

## PART C – Decision under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development (the ministry) dated 14 November 2012 denying the appellant designation as a person with disabilities (PWD). The ministry determined that the appellant did not meet all of the required criteria for PWD designation set out in the Employment and Assistance for Persons with Disabilities Act, section 2. Specifically the ministry determined that the information provided did not establish that the appellant has a severe mental or physical impairment that in the opinion of a prescribed professional

(i) directly and significantly restricts the person's ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and,

(ii) as a result of those restrictions, the person requires help to perform those activities.

The ministry did determine that the appellant satisfied the other 2 criteria: he has reached 18 years of age; and his impairment in the opinion of a medical practitioner is likely to continue for at least 2 years.

## 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

With the consent of both parties, the hearing was conducted as a written hearing, pursuant to section 22(3)(b) of the Employment and Assistance Act.

The evidence before the ministry at reconsideration consisted of the following:

1. The appellant's PWD Designation Application dated 10 August 2012. The Application contained:
  - The appellant's Self Report (SR1).
  - A Physician Report (PR) dated 07 August 2012 completed by the appellant's general practitioner (GP) who has known the appellant 12 years and seen him 2 - 10 times in the past year.
  - An Assessor Report (AR) dated 07 August 2012, completed by the same GP.
2. The appellant's Request for Reconsideration, dated 29 October 2012, including a statement by the appellant giving his reasons for reconsideration (SR2) and a note from his GP of the same date (GP Note).

In the PR and AR, the GP diagnoses the appellant with 1) chronic obstructive pulmonary disease (COPD) with significant shortness of breath (SOB) on exertion, and 2) deafness.

The panel will summarize the evidence from the PR, AR, the SRs and the GP note relating to the appellant's impairments as it relates to the PWD criteria at issue.

### *Physical impairment*

#### PR:

- Health history/severity: the GP writes:
 

"[The appellant] has been working as a scaler for many years which involves heightened exposure to thick rock dust. In combination with his smoking it has caused significant damage to his lungs resulting in COPD. Consequently he gets SOB quite easily, especially with exertion. This limits his ability to walk any distance, take stairs and do ADLs without having to stop. He frequently has to stop to catch his breath even if he is lifting all in one spot."
- The GP reports that the appellant has not been prescribed any make medication and/or treatments that interfere with his ability to perform DLA. He requires no prosthesis or aids for his impairment.
- Functional skills: the appellant can walk less than one block unaided, can climb 2 to 5 steps, and has no limitations to lifting and no limitations to remaining seated. No difficulties with communications are noted.

#### AR:

- Ability to communicate: speaking – good; reading – satisfactory (limited by vision); writing – satisfactory (education); hearing – poor (some deafness due to work noise).
- Mobility and physical ability: walking indoors, walking outdoors, climbing stairs and carrying and holding – takes significantly longer than typical (must stop frequently to catch his breath; limited distance due to SOB); standing and lifting – independent.
- Additional information: the appellant's condition is more likely to deteriorate than to improve

over time.

SR1:

- Describing his disability, the appellant lists COPD, severe carpal tunnel syndrome, lower lumbar and both shoulders are sore (shoulders sore when hands are lifted above head and back pain on harder surfaces like cement), deafness and cataract in right eye.
- Describing how his disability affects his life, the appellant states that COPD makes breathing difficult during and after activities. Walking for 10 min. on a flat surface is OK, but more than that or 5 minutes on an incline, wheezing and coughing starts. He must use a puffer every morning and throughout the day whenever needed – usually 15 to 20 minutes after a physical activity.
- He adds that he is hard of hearing and has a cataract in right eye and poor vision.

GP Note:

- The GP writes that the appellant must stop every 5 minutes when walking and rest 10 to 15 minutes. What used to take him 10 minutes to do now take 30 minutes at least. He has to rest 5 to 10 minutes just to get out of the car.

SR2:

- The appellant writes that after climbing only 4 steps, he's already wheezing and needs to rest. He cannot walk a full block and needs to stop to catch his breath every 5 to 7 meters.

*Mental impairment*

PR/AR:

- No mental health condition diagnosed, no cognitive or emotional deficits identified and no cognitive and emotional restrictions on daily functioning reported.

SR1

- The appellant writes that he has slight depression due to current living situation.

*Ability to perform DLA*

AR:

- Personal care and basic housekeeping: independent in all aspects (comment: appellant OK in short bursts of activity. Must rest if any activity becomes prolonged).
- Shopping: takes significantly longer than typical for going to and from stores and carrying purchases home (must stop periodically to catch his breath); independent for reading prices and labels, making appropriate choices and paying for purchases.
- Meals: independent in all aspects (if there is not a lot of movement, appellant can handle this on his own).
- Pay rent and bills and medications: independent in all aspects
- Transportation: takes significantly longer than typical for getting in and out of vehicle (has to get out slowly); independent for using public transport and using transit schedules and arranging transportation.
- General comment: the GP writes that the appellant is very independent and would not ask for

help unless he really needed it; he will pursue his activities rather than ask for assistance.

