

### PART C – Decision under Appeal

The decision under appeal is the ministry's reconsideration decision dated January 28, 2012 which found that the appellant did not meet two 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 her impairment is likely to continue for at least two years, and the ministry was also satisfied that the evidence establishes that the appellant has a severe physical impairment. However, the ministry was 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 she 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

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

- 1) Spirometry Report from hospital dated April 21, 2010 which states in part findings compatible with diagnosis of severe chronic obstructive pulmonary disease;
- 2) Sleep Oximetry Report dated June 17, 2010 which states in part a low probability for sleep apnea;
- 3) Person With Disabilities (PWD) Application: applicant information dated November 17, 2011, physician report dated November 17, 2011, and assessor report dated November 17, 2011;
- 4) Letter from the ministry to the appellant dated December 20, 2011 denying person with disabilities designation and enclosing a copy of the decision summary;
- 5) Respiratory Consultation Report dated January 3, 2012 which states in part that the purpose of the visit was COPD outpatient education, tobacco dependency counseling and spirometry assessment;
- 6) Respiratory Report dated January 8, 2012 which states in part that the appellant's current respiratory medications are Advair (1 puff twice daily), Atrovent (2 puffs 4 times a day or more), and Ventrolin (as needed), and she did not qualify for home oxygen program;
- 7) Letter dated January 19, 2012 'To Whom It May Concern' from a witness to the appellant's condition stating in part that walking from her bedroom to her kitchen, the appellant is breathless and has to lean on the counter to catch her breath, she was unable to stay sitting in one position while discussing the application, and she cannot go up the stairs to visit her landlord or walk the short distance to their door;
- 8) Undated People with Disabilities Check-Sheet in which the appellant has indicated that tasks are affected by her disability in personal care (getting into or out of chairs/tub, stairs, sitting, finding a comfortable position to lie in), housecleaning (cleaning tub, floors, oven, doing laundry, vacuuming, dusting), shopping (walking around store, being in crowded store, carrying groceries, paying for purchases), management of medication (remembering to take medication "or too often"), mobility outside the home/transportation (stairs, walking on uneven ground, getting in and out of vehicle, walking "2-3 meters before I have to sit down and rest or stop and lean against walls/shelf, etc.", yard work, snow removal, arranging for transportation), social functioning (unable to get help from others, unable to deal with unexpected demands, "no family, few friends because of isolation", loss of motivation), and no affect in the areas of meal preparation/cooking and managing finances. The appellant adds comments that she uses the food bank for food, food from some friends occasionally, transportation from a friend/volunteer occasionally.

The appellant provided additional documents as follows :

- 1) Advocate's submission on behalf of the appellant; and,
- 2) Report of X-Ray of appellant's chest dated February 13, 2012 which states in part that the reason for the exam is heavy smoker, severe COPD, weight loss, and a comparison is made to July 2009 and May 2008, on the frontal view, projecting adjacent to the cardiac apex is an apparent focal density measuring 2.1 cm; this may reflect summation of normal vessels however given the patient's history, consolidation or mass cannot be completely excluded; a repeat frontal X-Ray in the next few weeks is recommended and if finding persists then further evaluation with CT is recommended.

The ministry did not raise an objection to the admission of either document. The panel reviewed the new documents and admitted the X-Ray report as information regarding the appellant's diagnosed impairment and being in support of the information before the ministry on reconsideration, pursuant to Section 22(4) of the Employment and Assistance Act. The panel accepted the Advocate's submission on behalf of the appellant as argument.

At the hearing, the appellant's witness stated that she is retired after more than 30 years in the health care industry as a medical imaging technician, a manager, and a clinical instructor, and that having a working knowledge of reading reports has been part of her career. The witness stated that in her experience the use of the words "significant" or "severe" are not used by medical practitioners in reports unless the condition is having a major impact. The witness pointed to the use of the word "severe" by the physician in the reports when describing the appellant's COPD. The witness stated that she met the appellant about a bit more than a year ago and the appellant is the last surviving member of her family so there are few people available to help

