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PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development (the ministry) reconsideration decision dated January 23, 2013 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

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PART E – Summary of Facts

With the consent of the parties this appeal was conducted in writing in accordance with s. 22(3)(b) of the Employment and Assistance Act (EAA).

The evidence before the ministry at the time of the reconsideration decision included the following:

1) Undated Pulmonary Function Reports;
2) Undated letter 'To Whom It May Concern' from a respiratory therapist stating in part that the appellant has been diagnosed with COPD which is characterized by progressive, partially reversible airway obstruction and lung hyperinflation, systemic manifestations, and increasing frequency and severity of exacerbations. An exacerbation is a sustained worsening of shortness of breath, cough or sputum. There is a marked impairment in quality of life and this can last from 11 to 60 days. The ability to do activities of daily living, such as cooking and getting groceries, can be decreased for some time even after the exacerbation resolves. The appellant has up to 8 of these exacerbations per year;
3) Emergency Discharge Summary dated November 22, 2011;
4) Outpatient Department Clinic Note dated November 24, 2011 in which a medical practitioner who is a specialist in respiratory medicine states in part that the appellant "is a poor historian" and is not sure of the reason for the consult; he had a left upper lobe wedge resection October 2009, shown to be a classic carcinoid tumor with persistent left pleural postoperative changes which have continued to improve; the appellant had mild COPD based on previous lung function tests; he was previously on inhalers but did not find them of benefit; currently denies ongoing pulmonary symptoms, has no shortness of breath walking 20 blocks but he does feel heaviness on the left side of the chest since his previous surgery;
5) Emergency Discharge Summary dated December 2, 2011;
6) Outpatient Department Clinic Note dated March 8, 2012 which states in part that the appellant "..is a somewhat challenging historian", that he feels generally well however two weeks ago he noticed a chest cold with increased cough and sputum production, he was having sinus problems at the time, he took prescribed medication for 11 days. At present he is feeling well and is walking up to two hours with his dog and things are going well from the pulmonary standpoint;
7) Person With Disabilities (PWD) Application comprised of the applicant information dated October 8, 2012, a physician report completed by the appellant's family physician of approximately 15 years and dated October 13, 2012, and an assessor report completed by a social worker who met with the appellant once for the purpose of completing the report, and dated November 13, 2012; and,
8) Request for Reconsideration- Reasons.

Diagnoses

The appellant has been diagnosed by his general practitioner with COPD FEV1 March 2012 of 62% and chronic right shoulder pain.

The panel will summarize the evidence from the physician report, the assessor report and the appellant's statements relating to the appellant's impairments as it relates to the PWD criteria at issue.

Physical Impairment

- In the physician report, under health history, the general practitioner indicated that the appellant has "...frequent exacerbations of COPD, states 10 to 15 days per month or 110 days last year, see respiratory consults March 8, 2012 and November 24, 2011, unable to work with right arm above shoulder."
- Functional skills reported in the physician report indicated that the appellant can walk 4 or more blocks to 1 to 2 blocks unaided, he can climb 5 or more steps unaided or no steps, it is unknown how much he can lift, and he can remain seated for less than 1 hour. In the additional comments, the general practitioner explained that the appellant states he can walk 4 blocks on good days or half a block on

bad days. It is reported that the appellant states he can walk up 2 flights of stairs on good days and avoids stairs on bad days. He experiences left-sided chest pain at site of previous operation when sitting. The appellant states that exacerbations are related to change in weather.

- The physician reported that the appellant has not been prescribed any medications or treatments that interfere with his ability to perform daily living activities (DLA) and he requires an aid for his impairment in the form of grab bars in the shower and at the toilet.
- In the assessor report, the social worker assessed the appellant as requiring periodic assistance with walking indoors ("if level and symptom free, he has no problem"), walking outdoors ("can walk up to 4 blocks on a good day, 1 to 2 on a bad day"), lifting ("can lift up to 5 lbs.") and carrying and holding ("uses backpack for carrying small items"). The appellant takes significantly longer than typical with walking outdoors and with climbing stairs ("can climb up to 2 flights very slowly on a good day").
- The social worker reported that the appellant uses a bathing aid as an assistive device, being a grab bar in the shower.
- In his self-report, the appellant stated that on October 2, 2011 he experienced his first COPD episode followed by two emergency visits to the hospital on November 22 and December 2, 2011. The appellant stated his first episode lasted 62 days and took him into the moderate stage of COPD.
- The appellant stated that on a symptom-free day, he can only do one task or chore at a time followed by a rest period. It takes him 48 hours to recover from any physical chore. A day with COPD symptoms finds him flat on his back trying to breathe as wave after wave of flushing travels over his body and his lungs feel like they are about to explode. If he is lucky, he passes out and, if not, the symptoms last from 4 hours to 62 days. His last COPD episode lasted 31 days.
- The appellant stated that his COPD symptoms can be brought on by doing too much in one day, stairs, inclines, strong chemicals, noise, bright lights, second-hand smoke, and extreme or sudden changes in temperature.
- The appellant stated that he experiences withdrawal for 72 hours after use of a prescribed medication so he only uses it when he is flat on his back with COPD symptoms. The appellant stated that this prescribed medication has also resulted in a 30-lb. weight gain in one year.
- The appellant stated that over the one-year period from October 2, 2011 to October 2, 2012 he had 5 COPD episodes that required doctor's supervision, medication and bed rest for a total of 102 days out of 365 days.
- The appellant stated that his damaged right shoulder requires surgery. The pain in his shoulder would wake him up until a medication to assist with sleep was prescribed. He is unable to lift anything above his head or move his right arm past a 90 degree angle from his waist.
- In his Request for Reconsideration, the appellant stated that COPD is not episodic in nature as it is irreversible and persistent in its effect on his life. The appellant wrote "...there are no good days just bad days and depending on how severe those bad days are affects his mobility and ability to function every day of the year." His ability to function is declining. The combination of his medications only mask the effect of COPD on his daily life and do not offer any relief from the COPD because it cannot be cured.

