

PART C – DECISION UNDER APPEAL

(State the reconsideration decision)

The decision under appeal is the ministry's reconsideration decision dated October 26, 2009 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 requirement and that his impairment is likely to continue for at least 2 years. However, the ministry was not satisfied that:

- the appellant has a severe physical or mental impairment
- the appellant's daily living activities (DLA) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods
- a prescribed professional has confirmed that as a result of direct and significant restrictions, the appellant requires help to perform DLA.

PART D – RELEVANT LEGISLATION

(State the relevant Legislation considered)

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

Please set out the facts as determined by the panel, based on the evidence at the hearing. Please note that subsection 22(4) of the Employment and Assistance Act states that, in a hearing referred to in subsection (3), a panel may admit as evidence only:

- (a) the information and records that were before the minister when the decision was being made, and
- (b) oral or written testimony in support of the information and records referred to in paragraph (a).

The evidence before the ministry at the time of reconsideration included a PWD application, comprised of a Physician Report (PR) and an Assessor Report (AR), physician's notes dated December 28, 2008 and April 17, 2009, and the Request for Reconsideration.

In the PR dated June 23 2009, completed by the appellant's physician of 2 years, the appellant is diagnosed with "severe photophobia and associated headaches" and "multiple chemical sensitivities" (MCS). The physician writes that the appellant "cannot open his eyes in daylight without wearing maximally blocking sunglasses. If he does not shield his eyes from the lights he develops severe/disabling headaches". He cannot tolerate any scented products and external smells like exhaust fumes without developing days of headache, nausea and generalized distress. Treatment includes lying down in a dark room for several hours. Regarding Functional Skills, the appellant can walk 4+ blocks unaided, climb 5+ stairs unaided, and has no limitations for lifting or remaining seated. No difficulties with communication or deficits with cognitive and emotional function are noted. Respecting DLA, the physician indicates that personal self care, meal preparation, basic housework, daily shopping, mobility outside the home, use of transportation, and social functioning are restricted by the appellant's impairment; no restriction is indicated for mobility inside the home and management of finances while any restriction with management of medication is unknown. Neither the continuous nor the periodic boxes are ticked though where asked "If "Periodic", please explain:" the physician writes "the condition is not always severe. He has had brief periods where his symptoms decrease, but never disappear. The physician also writes that the appellant "is unable to do most simple household chores (laundry, dishes, meal prep, etc.) due to hyper-sensitivity to chemicals" and depends on his partner "for help with most ADL".

In the AR, dated June 24 2009, completed by a counselor but later signed by the physician, the appellant's ability to communicate is reported to be good for speaking and hearing but poor for reading and writing due to poor visuals. The appellant is independent in all aspects of 'mobility and physical ability' (walking indoors/outdoors, climbing stairs, standing, lifting, and carrying/holding) with the comment "mobility not generally affected, except in very bright conditions". A moderate impact is noted for 2 aspects (emotion and attention/concentration) of 'cognitive and emotional functioning' and no impact is noted for the remaining 12 aspects. Regarding DLA, the appellant is independent with all aspects of 'personal care', 'medications' and 'social functioning' while periodic assistance is indicated for 'shopping' (reactive to some products and generalized reaction to bright lights), 'meals', and 2 of 3 aspects of 'transportation' (presently not driving because of bright lights and fumes). Continuous assistance is indicated for 'basic housekeeping' ("all chemicals are out"). Good functioning is reported with immediate and extended social networks. The appellant receives assistance from family and friends and uses special dark glasses; no assistance is provided by an assistance animal.

The physician's notes state that the appellant is unable to work due to severe photophobia and that the use of flash photography has been known to trigger prolonged migraines.

In the Request for Reconsideration, the appellant writes that he is mostly housebound and that he cannot go into bright or contrast situations or read or write most of the time. He gets many migraine headaches and must sit in a dark room for hours a day to ease the headaches. He lost his driver's license because of photophobia and relies on his friend to shop and cook for him. He writes that his photophobia has been a chronic problem for 11 years, has been very bad for the last 6 months, and is a severe impairment. In addition he suffers from

MCS.

In the Notice of Appeal, the appellant writes that the ministry rejected the evidence submitted without proper reasons.

At the hearing, the ministry reviewed the evidence and the reconsideration decision in detail, noting that the appellant is independent in terms of functional skills and mobility and physical ability. The ministry stated that all 5 legislative criteria must be met in order to be designated as a PWD and that the evidence of the prescribed professionals does not establish that all 5 criteria are met. The ministry stated that employability is not a criterion for designation as a PWD but is for designation as a Person with Persistent Multiple Barriers.

At the hearing, the appellant stated that his medical conditions are "not normal" and are not easily understood. The appellant reviewed the evidence and stated that his physician has fully explained the severity of his impairments, photophobia and MCS, and how they impact his daily living and prevent him from working. He stated that his physician was being honest when indicating that the appellant is functional in terms of walking and other aspects of mobility but, that the categories listed in the PWD application respecting physical impairment do not address the nature of his unusual impairments as the questions do not specifically address visual impairments and headaches. He stated that while he is physically capable of walking, his mobility inside and outside the home is impacted because of his extreme photosensitivity; he has one 25W light bulb in his home, which sometimes must be turned off as it is too bright, and is required to spend many hours a day lying down in a dark room with a wet cloth over his head. His time outdoors is limited by the weather and on bright days he remains indoors. He also reports that his daily activities are limited by his photosensitivity as he is no longer able to go shopping due to bright store lights and cannot drive. His MCS, which he believes is related to oil based products, impacts his daily living as he is unable to do any cleaning, must avoid all plastic and food packaged in plastic, and is socially isolated due to the chemical products used by other people. He is limited in terms of transportation as he cannot take public transportation due to the exhaust fumes of buses and when being driven must sit in the middle of his vehicle, away from light and fumes, and next to a special fan which was installed in the van. He stated that he was first diagnosed with photophobia in 1998 and did have a period years back when it improved but that his current condition is the worst it has ever been, having become significantly worse since February 2009. He feels that the ministry is "splitting hairs" in its assessment of the evidence and is looking for a way to say no to his request for designation as a PWD.