the appellant, and the witness has to drive quite a distance to help her. The witness highlighted her letter dated January 19, 2012 and that she has observed the appellant walk a short distance and become breathless, and that she cannot climb stairs. The witness pointed to the Respiratory Consultation Report dated January 3, 2012, which included results from a pulmonary function test, and indicates that all the ratings for the appellant were well below 80%, which is abnormal. The witness highlighted the blood testing results, as part of the Report, and explained that the appellant's number is above 88% because her problem is getting oxygen into her lungs, but the absorption rate into her blood is not sufficiently low so as to qualify her for the home oxygen program. The witness stated that the appellant coughs all the time, including during the night which results in sleep deprivation. The witness pointed out that the appellant lives in a rural area and had to travel into town to have the testing conducted so she had used one of her medications, Ventolin, 20 minutes before the test which likely skewed the results in the Respiratory Report dated January 8, 2012. The witness stated that the medications that the appellant uses are not a cure, but can more accurately be considered a crutch, or an aid. The witness highlighted the chest X-Ray report dated February 13, 2012 as indicating that the appellant's condition is likely to get worse as COPD is a chronic progressive disorder, and further testing is recommended. The witness stated that the appellant needs to be closer to the hospital as she is currently in an isolated area which is a 10 to 20 mile drive to the closest town and because the appellant cannot walk to her landlord's door, if she has complications, she really has a problem because it would take so long for anyone to get to her. The witness stated that she helps the appellant periodically, sometimes twice a week, sometimes every other week, but on average it is several times per month.

In response to a question about the Respiratory Report dated January 8, 2012, the witness clarified that the statement that the appellant "...walks on occasion and has decreased activity from lack of interest" to be a reference to the appellant going out on a patio at her residence for a few minutes and returning, and that she is on anti-depressants for depression due to her inability to do some of the things she used to enjoy, such as gardening. The witness stated that when the appellant goes to the market for shopping, she walks in to pick up the needed items and leaves as she cannot walk around the store at all. The witness stated that the appellant is a very tidy person and she does not move around much, so there is not much housekeeping but she can no longer push a vacuum cleaner around. The witness stated that the appellant's physician recommended she use a scooter but it is not an option either financially or practically because of the gravel and grass around the appellant's residence. The witness clarified that the appellant's condition can vary with the weather and that it is worse when it is cold and damp. The panel admitted the oral testimony pursuant to Section 22(4) of the Employment and Assistance Act as relating to the impact of the appellant's diagnosed condition and being in support of the information before the ministry on reconsideration.

The appellant stated that her life these days is hard and she is pretty much restricted to getting up off the couch as she cannot lift anything or walk any distance. The appellant stated that she cannot lift a shovel and she has lost interest in many things. The appellant stated that she will drive to the food bank in order to get meals. The appellant explained that her basement suite measures 25' by 36' with a living room and adjacent kitchen and she occasionally goes outside on her patio to sit in a chair and look at the sky. The appellant stated that she can no longer walk a block due to her condition getting worse. The appellant stated that she finds her situation disheartening, that her depression is kicking in and she wakes up in the morning and starts crying and finds it difficult to stop. The appellant stated that she needs help but she cannot afford to live in a bigger community. In response to a question, the appellant clarified that some days are worse, such as if she gets an infection and she can end up in bed for two weeks.

In her self-report, the appellant adds that she has difficulty walking, or climbing stairs, or doing anything strenuous. The appellant states that if she catches a cold, she is sick in bed gasping for air. The appellant states it takes a long time to clean her suite and do other household chores. The appellant states that the medication she is taking helps somewhat, some days it does not help much and she is forced to sit and other days she is fine and can maneuver and keep herself fed and do some household chores. The appellant states that she has been depressed a lot and some days she has a hard time fighting it.

The physician who completed the physician report has confirmed that the appellant has been his patient for 1 year and that he has seen the appellant 11 or more times within the last 12 months. In the physician report, the physician notes that the appellant has a long history of COPD, that it is a chronic progressive disorder, that she has severe shortness of breath limiting her general activities and she is only able to walk about 1 block. The physician indicates that the appellant does not require any aids for her impairment. In the additional comments, the physician reports that "...any activities will cause her severe breathlessness; consequently, she's severely limited in her ability to perform daily activities of living."

