

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development (ministry) reconsideration decision dated April 30, 2012 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 he has a severe physical or mental impairment. The ministry was also not satisfied that the appellant's daily living activities (DLA) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods. As the ministry found that the appellant is not significantly restricted with DLA, it could not be determined that he requires 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) Person With Disabilities (PWD) Application: applicant information dated January 26, 2012, undated physician report and undated assessor report;
- 2) Hospital reports, including Emergency/Ambulatory Care Clinical Record dated March 11, 2012, Triage Assessment Form dated March 12, 2012, Medical Imaging Report of the appellant's chest dated March 11, 2012 which states in part that the lungs are hyper-inflated; this would be in keeping with underlying COPD; definite acute consolidation not seen, and Discharge Report dated March 11, 2012;
- 3) Letter from the ministry to the appellant dated March 27, 2012 denying person with disabilities designation and enclosing a copy of the decision summary; and,
- 4) Request for Reconsideration.

At the hearing, the appellant provided a number of additional documents which he stated he had submitted to the ministry prior to the due date for the reconsideration, namely:

- 1) Note dated April 23, 2012 from the appellant's physician which states in part that he is surprised that the appellant's request for disability payment was denied, that he has severe COPD in addition to the information on file he has difficulty with cooking and showering, steam affects his breathing;
- 2) Undated letter from the appellant's daughter which states in part that she has been caring for her father since he became ill, that she stops in daily to clean his house (dishes, laundry, cook, prepare meals, and remove garbage). She also sweeps and mops and drives her father to the store when needed; she has watched him try to cook meals and the heat/steam causes him to have an asthma attack and he also has attacks when he tries to move furniture or tries to do simple tasks like sweeping or taking his garbage out;
- 3) Undated letter from the appellant's previous employer which states in part that the appellant was at his house on March 11, 2012 painting, he worked for about half an hour, his breathing became very laboured and it got steadily worse. He was driving the appellant home when the appellant could not breath at all. He drove the appellant to the hospital and he feels they got there just in time, that the appellant was close to dying. The appellant was not able to finish the painting job; and,
- 4) Letter dated April 27, 2012 from the appellant which states in part that the appellant is constantly needing assistance from his daughter, for care at his home and for shopping needs as well. The appellant states that his ability to work has been virtually eliminated, that he attempted to work and the results were severe, as set out in the letter from his last employer, and the reports from the hospital. The appellant states that his doctor agrees and has also endorsed a handicapped parking permit as his ability to walk even short distances is severely impaired. The appellant states that he can lift 15 lbs. but he could not walk around with it and he can climb 5 steps unaided but as a result he is forced to rest and catch his breath before proceeding any further. The appellant states that he has a very hard time showering because hot air and steam causes a reaction every time, and it also happens with cooking; when his daughter is not available to cook for him, he has a cold meal or uses his microwave only. The appellant states that his daughter takes care of his house cleaning and laundry for him because it leaves him exhausted to do even a small amount.

The ministry did not object to the admissibility of these documents. The panel reviewed the documents and admitted them as being a further description of the impacts from the appellant's diagnosed impairment and his need for assistance, and being in support of the information and records before the ministry on its reconsideration, pursuant to Section 22(4) of the Employment and Assistance Act.

In his Notice of Appeal, the appellant states that he considers himself disabled in many ways and he cannot work as a result so he is restricted to live on social assistance. The appellant states that he needs money for help with house work, yard work, food preparation, laundry, etc. The appellant states that the money the ministry gives him is just enough to pay for his basic needs.

In his Request for Reconsideration, the appellant states that he has COPD and chronic asthma to the point where he has been hospitalized and nearly died. The appellant states that climbing 5 steps leaves him breathless and he cannot do housework. The appellant states that his impairment affects his ability to work

and do normal activities, showering, cutting lawns, cooking, etc. The appellant states that help is required daily for cooking by his daughter, that somebody cuts his lawn, and his daughter is cleaning since the steam from cooking affects his asthma.

