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PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development's (the "Ministry") October 1, 2012 reconsideration decision in which the Ministry determined that the Appellant was not eligible for Persons with Disabilities ("PWD") designation because he did not meet all of the requirements 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.

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PART E – Summary of Facts

For its reconsideration decision the Ministry had the following evidence:
1. Appellant's PWD application consisting of the Appellant's self-report; a physician's report ("PR") and an assessor's report ("AR"). The PR and the AR were completed by the same doctor who indicated that the Appellant has been a patient for more than 20 years and that he has seen the Appellant between 2-10 times in the 12 months preceding the reports.
2. Summary of Appellant's medical history dated July 5, 2012 listing the Appellant's medical problems as anemia, colon polyp, vision loss, glaucoma, back pain chronic, GERD, COPD bronchitis, and also listing the Appellant's medications.
3. Chest x-ray dated June 22, 2012 indicating the Appellant's lungs are hyper inflated, consistent with COPD.
4. Knee x-rays dated October 22, 2011 indicating very mild medial compartment degenerative narrowing and osteophyte formation.
5. Letter dated February 9, 2012 from an ophthalmologist to another doctor, reporting that the Appellant's visual acuity with correction was 20/20 in the right eye and 20/400 in the left and that the Appellant is suffering from a secondary glaucoma in the left eye.
6. Letter dated December 19, 2011 from an ophthalmic surgeon to another doctor regarding the Appellant injury and visual acuity.
7. Hospital record from April 2009 with respiratory results.
8. Letter from a sports medicine doctor to the Appellant's doctor dated August 31, 2005 regarding the Appellant's right knee pain and recommending optimizing knee pads.
9. Letter dated January 22, 2004 from a respiratory and thoracic surgeon to the Appellant's doctor reporting that he agrees that the Appellant has significant chronic obstructive lung disease.
10. Appellant's request for reconsideration with written argument from his advocate and a list of medications from a pharmacy for March to June 2012.

In his self-report the Appellant listed his medical conditions as follows: bronchitis (since age 12) frequent sickness, compressed disc(s) lower back (1978), eye injury from bungee hook in left eye 1986, cluster migraines (right eye over compensating) 1994, glaucoma (left eye and expected in right eye) 2010, digestive problems (treatment to "remove" bacteria" and prevent regurgitation) 2008, history of sleep problems, anxiety, marked worsening of COPD 2009, knee pain, extreme fatigue, weakness, vision deterioration and hearing problems 2010. The Appellant wrote that his mobility has been restricted for several years because of his lung condition and the pain he experiences daily in his lower back and knees. He stated that he is tired all the time, and no matter how fatigued he is he has trouble sleeping. On a good night, he gets 5/6 hours of sleep but often it's only 2 hours. The Appellant wrote that he has to keep to a very strict eating regime because of his digestive problems. He gets sick at night if he eats too late, despite sleeping on a tilted bed to help keep the food down.

The Appellant wrote that he cooks for himself and is careful about what he eats, but can only manage to stand at the counter for 5 minutes at a time because of his back and knee pain. He must stop and sit down. The Appellant stated that he can only lift about 10 lbs. maximum. He also has trouble with cramping when attempting fine hand movements (cutting, peeling and chopping). He wrote that no matter how he feels he has to eat at certain times and is always conscientious about taking his medications. The Appellant indicated that he takes his medication in the mornings to help with vomiting but waits an hour to allow them to work before he eats or does anything. He uses his puffer twice a day, but his lungs have gotten a lot worse lately. He always seems to be short of breath.

The Appellant stated that household chores are always hard for him because of his shortness of breath and lower back pain. He can do small tasks for 10-15 minutes and then he must rest for 5-10 minutes. The Appellant indicated that making the bed is particularly difficult because the bed is tilted, and because of the reaching and bending involved. He wrote that every day is a struggle and by noon he is usually exhausted and spends afternoons quietly. Sitting isn't always comfortable for long so he has to lie down to have his head higher than his feet. The Appellant wrote that he finds that motivation is increasingly a problem for him, but he paces himself and tries not to overdo it and put himself out of action completely. He indicated that he manages self-care but can only use a shower.