PART F – REASONS FOR PANEL DECISION

(State the reasons for the panel decision)

The issue under appeal is whether the ministry reasonably concluded that the appellant does not have a severe physical or mental impairment and that his DLA are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods, and that the appellant does not require help to perform DLA. The ministry determined that the age requirement had been met and that the appellant has an impairment that will last for 2 years.

The criteria for being designated as a person with disabilities (PWD) are set out in section 2 of the EAPWDA. The minister may designate a person as a PWD when the following requirements are met. Pursuant to section 2(2) the applicant must have reached the age of 18 and the minister must be satisfied that the person has a severe mental or physical impairment. Under section 2(2)(a) the impairment must be likely, in the opinion of a medical practitioner, to continue for at least 2 years. Section 2(2)(b)(i) requires that the impairment, in the opinion of a prescribed professional, directly and significantly restricts the person's ability to perform daily living activities (DLA) either continuously or periodically for extended periods. Section 2(2)(b)(ii) states that as a result of those restrictions the person must require help to perform DLA. Section 2(3)(b) of the EAPWDA states that a person requires help in relation to a DLA if the person requires an assistive device, the significant help or supervision of another person, or the services of an assistance animal.

Section 2(1)(a) of the EAPWDR defines DLA for a person who has a severe physical or mental impairment as preparing own meals, managing personal finances, shopping for personal needs, using public or personal transportation, performing housework to keep one's residence in acceptable sanitary condition, moving about indoors and outdoors, performing personal hygiene and self care and managing personal medication. Section 2(1)(b) adds two additional activities for a person with a severe mental impairment: making decisions about personal activities, care or finances; and, relating to, communicating or interacting with others effectively.

The ministry's position is that the appellant is not eligible for designation as a PWD because the evidence does not establish the existence of a severe physical or mental impairment that, in the opinion of a prescribed professional, directly and significantly restricts DLA and necessitates help with DLA.

The appellant's position is that he has a severe impairment which directly and significantly restricts his ability to manage DLA and that he requires the continual support and supervision of another person to perform DLA and that he is unable to work because of his impairment.

Regarding the existence of a severe mental impairment, the panel finds that a mental impairment has not been diagnosed and that there is no evidence of a major impact in any aspect of cognitive and emotional functioning. Therefore, the panel finds that the ministry reasonably determined that a severe mental impairment has not been established under section 2(2) of the EAPWDA.

In considering whether the ministry reasonably determined that the appellant does not have a severe physical impairment, the panel finds that the evidence of the prescribed professionals is that the appellant is independently able to manage all aspects of functional skills and mobility and physical ability, though mobility is somewhat impacted by photophobia. Poor functioning has been established for reading and writing. The panel also finds that the physician's narrative establishes that the appellant's photophobia is severe and that both it and his MCS lead to severe disabling headaches which require the appellant to lie down for several hours in a dark room, though the physician does not specify how often. The physician also writes that the

appellant is "unable" to do most simple household chores, depends on his partner for help with "most ADL (meals, cleaning, driving etc.)", and has restrictions with other DLA (personal self care, daily shopping, mobility outside the home). The appellant's evidence is that his impairments continuously impact his functioning as he is often housebound, must rest with a cold wet cloth on his head every day for hours, needs assistance with most activities both indoors and outdoors, and has to avoid contact with other people. The panel finds, based on the evidence, that although the appellant is independent in terms of functional skills and mobility, a severe physical impairment has been established as the evidence indicates poor functioning in terms of reading and writing, an inability to perform 2 DLA (basic housework and meal preparation), and restrictions with all but 3 of the other DLA. In reaching this decision, the panel notes that section 2(2) of the EAPWDA does not require that a person be incapacitated in terms of mobility nor does it specify the particular factors to be assessed when determining the existence of a severe physical impairment. Therefore, the panel finds that the ministry did not reasonably determine that a severe physical impairment was not established under section 2(2) of the EAPWDA.

Regarding the degree of restriction with DLA, the panel finds that the evidence of the physician in the PR is that the appellant is continuously restricted with the DLAs meal preparation and basic housework, as he is unable to perform these activities, and that the appellant is restricted with personal self care, daily shopping, mobility outside the home, and social functioning – whether the restrictions are periodic or continuous is not specified. The evidence in the AR is that the appellant is continuously restricted with basic housekeeping and requires periodic assistance with shopping, meals, paying rent and bills, and 2 of 3 aspects of transportation. Therefore, the panel finds that a prescribed professional has confirmed a continuous restriction in 2 DLA (meal preparation and basic housework) and a restriction with 4 DLA respecting a physical impairment (personal self care, daily shopping, mobility outside the home, and use of transportation). The panel finds that the ministry did not reasonably determine that the appellant's DLA are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods as required under section 2(2)(b)(i) of the EAPWDA.

Regarding the need for help, as defined in the legislation, the panel finds that the evidence establishes that the appellant is unable to perform 2 DLA, "depends on his partner for help with most ADL (meals, cleaning, driving, etc.)", and that the appellant must use dark glasses because of photophobia. Therefore, the panel finds that the ministry did not reasonably determine that the appellant does not require the significant help or supervision of another person with DLA which are directly and significantly restricted either continuously or periodically for extended periods as required under section 2(2)(b)(ii) of the EAPWDA.

The panel finds that the ministry's reconsideration decision was not reasonably supported by the evidence and rescinds the decision.