In his self report included with the PWD application, the appellant states that over the past year he had been getting winded easier with several bouts of coughs and flu -like symptoms with severe coughing bouts throughout this winter with severe bronchitis. In December of 2011 he was continuing in this pattern and it took him half an hour to walk 2 blocks down hill so he went to the doctor and was given an X-Ray and lung test as well as a CT scan. The appellant states he was having more difficulty breathing after Christmas, that he was hospitalized for a week and a half with more tests and the doctor told him he has cancer. The appellant states that a specialist confirmed this diagnosis, that more tests needed to be done, but his lungs are shot and he is borderline for needing a double lung transplant. The appellant states that the doctor indicated that his lungs will not get better but he may be able to live with it, if it does not get worse. The appellant states that sometimes he gets winded just standing and walking a few steps and other days he can function much better. The appellant states that being short of breath is the usual result of doing anything physical at all.

At the hearing, the appellant's daughter stated that her father is not able to do housework or cooking and that she goes by every day to tidy up his place, to do the sweeping and laundry and to feed his cat. The appellant's daughter stated that her father gets out of breath within about 30 seconds, that steam affects his asthma and that his breathing attacks are very scary. The appellant's daughter stated that the fumes from a diesel vehicle can also trigger an attack. The appellant's daughter stated that her husband cuts the grass for her father as well and that she will be having a baby in December so she will not be able to help her father as much then. The appellant's daughter stated that she drives her father to get groceries and carries the groceries in from the car and puts them away; she cooks meals for her father so he can heat them up later in the microwave. The appellant's daughter stated that it took a week to clean up her father's place when he got out of the hospital because he had not been keeping up. The appellant's daughter stated that her father is a house painter and he cannot work because he cannot use a sprayer or sand anymore. In response to a question, the daughter stated that she started cooking for her father and shopping for him sometime in January 2012, that she has changed her life to accommodate caring for him. The daughter also stated that she does not do any of her father's personal care. The panel admitted the daughter's oral testimony as further information regarding the appellant's diagnosed impairment and need for assistance, and being in support of the information and records before the ministry on its reconsideration, pursuant to Section 22(4) of the Employment and Assistance Act.

The appellant stated that his condition is bad but his doctor told him that it has been determined, after further testing, that he does not have cancer. The appellant stated that he needs help, that his daughter drives him to the store to get groceries. The appellant stated that his doctor was surprised that he did not qualify for disability, as set out in his note. The appellant stated that the incident that is described in the letter from his previous employer was very scary, that he could not breath at all and, contrary to what was stated in the hospital admission report, he was not "screaming" in the parking lot; he feels that if they had been 5 minutes longer getting to the hospital that he would be gone. The appellant stated that he is now afraid to do anything physical for fear of bringing on an attack. The appellant stated that he can walk 5 steps but then he is completely out of breath. In response to a question, the appellant clarified that he was first diagnosed in December 2011, that he had an incident in January 2012 that put him in the hospital and then again in March 2012. The appellant stated that it is really bothering him that he cannot work because he is a person who likes to get things done. The appellant stated that the breathing devices he uses are 3 different inhalers, 2 of which are used daily and one of which is used on an "as needed" basis, which ends up being every day. The appellant stated that he is also on medication for his condition, but that he does not use any other aids.

The physician who completed the physician report confirms that the appellant has been his patient on and off for a few years with no recent contact and that he has seen the appellant once in the past 12 months. In the physician report, the physician confirms a diagnosis of COPD ("many years"). The physician adds a comment regarding the severity of the medical condition relevant to the appellant's impairment that the appellant has

"...severe COPD with very limited respiratory reserve." The physician reports that the appellant can walk less than 1 block unaided on a flat surface, he can climb 5 or more steps unaided, can lift 5 to 15 lbs. and has no limitation with remaining seated. The physician indicates that there are no significant deficits with cognitive and emotional function. The physician adds comments that the appellant presented in October 2011 with a cough and a CT scan suggested cancer, the appellant has a permanent lung disability but the diagnosis of cancer was not confirmed at that point.

