

**PART C – DECISION UNDER APPEAL**

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Poverty Reduction (the ministry) dated August 11, 2020, 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* for designation as a person with disabilities (PWD). The ministry found that the appellant met the age and duration requirements, but was not satisfied that:

- the appellant has a severe physical and/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, the appellant requires an assistive device, the significant help or supervision of another person, or the services of an assistance animal to perform DLA.

In addition, the ministry found that it had not been demonstrated that the appellant is one of the prescribed classes of persons who may be eligible for PWD designation on alternative grounds, which includes: a person who is enrolled in palliative care; a person who has at any time been determined eligible for At Home Program payments through the Ministry of Children and Family Development; a person who has at any time been determined eligible by Community Living BC for community living support; and a person who is considered disabled under section 42(2) of the *Canadian Pension Plan Act*.

**PART D – RELEVANT LEGISLATION**

*Employment and Assistance for Persons with Disabilities Act* (EAPWDA), section 2

*Employment and Assistance for Persons with Disabilities Regulation* (EAPWDR), section 2

## **PART E – SUMMARY OF FACTS**

The evidence before the ministry at the time of the Reconsideration Decision included:

1. The appellant's PWD application comprised of a Medical Report (MR) [dated February 23, 2020], which was completed by the appellant's Glaucoma specialist, who had known the appellant since November 2016 and seen her 2-10 times in the past 12 months prior to completing the PWD application. The approaches and sources used to conduct the MR and AR were not indicated.
2. Assessor Report (AR) [dated May 4, 2020], which was completed by the appellant's family physician (the GP) who had known the appellant for 4 years and seen her 2-10 times in the past 12 months prior to completing the PWD application. The AR was based on an officer interview with the appellant, chart notes from office visits and specialist reports.
3. The PWD application also included the appellant's Self-Report (SR) signed and dated 2020. In it the appellant described her medical condition, its symptoms and how it affects her both indoors and outdoors and her ability complete her daily living activities (DLA).
4. A 2-page medical report dated May 8, 2019 (single field analysis).
5. Request for Reconsideration (RFR), signed and dated July 23, 2020, which in part stated the following:
  - A description of how the appellant's condition manifests on a day to day basis and how it impacts her daily life and daily living activities.
  - A description of the appellant's mental state as a result of the complications of her medical condition.
  - A description of the effectiveness, ineffectiveness and side-effects of her medications.
  - A statement about including with her RFR more information from her GP, in the form of a questionnaire, to address the concerns the ministry had outlined in its original decision.
6. Letter from community advocacy group dated July 20, 2020, which in part, described questions posed to the appellant's GP and summarized the GP's response.
7. Completed questionnaire (the questionnaire) from the GP dated July 17, 2020. The questionnaire asks for clarification regarding the duration of the impairment, if assistance is required with tasks and if so for what duration and how often, how much longer does it take to complete the tasks if help is not available and is there a danger to the appellant if she performs these tasks, and lastly, are there any aids or prothesis required to assist the impairment?
8. Chart of daily effects of disability, dating from September 12 to February 27 (year unknown) and operation history dating from 2000-2017.

### ***Diagnoses***

In the MR, the specialist diagnosed the appellant with Keratoconus (onset 2020).

### ***Duration***

In the MR, the specialist indicated the following about the appellant:

- "I cannot reliably estimate the duration of her symptoms. They began (approximately) a few months ago (September 2019)".

### ***Physical Impairment***

In the MR, the specialist indicated the following about the appellant:

- Can walk 4+ blocks unaided, can climb 5+ steps unaided, can lift without limitation and can remain seated without limitation.
- A detailed timeline of the appellant's medical condition.
- The appellant informed the specialist of experiencing 'visual fog' and pressure sensation, which worsened with humidity and when exposed to steam or hot environments.

- “I am relying on her [the appellant’s] accounts of her symptoms and how they affect her. I do not have any notes from her cornea specialist to add further details. Unfortunately, her clinical visits have not coincided with days she was experiencing visual fog. I was able to see her a few days after such an episode and her vision was 20/100 in the right eye”.

