

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development (the ministry) reconsideration decision dated December 10, 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:

- the appellant has a severe physical or mental impairment;
- 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; and,
- 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.

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 included the following:

- 1) Person With Disabilities (PWD) Application comprised of the applicant information dated August 1, 2012, a physician report and an assessor report both dated September 22, 2012 and completed by the appellant's family physician of 19 years; and,
- 2) Request for Reconsideration- Reasons.

Diagnoses

The appellant has been diagnosed by his general practitioner with COPD, emphysema and chronic bronchitis with a date of onset of March 2008.

Physical Impairment

- In the physician report, the general practitioner indicated that the appellant has a long history of smoking. His symptoms of shortness of breath on exertion associated with cough have continued to progress. He fatigues easily and sometimes has shortness of breath at rest but more with walking and on stairs or hills. Functional skills reported in the physician report indicated that the appellant can walk 4 or more blocks unaided, he can climb 5 or more steps unaided, and he has no limitation with either lifting or with remaining seated.
- The physician reported that the appellant has not been prescribed any medications or treatments that interfere with his ability to perform his daily living activities (DLA) and he does not require any aids for his impairment.
- In the assessor report, the appellant is reported as being independent with all tasks of mobility and physical ability, including walking indoors and walking outdoors, climbing stairs, standing, lifting and carrying and holding. The physician commented with respect to these tasks that the appellant is able to do them but stops/rests frequently.
- The general practitioner also indicated in the assessor report that the appellant uses puffers as an assistive device. For additional information, the physician commented that the appellant has "...moderately severe emphysema and chronic bronchitis; he gets short of breath with any exertion, gets fatigued, has to stop and rest frequently. It takes him much longer to do any activities."
- In the appellant's self-report, the appellant stated that he runs out of breath walking up stairs and getting out of bed to go to the bathroom.

Mental Impairment

- The general practitioner did not diagnose a mental disorder.
- The general practitioner reported the appellant has a good ability to communicate and there are no significant deficits identified with cognitive and emotional function .
- The general practitioner indicated that the appellant independently manages all 5 listed aspects of social functioning and that an assessment of functioning in immediate and extended social networks is not applicable to the appellant.

DLA

- In the physician report, the general practitioner commented that the appellant "...attempts to do most things around the house but it takes him a lot longer and he has to stop regularly to catch his breath."
- In the assessor report, the general practitioner reported that all 8 listed tasks of the DLA personal care are performed independently without any noted restriction.
- The appellant is independent with doing his laundry but requires periodic assistance from another person with doing basic housekeeping, with the explanation added that he gets short of breath with

exertion and benefits with help doing housekeeping.

- The appellant is independent with 4 of 5 tasks of shopping, while requiring periodic assistance from another person with carrying purchases home. The additional comments are that the appellant attempts to do most activities but has to stop regularly to catch his breath or he gets help.
- All listed tasks for the DLA meals, paying rent and bills, medications and transportation are managed independently with no noted need for assistance.
- In his self-report, the appellant stated that he is limited to what he can do since he has to take breaks between what he is doing, for example when he does the dishes, he has to rest before he has finished them all.

Need for Help

- The general practitioner reported that the appellant uses puffers as an assistive device.
- The general practitioner indicated in the assessor report that help required for DLA is provided by the appellant's family.

In his Notice of Appeal, the appellant expressed his disagreement with the reconsideration decision because he is out of breath rolling over in bed. He cannot find an employer who can work on his schedule.

At the hearing, the appellant provided the following oral evidence:

- The appellant reported that another breathing test was conducted yesterday because the last test showed his breathing was half of what it was a year previously. The specialist has told him that he will eventually need home oxygen.
- The appellant stated that every morning it is like he is being choked, that he cannot breathe because of the fluid build-up in his lungs and vomits flem and blood. This also happens sometimes when he is out of his home. He considers any activity as "exertion". Sometimes he runs out of breath just sitting and, about twice a week, he coughs so hard that it feels like pins and needles are sticking in his lungs.
- The appellant stated that he currently takes two medications daily and has a puffer that he uses as needed. Sometimes his lungs swell up and the last time he was hospitalized because it was thought he was experiencing a heart attack. He has been given emergency antibiotics to reduce the risk of this happening again.
- The appellant reported that everything he does "is a chore", that mopping the kitchen floor will take him an hour. He does laundry in small loads. He has to do any task "in little spurts" but he can do anything on his own time.
- The appellant reported that his wife helps him with many tasks and does all the heavy lifting of anything over 20 lbs.
- The appellant stated that his problems are physical and his mind is OK.