In the assessor report, the physician reports that severe shortness of breath from severe COPD impacts the appellant's ability to manage DLA. The physician indicates that the appellant takes significantly longer than typical with all aspects of mobility and physical ability including walking indoors and outdoors, climbing stairs, standing, lifting and carrying and holding. The physician notes that the appellant "...takes much longer to do all these tasks than a normal person... due to breathlessness." The physician indicates that the appellant is independent with all tasks of personal care, including dressing, grooming, bathing, toileting, feeding self, regulating diet, transfers in/out of bed and transfers on/off chair. The physician indicates that the appellant is independent with laundry and takes significantly longer than typical with basic housekeeping ("due to breathlessness"). The physician reports that the appellant is independent with 3 out of 5 tasks of shopping while taking significantly longer than typical with going to and from stores and carrying purchases home ("due to breathlessness"). Further, the physician reports that the appellant is independent with all tasks of managing meals, including meal planning, food preparation, cooking and safe storage of food, with no other comments provided. The physician indicates that the appellant is independent with all tasks of paying rent and bills, and managing medications and transportation with no further explanation. In terms of social functioning, the assessor has assessed the appellant as independent in all aspects, with good functioning in both her immediate and extended social networks, with the added comment that the appellant "...lives in a very rural area and is socially isolated, she will struggle to find social support/supervision." For assistance provided by other people, the physician has noted that the appellant receives assistance "...occasionally from friends, but difficult since geographic isolation" and for the help needed it is noted "...daily home help for housekeeping and shopping."

## PART F – Reasons for Panel Decision

The issue on the appeal is whether the ministry reasonably concluded that the appellant is not eligible for designation as a person with disabilities (PWD) as her daily living activities (DLA) are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods and that, as a result of those restrictions, it could not be determined that 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 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 person 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. The impairment must also, in the opinion of a prescribed professional, directly and significantly restrict the person's ability to perform DLA either continuously or periodically for extended periods, as set out in Section 2(2)(b)(i). As a result of those restrictions, the person must require help to perform DLA, pursuant to Section 2(2)(b)(ii). Section 2(3)(b) sets out that a person requires help in relation to DLA if, in order to perform it, 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: prepare own meals, manage personal finances, shop for personal needs, use public or personal transportation facilities, perform housework to maintain the person's place of residence in acceptable sanitary condition, move about indoors and outdoors, perform personal hygiene and self care, and manage personal medication. In relation to a person who has a severe mental impairment, there are two additional activities, namely: making decisions about personal activities, care or finances, and relating to, communicating or interacting with others effectively.

The ministry's position is that the evidence does not establish that the appellant's severe impairment directly and significantly restricts her DLA continuously or periodically for extended period. The ministry argued that the physician indicates in the assessor report that the appellant can perform all of her DLA, including social functioning activities, independently with no assistance from another person or an assistive device. The ministry pointed out that although basic housekeeping, going to and from stores and carrying purchases home take significantly longer than typical to perform "due to breathlessness", this does not constitute direct and significant restrictions in the appellant's ability to perform DLA either continuously or periodically for extended periods. The ministry acknowledged that the physician states that the appellant's physical activities are severely limited by severe COPD, but argued that the information provided in the assessor report does not support this narrative. The ministry argued that the medical reports and the additional letter from the appellant's friend, while describing the appellant's diagnosed condition, do not describe resulting restrictions or limitations in the appellant's ability to perform DLA. The ministry argued that although the appellant has reported in the People With Disabilities Check Sheet that she experiences restrictions in the areas of personal self care, housecleaning, shopping, management of medications and social functioning, this does not establish that a prescribed professional has confirmed that the appellant's ability to perform DLA is directly and significantly restricted either continuously or periodically for extended periods.

The appellant argued, through her advocate, that the evidence establishes that the prescribed professional has provided sufficient evidence that the appellant's severe physical and mental impairments directly and significantly restrict her ability to perform at least 2 DLA. The appellant's advocate argued that the ministry's determination that the appellant has a severe impairment was based on the finding that all aspects of functional skills and mobility take significantly longer to perform and that these restrictions provide the evidentiary underpinnings of both the severity of her impairment and the restrictions it imposes on her life. The

advocate argued that the legislation must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objectives, according to Section 8 of the *Interpretation Act*. The advocate also argued that the decision in *Hudson v. B.C. (EAAT) 2009 BCSC 1461* is authority for the position that there must be evidence from a prescribed professional indicating a direct and significant restriction on at least 2 DLA, that the application must be read in its entirety to include narrative points to see if eligibility can be confirmed, and that the appellant's input should be given considerable weight unless there is a legitimate reason not to do so. The advocate highlighted the physician's narrative, including that any activities will cause severe breathlessness and consequently the appellant is severely limited in her ability to perform DLA, as well as portions of the appellant's self-report and the letter from the witness, as evidence establishing the direct and significant affect of the appellant's disability on her life.