In the AR, the GP indicated the following about the appellant:

- Walking indoors, climbing stairs, and standing independently.
- Lifting and carrying/holding are performed with periodic assistance from another person.
- There is a history of Keratoconus, which causes impaired vision, fogginess in the eye, pain, tearing and irritation.

In the SR, the appellant did not make mention of her physical ability, physical functioning, or mobility.

### ***Mental Impairment***

In the MR, the specialist did not diagnose the appellant with a mental impairment and indicated the following:

- There are no difficulties with communication
- There are no significant deficits with cognitive and emotional function.
- There are no restrictions with the management of finances or social functioning.

In the AR, the GP indicated the following about the appellant:

- The ability for speaking, writing, and hearing are good and reading is satisfactory.
- There is a moderate impact to emotional functioning and all other listed areas of cognitive and emotional functioning have either no or minimal impacts.
- All listed tasks under ‘pay rent/bills’, ‘medications’ and ‘social functioning’ are performed independently.

In the SR, the appellant did not make mention of a mental impairment.

### ***Daily Living Activities***

In the MR, the GP indicated the following about the appellant:

- No medications that interfere with the ability to perform DLA have been prescribed.
- “As per the patient”, there are periodic restrictions in the ability to perform ‘meal preparation’, ‘basis housework’ and ‘use of transportation’.
- Restrictions to the ability to perform ‘daily shopping’ and ‘mobility inside the home’ are unknown and all other list areas are performed without restrictions.
- “She [the appellant] describes her symptoms as dependent on the weather (humidity) and environment (steam and heat) in the kitchen. Occasionally wakes with ‘fog’”.

In the AR, the GP indicated the following about the appellant:

- The history of keratoconus has “interfered with her activities of daily living” such as cooking, cleaning and shopping.
- All activities under ‘personal care’ are performed independently except ‘grooming’, which requires periodic assistance and takes significantly longer. The GP commented: “difficulty with vision; blurred vision”.
- Laundry requires periodic assistance and takes significantly longer. The GP commented: “exposure to heat from dryer affect vision”.
- Basic housekeeping requires continuous assistance and takes significantly longer. The GP commented: “need assistance – take more than twice the time”.
- With Shopping, ‘going to and from stores’, and ‘reading prices and labels’ require periodic

assistance and “depends on the weather”, ‘carrying purchases home’ requires periodic assistance and takes significantly longer due to “pressure on eye...need to rest in-between”. All other listed items in the shopping category are performed independently.

- With Meals, ‘food preparation’ and ‘cooking’ require continuous assistance and take significantly longer as “fumes and aromas from food causes fogginess and irritation of eye. Need 2x longer than regular person”. All other items in this category are performed independently.
- All items under ‘pay rent/bills’ and ‘medications’ are performed independently.
- With Transportation, ‘using public transit’ (“cannot tolerate standing on bus”) and ‘using transit schedules and arranging transportation’ (“blurred vision depending on weather”) require periodic assistance and take significantly longer.
- All items with Social functioning are performed independently and the remaining section in this category were left blank.

In the SR, the appellant indicated that she needs help with cleaning, cooking, and ironing, and cannot drive at night.

### ***Help***

In the MR, the specialist indicated the following about the appellant:

- Requires no prostheses or aids for her impairment.
- “She [the appellant] informs me that the women she lives with will cook for her and drive her around when she feels the ‘visual fog’ is present”.

In the AR, the GP indicated the following about the appellant:

- Assistance is provided by family and friends.
- The appellant uses prescription sunglasses as an assistive device.
- No assistance is provided by assistance animals.

In the SR, the appellant did not indicate who provides the necessary assistance.

### ***Evidence on Appeal***

Notice of Appeal (NOA), signed and dated August 18, 2019, in which the appellant stated, in part, that “the documents and information I provided in my application demonstrate that I have a severe physical impairment that significantly restricts my everyday activities making me require assistance for these activities”.