- Social functioning: no assessment made by the GP for restrictions or support/supervision required;
- Additional information: the GP writes that the appellant is really limited by his activities as, if he moves slowly, he can complete most tasks but it definitely takes him longer to do so. His condition is more likely to deteriorate than to improve over time.

SR2:

- The appellant writes that DLA, including personal hygiene needs, and physical movement can be significantly slower.
- He has lost a great number of pounds because it is difficult to make meals and his wife makes the dinners.

*Assistance required/provided*

PR:

- The GP reports that assistance required for DLA is provided by family and friends.
- The GP reports that assistance is provided through the use of a breathing device, commenting "uses an inhaler on a regular basis."

SR2:

- The appellant writes that due to pain in lower back and COPD, he needs constant assistance from his wife for all housekeeping and shopping: many times she will do it for him – 8/10 times.
- He writes that the use of a scooter would be ideal because even walking in grocery stores on flat surfaces is difficult.

In his Notice of Appeal dated 20 November 2012, the appellant attaches a letter of the same date describing his objection to the denial of this PWD application in light of his doctor's diagnosis of severe COPD – non-treatable and no recovery/treatment is available. He states that he is unable to work; he is unable to take more than five steps without losing his breath. He cannot either walk upstairs or get out of his car without help or loss of breath. Clearly he cannot function like this and the whole situation is causing him extreme stress and anxiety. This is taking a toll on his life, not to mention his relationship with his wife.

In the submission for the written hearing faxed to the Tribunal on 30 December 2012, the appellant attached numerous medical documents. These included several Progress Notes relating to visits to his GP's office; a Medical Report – Employability completed by his GP on 29 November 2011; an imaging consultation report regarding a chest x-ray dated 18 November 2011 (the lungs are hyperinflated consistent with underlying COPD); notes from the GP stating the appellant is unable to work due to COPD; a lab report dated 19 July 2012 reporting on a complete lung function test (very severe airflow obstruction with significant improvement post bronchodilator; impression: reversible, very severe, airflow obstruction evident); a disability claim form to a financial institution dated 15 October 2012 noting a moderate degree of limitation for walking and a severe limitation for climbing and lifting; a special parking permit program application; a letter from the GP to an insurance company dated 19 November 2012; and a "To whom it may concern" letter from the GP dated 24 December 2012 (GP Letter).

In the letter to the insurance company, the GP writes:

"He continued to have lots of issues with his COPD and shortness of breath on exertion when he was last seen mid June 2012. He had had at least one other episode of acute exacerbation and was using his [puffer medication] on a regular basis as well as [another medication]. He was subsequently sent for pulmonary function tests which showed severe airflow obstruction. Bronchodilators do help and [the puffer medication] does work for him to get his cough down, although he is still quite short of breath with minimal exertion. Unfortunately despite the puffers, he continues to have ongoing issues and finds that even just walking across the room makes him short of breath.

On discussion with him October 29, 2012 it was apparent that he can only walk 5 minutes without having to rest and it takes him approximately 30 minutes to do what he used to take 10 minutes to do despite his puffers

It is obvious that [the appellant] has ongoing issues with COPD despite being treated with puffers and smoking cessation. Minimal exertion exacerbates these symptoms and certainly limits his ability to do any work except for possibly sedentary."

In the GP Letter, the GP writes:

"This letter is to verify that [the appellant] suffers from severe COPD – not moderate COPD. This has been proven on both chest x-ray and pulmonary function tests. This limits his abilities to do most of his basic ADLs because he gets extremely short of breath with even minimal exertion. What used to take him 10 minutes to do now takes 30 minutes to do. He can barely walk 5 minutes without having to stop and catch his breath.

Currently his partner has to pay bills and do grocery shopping for him.

Despite using inhalers which only give him mild relief and temporary relief, he continues to have ongoing issues. He certainly cannot walk any distance, lift any weight over 5 to 10 kg and definitely cannot do it repetitively. He will even have trouble bending over and tying his shoes at times."

The ministry did not raise an objection to the admissibility of the appellant's submission. The panel admitted the appellant's evidence, pursuant to Section 22(4) of the Employment and Assistance Act, as providing further detail relating to his diagnosed COPD condition and its impact on daily functioning in support of information that was before the ministry at reconsideration.

The ministry relied on its reconsideration decision as its submission for the hearing.

