

PART C – Decision under Appeal

The decision being appealed is the Ministry's May 23, 2012 reconsideration decision denying the Appellant Persons with Disabilities (PWD) designation. The Ministry determined that the Appellant had not met all of the required criteria for PWD designation set out in section 2(2) of the Employment and Assistance for Persons with Disabilities Act. Specifically the Ministry was not satisfied that the Appellant has a severe mental or physical impairment that in the opinion of a prescribed professional:

(i) directly and significantly restricts his ability to perform daily living activities either continuously or periodically for extended periods; and,

(ii) as a result of those restrictions he requires help to perform those activities.

The Ministry was satisfied that the Appellant has reached 18 years of age and in the opinion of a medical practitioner his impairment is likely to continue for at least 2 years.

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Act (EAPWDA) Section 2(2) and 2(3).

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR) Section 2.

PART E – Summary of Facts

For its reconsideration decision the Ministry had the following evidence:

1. Appellant's January 12, 2012 PWD application in which he described his disability as: COPD since February or March 2011; he is 63 years old and very, very ill.
2. Physician's Report (PR) and Assessor's Report (AR) both dated February 2, 2012 and both completed by the same physician who indicated the Appellant has been his patient for 5+ years and he has seen the Appellant 11 or more times in the 12 months preceding the reports.
3. Appellant's April 18, 2012 Request for Reconsideration with a typed statement indicating that the Appellant has been receiving Canada Pension Plan Disability since February 2011. That statement also had a review of the information submitted by the doctor in the PR and in the AR, and a submission that the Appellant's case is one where "the application of the *Hudson* case and section 8 of the *Interpretation Act* is especially pertinent".

In the PR the doctor described the Appellant's diagnoses as chronic chest pain, pulmonary embolism – non sustained VT, coronary artery disease, chronic left foot pain, reflux, and sleep apnea. The doctor described the severity of the Appellant's medical conditions as recurrent, multiple admissions to the ER for atypical chest pain, shortness of breath even when walking 10 minutes, pain to foot standing for more than 30 minutes, and previous pulmonary embolism. The doctor wrote that the Appellant reports using bathroom grab bars and a shower chair. For functional skills the doctor reported that the Appellant can walk 1-2 blocks unaided on a flat surface, climb 5+ steps unaided, lift 5-15 lbs. and has no limitations remaining seated. The doctor also indicated that the Appellant has no difficulty with communication and has no significant deficits with cognitive and emotional function.

In the AR the doctor described the Appellant's impairments as atypical chest pain and shortness of breath, walking tolerance less than 10 minutes, feels short of breath all the time and fatigue. The doctor reported that the Appellant is independent walking indoors; however, for all other aspects of mobility and physical ability (walking outdoors, climbing stairs, standing, lifting, carrying and holding) the Appellant needs periodic assistance. The doctor also added - walking tolerance less than 10 minutes and needs help lifting more than 10-15 lbs. For impacts to cognitive and emotional functioning, the doctor indicated "n/a" – not applicable. With respect to assistance required related to impairments that directly restrict the Appellant's ability to manage daily living activities, the doctor indicated that the Appellant is independent in all aspects of meals, of medications and getting in and out of a vehicle. Using transit and transit schedules were noted as "n/a" - not applicable.

With respect to aspects of personal care, the doctor indicated that the Appellant is independent with dressing, grooming, feeding himself, regulating diet, and transfers in/out of bed and on/off a chair. However, the doctor noted that dressing, grooming, and transfers in/out of bed and on/off a chair take significantly longer. The doctor also noted that the Appellant uses a grab bar as an assistive device for bathing and toileting. The doctor indicated that the Appellant needs periodic assistance with laundry, basic housekeeping (adding the Appellant can't lift more than 10-15 lbs.) and with carrying purchases home (adding walking more than 10 minutes). With respect to all other aspects of shopping (going to and from stores, reading prices and labels, making appropriate choices, paying for purchases) the doctor noted that the Appellant is independent. For paying rent and bills (banking, budgeting, paying rent and bills) the doctor reported that the Appellant needs periodic assistance and he added - walking more than 10-15 minutes has shortness of breath. With respect to social functioning the doctor indicated the Appellant is independent making appropriate social decisions,

developing and maintaining relationship, interacting appropriately with others and securing assistance from others. The Appellant needs periodic assistance in dealing appropriately with unexpected demands and the doctor added "overwhelms easily".