The Appellant wrote that he can drive himself around, but has to stop for breaks to relieve his back, so he is restricted to short journeys of a few minutes. Getting in and out of the car is painful, slow and difficult especially if he has been sitting too long. The Appellant indicated that when shopping he can walk for 15 minutes maximum before his back pain starts in earnest, so he tends to be in and out of stores as quickly as possible. He uses a cart to support himself and avoids lifting anything over 7-10 lbs. into the cart. The Appellant stated that he cannot stretch upwards at all so he gets help for items out of reach. He wrote that standing in line is really a problem. He cannot stand more than a couple of minutes and shifts from foot to foot with pain. For the last 2-3 years, he hasn't been able to tolerate crowds or crowded noisy places. He indicated that walking uphill is very hard and he avoids that if possible, as well as stairs and ramps.

The Appellant also indicated that his eyes are now causing him a good deal of anxiety. Although the cluster migraines are more or less under control, he now has severe pain in his left eye from glaucoma. His specialist told him that the right eye will inevitably become involved as well. The Appellant wrote that his vision is foggy, depth perception is a problem and straight lines appear wavy. His right eye is very overworked and he suffers greatly from eye strain and fatigue. The Appellant stated that he has trouble reading and has to use a magnifying glass in addition to his glasses for smaller print. He also has problems with his hearing and will be tested shortly.

In the PR, the doctor described the Appellant's diagnoses as COPD, degenerative disc disease, arthritis in both knees, vision impaired/optic neuropath and glaucoma. With respect to the severity of these conditions, the doctor wrote that the Appellant has severe COPD with deterioration over past 6 months; when walking does not show hypoxemia as yet, but walking 100 feet shows heart rate increased from 80-120 and respiration rate is higher. The doctor wrote that the Appellant gets SOB (short of breath) with daily living activities of dressing, housework and food preparation. The doctor reported that the Appellant's degenerative disc disease and arthritis in his knees cause chronic pain in his back and knees. The Appellant is no longer able to do his previous work (tile installer) and he cannot tolerate prolonged standing/walking and sitting. The doctor described the Appellant's vision loss as 20/400 in the left eye and retinal trauma to the left eye. The Appellant has secondary glaucoma in his left eye and loss of depth perception impairs his ability to do his prior job. The doctor also listed the medications the Appellant has been prescribed and indicated that the Appellant does not need any prostheses or aids.

With respect to the Appellant's physical functional skills the doctor reported that the Appellant can walk less than 1 block unaided on a flat surface, climb 5+ steps unaided "slowly", lift 5-15 lbs. "not repetitively" and can remain seated for less than 1 hour. The doctor indicated that the Appellant does not have any significant deficits with cognitive and emotional function, and he added "normal adjustment symptoms to loss of functional capacity."

In the AR, the doctor reported that the Appellant is independent in all aspects of mobility and physical activity, although taking significantly longer with each of them. The doctor added the following comments beside each listed activity:

- Walking indoors – "walks slowly, stops at 25-50'".
- Walking outdoors – "same".
- Climbing stairs – "very slow, frequent pause".
- Standing – "limited 10-15 minutes".
- Lifting – "can lift 15kg., but not repetitive."
- Carrying and holding – "same".

The doctor also added the following comments: "mainly due to COPD; arthritis limits standing tolerance; cannot squat or kneel". The doctor did not complete the section regarding impacts to cognitive and emotional functioning.

The doctor reported that the Appellant is independent in all aspects of daily living activities listed in the AR and crossed out the aspects for social functioning. The doctor did indicate that the following activities take significantly longer and provided the noted comments:

- Basic housekeeping and laundry – takes 2-3 times longer than normal due to arthritis/COPD.
- Going to and from stores – limited by standing tolerance.
- Carrying purchases home – uses cart from store to vehicle.
- Food preparation and cooking takes longer than normal

The doctor added that daily living activities take the Appellant much longer than normal to perform. He is unable to carry 10 lbs. for 50 feet. The Appellant must use a cart for support in the store and for carrying purchases. He can only stand for short periods. The doctor also wrote that it is painful for the Appellant to sit in a vehicle for more than short periods. The doctor indicated that the Appellant might benefit from a walker with a seat in the future. The Appellant must sit down frequently to relieve back pain.

