

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development (ministry) reconsideration decision dated August 17, 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 May 14, 2012, physician report dated May 3, 2012, and assessor report dated May 14, 2012;
- 2) Letter dated June 20, 2012 from the ministry to the appellant denying his request for PWD designation and enclosing a copy of the original decision summary;
- 3) Letter dated August 2, 2012 from a respirologist/internist 'To Whom It May Concern' stating in part that the appellant was assessed on January 27, 2012 and he is an ex-smoker for over 6 months having smoked up to 20 cigarettes a day for about 35 years. He describes breathing difficulties for several years but worse in the last 2 to 3 years. His chest x-ray done in October 2011 demonstrated moderate to severe emphysema also with evidence of bronchitis. In February, he had a CT scan of his chest which showed hyper-inflated lungs associated with centrilobular and paraseptal emphysema. His pulmonary function test demonstrated mild to moderate airway obstruction with reversibility. He does not qualify for home oxygen at the present time. The appellant has significant respiratory disease in the form of bullous emphysema, with mild to moderate impairment of his lung function and he would be expected to be short of breath on moderate to severe exertion, however he reports shortness of breath on minimal exertion which is out of proportion to the lung function impairment. He is on appropriate inhalers for his obstructive airways disease. This may be secondary to other causes, for example cardiac disease which needs to be excluded; and,
- 4) Request for Reconsideration- Reasons prepared by an advocate on behalf of the appellant.

Prior to the hearing, the appellant provided a written submission prepared by an advocate that did not contain new evidence, and the ministry relied on its reconsideration decision. The panel accepted the appellant's written submission as argument.

In his Notice of Appeal, the appellant states that he has a severe disability that restricts his daily living activities (DLA) and he requires the assistance of another person. In his Request for Reconsideration, the appellant states that he is not able to breathe when exerting himself, that he is not able to walk for very long and asks who wants someone on a jobsite? The appellant states that his age (55) and his health are the problem, that emphysema is not curable and it gets worse.

In his self-report included in the PWD application, the appellant states that he cannot perform any required duties on the job site because as soon as he exerts himself, he has a complete shortness of breath. The appellant states that he has worked in the construction industry all of his life and he cannot any longer without looking useless because he cannot breathe properly and earning a living has become all but impossible. The appellant states that he is 55 years old and maybe he could have a few more good years in a different line of work, something where physical exertion is not required, but retraining to a new field is required. The appellant states that eating has become difficult because when he eats too much, he experiences great pain. The inhalers he has been given to open his airways help but "...only for a little while." Many aspects of his life have been affected.

The physician who completed the physician report is the same specialist in respirology and internal medicine who wrote the letter dated August 2, 2012 and he indicates the appellant has been his patient for approximately 4 months and that he has seen the appellant once in the past 12 months. In the physician report, the physician confirms a diagnosis of bullous emphysema. In describing the severity of the medical condition relevant to the appellant's impairment, the physician notes "...his lung function confirms moderate airway obstruction." The physician indicates that the appellant has not been prescribed medications or treatments that interfere with his ability to perform daily living activities (DLA) and he does not require an aid for his impairment. For the degree and course of impairment, the physician has added a note that "...bullous emphysema is not curable, inhalers would give symptomatic improvement." The physician reports that the appellant can walk 1 to 2 blocks unaided on a flat surface, that he can climb 2 to 5 steps unaided, lift 5 to 15 lbs., and there is no limitation with remaining seated. The physician indicates that there are no difficulties with communication. The physician reports that there are no significant deficits with cognitive and emotional

function. The physician has responded "unknown" to the question whether the impairment directly restricts the appellant's ability to perform DLA and goes on to assess the appellant as not restricted with personal self care, meal preparation, management of medications, mobility inside the home, use of transportation, management of finances and social functioning, continuously restricted in the areas of daily shopping and mobility outside the home and 'unknown' regarding basic housework. The physician adds a comment with respect to the degree of restriction that the appellant "...experiences shortness of breath on exertion, pulmonary function test shows moderate airway obstruction." In response to a question regarding the assistance the appellant needs with DLA, the physician has noted "...limited exercise capacity".