The physician also completed the assessor report and indicates that the appellant's impairment that impacts his ability to manage DLA is "...shortness of breath." The physician reports that the appellant has a good ability to communicate in all areas. The physician indicates that the appellant is independent with walking indoors and walking outdoors and with climbing stairs but that he takes significantly longer than typical ("short of breath on minimal exertion"). The physician reports that the appellant requires periodic assistance from another person with standing, and continuous assistance with lifting and carrying and holding, with no further comments provided. 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 reports that the appellant requires continuous assistance from another person with doing laundry and basic housekeeping ("short of breath on minimal exertion"). The physician indicates that the appellant is independent with most tasks of shopping, including reading prices and labels, making appropriate choices, paying for purchases, and going to and from stores, while requiring continuous assistance from another person with carrying purchases home ("unable to unless by car"). Further, the physician reports that the appellant is independent with all of the tasks of managing meals, including meal planning, food preparation, cooking and safe storage of food. The physician indicates that the appellant is independent with all tasks of paying rent and bills (including banking and budgeting), managing medications (filling/refilling prescriptions, taking as directed and safe handling and storage) and transportation (getting in and out of a vehicle, using public transit, and using transit schedules and arranging transportation). The physician indicates that the section of the report regarding impact to cognitive and emotional functioning is not applicable. The physician indicates that the appellant is independent in all areas of social functioning, including making appropriate social decisions, developing and maintaining relationships, interacting appropriately with others, dealing appropriately with unexpected demands, and securing assistance from others. The physician reports good functioning in both the appellant's immediate and extended social networks.

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 he does not have a severe mental or physical impairment and that his 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 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 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.

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

Section 2(1)(a) of the EAPWDR defines DLA for a person who has a severe physical or mental impairment 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.

The ministry argues that the evidence does not show that the appellant has a severe physical impairment. The ministry points to the physician report, where the physician indicates that the appellant is able to walk less than 1 block, to climb 5 or more steps unaided, to lift 5 to 15 lbs., and has no limitation with remaining seated. The ministry argues that the appellant is independently able to walk indoors and outdoors and climb stairs although he is short of breath on minimal exertion and has to walk slowly. The ministry points out that although a nebulizer is used to treat asthma, no assistive devices are routinely used to help compensate for an impairment. The ministry acknowledges that the appellant's condition is serious but argues that remedial measures in the form of proper medical care and medication are in place and the appellant reports adequate functioning except when doing more physically strenuous activities. At the hearing, the ministry argued that the appellant's episodes are situational, aggravated by steam and hot air and the risk of an attack can be managed. The appellant argues that he has a severe physical impairment as a result of his COPD, as confirmed by his physician in the PWD application and in his additional note dated April 23, 2012. The appellant argues that although he may be able to climb 5 or more steps, he is completely winded and has to rest before he can proceed, and he may be able to lift up to 15 lbs. but he cannot carry it any distance. The appellant also argues that the nature of COPD is that it is triggered by certain things and he is afraid to do anything physical for fear of causing an attack.

The panel finds that the evidence of a medical practitioner confirms a diagnosis of COPD which his physician refers to as 'severe' in the PWD application as well as his note dated April 23, 2012. In the physician report, the physician adds a comment that the appellant has "...severe COPD with very limited respiratory reserve." The physician reports that the appellant can walk less than 1 block unaided on a flat surface, he can climb 5 or more steps unaided, can lift 5 to 15 lbs. and has no limitation with remaining seated. The physician indicates that the appellant is independent with walking indoors and walking outdoors and with climbing stairs but that he takes significantly longer than typical ("short of breath on minimal exertion"). The physician reports that the appellant requires periodic assistance from another person with standing, and continuous assistance with lifting and carrying and holding. The appellant stated that he can walk 5 steps but then he is completely out of breath and that he can lift up to 15 lbs. but he cannot carry it any distance. The appellant stated that the breathing devices he uses are 3 different inhalers, 2 of which are used daily and one of which is used on an "as needed" basis, which ends up being every day. The appellant states that sometimes he gets winded just standing and walking a few steps and other days he can function much better but being short of breath is the usual result of doing anything physical at all. The appellant states that his doctor endorsed a handicapped parking permit for him as his ability to walk even short distances is severely impaired. The appellant's daughter stated that her father gets out of breath within about 30 seconds, that steam affects his asthma and that his breathing attacks are very scary. Although the ministry argues that the appellant reports adequate functioning except when doing more physically strenuous activities or when triggered by certain aggravating factors like steam, the panel finds that the appellant has clarified that his mobility and physical functioning is minimal most of the time, which is consistent with the physician reporting that the appellant is not capable of walking a block unaided on a flat surface, requires periodic assistance with standing as well as continuous assistance with lifting and carrying. Therefore, the panel finds that the ministry's determination that the evidence does not establish a severe physical impairment was not reasonable.