The doctor indicated "none" for assistance provided by others, or from assistive devices or an assistance animal, but referred back to his note about benefitting from a walker. The doctor added that the information the Appellant provided in his application statement is in keeping with the doctor's assessment of his diseases and functional capacity. The doctor also reported that he conducted an oximetry test with the Appellant walking 25-50 feet slower than a normal pace. The test did not show hypoxy as yet, but the Appellant's heart rate was up to 120/minute, and his respiratory rate was high. The doctor wrote that this is due to the Appellant's severe COPD and represents his optimal functional ability.

At the hearing, the Appellant described his employment history, including working as a bricklayer, a tile installer and a mason at an industrial facility. He stated that these work experiences contributed to his impairments, and now he cannot work at all. Because of his medical conditions, the Appellant said he finds himself wiped out all afternoon. He experiences constant fatigue and shortness of breath. He can drive for about half an hour and then has to stretch. The Appellant also said that his back will just let go and then he stumbles and has to grab something to keep from falling. He said that he might benefit from a walker with a seat. The Appellant stated that he often has to sit down to relieve his back pain. He said he also has breathing problems and eye problems. The Appellant said he has been independent all of his life and now doing his daily living activities is not easy.

The Appellant explained how he rolls out of bed to avoid hurting his back. He keeps items, like

dishes, low to avoid reaching far and he doesn't carry much at a time. The Appellant said that sometimes his back problem puts him in bed for days. For example, he said about two weeks ago his back gave out so that he could not straighten up and then spent a lot of time lying around. When he cooks, he has to sit down after a few minutes. The Appellant also stated that he uses two different puffers at regular times during the day, one 16 times a day and the other 4 times a day. If he forgets to use one he is out of breath. The Appellant described how when he goes to the mall he has to sit on a bench after a few minutes. He said that since seeing his doctor for the PWD application, his lungs have gotten worse. The Appellant also said that he uses no other devices and takes medication for his pain.

The Appellant's advocate submitted written and oral arguments to support the Appellant's appeal. These are set out in Part F of this decision.

The Panel finds that the Appellant's oral testimony about his medical conditions and how they affect his daily functioning is related to information the Ministry had about the Appellant's impairments at the time of reconsideration. Therefore, the Panel admits that testimony as being in support of evidence before the Ministry when it made its reconsideration decision in accordance with section 22(4) of the Employment and Assistance Act.

At the hearing, the Ministry reviewed the information it had at the time of reconsideration and acknowledged that based on the information from the Appellant and the doctor it was hard to defend the Ministry's finding that the Appellant does not have a severe physical impairment that directly restricts his daily living activities. However, the Ministry pointed out that the information from the doctor did not confirm that the daily living activities are significantly restricted continuously or periodically for extended periods, or that the Appellant needs significant help with the activities. Therefore, the Ministry reaffirmed its decision.

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PART F – Reasons for Panel Decision

The issue in this appeal is whether the Ministry reasonably determined that that the Appellant was not eligible for PWD designation because he did not meet all of the requirements for PWD designation as set out in section 2(2) of the EAPWDA, and specifically that the Appellant does not have 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 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 EAPWDR as:
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 reviewed the information in the PR from the Appellant's doctor, including the diagnoses. The Ministry noted that the Appellant's impairment is related to limitations in walking, shortness of breath with certain daily living activities (dressing, housework and food preparation), and chronic back and knee pain. The Appellant cannot tolerate prolonged standing/walking/sitting and loss of depth perception impairs his ability to do tile setting. The Ministry pointed out that employability is not a criterion for PWD eligibility. The Ministry reviewed the doctor's report of the Appellant's physical functionality in the PR. It also considered the doctor's assessment in the AR that the Appellant is independently able to do all aspects of mobility and physical abilities,

although they take longer than normal to perform. The Ministry considered medication as remedial measures. The Ministry also noted that the Appellant does not use assistive devices although he may benefit from a walker with a seat in the future. Based on the information, the Ministry determined that the Appellant's functional skill limitations are more in keeping with a moderate degree of impairment and was not satisfied that the information provided was evidence of a severe physical impairment.