The panel found that the information in the NOA consists of the appellant’s argument and does not require a determination of admissibility.

### ***Evidence at the Hearing***

At the hearing, the appellant stated, in part, the following:

- The PWD application process began in 2016, with the MR being completed in December 2019 and the AR being completed in May 2020.
- The PWD application was submitted by the GP in June 2020 without the appellant reviewing the application or receiving a copy.
- The timeline between starting the application and submitting was long and therefore it does not accurately represent her medical conditions.
- Her current health conditions are worse.
- She was in contact with the specialist who completed the MR until June 2020. But the

specialist's office closed, and she was referred to a cornea specialist in July or August 2020. This shows that she needs consistent close monitoring.

- There was no characterization of her health current situation and some of the information that the ministry relied on to make its decision was old.
- She worked with an advocate and the GP to provide updated information and address some the questions the ministry had. But the ministry did not take this information into consideration and continued to rely on old, out-dated information.
- There are contradictions between the old and new information provided.
- She also provided a detailed daily report of her condition.

At the hearing, the ministry relied on its reconsideration decision.

## **PART F – REASONS FOR PANEL DECISION**

The issue on appeal is whether the ministry's reconsideration decision, which found that the appellant is not eligible for 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. The ministry found that the evidence does not establish that the appellant has a severe mental or physical impairment and that her DLA are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods. Also, it could not be determined that the appellant requires the significant help or supervision of another person because of those restrictions.

The criteria for being designated as a PWD are set out in Section 2 of the EAPWDA as follows:

### **Persons with disabilities**

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.

(4) The minister may rescind a designation under subsection (2).

The EAPWDR provides as follows:

### **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.

**Alternative grounds for designation under section 2 of Act**

**2.1** The following classes of persons are prescribed for the purposes of section 2 (2) [*persons with disabilities*] of the Act:

- (a) a person who is enrolled in Plan P (Palliative Care) under the Drug Plans Regulation, B.C. Reg. 73/2015;

(b) a person who has at any time been determined to be eligible to be the subject of payments made through the Ministry of Children and Family Development's At Home Program;

(c) a person who has at any time been determined by Community Living British Columbia to be eligible to receive community living support under the *Community Living Authority Act*;

(d) a person whose family has at any time been determined by Community Living British Columbia to be eligible to receive community living support under the *Community Living Authority Act* to assist that family in caring for the person;

(e) a person who is considered to be disabled under section 42 (2) of the *Canada Pension Plan*

### **Panel Decision**

#### **Severe Impairment**

In the reconsideration decision, the ministry was not satisfied that the information provided establishes a severe physical or mental impairment. Determining a severe physical or mental impairment requires weighing the evidence provided against the nature of the impairment and its reported functional skill limitations. 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 the nature of the impairment and the extent of its impact on daily functioning.

The panel finds that employability is not a consideration for eligibility for PWD designation because employability is not a criterion in section 2(2) of the EAPWDA nor is it listed among the prescribed daily living activities in section 2 of the EAPWDR.

#### **Physical Impairment**

The appellant argued that she has a severe impairment that causes symptoms as described in section A and B of the PWD application, her SR and RFR.

The ministry argued that based on the information provided in the PWD application, a severe impairment of the appellant's physical functioning has not been established.

In its reconsideration decision, the ministry noted that the specialist provided a history of the appellant's condition, symptoms, and the impact of treatment. The ministry also noted that, regarding functional skills, the specialist indicated that the appellant can walk 4+ blocks unaided, climb 5+ steps unaided, lift without limitation and remain seated without limitation.

The ministry noted that, regarding mobility and physical ability, the GP indicated that the appellant walks indoors, climb stairs and stand independently but walking outdoors, lifting, and carrying/holding require periodic assistance. The ministry pointed out that it is unclear why periodic assistance is required with walking outdoors, lifting or carrying/holding when the specialist indicated that the appellant can walk 4+ blocks unaided and lift without limitation. The panel finds that neither the specialist nor the GP provided evidence to remedy this ambiguity.