The doctor also reported that the Appellant has marginal functioning in both his immediate social network and extended social network, adding that shortness of breath limits the Appellant's interactions. For assistance provided by others the doctor indicated that the Appellant's friends help and he wrote that the roommate helps with household activities. For help required the doctor indicated "home support, Handy Dart". The doctor also noted that the Appellant uses bathroom grab bars assistive devices, but does not have an assistance animal.

At the hearing the Appellant described his various medical conditions. He said his back fusion is broken so he is in chronic severe pain and he has been using a cane since about April or May of this year. His back condition also makes it difficult to get in and out of a vehicle. The Appellant also said that he gets dizzy and loses his balance. He has fallen and hit the back of his head, so these conditions are a safety issue. The Appellant described the various times he went to the hospital, when he was in the ICU and when he had a heart attack. He also said that he has an aneurism which is getting worse and he has severe high blood pressure. The Appellant stated he uses a machine for sleep apnea and needs oxygen from time to time. He also said he has a caregiver who helps him with housekeeping, with lifting, with shopping and driving him places. The Appellant said his health is going down.

The Panel finds that the oral testimony from the Appellant, except for the information about the aneurism, high blood pressure and back fusion, relates to information that the Ministry had at reconsideration regarding the Appellant's medical conditions and their impacts on his daily activities. Therefore the Panel admits that information as being in support of the evidence that was before the Ministry at the time of reconsideration pursuant to section 22(4) of the Employment and Assistance Act (EAA). As for the testimony about the aneurism, blood pressure and back fusion, the Panel finds that that is new information not in support of the evidence that was before the Ministry at the time of reconsideration and therefore the Panel does not admit this information as evidence.

For this appeal the Appellant submitted documents which appeared to be revised or new pages from a PWD application. The Panel asked the Appellant to go through each of them to identify who completed the documents and when.

The first document appears to be the first 3 pages of the Appellant's original PWD application, but with more information in the section where the applicant is asked to describe how his disability affects his life and his ability to take care of himself. The Appellant stated that that section was written for him by his caregiver and it was also signed by his caregiver and by him. In that statement the Appellant indicated that he is in very ill health and has a lot of health issues. He needs a caregiver or provider, and he needs help with shopping. He cannot walk up steps. The Appellant stated that he needs a machine to help him breath at night as he has sleep apnea. He had a disc removed in 1973 and a fusion in his back where a disc was removed. He stated that he is in a lot of pain and now walks with a cane. The Appellant also indicated that he has a person who has been helping with his illness and health problems. He stated that he has been trying to get the PWD income assistance but the doctor does not know how to fill in the forms so he was denied 3 times. The Appellant indicated

that he has started to see another doctor for another opinion and to have forms filled out about the problems he has and the help he needs. The Appellant indicated what his monthly income is and how much financial assistance he needs because he cannot work. He also stated that he has very severe high blood pressure, his balance is off and he has thyroid issues which cause breathing problems as per the doctor's report attached to this statement.

At the end of this document there was an additional statement completed by the Appellant's caregiver who wrote that the Appellant "requires 24 hours, 7 days a week assistance; that is, reminders to take medications, appointments and general care. His health is deteriorating on a downward slope". She also wrote that the Appellant has more than the usual visits to the emergency room.

The Panel finds that the information in these written statements from the Appellant and his caregiver, except for the information about his back, severe high blood pressure and thyroid, relates to information that the Ministry had at reconsideration regarding the Appellant's medical conditions, their effects on his daily functioning and the help he needs. Therefore the Panel admits that information as being in support of the evidence that was before the Ministry at the time of reconsideration pursuant to section 22(4) of the EAA. As for the information about his back, severe high blood pressure and thyroid and their effects on his daily functioning, the Panel finds that that is new information not in support of the evidence that was before the Ministry at the time of reconsideration and therefore the Panel does not admit this information as evidence.

The Appellant also submitted a physician's report (PR2) and an assessor's report (AR2). The Panel noted that each of these has a signature on the last page, but no date and no printed name to identify who signed each form. Also the frequency of contact with the Appellant in the PR2 is noted as once and that the Appellant has been a patient since 2012. However, the Panel noted that in the AR2 the frequency of contact with the Appellant is noted as 11 or more times and that the Appellant has been a patient since 2006.