The Appellant argued that the Ministry's reconsideration officer is not a prescribed professional as defined in the EAPWDR and therefore is not qualified to gainsay the doctor's opinion that the Appellant suffers from severe physical impairments in the form of severe COPD, degenerative disc disease, arthritis in both knees and impaired vision. This doctor has treated the Appellant for over 20 years and described the severity of the Appellant's impairments in his reports. The doctor reported severe limitations in physical functioning and indicated that some physical tasks take 2-3 times longer than normal. The doctor also wrote that "ADLs take m[uch] longer than normal", that the Appellant's shopping is limited by his standing tolerance because of his disc disease and arthritic knees that he has to use a cart for groceries and that he must frequently sit down to relieve his back pain. The Appellant submitted that he has adapted to his functional limitations by letting his homecare standards slide. This is due to his mobility limitations as well as his constant fatigue and shortness of breath.

The Appellant cited the *Hudson* case to point out that it is illogical to ask the Appellant to describe his disabling conditions if the Ministry does not grant it considerable weight, unless there is an issue about credibility. There is no credibility issue in this case and given the doctor's endorsement of the Appellant's statement, the Appellant argued that it is perverse for the Ministry to ignore it. The Appellant pointed out that the doctor wrote that the Appellant's statement is in keeping with the doctor's assessment of his disease and functional capacity.

The Panel notes that with his PWD application the Appellant submitted a detailed statement about his medical conditions and about how these conditions impact his functionality. He also described his conditions and limitations at the hearing, including how his lung conditions and the daily pain in his lower back and knees contribute to his shortness of breath, his fatigue, his limitations in standing and doing tasks. The Appellant stated that he can do small tasks for 10-15 minutes and then he has to rest. Reaching and bending are also limited. He explained how he can only stand for 5 minutes when cooking because of his back and knee pain. The Appellant stated that every day is a struggle and by noon he is usually exhausted. The Appellant also described how he can walk only for 15 minutes maximum before his back pain starts in earnest and he stumbles when his back gives out. He avoids stairs and ramps. The Appellant described how he cannot straighten out his back for long periods and then he is confined to bed. He explained how he uses two different puffers during the day and how his lung condition is getting worse. He is always short of breath when doing tasks. The Appellant also submitted that his homecare has slipped because of his limitations in functioning.

In the PR, the doctor wrote that the Appellant has severe COPD with deterioration over the past 6 months. When the Appellant walks for 100 feet his heart rate increases to 80-120. The Appellant has chronic pain in his back and knees and his vision is also limited. The doctor reported that the Appellant's physical functional skills are limited as follows: walking unaided on a flat surface for less than 1 block; climbing 5+ stairs unaided "slowly"; lifting 2-7 kgs "not repetitively"; and, remaining seated for less than 1 hour. The Appellant cannot tolerate prolonged standing, walking and sitting. In

the AR, although the doctor reported that the Appellant is independent in aspects of mobility and physical ability, the doctor also noted that all of those activities take significantly longer than typical. The doctor added specific comments such as for walking "walks slowly, stops at 25-50 feet"; for climbing stairs "v[ery] slow, frequent pause"; and, for standing "limited 10-15 minutes", "mainly due to COPD, arthritis limits standing tolerance." With respect to other daily living activities that require physical functioning, the doctor reported that several take significantly longer. For example, basic housekeeping takes 2-3 times longer than normal due to the Appellant's arthritis and COPD. The doctor added the comments that "ADL's take m[uch] longer than normal" and "can only stand for short periods". For carrying limitations, the doctor reported that the Appellant is unable to carry 10lbs for more than 50 feet and that he uses a cart for support and to carry purchases. It is also painful for the Appellant to sit in a vehicle for short periods.

The Panel finds that the doctor's reports are consistent with and confirm the Appellant's descriptions of his physical limitations. In fact, the doctor, who has known the Appellant for more than 20 years, wrote that the information provided by the Appellant is in keeping with his assessment of the Appellant's diseases and functional capacity. The Panel also finds that the doctor provided comments linking the Appellant's physical limitations to his medical conditions; for example, the Appellant's restrictions in walking, climbing and standing are mainly due to COPD and arthritis. When all of the evidence from the Appellant and from the doctor is considered, and when all of the Appellant's medical conditions and their impacts on his daily functioning are considered, the Panel finds that it was not reasonable for the Ministry to determine that the Appellant does not have a severe physical impairment.