Regarding the appellant's ability to manage DLA, the panel has relied on the evidence of the physician provided in the PWD application, in both the physician and the assessor reports. The evidence of the appellant and the witness have been considered, where it is consistent with the physician's evidence, as providing further detail and clarification. In terms of preparing her own meals, the physician indicates in the assessor report, that the appellant is independent with all tasks and the appellant has indicated in the People with Disabilities Check-Sheet that there is no affect on the listed tasks in the area of meal preparation/cooking and the appellant comments that she uses the food bank and occasionally gets food from friends. For managing personal finances, the physician indicates that the appellant is independent with all tasks of paying rent and bills and the appellant has reported in the Check-Sheet that there is no affect on the listed tasks in the area of managing finances. In terms of shopping for her personal needs, the appellant's physician has reported that the appellant is independent with some tasks of shopping (reading prices and labels, making appropriate choices, and paying for purchases) while taking significantly longer than typical with going to and from stores and carrying purchases home due to breathlessness. The appellant has reported an impact from her condition on the tasks of walking around store, being in a crowded store, carrying groceries, and paying for purchases and the witness stated that when the appellant walks into the store to pick up the needed items and leaves immediately as she cannot walk around the store at all.

For use of public or personal transportation facilities, in the PWD application, the physician reports that the appellant is independent in all tasks. Although the appellant reports impacts to getting in and out of a vehicle and arranging for transportation, this has not been confirmed in the opinion of a prescribed professional, as required by the legislation. For performing housework to maintain the appellant's place of residence in an acceptable sanitary condition, the physician indicates that the appellant is independent with laundry and takes significantly longer than typical with basic housekeeping "due to breathlessness." The appellant stated in her self-report that it takes a long time to clean her suite and do other household chores and she reported in the Check-Sheet that some of the tasks of housecleaning are affected by her condition. With respect to moving about indoors and outdoors, the physician indicates that the appellant takes significantly longer than typical with walking indoors and outdoors and with climbing stairs, that she can walk 1 to 2 blocks unaided on a flat surface, and climb 2 to 5 steps unaided. The appellant stated that due to the progression of her condition she can no longer walk even 1 block.

With respect to performing personal hygiene and self care, the physician indicates that the appellant is independent with all tasks of personal care. Although the appellant reports in the Check Sheet that some tasks of personal care are affected by her condition, these have not been confirmed in the opinion of a prescribed professional, as required by the legislation. The physician reports that the appellant is independent with all tasks of medication, including filling/refilling prescriptions, taking as directed, and safe handling and storage. Although the appellant has self-reported an impact by her condition on remembering to take medication ("or too often"), this impact has not been confirmed by the physician as being a related impact. For making decisions about personal activities, care or finances, and relating to, communicating or interacting with others effectively, the physician has assessed the appellant as independent with making appropriate social decisions, developing and maintaining relationships, interacting appropriately with others, dealing appropriately with unexpected demands and securing assistance from others.

Looking at the evidence as a whole, the panel finds that it demonstrates that the appellant experiences restrictions in moving about indoors and outdoors, with 2 out of 5 listed tasks of the DLA of shopping, and with basic housekeeping, in that these take the appellant significantly longer than typical. The ministry acknowledged that the physician states that the appellant's physical activities are severely limited by severe COPD, but argued that the information provided in the assessor report does not support this narrative, and the panel finds this conclusion reasonable. The panel finds that the evidence of the prescribed professional consistently indicates that the appellant performs a majority of her DLA without restriction and that it is not reported that assistance is required from another person for any of the tasks of DLA. The appellant's advocate argues that the Hudson decision is authority for the position that only 2 DLA need to be restricted, however the evidence of a prescribed professional must establish that the severe impairment "directly and significantly" restricts the person's ability to perform DLA, which the panel finds the ministry reasonably concluded was not shown in the appellant's case. Therefore, the panel finds that the ministry's determination that the evidence of a prescribed professional does not establish a direct and significant restriction on the appellant's ability to perform DLA either continuously or periodically for extended periods, as required by Section 2(2)(b)(i) of the EAPWDA, was reasonable.

In determining whether the ministry reasonably concluded that the appellant does not require the significant help or supervision of another person or the use of an assistive device, the panel relies on the information from the physician that the appellant lives alone and does not use an assistive device. The advocate argued that the physician provided information that the appellant receives occasional help from friends and requires daily home help with housekeeping and shopping. However, as it has not been established that DLA are significantly restricted, the panel finds that the ministry's conclusion that the requirement for significant help or supervision of another person, an assistive device, or the services of an assistance animal to perform DLA, under Section 2(2)(b)(ii) of the EAPWDA, has not been met was reasonable.

The panel finds that the ministry's reconsideration decision was reasonably supported by the evidence and confirms the decision.