The Appellant explained that the doctor who completed the original PR and AR in February 2012 did not listen to him, did not understand the two forms he was supposed to complete and did not pay attention to all of the Appellant's conditions and their effects on his daily living activities. Therefore, the Appellant said he got a second opinion from another doctor and with the help of his advocate had that doctor fill out part of these forms. The Appellant also said that this second doctor only saw him once when he filled out the forms.

The Panel also noted that based on the handwriting, it appeared that different people completed parts of the PR2 and parts of the AR2. Also, someone had written what appear to be directions, such as "Dear Dr. Detail is missing" and "Dear Doctor. Detail is necessary" in parts of the reports. The Appellant told the Panel that the second doctor completed the diagnoses and health history parts of the PR2 as well as the last page with additional comments. The Appellant also said that his advocate had been in touch with the doctor about completing these forms and that a social worker had completed some parts of this form, such as the restrictions to daily living activities. The Appellant gave the same explanation about the AR2, stating that a social worker had completed the sections about the Appellant's living environment, his mental and physical impairments, his mobility and physical ability, and the restrictions to daily living activities. The Appellant was not able to identify this social worker, how he knew the social worker, what information the social worker based the

assessment on or when the social worker completed these forms.

In the PR2 the Appellant's diagnoses are listed as atypical chest pain, shortness of breath, previous pulmonary embolism, coronary artery disease, osteoarthritis in back & knee injuries, pre-diabetes and reactive depression. There is also the following note: "severe impairment – on CPP disability since Feb. 2011." The Appellant is described as having severe circulating and respiratory problems. He takes numerous medications and an inhaler for severe chest pain, and has shortness of breath and lower stamina. The Appellant had a stent inserted in 2011 and had a cardiac arrest on June 5, 2010. The Appellant's severe osteoarthritis is described as being all over but especially in the back and right knee due to previous injuries. Celebrex and amitriptyline are listed as medications. The following comments are in this report: "depression – very impaired concentration, memory, execution, judgement, low mood." The report also had a note indicating "dizziness, balance and tremor issues" and with arrows to "bathroom grab bars and shower chair".

For functional skills the information in this report indicates that the Appellant can walk unaided on a flat surface for less than 1 block, can climb no stairs unaided, can lift under 5 lbs unaided, and can remain seated for less than 1 hour. There are also cognitive difficulties with communication noted, including very impaired concentration and short term memory, and significant deficits with cognitive and emotional function in the areas of memory, emotional disturbance and attention, and reactive depression to severe illness.

The Panel finds that the information in the PR2 and in the AR 2 about the Appellant's chest pain, shortness of breath, pulmonary embolism, and coronary artery disease and their effects on his ability to function, all relates to information that the Ministry had at reconsideration regarding the Appellant's impairments and their effects on his daily functioning. Therefore the Panel admits that information as being in support of the evidence that was before the Ministry at the time of reconsideration pursuant to section 22(4) of the EAA. As for the information about the Appellant's osteoarthritis in his back and knee injuries, pre-diabetes, reactive depression, and cognitive and emotional deficits, as well as the effects of these conditions on the Appellant's functioning, the Panel finds that all of this is new information not in support of the evidence that was before the Ministry at the time of reconsideration. Therefore the Panel does not admit this information as evidence.

With respect to the information in the PR2 and the AR2 which the Panel has admitted into evidence, including evidence regarding the effects of the Appellant's medical conditions on his functioning, on his ability to manage daily living activities and the assistance he requires, the Panel gives all that information little weight for the following reasons:

1. Based on the information in the forms and the information the Appellant provided at the hearing, it is not clear who completed any part or all of the PR2 and the AR2 – the second doctor, an unidentified social worker or someone else.
2. Neither the PR2 nor the AR2 is dated to indicate when these were completed and the identity of the person who signed them is not disclosed on the forms.
3. There is a discrepancy between the PR2 and the AR2 as to how long the person who signed them has known the Appellant.
4. Based on the information in the forms and the Appellant's explanation, it is not clear what the source of the information in the reports is; for example, interviews, medical files or other reports.

Two other documents were submitted by the Appellant. The first is an undated, typed page with questions and answers about the Appellant's medical conditions and daily functioning. The Panel finds that there is nothing on that page to indicate who prepared the document, who provided the answers and when it was typed. Therefore the Panel does not admit this document into evidence.