Mental Impairment

- The general practitioner did not diagnose a mental disorder.
- The general practitioner reported the appellant does not have difficulties with communication and the social worker assessed the appellant with good to satisfactory ability to communicate in all areas.
- The general practitioner reported no significant deficits with cognitive and emotional function.
- The social worked did not complete the sections of the assessor report dedicated to those with an identified mental impairment or brain injury, including impacts to cognitive and emotional functioning and areas of social functioning.

Daily Living Activities (DLA)

- In the physician report, the general practitioner indicated that the appellant is restricted on a periodic basis with personal self care, meal preparation, basic housework, daily shopping, mobility inside the home, mobility outside the home, and use of transportation. The appellant is not restricted with management of medications or management of finances and there is no assessment with respect to social functioning. In response to a request to describe the assistance required with DLA, the general practitioner wrote "...partner does cooking on patient's bad days" and "needs assistance with groceries, housework when has exacerbation."
- In the additional comments to the physician report, the general practitioner added that the appellant states it takes him 4 hours to cook a meal because he has to do it in stages to avoid fatigue, he does not do laundry on symptom days and it takes him 4 days to clean his apartment since he has to clean it in stages, and he is unable to shop on bad days due to an inability to carry groceries
- In the assessor report, the social worker indicated that the appellant requires continuous assistance with tasks of DLA including dressing ("difficult due to shoulder pain and breathlessness"), laundry ("cannot stand heat of laundry room, partner does this"), basic housekeeping ("if partner away, he takes up to 4 days to clean, needs a mask"), carrying purchases home ("uses backpack for small items"), food preparation and cooking ("partner does this, when partner is away, it takes up to 3 hours") and using public transit ("cannot sit or stand on a crowded train or bus").
- In his self-report, the appellant stated that he takes 3 hours to shower, shave and dress. Preparing and cooking a simple meal takes over 4 hours, he cleans his apartment in stages over 4 days, and he is only able to stand for 20 minutes due to dizziness.

Need for Help

- The social worker reported that the appellant requires a grab bar in the shower as an assistive device.
- The social worker indicated in the assessor report that the appellant lives with friends and help required for DLA is provided by the appellant's friends.

In his Notice of Appeal, the appellant expressed his disagreement with the reconsideration decision and referred to a Medical Report- Persons with Persistent Multiple Barriers (PPMB) dated January 24, 2013. The appellant stated that on February 8, 2014 he was granted PPMB status. The appellant referred to the Medical Report- PPMB in which the appellant's physician reported that his COPD is not episodic in nature. The appellant wrote that in the respiratory specialist's report of March 8, 2012, he misinterpreted the appellant's comment that he "missed" his two-hour walk with his dog. The appellant stated that he is limited to taking two flights of stairs if there is no elevator and it takes him 40 minutes or longer to walk 4 blocks. It is frustrating and exhausting for him to take several trips to a store. The appellant stated that he has "...had 9 exacerbations, as well, that have lasted 20 days with 8 exacerbations lasting 102 days over a one-year period with those 120 days (sic) being bedridden and the remaining days dealing with the limitations and restrictions [of COPD]."