At the hearing, the appellant's wife provided the following oral evidence:

- She carries the laundry downstairs and helps with grocery shopping by carrying the groceries out to the truck and into their home. She usually does the housework because the appellant can only do something like vacuuming for a couple of minutes at a time and it takes too long.
- The witness stated that the appellant can do the dishes but she does all the other housework because it takes him too long.

The panel admitted the evidence of the appellant and his wife, pursuant to Section 22(4) of the Employment and Assistance Act, as providing further detail regarding the impact of the appellant's diagnosed conditions and being in support of information that was before the ministry on reconsideration.

At the hearing, the ministry relied on its reconsideration decision.

PART F – Reasons for Panel Decision

The issue on the appeal is whether the ministry's reconsideration decision, that the appellant is not eligible for designation as a person with disabilities (PWD), was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. The ministry found that the appellant does not have a severe mental or physical impairment and that his daily living activities (DLA) are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods and that, as a result of those restrictions, it could not be determined that the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

The criteria for being designated as a person with disabilities (PWD) are set out in Section 2 of the EAPWDA as follows:

Persons with disabilities

2 (1) In this section:

"**assistive device**" means a device designed to enable a person to perform a daily living activity that, because of a severe mental or physical impairment, the person is unable to perform;

"**daily living activity**" has the prescribed meaning;

"**prescribed professional**" has the prescribed meaning.

(2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act if the minister is satisfied that the person has a severe mental or physical impairment that

(a) in the opinion of a medical practitioner is likely to continue for at least 2 years, and

(b) in the opinion of a prescribed professional

(i) directly and significantly restricts the person's ability to perform daily living activities either

(A) continuously, or

(B) periodically for extended periods, and

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

(3) For the purposes of subsection (2),

(a) a person who has a severe mental impairment includes a person with a mental disorder, and

(b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires

(i) an assistive device,

(ii) the significant help or supervision of another person, or

(iii) the services of an assistance animal.

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

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

Definitions for Act

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

(a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following activities:

(i) prepare own meals;

(ii) manage personal finances;

(iii) shop for personal needs;

- (iv) use public or personal transportation facilities;
 - (v) perform housework to maintain the person's place of residence in acceptable sanitary condition;
 - (vi) move about indoors and outdoors;
 - (vii) perform personal hygiene and self care;
 - (viii) manage personal medication, and
- (b) in relation to a person who has a severe mental impairment, includes the following activities:
- (i) make decisions about personal activities, care or finances;
 - (ii) relate to, communicate or interact with others effectively.

The 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 Physical Impairment

The appellant's position is that a severe physical impairment is established by the evidence of his shortness of breath due to COPD, emphysema and chronic bronchitis which requires that he rest frequently and it takes him much longer to do any activities.

The ministry points out that the appellant's general practitioner of 19 years assesses his functional skills as at the top end of the scale, being able to walk 4 or more blocks unaided, to climb 5 or more steps unaided, and having no limitation with lifting and remaining seated. While the physician indicates that the appellant has moderately severe emphysema and chronic bronchitis and that he gets short of breath with any exertion and has to stop and rest frequently, she also reported that the appellant is independent in all aspects of mobility and physical ability, including walking indoors and outdoors, climbing stairs, standing, lifting and carrying and holding. The general practitioner indicates that the appellant sometimes has shortness of breath at rest, but more with walking and that he gets very short of breath on stairs and hills. The ministry argues that while this indicates some functional limitations, they are more in keeping with a moderate degree of impairment.

Panel Decision

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 prescribed professional respecting the nature of the impairment and its impact on daily functioning.