The panel finds the ministry's analysis of the evidence as stated here reasonable and adds that the GP



did not indicate the frequency and duration of the assistance required with walking outdoors, lifting or carrying/holding. The panel notes that in the questionnaire the GP did not explicitly indicate that the appellant suffers from a severe physical impairment and disagrees with the advocate's assertion that, by stating that the appellant has to stop what she is doing "very frequently to avoid blurred vision and irritation, dryness and migraines which leads to imbalance", the GP confirmed a severe impairment. Finally, the panel notes that the specialist explicitly stated that when completing the MR, the specialist was "relying on [the appellant's] accounts of her symptoms and how they are affecting her", and that there were no notes from the cornea specialist to consult. The panel finds that the information in the MR reflects the appellant's opinion about her condition which includes the assessment of physical functioning.

Given the overall assessments of the appellant's functional ability, and mobility and physical ability in the PWD application and the lack of definitive additional information provided at appeal from a prescribed professional, the panel finds that the ministry was reasonable in its determination that the evidence does not support a finding that the appellant suffers from a severe physical impairment and that the legislative criteria outlined in Section 2(2) of the EAPWDA have not been met.

#### Mental Impairment

The appellant argued that she feels depressed and helpless due her keratoconus.

The ministry's position is that based on the assessments provided in the PWD application, a severe impairment of mental functioning has not been established.

In its reconsideration decision, the ministry noted that the specialist did not diagnose the appellant with a condition that gives rise to a mental impairment. The ministry noted also that the specialist indicated that the appellant has no difficulties with communication and there are no deficits with cognitive and emotional functioning.

The ministry noted that the GP indicated that the ability to speak, hear and write were good and reading was satisfactory. The ministry also noted that the GP indicated that there are moderate impacts to emotional function and that all other listed areas of cognitive and emotional functioning have either no or minimal impacts. The ministry acknowledged that the appellant feels depressed but stated that it must rely on a diagnosis from a medical practitioner.

The panel concurs with the ministry's analysis of the evidence as stated here and adds that narrative provided by both physicians and the appellant does not point to the appellant suffering from a severe mental impairment. The panel also finds that overall functioning of the appellant is not limited due to a mental impairment. For example, the panel notes that DLA that are typically associated with a mental impairment are performed independently by the appellant. It is reasonable that if the appellant suffered from a severe mental impairment, there would be some type of deficits in the areas of 'pay bills/rent', 'medications' and 'social functioning'.

Given the overall assessments of the appellant's mental, cognitive and emotional ability and functioning in the PWD application and the lack of any additional information provided at appeal from a prescribed professional, the panel finds that the ministry was reasonable in its determination that the evidence does not support a finding that the appellant suffers from a severe mental impairment and that the legislative criteria outlined in Section 2(2) of the EAPWDA have not been met.

#### Restrictions in the ability to perform DLA

Section 2(2)(b)(i) of the EAPWDA requires that the minister be satisfied that in the opinion of a prescribed professional, a severe mental or physical impairment directly and significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods. While other evidence may be considered for clarification or support, the ministry's determination as to whether it is satisfied that the legislative criteria are met, is dependent upon the evidence from prescribed professionals. 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 periodic, it must be for extended periods. Any analysis of periodicity must also include consideration of how frequently the activity is restricted. All other things being equal, a restriction that only arises once a year is less likely to be significant than one that occurs several times a week. Accordingly, in circumstances where the evidence indicates that a restriction arises periodically, it is appropriate for the ministry to require evidence of the duration and frequency of the restriction in order to be "satisfied" that this legislative criterion is met.

DLA are defined in section 2(1) of the EAPWDR and are listed in both the MR and the AR sections of the PWD application with the opportunity for the prescribed professional to check marked boxes and provide additional narrative. DLA, as defined in the legislation, do not include the ability to work.

The appellant argued that due to the complication of keratoconus, her ability to perform her DLA is restricted as indicated in section A and B of the PWD application.