Prior to the hearing, the appellant provided the following additional evidence:
1) Operative Report dated October 13, 2009 describing a left MIS wedge resection for a carcinoid tumor;
2) Medical Report- PPMB dated January 24, 2013 which states in part that the restrictions to the primary medical condition of COPD are that the appellant is "... not suitable for employment involving moderate or heavy labour; frequency of exacerbation may interfere with keeping employed;"
3) Letter dated January 29, 2013 from the ministry to the appellant regarding his PPMB application;
4) Letter dated February 8, 2013 from the ministry to the appellant approving his application for PPMB;
5) Letter dated February 26, 2013 from the appellant's sister 'To Whom It May Concern' stating in part that she is 'horrified' by the appellant's decline in the last 5 years since his surgery.

The ministry did not raise an objection to the admissibility of these documents. The panel admitted the documents, pursuant to Section 22(4) of the Employment and Assistance Act, as providing further information about the appellant's diagnosed medical condition and being in support of information that was before the ministry on reconsideration.

The ministry relied on its reconsideration decision as its submission.

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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 of the EAPWDR provides the following definitions:

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.

(2) For the purposes of the Act, "prescribed professional" means a person who is authorized under an enactment to practice the profession of

(a) medical practitioner,

(b) registered psychologist,

(c) registered nurse or registered psychiatric nurse,

(d) occupational therapist,

(e) physical therapist,

(f) social worker,

(g) chiropractor, or

(h) nurse practitioner.

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, fatigue and weakness due to COPD and pain experienced in his right shoulder.

The ministry points out that the appellant's general practitioner reported a range of functional abilities presumably based on good and bad days, ranging from walking 4 or more blocks to 1 to 2 blocks and climbing 5 or more steps to climbing none. The ministry argues that the social worker indicated in the assessor report that there are no problems if the appellant is symptom-free; the appellant is assessed as walking up to 4 blocks on a good day or 1 to 2 blocks on a bad day, climbing two flights of stairs very slowly on a good day, standing up to 20 minutes before becoming dizzy, and lifting up to 5 lbs. and using a back pack to carry small items. The ministry argues that the appellant's physician does not give an opinion on the frequency of good and bad days. The ministry also argues that functional skill limitations even on bad days are not significantly restricted and, as remedial measures are in place to treat exacerbations, there is insufficient information to support a finding of a severe physical impairment.

Panel Decision

The diagnosis of a medical condition is not itself determinative of a severe impairment. To assess the severity of an impairment one must consider the nature of the impairment and its impact on the appellant's daily functioning as evidenced by functional skill limitations and the restrictions to DLA. The ministry describes this approach well when it defines the word "impairment" in the physician report as being "a loss or abnormality of psychological, anatomical or physiological structure or function causing a restriction in the ability to function independently, effectively, appropriately or for a reasonable duration." This definition is not set out in legislation and is not binding on the panel, but in the panel's view it quite appropriately describes the legislative intent.

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 of approximately 15 years, diagnosed the appellant with COPD and chronic right shoulder pain. In the physician report, the general practitioner reported that the appellant can walk a range of 4 or more blocks to 1 to 2 blocks unaided, he can climb 5 or more steps unaided or no steps, it is unknown how much he can lift, and he can remain seated for less than 1 hour. In the additional comments, the general practitioner explained that the appellant states he can walk 4 blocks on good days or half a block on bad days. The general practitioner reports that the appellant states he can walk up 2 flights of stairs on good days and avoids stairs on bad days, and that he experiences left-sided chest pain at the site of the previous operation when sitting. The panel notes that in the foregoing the general practitioner is emphasizing that he is reporting the appellant's statements. Regarding the appellant's shoulder, the general practitioner wrote that the appellant is "...unable to work with right arm above shoulder." In the assessor report, the social worker assessed the appellant as requiring periodic assistance with walking indoors ("if level and symptom free, he has no problem"), walking outdoors ("can walk up to 4 blocks on a good day, 1 to 2 on a bad day"), lifting ("can lift up to 5 lbs.") and carrying and holding ("uses backpack for carrying small items"). The appellant takes significantly longer than typical with walking outdoors and with climbing stairs ("can climb up to 2 flights very slowly on a good day"). In his self report, the appellant described a day with COPD symptoms, that he is "flat on [his] back trying to breathe as wave after wave of flushing travels over [his] body and [his] lungs feel like they are about to explode." The appellant stated that the combination of his regular medications will not cure his COPD and he only uses the additional prescribed medication when he is flat on his back with COPD symptoms because of both the medication's addictive qualities and its side effect of weight gain. The panel finds that the ministry's conclusion that the appellant's functional skill limitations on a 'bad day' are not significantly restricted was not reasonable, although the appellant's functioning on a 'good day' is indicative of a moderate degree of impairment.

