxiety and elevated heart rate. Witness L states that the appellant gets "foggy", either from the allergies or the medication taken to control the allergic symptoms.

In the PR the GP does not diagnose or describe a mental disorder or brain injury and indicates that the appellant has no difficulties with communication, no significant deficits with cognitive and emotional functioning, and is unrestricted with social functioning. In the questionnaire the GP states that the appellant has difficulty concentrating, staying on track and keeping appointments because his allergies cause disorientation. He also states that the allergies affect the appellant's cognitive skills. The GP does not describe the severity, duration or frequency of these difficulties. In the AR, under "Cognitive and Emotional Functioning" the Assessor notes the degree to which the appellant's mental impairment or brain injury impacts his functioning as follows:

- major impact in bodily functions ("sleeps to 3 am"), consciousness, emotion ("lost a close friend due to heart attack"), insight and judgement, and motivation;
- moderate impact in impulse control and other neuropsychological problems (eg. visual/spatial problems, psychomotor, learning disabilities), with the added comment: "very weak in math";
- minimal impact on motor activity and language;
- in the areas of attention/concentration, executive and memory the Assessor writes: "memory loss is medication related due to being 7 times the regular dose".

The Assessor also indicates that the appellant has very disrupted social functioning and requires continuous support.

### *Panel Decision*

As discussed earlier in this decision under the heading "Severe Physical Impairment" the legislation states that the determination of the severity of an impairment is at the discretion of the minister. The ministry is faced with conflicting evidence from the GP and the Assessor. In the PR the GP does not diagnose a mental disorder or brain injury and does not indicate difficulties with cognitive, emotional, or social functioning. The appellant is not prescribed medication for a mental disorder or brain injury. In the questionnaire the GP comments that the appellant has difficulty concentrating, staying on track and keeping appointments, and that the appellant's cognitive skills are affected by his allergies, but does not provide additional information to indicate their severity, duration or frequency.

The GP's evidence in the PR and questionnaire is contradicted by the comments of the Assessor in

the AR. The Assessor indicates that the appellant experiences a major impact on bodily functions, consciousness, emotion, insight, judgement and motivation, moderate impact on impulse control and neuropsychological areas, and requires continuous support/supervision with all listed areas of social functioning.

Although the Assessor notes major and moderate impacts in the overall area of mental functioning the GP does not identify a mental disorder or brain injury and in somewhat general terms refers to the appellant as having difficulties with concentration, keeping appointments, and an impact on his cognitive skills, without providing additional evidence as to frequency, severity or duration of the difficulties on the appellant's functioning.

Taking into account all of the evidence before the ministry at reconsideration and the additional evidence submitted at the hearing the panel finds that the ministry reasonably determined that there is insufficient evidence to establish that the appellant has a severe mental impairment.

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

The appellant argues that due to his allergies he is unable to predict what he will be able to do the next day, and on bad days he requires assistance with shopping, reading labels and prices, preparing meals, reading mail. He needs to "pick his way" when out walking.

Witness L states that she provides extensive support with the appellant's DLA almost daily, including shopping, transportation to appointments, maintaining his apartment and assisting with finances. M writes that he and his staff provide substantial support around the appellant's DLA, particularly with finances, shopping and food preparation.

The ministry argues that the GP does not describe the frequency or duration of the appellant's periodic restrictions other than in the summer season, and notes that the GP indicates he is not restricted with the majority of DLA. The ministry also argues that the Assessor does not indicate the nature of restrictions in areas of laundry, basic housekeeping, shopping, carrying purchases home, meal preparation, cooking and safe food storage, and that the comments of the Assessor in relation to most of these impairments, such as "in a bucket" very limited in the bush, very seldom", "many times" and "very difficult" do not adequately describe the nature, frequency or duration of the restrictions.

### *Panel Decision*

Section 2(2) (b) of the EAPWDA requires that a prescribed professional confirm that the appellant's impairments directly and significantly restrict the appellant's ability to perform the prescribed DLA either continuously or periodically for extended periods. The term "directly" means that there must be a causal link between the severe impairment and the restriction. The direct restriction must also be significant. Finally, there is a component related to time or duration. The direct and significant restriction may be either continuous or periodic. If it is periodic it must be for an extended time.

Although the appellant, the witness L, housing manager M and the Assessor indicate that as a result of the appellant's environmental allergies he is continuously restricted in many DLA, including shopping, transportation, preparing meals, basic housekeeping, laundry, managing his finances, and the GP notes that the appellant is directly restricted in his ability to perform DLA and specifically is periodically restricted with basic housework, daily shopping, mobility outside the home and use of transportation on a periodic basis, a severe physical or mental impairment has not been established.

The determination of a severe impairment is a requirement which must be met prior to a determination that a person's ability to perform DLA are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods.

The panel therefore finds that the ministry reasonably determined that the legislative criteria in EAPWDA Section 2 (2) (b) were not met because a severe physical or mental impairment was not established.

### **Help in Performing DLA**

The appellant argues that he requires significant help from his outreach worker L and his housing manager M to perform his DLA on a daily or near-daily basis.

The ministry argues that because it has not been established that DLA are significantly restricted it cannot be determined that significant help is required.

### *Panel Decision*

The panel accepts the appellant's evidence that he requires significant help from L and M to perform his DLA on a daily or near-daily basis. However, a finding that a severe impairment directly and significantly restricts a person's ability to manage his DLA either continuously or periodically for an extended period is a precondition to a person requiring "help" as defined by section 2(3)(b) of the EAPWDA. For the reasons provided earlier in this decision, that precondition of a severe impairment has not been established in the appellant's circumstances.

Accordingly, the panel finds that the ministry reasonably concluded it could not be determined that the appellant requires help with DLA as defined by section 2(3) (b) of the EAPWDA.

### **Conclusion**

The panel acknowledges that the appellant's environmental allergies cause impairments to his functional abilities, restrict his ability to perform DLAs and cause him to require the help of other people in relation to his DLA. However, having reviewed and considered all of the evidence and the relevant legislation, the panel finds that the ministry's decision determination that the appellant is ineligible for PWD designation because the legislative requirements were not met is a reasonable application of the legislation in the circumstances of the appellant. The panel therefore confirms the ministry's decision.