The second document is a one page list of medications from a pharmacy with the Appellant's name at the top, prescription fill dates from January 2010 to December 2010 and the names of several different doctors. The Appellant said that he submitted that list to show all of the medications he takes. The Panel finds that the list relates to information that the Appellant was taking medications which the Ministry had at reconsideration, and therefore the Panel admits this document as evidence in support of the evidence the Ministry had pursuant to section 22(4) of the EAA. However, because the list of medications is from 2010 and there is no indication which medications relate to which of the Appellant's medical conditions, the Panel gives this list little weight.

At the hearing the Ministry referred to its reconsideration decision, indicating it relied on the information it had at the time and reaffirmed that decision.

PART F – Reasons for Panel Decision

The issue in this appeal is whether the Ministry reasonably determined that the Appellant is ineligible for PWD designation because he did not meet all of the requirements in section 2(2) of the EAPWDA, and specifically that: he does not have a severe mental or physical impairment that in the opinion of a prescribed professional directly and significantly restricts his ability to perform daily living activities either continuously or periodically for extended periods; and, also, that in the opinion of a prescribed professional, as a result of the restrictions, he does not require help to perform those activities.

The eligibility criteria for PWD designation are set out in the following sections of the EAPWDA:

2(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.

The "daily living activities" referred to in EAPWDA section 2(2)(b) are defined in the following section of the EAPWDR:

2 (1) For the purposes of the Act and this regulation, "daily living activities",

(a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following activities: (i) prepare own meals; (ii) manage personal finances; (iii) shop for personal needs; (iv) use public or personal transportation facilities; (v) perform housework to maintain the person's place of residence in acceptable sanitary condition; (vi) move about indoors and outdoors; (vii) perform personal hygiene and self care; (viii) manage personal medication, and

(b) in relation to a person who has a severe mental impairment, includes the following activities:

(i) make decisions about personal activities, care or finances; (ii) relate to, communicate or interact with others effectively.

The Panel will consider each party's position regarding the reasonableness of the Ministry's decision under the applicable PWD criteria at issue in this appeal.

Severe Impairment

In its reconsideration decision the Ministry noted that the Appellant did not provide a self-report with his PWD application and therefore it considered the information in the physician's February 2012 reports. The Ministry reviewed the Appellant's functional skills as reported by the doctor and that the Appellant requires periodic assistance with these. However, the Ministry noted that the duration and frequency of periodic assistance was not defined. In addition the doctor reported that the Appellant can walk indoors independently and there was no indication that the Appellant uses a mobility aid. Therefore the Ministry determined that the Appellant's medical conditions were more in keeping with a moderate impairment and it was not satisfied that the information about the Appellant displayed a severe physical impairment.

The Appellant's position is that he has several medical conditions which are worsening. The Appellant indicated he has difficulty breathing, he gets dizzy and loses his balance, and he suffers from severe, chronic pain. Because of his conditions he now uses a cane, grab bars and a breathing machine for sleeping. The Appellant submitted that his mobility and physical abilities are severely impaired and he needs help with daily activities. Also he has been hospitalized several times. The Appellant referred to the second PR and AR reports, his statements and the caregiver's statement for confirmation of his conditions and their effects on his daily life.

The Panel explained in Part E- Summary of Facts why some of the information in the second PR and the second AR was not admissible and why it gave the remaining contents of those reports little weight. The Panel did find that some of the Appellant's oral testimony and some of the written statements provided evidence about the Appellant's physical impairments, such as his sleep apnea, his difficulties with walking and climbing steps, his shortness of breath, his severe pain and his difficulties with lifting and carrying things. There was also evidence of the use of assistive devices and help from a caregiver. The Panel notes that all of that evidence is consistent with the first doctor's reports about the Appellant's mobility and physical functioning and his need for periodic assistance with some tasks. The Ministry reviewed and considered the evidence from the first doctor, including the Appellant's ability to walk 1-2 blocks unaided for 10 minutes, climb 5 or more steps, lift 5-15 lbs., his independent ability to manage some physical daily living activities, and his need for periodic assistance with some other daily living activities. Based on the evidence it had, the Ministry concluded that the Appellant's medical conditions were more in keeping with a moderate impairment. The Panel finds that the Ministry considered all of the evidence and then reasonably determined that the Appellant does not have a severe physical impairment.