The social worker who prepared the assessor report indicates that he has seen the appellant once for the purposes of completing the report, which is based on an office interview with the appellant and the physician report. The assessor indicates the appellant has a good ability to communicate in all areas, with the exception of poor hearing, with no further explanation. The assessor indicates that the appellant requires continuous assistance from another person in walking indoors, walking outdoors, climbing stairs, standing, lifting, carrying and holding, with the note that "...any of these activities leave applicant out of breath." The assessor indicates that the appellant is independent with all tasks of personal care including dressing, grooming, bathing, toileting, feeding self, regulating diet, and with transfers in/out of bed and transfers on/off chair, with no other explanation or description provided. The assessor reports that the appellant requires continuous assistance with doing laundry and with basic housekeeping, with the comment, "...cannot do physical labour." The assessor indicates that the appellant is independent with some tasks of shopping, including reading prices and labels, making appropriate choices, and paying for purchases, while requiring continuous assistance from another person with going to and from stores and carrying purchases home, with the note that "...walking and physical chores take his breath away." The assessor reports that the appellant is independent with all of the tasks of managing meals, finances, medications and transportation, while requiring continuous assistance with using public transit, with the comment that the appellant "...cannot walk without stopping for a rest every 1/2 block." In terms of assistance provided by other people, the assessor notes that the appellant's roommate helps with daily living activities. For the sections of the report for those with an identified mental impairment or brain injury, including the assessment of impacts to cognitive and emotional functioning and social functioning, the assessor has crossed it out as not applicable.

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.

Severity of physical impairment:

The ministry argues that the evidence does not show that the appellant has a severe physical impairment. The ministry points out that the appellant's physician indicates that the appellant's lung function confirms moderate airway obstruction, that his emphysema is not curable but inhalers would give improvement. The ministry argues that the physician indicates the appellant can walk 1 to 2 blocks unaided, climb 2 to 5 steps unaided, lift 5 to 15 lbs., and has no limitation with remaining seated. While the assessor indicates the appellant requires continuous assistance with all of his mobility and physical functions, the ministry argues that the comment that "...any of these activities leave applicant out of breath" does not explain why the appellant requires this level of assistance with these tasks, and the level of impairment has not been confirmed by the physician. The ministry points out that both the physician and the assessor indicate that the appellant does not require any aids for his impairment.

The appellant, through his advocate, argues that he has a severe physical impairment as a result of bullous emphysema which the physician states is not curable. The advocate points out that in the letter dated August 2, 2012, the physician states that in summary the appellant "...does have significant respiratory disease," and the assessor states that "...emphysema will never get any better and will in fact become more of an issue. Applicant has a hard time breathing no matter what he is doing", and that he "...cannot do physical labour and he cannot walk 1/2 block without a rest." The advocate argues that the decision in Hudson v. EAAT, 2009 BCSC 1461 is authority for the position that the evidence of the physician and the assessor must be reviewed in full, including narrative portions, to see if eligibility can be found. The advocate points out that the appellant states, in his Request for Reconsideration, that he is not able to breathe when exerting himself, that he is not able to walk for very long so who wants someone on a jobsite, that his age and health are the problems, and that emphysema is not curable and gets worse. The advocate argues that the court in Hudson held that significant weight must be placed on the evidence of the applicant, unless there is a legitimate reason not to do so.

The panel finds that the evidence of a medical practitioner has confirmed a diagnosis of bullous emphysema and, in describing the severity of the medical condition relevant to the appellant's impairment, the physician notes "...his lung function confirms moderate airway obstruction." The physician indicates that the appellant has not been prescribed medications or treatments that interfere with his ability to perform DLA and he does not require an aid for his impairment. For the degree and course of impairment, the physician adds a note that "...bullous emphysema is not curable, inhalers would give symptomatic improvement." The physician reports that the appellant can walk 1 to 2 blocks unaided on a flat surface, that he can climb 2 to 5 steps unaided, lift 5 to 15 lbs., and there is no limitation with remaining seated. The physician indicates that the appellant is continuously restricted in the area of mobility outside the home and comments with respect to the degree of restriction that the appellant "...experiences shortness of breath on exertion, pulmonary function test shows moderate airway obstruction." In his Request for Reconsideration, the appellant states that he is not able to breathe when exerting himself, that he is not able to walk for very long and asks who wants someone on a jobsite? The appellant states that his age and his health are the problem, that emphysema is not curable and it gets worse. In his self-report included in the PWD application, the appellant states that he cannot perform any required duties on the job site because as soon as he exerts himself, he has a complete shortness of breath. The appellant states that he has worked in the construction industry all of his life and he cannot any

longer, that maybe he could have a few more good years in a different line of work, something where physical exertion is not required. The appellant states that the inhalers he has been given to open his airways help but "...only for a little while." In the assessor report, the social worker indicates that the appellant requires continuous assistance from another person or he is unable to walk indoors, walk outdoors, climb stairs, stand, lift, carry and hold, with the note that "...any of these activities leave applicant out of breath."