The ministry argues that the evidence does not show that the appellant has a severe mental impairment. The

ministry argues that there is no mental health disorder or brain injury, no deficit to cognitive and emotional functioning or impact on daily functioning. The appellant did not argue that the evidence establishes that he suffers from a severe mental impairment.

The panel finds that the evidence of a medical practitioner does not confirm a diagnosis of a mental disorder. The physician indicates that there are no significant deficits with cognitive and emotional function and that the appellant is independent in all areas of social functioning, with good functioning in both his immediate and extended social networks. The panel finds that the ministry's decision, which concluded that the evidence does not establish a severe mental impairment, was reasonable.

The ministry argues that the evidence does not establish 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. The ministry points out that the physician indicates in the assessor report that the appellant performs a majority of his DLA independently, i.e. 25 out of 28, and all aspects of social functioning. The ministry points out that lawn mowing and heavy housekeeping (beyond basic) are not DLA. The appellant argues that the evidence of his family physician, including the information in his note dated April 23, 2012, establishes that he is directly and significantly restricted in his ability to perform his DLA, either continuously or periodically for extended periods of time.

The panel finds that the legislation requires that the ministry must be satisfied that the opinion of a prescribed professional confirms that the appellant's ability to perform DLA is directly and significantly restricted either continuously or periodically for extended periods. In terms of preparing his own meals, the physician indicated in the assessor report that the appellant is independent with all tasks, including meal planning, food preparation, cooking and safe storage of food. In his note dated April 23, 2012, the physician adds that the appellant has difficulty with cooking since steam affects his breathing. Both the appellant and his daughter stated that the appellant cannot cook food because the hot air and steam trigger an attack and that the appellant's daughter prepares meals for the appellant which she freezes so that he can heat them up later in the microwave. The appellant explained that when his daughter is not available to cook for him, he has a cold meal or uses his microwave only. For managing personal finances, the physician reported that the appellant is independent with all tasks. In terms of shopping for his personal needs, the physician indicated that the appellant is independent with most tasks but requires continuous assistance from another person with carrying purchases home ("unable to unless by car"). The appellant's daughter stated that she drives her father to get groceries and carries the groceries in from the car and puts them away for him. For use of public or personal transportation facilities, the physician indicates that the appellant is independent with all tasks including getting in and out of a vehicle, using public transit, and using transit schedules and arranging transportation. With respect to performing housework to maintain the appellant's place of residence in an acceptable sanitary condition, the physician indicated that the appellant requires continuous assistance from another person with basic housekeeping and doing his laundry ("shortness of breath on minimal exertion"). The appellant states that his daughter takes care of his house cleaning and laundry for him because it leaves him exhausted to do even a small amount. The appellant's daughter stated that her father is not able to do housework and that she goes by every day to tidy up his place, to do the sweeping and laundry and to feed his cat. She also stated that she spent a week cleaning his place when he got out of the hospital because he had not been keeping up with the housekeeping.

For moving about indoors and outdoors, the physician reported in the physician report that the appellant can walk less than 1 block unaided on a flat surface and, in the assessor report, that he is independent but it takes significantly longer than typical with walking indoor and walking outdoors ("shortness of breath on minimal exertion"). Regarding performing personal hygiene and self care, the physician indicated in the assessor report that the appellant is independent with all tasks, including dressing, grooming, bathing, toileting, feeding self, regulating diet, transfers in/out of bed and transfers on/off chair. The appellant states that he has a very hard time showering because hot air and steam causes a reaction every time, and this is confirmed by the physician in his note dated April 23, 2012. There appellant's daughter stated that she does not help her father

with any of his personal care. With respect to managing his personal medications, the physician has indicated in the assessor report that the appellant is independent with all tasks, including filling/refilling prescriptions, taking as directed and safe handling and storage.

The panel finds that the physician, as a prescribed professional, has confirmed that the appellant requires continuous assistance with housekeeping and with 1 of 5 tasks of shopping. The physician indicates in his April 23, 2012 note that the appellant has difficulty with cooking and showering and the appellant's daughter confirmed that she assists with hot meals (periodically) but not with any of her father's personal care. The panel finds that the evidence demonstrates that the appellant performs a majority of the tasks of DLA independently. 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, the appellant and his daughter, that he lives alone and assistance is provided by his daughter and that he does not use assistive devices. As it has not been established that the ability to perform DLA is 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.

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