With respect to a mental impairment the Ministry noted that in the February 2012 PR and AR the doctor did not diagnose any mental conditions or refer to any mental impairment in his reports. That doctor also indicated there were no significant deficits to or impacts on the Appellant's cognitive or emotional functioning. Therefore the Ministry determined that mental impairment could not be established. The Appellant's submissions about his mental impairments were supported by the information in the second PR and second AR which the Panel has determined was not admissible as evidence. Therefore the Panel finds that based on the evidence, the Ministry reasonably determined that the Appellant does not have a severe mental impairment.

Restrictions to Daily Living Activities

The Ministry reviewed the February 2012 AR and specifically noted the daily living activities requiring periodic assistance, including information that the Appellant uses grab bars while toileting and bathing. The Ministry determined that overall these restrictions are not significant and it also noted that in that AR the Appellant was reported as being able to perform 20 out of 28 daily living activities independently. The Ministry also noted that this doctor reported that the Appellant can perform other physical activities independently, including going to and from stores which involves walking. Also, the frequency and duration of periodic assistance was not defined. Therefore the Ministry determined there was no indication of direct restrictions to the Appellant's ability to perform his daily living activities. The Ministry recognized that the Appellant has limitations with lifting and walking due to shortness of breath and fatigue; however, it determined that the Appellant's impairments do not directly and significantly restrict his ability to perform daily living activities, either continuously or periodically for extended periods of time.

The Appellant submitted that he needs daily help with his living activities. He has a caregiver who helps with his personal self-care, meals, medication reminders, basic housework, shopping and by driving him to appointments. In her statement the care giver indicated that he requires help 24 hours, 7 days a week. The Appellant also relied on the second PR and second AR which were submitted for the hearing. The Appellant further submitted that he uses a cane, grab bars and a machine for his sleep apnea, all of which indicate his activities are directly restricted by his medical conditions.

Section 2(2)(b) of the EAPWDA requires the opinion of a prescribed professional to satisfy the requirements in section 2(2)(b)(i) and (ii). Based on the Panel's previous findings regarding the admissibility of parts of the second PR and second AR and the weight to be given the other parts, the Panel finds that the Appellant's first doctor is the prescribed professional in this case. The Panel notes that the Ministry did consider that doctor's reports in its reconsideration decision. Specifically the Ministry noted that although that doctor indicated some aspects of daily living activities required periodic assistance, the frequency and duration of such assistance was not defined. The Ministry also considered that doctor's report that the Appellant could perform 20 out of the 28 listed daily living activities independently. Therefore the Panel finds that the Ministry reasonably determined that, in the opinion of a prescribed professional, the Appellant's impairments do not directly and significantly restrict his ability to perform daily living activities either continuously or periodically for extended periods.

Help with Daily Living Activities

The Ministry decided that because it determined that the Appellant's daily living activities are not significantly restricted by a severe impairment, it could not determine that significant help is required from other persons.

The Appellant submitted that he uses grab bars for bathing and toileting, a cane for mobility and a machine to help with sleep. He also referred to the information from his caregiver who the Appellant argued helps with many daily activities. The Appellant's caregiver wrote that the Appellant "requires 24 hours, 7 days a week assistance; that is, reminders to take medications, appointments and general care".

The Panel notes that Section 2(2)(b)(ii) of the EAPWDA also requires the opinion of a prescribed professional, which in this case the Panel has determined was the first doctor. That doctor did indicate that the Appellant uses grab bars and that a roommate helped with household activities. The same doctor wrote that home support and Handy Dart service would be required. However, the doctor provided no details about the frequency or extent of the help the roommate provided, or the frequency of assistance that the Appellant needs from home support or Handy Dart. Therefore based on all of the evidence and the applicable enactments, and given the Panel's finding above that the Ministry's determination that the Appellant's daily living activities are not directly and significantly restricted was reasonable, the Panel further finds that the Ministry's determination that the Appellant does not meet the requirements of section 2(2)(b)(ii) of the EAPWDA was also reasonable.

The Panel finds that the Ministry's reconsideration decision was reasonably supported by the evidence and was a reasonable application of the applicable enactments in the Appellant's circumstances. Therefore the Panel confirms that decision.