The medical practitioner, the appellant's general practitioner, has diagnosed the appellant with COPD, emphysema and chronic bronchitis and has described his emphysema and chronic bronchitis as "moderately severe". While the physician indicated that the appellant gets short of breath with any exertion, gets fatigued and has to stop and rest frequently, the appellant is nevertheless able to walk 4 or more blocks and to climb 5 or more steps without the use of an assistive device or the assistance of another person to perform these tasks. As the ministry points out, the general practitioner also assessed the appellant as independent with all mobility and physical ability. The physician commented with respect to these tasks that the appellant is able to do them but stops/rests frequently; however the physician has not reported that the appellant takes significantly longer than typical with any of these tasks or provided an approximation of how much longer it takes him. The appellant and his wife both stated that the appellant requires help with lifting more than 20 lbs., and even though the physician has not reported this restriction, the panel finds that this limit is still for heavier lifting, at the higher end of the scale for functional skills. The appellant also described the deterioration in the condition of his lungs, that he takes two medications daily and a puffer as needed and that his specialist has stated he will eventually need home oxygen. The evidence demonstrates that the appellant is impaired in his physical functioning; however the panel finds that the ministry reasonably determined that the information

currently provided shows more of a moderate than a severe degree of impairment. Therefore, the panel concludes that the ministry reasonably determined that the appellant's level of independent physical functioning does not establish that the appellant has a severe physical impairment under section 2(2) of the EAPWDA.

Severe Mental Impairment

The appellant did not argue that he has a severe mental impairment and he stated that his difficulties are physical and his mind is OK.

The ministry's position is that there is no mental health diagnosis and, therefore, no mental impairment.

Panel Decision

The general practitioner has not diagnosed a mental impairment and the appellant stated that his difficulties are physical and his mind is OK. The general practitioner reported the appellant has a good ability to communicate, there are no significant deficits identified with cognitive and emotional function, and the appellant independently manages all 5 listed aspects of social functioning. For these reasons, the panel finds that the ministry reasonably determined that a severe mental impairment was not established under section 2(2) of the EAPWDA.

Restrictions in the ability to perform DLA

The appellant's position is that his physical impairment directly and significantly restricts his ability to perform DLA to the point that he requires assistance in various areas of DLA, including tasks of housekeeping and shopping.

The ministry's position is that while the evidence of the prescribed professional is the appellant attempts to do most things around the house but it takes him a lot longer since he has to stop regularly to catch his breath, the physician does not specify which activities take longer and how much longer these aspects of DLA take him to complete. Although the physician indicates that the appellant requires periodic assistance with basic housekeeping and carrying purchases home, the majority of the aspects of DLA (26 of 28) are still performed independently.

Panel Decision

The evidence of a prescribed professional, the appellant's long-time general practitioner, is that the appellant is independent with walking indoors and outdoors and he can manage distances of 4 or more blocks and climbing 5 or more steps without the use of an assistive device. The majority of the listed tasks for all DLA are managed independently, including all tasks associated with personal care, meal preparation, paying rent and bills, medications, transportation and all aspects of social functioning. The only restrictions to DLA identified are for periodic assistance required with one of two tasks of basic housekeeping and one of five tasks of shopping (carrying purchases home). The appellant identified his limitation with lifting as being for more than 20 lbs., and the panel finds that his need for assistance is within this functional limitation. The general practitioner commented that the appellant attempts to do most things around the house but it takes him a lot longer and he has to stop regularly to catch his breath; however, the physician did not assess specific tasks of DLA as taking significantly longer than typical or provide a description provided of how much longer these tasks take. The panel concludes that the noted restrictions in the appellant's ability to perform some aspects of some DLA were reasonably viewed by the ministry as not constituting a direct and significant restriction of the appellant's ability to perform DLA in the opinion of a prescribed professional thereby not satisfying the legislative criterion of s. 2(2)(b)(i) of the EAPWDA.

Help to perform DLA

The appellant's position is that he requires the use of puffers as an assistive device and the significant assistance of another person to perform DLA.

The ministry's position is that because it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required.

Panel Decision

Section 2(2)(b)(ii) of the EAPWDA requires that, as a result of direct and significant restrictions in the ability to perform DLA, a person requires help to perform those activities. Help is defined in subsection (3) as the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform a DLA.

While the panel finds that the evidence of the prescribed professional establishes that the appellant requires some assistance from his wife with tasks of some DLA and the use of puffers as an assistive device, the panel also finds that the ministry reasonably determined that, as direct and significant restrictions in the appellant's ability to perform DLA have not been established, it cannot be determined that the appellant requires help to perform DLA as a result of those restrictions.

Conclusion

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