The panel finds that the social worker's assessment is inconsistent with the evidence of the physician with respect to the requirement for continuous assistance with walking outdoors, for which the physician indicates that the appellant is restricted but can walk 1 to 2 blocks unaided, with walking indoors, for which the physician indicates the appellant is not restricted, and for climbing stairs, for which the physician states the appellant can climb 2 to 5 steps unaided, for lifting, for which the physician indicates the appellant can lift 5 to 15 lbs., and for standing, for which neither the physician nor the appellant have indicated a restriction. The panel places more weight on the evidence of the physician as he is a specialist in respirology and internal medicine and the social worker based his assessment solely on the physician's report and an office interview with the appellant and gives no explanation of a recent deterioration in the appellant's condition. In his letter dated August 2, 2012, the physician indicates that the appellant's pulmonary function test demonstrated mild to moderate airway obstruction with reversibility and that the appellant does not qualify for home oxygen at the present time. Although the physician indicates that the appellant has significant respiratory disease in the form of bullous emphysema, he also states that the appellant would be expected to be short of breath on moderate to severe exertion, however the appellant reports shortness of breath on minimal exertion which is out of proportion to the lung function impairment and he is also on appropriate inhalers for his obstructive airways disease. The physician states that the appellant's reported limitations may be secondary to other causes, for example cardiac disease which needs to be excluded. The panel finds that the evidence demonstrates that the appellant is impaired by his currently diagnosed condition of bullous emphysema and uses his inhalers for symptomatic improvement, but that the ministry reasonably concluded that the available evidence does not establish a severe physical impairment.

Severity of mental impairment:

The ministry argues that the evidence does not show that the appellant has a severe mental impairment. The ministry points out that the physician indicates that the appellant does not have any significant deficits to cognitive and emotional functioning. The ministry argues that the assessor also does not indicate that the appellant's impairment impacts his cognitive and emotional functioning. The appellant does not argue that he has a severe mental impairment.

The panel finds that the evidence of a medical practitioner does not confirm a diagnosis of a mental disorder. In the physician report, the physician indicates that there are no difficulties with communication and there are no significant deficits with cognitive and emotional function. In the physician report, the physician indicates no restrictions to social functioning and, in the assessor report, the social worker indicates that the sections relating to impacts on the appellant's daily cognitive and emotional functioning and social functioning are not applicable. Therefore, the panel finds that the ministry's decision, which concluded that the evidence does not establish a severe mental impairment, was reasonable.

Whether ability to perform DLA is significantly restricted:

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 reports that the appellant is not restricted in his ability to manage the majority of his DLA, and his ability to manage basic housework is unknown. The ministry argues out that the assessor indicates the appellant requires continuous assistance with his basic housekeeping, however "cannot do physical labour" does not explain why the appellant needs this level of assistance. The ministry argues that although the physician indicates that the appellant requires continuous assistance with daily shopping and mobility outside the home, the note that the appellant "...experiences shortness of breath on exertion, pulmonary function test shows moderate airway obstruction" does not explain

why the appellant requires this level of assistance. The ministry argues that while the assessor indicates that the appellant requires continuous assistance with going to and from stores, carrying purchases home, and with using public transit, the narrative does not support this as the restriction is described as "...any of these activities leave applicant out of breath." The ministry also argues that further narrative states that a rest is required with walking or doing physical chores and then it appears that the appellant is able to complete these activities.

The appellant argues, through his advocate, that the evidence of the physician and the social worker establishes that the appellant is directly and significantly restricted in his ability to perform his DLA continuously. The advocate argues that the court decision in Hudson is authority for the position that there must be evidence from a prescribed professional indicating a direct and significant restriction on at least two DLA and that there is no statutory requirement that more than two DLA be restricted. The advocate argues that the physician indicates the appellant is restricted continuously in the two DLA of daily shopping and mobility outside the home. The advocate points out that the assessor indicates that the appellant requires continuous assistance from another person or he is unable to walk indoors or outdoors, climb stairs, stand, lift, carry and hold, do laundry and basic housekeeping, go to and from stores, carry purchases home and use public transit. The advocate also argues that Hudson held that any ambiguity in the interpretation of the EAPWD legislation must be resolved in favour of the applicant and the legislation must be interpreted with a benevolent purpose in mind.