The ministry argued that it is not satisfied that the information provided establishes that the impairment directly and significantly restrict DLA continuously or periodically for extended periods.

The ministry noted that in the MR, the specialist indicated that the appellant is periodically restricted with DLA in the areas of meal preparation, basic housework and use of transportation, but did not provide information on the degree of the restriction. As previously mentioned, and noted by the panel, the specialist indicated that the restrictions listed were "as per patient".

The ministry noted that in the AR, the GP indicated that the majority of the DLA were performed independently, with assistance required with grooming, laundry, going to and from stores, reading prices and labels, and carrying purchases home. These areas are also listed as taking significantly longer to complete. The ministry found that the GP did not indicate how much longer the appellant takes to complete these tasks nor is the frequency and duration of the assistance required described. The ministry noted that the GP indicated that periodic assistance was required and it takes significantly longer to use public transit and commented that the appellant is unable to tolerate standing on the bus due to pain and pressure in the eye. The ministry notes that the GP indicated in the same AR that the appellant could stand independently and therefore it is difficult to make a determination of a significant restriction.

The ministry noted that the GP indicated that continuous assistance was required, and it takes significantly longer for food preparation/cooking meals and basic housekeeping. The GP noted that fumes and aroma from the food causes fogginess and eye irritation. The ministry determined that it is not clear that there is a significant restriction in the appellant's overall ability to complete her tasks as it is reported to only take twice as long to complete these tasks.

The panel finds the ministry's analysis of the evidence as stated here reasonable and adds that, in the AR, the GP indicated that carrying purchase home requires periodic assistance because of pressure on the eye and that rest is needed in between. However, the GP did not indicate how often rest is needed or for how long. Unfortunately, the questionnaire did not provide clarity to this matter as the GP

mentioned that daily help is needed for most of the day with chores that involve change in temperature. The panel finds that information provided by both the GP and specialist is insufficient to make a definitive determination, thus forcing the reader to make assumptions and draw conclusions from those assumptions. Though the legislation gives some allowance, in this case, the information is too ambiguous or conflicting. For example, in the AR the GP indicated that going to and from stores requires periodic assistance but in the MR, which was indicated to be based on the appellant's own assessment, the specialist indicated that it was unknown if shopping had any restrictions. In the questionnaire the GP indicated that all chores that involve a change in temperature and humidity require assistance however, in the AR, the GP indicated that basic housekeeping needs assistance and takes longer without providing an explanation as why household tasks that do not typically involve a change in temperature or humidity would require assistance. Also, the specialist indicated that personal self care is not restricted but the GP indicated that grooming requires assistance due to blurred vision. The panel also noted that the specialist and GP differed in their opinion of the appellant's mobility and physical functioning.

Given the evidence as a whole, the panel finds that the ministry reasonably concluded that the evidence does not establish that an impairment significantly restricts DLA continuously or periodically for extended periods, pursuant to Section 2(2)(b)(i) of the EAPWDA.

#### Help to perform DLA

Section 2(2)(b)(ii) of the EAPWDA requires that, *as a result of direct and significant restrictions in the ability to perform DLA*, a person requires help to perform those activities. Help is defined in subsection (3) as the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform DLA.

The appellant indicated that she receives help from her the women she lives with.

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

The panel notes that, AR, the GP indicated that assistance is required from the women the appellant lives with. However, it was not indicated what assistance is provided, how often or for how long.

Given that confirmation of direct and significant restrictions with DLA is a precondition of the need for help criterion and 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

The panel finds that the ministry's reconsideration decision, which determined that the appellant was not eligible for PWD designation, was reasonably supported by the evidence and is a reasonable application of the applicable enactment, and therefore confirms the decision. The appellant is not successful on appeal.

APPEAL NUMBER  
2020-00201

**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

Neena Keram

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2020/09/14

PRINT NAME

Arshdeep Dhaliwal

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2020/09/14

PRINT NAME

Shirley Heafey

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2020/09/14