In terms of a mental impairment the Ministry noted that the Appellant's doctor did not confirm any deficits to cognitive and emotional functioning or impacts on daily functioning, except to comment "normal adjustment symptoms to loss of functional capacity" The Ministry was not satisfied that there is a severe impairment. The Appellant provided no information about any diagnosis of a mental health condition or impacts to cognitive and emotional functioning except that his eye conditions are causing him anxiety. Therefore, based on the evidence, the Panel finds that the Ministry reasonably determined that the Appellant does not have a severe mental impairment.

Restrictions to Daily Living Activities

The Ministry noted that the doctor reported that all daily living activities are performed independently, although 6 of the 28 tasks listed in the AR take longer than normal to perform. The doctor reported that basic housekeeping takes 2 times longer than normal, but provided no information about how much longer than normal the other tasks take. The Ministry also noted that the doctor indicated that the Appellant uses a cart for support in stores and to transport purchases to his vehicle. The Appellant is unable to carry items weighing more than 10 lbs. for 50 feet and can only stand for short periods. The Ministry determined that because the Appellant can perform all daily living activities independently, the information from the prescribed professional did not establish that the Appellant's impairment significantly restricts daily living activities either continuously or periodically for extended periods.

The Appellant submitted that he receives very little help. He is managing as best he can without help. However, the Appellant submitted, not receiving help does not imply that help is not needed only that it is not available. The Appellant argued that if this was not the case, there would not be a column in the AR labeled "takes significantly longer than typical". The Appellant pointed out that the doctor

checked this column for every mobility and physical category, as well as for laundry, housekeeping, shopping, food preparation, cooking and transportation. In order to manage without help the Appellant submitted that he has reduced his housekeeping standards and has to spend each afternoon lying down. The Appellant cited the *Hudson* decision for his position that every one of the listed daily living activities does not have to be affected by his severe physical impairments. He argued that the prescribed professional, in this case his doctor, reported direct and significant restrictions to more than two daily living activities.

To satisfy the requirements of section 2(2)(b)(i) of the EAPWDA, the Appellant must provide the opinion of a prescribed professional confirming that his severe impairments directly and significantly restrict his daily living activities. In this case, the doctor who completed the PR and the AR is the prescribed professional. The Panel notes that the Ministry considered the information in the doctor's reports and acknowledged that the doctor reported that some tasks take significantly longer than normal. However, based on the information from the doctor in the AR, the Panel finds that the Ministry reasonably determined that even with the reported limitations, the doctor nevertheless indicated that the Appellant can independently manage his daily living activities. Therefore the Panel finds that based on the evidence the Ministry reasonably 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.

Help with Daily Living Activities
The Ministry noted that the Appellant does not use assistive devices currently. The Ministry also 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 just because he does not complain about not having help or being unable to perform daily living activities does not mean that he does not need significant help. He referred to the evidence of how long it takes him to accomplish basic housekeeping tasks, his difficulty with cooking and reaching, with carrying and with his mobility. The Appellant submitted that his home care standards have declined because of his mobility limitations and his constant fatigue and shortness of breath. Several tasks take significantly longer than typical and he has to spend each afternoon lying down. The Appellant submitted that he does need the significant help of others.

The Panel notes that section 2(2)(b)(ii) of the EAPWDA also requires the opinion of a prescribed professional. In this case that is the Appellant's doctor. In the AR, the doctor did not indicate that help is required for any daily living activities either continuously or periodically for extended periods. Nor did the doctor provide additional notes about help currently given or that might be needed. As for any assistive devices, the doctor only stated that the Appellant might benefit from a walker in the future and that he uses a cart for support and to carry purchases. Based on the evidence from the doctor 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 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 confirms the Ministry reconsideration decision because it was reasonably supported by the evidence and was a reasonable application of the applicable enactments.