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 that the appellant is not restricted with the DLA of meal preparation and, in the assessor report, the social worker indicates that the appellant is independent with all tasks, including meal planning, food preparation, cooking and safe storage of food. For managing personal finances, the physician reports that the appellant is not restricted with this DLA and the assessor reports that he is independent with all tasks of paying rent and bills including banking and budgeting. In terms of shopping for his personal needs, the physician indicates that the appellant is continuously restricted and comments on the degree of restriction as "...experiences shortness of breath on exertion; pulmonary function test shows moderate airway obstruction." The assessor indicates that the appellant is independent with the tasks of reading prices and labels, making appropriate choices and paying for purchases, while requiring continuous assistance from another person with going to and from stores and carrying purchases home, with the comment that the appellant "...cannot walk more than 1/2 block without a rest."

For use of public or personal transportation facilities, the physician indicates that the appellant is not restricted and the assessor reports that the appellant is independent with the tasks of getting in and out of a vehicle and using transit schedules and arranging transportation, while requiring continuous assistance with using public transit, with the comment that the appellant "...cannot walk without stopping for a rest every 1/2 block." With respect to performing housework to maintain the appellant's place of residence in an acceptable sanitary condition, the physician reports that it is unknown whether the appellant is restricted in this DLA and the assessor indicates that the appellant requires continuous assistance from another person with doing laundry and basic housekeeping, with the comment that the appellant "...cannot do physical labour."

For moving about indoors and outdoors, the physician indicates that the appellant is not restricted with mobility inside the home but is continuously restricted with mobility outside the home. The physician, who is a specialist in respirology and internal medicine, indicates that the appellant can walk 1 to 2 blocks unaided and that he can climb 2 to 5 steps unaided. The assessor indicates that the appellant requires continuous assistance or he is unable to walk indoors and outdoors, or climb stairs, however the assessor also indicates that the appellant "...cannot walk without stopping for a rest every 1/2 block", which the panel finds demonstrates an ability to perform this activity, with rests. Regarding performing personal hygiene and self care, the physician indicates that the appellant is not restricted with personal self care and the assessor

reports that the appellant is independent with all tasks, including dressing, grooming, bathing, toileting, feeding self, regulating diet, transfers in/out of bed and on/off chair. With respect to managing his personal medications, the physician reports that the appellant is not restricted and the assessor indicates that the appellant is independent with all tasks, including filling/refilling prescriptions, taking as directed, and safe handling and storage.

The physician reports no restriction with one aspect of the DLA of moving about, for mobility inside the home, but continuous restrictions in the aspect of mobility outside the home, that the appellant can walk 1 to 2 blocks unaided and has "limited exercise capacity", and the assessor indicates that appellant must rest after walking half a block. The assessor indicates that the appellant requires continuous assistance with basic housekeeping ("cannot do physical labour") and 2 out of 5 tasks of shopping and 1 out of 3 tasks of managing transportation due to being unable to walk without stopping for a rest every 1/2 block, and the panel finds that the ministry reasonably concluded that a rest is required with walking and then it appears that the appellant is able to complete these activities. In his letter dated August 2, 2012, the physician indicates that the appellant has mild to moderate impairment of his lung function and he would be expected to be short of breath on moderate to severe exertion, however the appellant reports shortness of breath on minimal exertion which is out of proportion to the lung function impairment and that he is on appropriate inhalers for his obstructive airways disease. In his self-report, the appellant states that the inhalers he has been given to open his airways help but "...only for a little while" and there is no additional information regarding how long the symptomatic improvement lasts. The physician suggests there may be other causes, for example cardiac disease, which need to be excluded and for which there is currently no other diagnoses. The advocate argues that there is no statutory requirement that more than 2 DLA be restricted, however the panel finds that the ministry reasonably determined that the evidence does not establish a direct and significant restriction on a minimum of two DLA on either a continuous basis or periodically for extended periods of time. The panel finds that the evidence demonstrates that the appellant has no restrictions and is independent in performing the majority of his DLA and that the identified restrictions are for those tasks outside the appellant's functional skills limitations of lifting up to 15 lbs. and walking more than 1 to 2 blocks unaided, with rests. 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.

Whether help to perform DLA is required:

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 notes the information from the assessor that the appellant lives with and receives assistance from a roommate, and that he uses inhalers. 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.

Conclusion:

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