## 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 the requirements in section 2 of the EAPWDA.

Specifically the Ministry determined that the information provided did not establish 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 did determine that he met the 2 other criteria in EAPWDA section 2(2) set out below.

The following section of the EAPWDA applies to this appeal:

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.

The following section of the EAPWDR applies to this appeal:

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.

### *Severity of impairment*

The legislation clearly provides that the determination of severity of impairment is at the discretion of the minister, taking into account all of the evidence including that of the appellant. However, the legislation is also clear that the fundamental basis for the analysis is the evidence from a medical practitioner respecting the nature of the impairment, its duration and its impact on daily functioning. On this basis, the panel makes the following findings:

- While the appellant stated in his notice of appeal that his situation is causing him extreme stress and anxiety, the panel notes that the GP has not diagnosed any mental health condition and has not identified any cognitive or emotional deficits or cognitive and emotional restrictions on daily functioning. In the absence of such a diagnosis, the panel finds that the ministry reasonably determined that a severe mental impairment had not been established.
- In SR1 and his notice of appeal, the appellant states that he suffers from severe tunnel carpal syndrome, soreness in his lumbar region and in the shoulders and has a cataract in his right eye. As none of these conditions has been identified by his medical practitioner as an impairment that will likely continue for at least 2 years, the panel finds that the impact of these conditions on his daily functioning cannot be considered in assessing the severity of the appellant's physical impairment.

### *Physical impairment*

The position of the ministry is that while walking distances and stair climbing are limited by shortness of breath and the need to stop and rest, for the most part the appellant's functional skill limitations are not significantly restricted and are more in keeping with a moderate degree of physical impairment. Remedial measures in the form of medications can improve the symptoms of shortness of breath. The ministry noted the information provided in the GP Note at reconsideration that the appellant must stop every 5 minutes when walking and rest 10 to 15 minutes and that what used to take him 10 minutes to do now takes 30 minutes at least. The ministry found that this new information did not demonstrate either a severe physical impairment or a significant restriction in the appellant's ability to perform DLA. The ministry was therefore not satisfied that the information provided is evidence of a severe physical impairment.

The position of the appellant is that his GP has diagnosed him with severe, not moderate, COPD – non-treatable and no recovery/treatment is available. He states that he is unable to work; he is unable to take more than five steps without losing his breath. He cannot either walk upstairs or get out of his car without help or loss of breath. He submits that this is clear evidence of a severe physical impairment.

### Panel findings

With respect to the deafness diagnosed by the GP, the panel notes that the ministry did not make a

separate determination on the severity of the appellant's hearing impairment as a physical impairment. The GP has diagnosed the appellant with deafness, assessing his hearing as poor, with "some deafness due to work noise." However, the GP reports no overall difficulties with communications and there is no reference elsewhere in the medical documentation of any restrictions to daily functioning due to hearing loss. There is also no reference to the use of, or need for, a hearing aid. In the absence of any further information on the degree of the appellant's hearing impairment and the impact on daily functioning, the panel finds that the ministry was reasonable in not addressing the hearing impairment as a separate severe physical impairment.

As to the appellant's COPD, the appellant relies on a diagnosis by his GP of severe – not moderate – COPD. However, the panel notes that under the legislation it is not the severity of the underlying medical condition that is at issue but the severity of the impairment caused by the medical condition. This means that a determination of the severity of impairment is based on the extent to which there is a restriction in the ability to function independently, effectively, appropriately or for a reasonable duration. In addressing this criterion, the panel notes several areas of inconsistency or incompleteness in the evidence that make it difficult to assess the severity of the appellant's COPD-related impairment:

- The evidence is clear that the appellant's ability to walk any distance is compromised by his SOB. For instance, the GP writes in his note at reconsideration: "[The appellant] must stop every 5 minutes when walking and rest 10 to 15 minutes" and in his letter on appeal: "He can barely walk 5 minutes without having to stop and catch his breath." Yet when asked in the PR whether the appellant requires any prostheses or aids for his impairment, the GP answers "No." Similarly in the AR, when asked, no indication is given that the appellant requires a cane, a walker or a scooter. In the Notice of Appeal, the appellant states that the scooter would be "ideal," but the need has not been confirmed by the GP. The absence of the identified need for a mobility-specific assistive device raises questions as to the extent to which the appellant's SOB with walking restricts his independence and ability in areas of daily functioning that require mobility. The appellant's reliance on a puffer/inhaler is discussed below and further under whether help to perform DLA is required
- The GP has stated in his notice at reconsideration and elsewhere: "What used to take him 10 minutes to do now takes 30 minutes at least." To the panel, this indicates a degree of independence and effectiveness in daily functioning not consistent with a severe physical impairment
- In the AR, the GP reported that the appellant uses a puffer on a regular basis and the appellant has stated that he must use a puffer every morning and throughout the day whenever needed – usually 15 to 20 minutes after a physical activity. The GP has also written: "Despite using inhalers which only give him mild relief and temporary relief, he continues to have ongoing issues." To the panel this evidence, in combination with the appellant taking 30 minutes to do what used to take 10 minutes, suggests that the use of a puffer provides sufficient mitigation to address restrictions in daily functioning arising from his medical condition.

The panel finds that, based on the foregoing, the ministry reasonably determined that the information provided relating to the appellant's COPD did not establish a severe physical impairment.

As no evidence had been presented or argument made that the combination of the hearing impairment and COPD compounded the impacts of the two impairments on the appellant's daily



functioning, the panel finds that the ministry reasonably determined that for the totality of the two impairments a severe physical impairment had not been established.

*Whether DLA are significantly restricted*

The position of the ministry is that, as all daily living activities are performed independently with several heavier tasks requiring breaks to catch his breath, the information from the appellant's prescribed professional does not establish that impairment significantly restricts his DLA either continuously or periodically for extended periods.

The position of the appellant is that his COPD significantly restricts his ability to perform DLA, as the evidence from his GP is that it takes him 30 minutes to do what he used to be able to do in 10 minutes. The evidence that his wife needs to do all his shopping for him further demonstrates that his ability to perform the shopping DLA is significantly restricted. The appellant argues that he needs constant assistance from his wife (8 out of 10 times) for housekeeping and shopping, and his wife makes the dinners.

The panel notes that, according to the legislation, the direct and significant restriction in the ability to perform DLA must be a result of a severe impairment, not established in this appeal, and be in the opinion of a prescribed professional. The evidence from the GP in the AR is that the appellant is assessed as independent in virtually all aspects of DLA requiring physical effort. In terms of moving about indoors and outdoors, the GP reports that he must stop frequently to catch his breath and that he takes significantly longer than typical for going to and from stores, carrying purchases home and getting in and out of vehicle, but for none of these activities is assistance from another person reported to be required. In his GP Letter the GP stated that currently his partner has to pay bills and do grocery shopping for him. It is not clear whether the "pay bills" activity refers to his partner using her financial resources for this purpose, something which does not represent providing assistance for a DLA, or whether it means taking the bill payment to the postbox or the bank. Nor has it been explained whether this is a change due to deterioration in the appellant's condition or why there's been a change in the GPs original assessment. The need for continuous assistance from his wife for housekeeping and meal preparation, as reported by the appellant, has not been confirmed to be "in the opinion of a prescribed professional," the appellant's GP.

The panel notes in particular the following statements from the GP in the AR: "[The appellant] is very independent and would not ask for help unless he really needed it; he will pursue his activities rather than ask for assistance." And "[The appellant] is really limited by his activities as, if he moves slowly, he can complete most tasks but it definitely takes him longer to do so." These comments suggest to the panel that the appellant is basically independent in his ability to perform his DLA, able to work through the SOB resulting from COPD, albeit with frequent rests. The panel therefore finds that the ministry reasonably determined that the information provided did not establish that this criterion had been met.

*Whether help to perform DLA is required*

The position of the ministry is that, as it had been established that DLA are not significantly restricted, it can be determined that significant help is not required from other persons. The appellant does not require the services of an assistance animal.

The appellant's position is that he relies on ongoing help from his spouse and the frequent use of a puffer/inhaler as he deals with his COPD impairment.

In the AR, the GP indicates that the appellant routinely uses an assistive device, namely a "breathing device," to help compensate for his impairment, noting that he uses an inhaler on a regular basis. In the panel's view, the purpose of an inhaler is to deliver medication (in much the same way that a cup of water is used to swallow a pill or a needle used to inject insulin), rather than "...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," as per the definition of "assistive device." The legislation refers to help required through an assistive device, the significant help or supervision of another person or the services of an assistance animal. Help required through taking medication is not a factor in this criterion. As noted above, the GP, the appellant's prescribed professional, has not confirmed the need for continuous assistance from his wife for housekeeping and meal preparation.

The panel notes that the legislation requires that in the opinion of a prescribed professional the need for help must arise from direct and significant restrictions in the ability to perform DLA that are either continuous or periodic for extended periods. The panel finds that the ministry reasonably determined that since it has not been established that DLA are directly and significantly restricted, it cannot be determined that help is required as provided under section 2(2)(b)(ii) of the EAPWDA.

#### *Conclusion*

Having reviewed and considered all of the evidence and the relevant legislation, the panel finds that the ministry's decision that the appellant was not eligible for PWD designation was reasonably supported by the evidence and therefore confirms the ministry's decision.