With respect to the frequency and duration of these bad days or "exacerbation" of symptoms, the general practitioner reported "frequent exacerbations of COPD," that the appellant states these occur 10 to 15 days per month or 110 days last year, and the general practitioner specifically referenced the Respiratory Consults dated March 8, 2012 and November 24, 2011. In the report dated November 24, 2011, the medical practitioner who specializes in respiratory medicine wrote that the appellant is "a poor historian" and the appellant was not sure of the reason for the consult; the appellant had mild COPD based on previous lung function tests, he was previously on inhalers but did not find them of benefit; the appellant denied ongoing pulmonary symptoms, had no shortness of breath walking 20 blocks but has felt heaviness on the left side of the chest since his previous surgery. In his self-report with the PWD application, the appellant stated that on October 2, 2011 he experienced his first COPD episode and it lasted 62 days and took him into the moderate stage of COPD; however, as of November 24, 2011 or 55 days after the reported onset of the first exacerbation, the respiratory specialist wrote that the appellant denied ongoing pulmonary symptoms and he has no shortness of breath walking 20 blocks. In the report dated March 8, 2012, the same respiratory specialist who prepared the previous report repeated that the appellant "..is a somewhat challenging historian", that the appellant reported feeling generally well but two weeks previously had noticed a chest cold with increased cough and sputum production, he was having sinus problems at the time, and he took the prescribed medication for 11 days. At the time of the report the appellant was reported to be walking up to two hours with his dog and that "...things are going well from the pulmonary standpoint." Although the appellant wrote in his Notice of Appeal that the respiratory specialist misinterpreted the appellant's comment about missing his 2-hour walks with his dog, nevertheless, the specialist's conclusion after meeting with the appellant was that things were going well.

In an undated letter, a respiratory therapist wrote that an exacerbation is a sustained worsening of shortness of

breath, cough or sputum in which there is a marked impairment in quality of life and this can last from 11 to 60 days. The respiratory therapist wrote that the appellant has up to 8 of these exacerbations per year. The panel notes that no information is provided relating to how long the respiratory therapist has known the appellant and in what capacity; the panel also finds that a respiratory therapist is not a prescribed professional under Section 2(2) of the EAPWDR. In his Notice of Appeal, the appellant stated that he has had "...9 exacerbations, as well, that have lasted 20 days with 8 exacerbations lasting 102 days over a one-year period; with those 120 days (sic) being bedridden and the remaining days dealing with the limitations and restrictions [of COPD]." The panel is unable to resolve the inconsistency in this statement. In his Request for Reconsideration, the appellant wrote "...there are no good days just bad days and depending on how severe those bad days are affects his mobility and ability to function every day of the year." The panel finds that the evidence regarding the frequency and duration of an exacerbation of the appellant's COPD symptoms and the number of 'bad days' is not consistent and has not been confirmed by a medical practitioner or prescribed professional. The panel finds that the ministry reasonably concluded that there is insufficient evidence of the frequency of good and bad days and the available evidence 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 advance an argument with respect to severe mental impairment.

The ministry's position is that there is no mental health diagnosis and therefore no evidence of a severe mental impairment.

Panel Decision

The panel finds that that medical practitioner did not diagnose a mental disorder. The general practitioner reported the appellant does not have difficulties with communication and the social worker assessed the appellant with good to satisfactory ability to communicate in all areas. The general practitioner reported no significant deficits with cognitive and emotional function. The social worked did not complete the sections of the assessor report dedicated to those with an identified mental impairment or brain injury, including impacts to cognitive and emotional functioning and areas of social functioning. 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 from another person, either continuously or for extended periods of time, in tasks of all of his DLA.

The ministry's position is that the general practitioner reports periodic restriction to 7 out of 10 DLA; however, he offers no information on the frequency or duration of restriction to allow the ministry to determine the significance of the restriction. The ministry argues that the social worker reports that many activities are performed independently and that since the appellant's functioning is at the higher end of the spectrum on his good days, the noted restrictions are presumed to occur on the appellant's bad days. The ministry argues that there is no medical opinion on the frequency or duration of severe exacerbations and remedial measures are in place to treat such worsening in respiratory function.

Panel Decision

The evidence of the appellant's long-time general practitioner is that the appellant can manage walking distances of 4 or more blocks without the use of an assistive device and the social worker confirms this

assessment, that the appellant has "no problem" on days when he is "symptom free." In the physician report, the general practitioner indicated that the appellant is restricted on a periodic basis with personal self care, meal preparation, basic housework, daily shopping, mobility inside the home, mobility outside the home, and use of transportation. The appellant is not restricted with management of medications or management of finances and there is no assessment with respect to social functioning. In response to a request to describe the assistance required with DLA, the general practitioner wrote "...partner does cooking on patient's bad days" and "...needs assistance with groceries, housework when has exacerbation." As previously set out, the panel finds that the evidence regarding the duration of an exacerbation of the appellant's COPD symptoms is not consistent and has not been confirmed by a medical practitioner or prescribed professional. While the social worker indicated that the appellant requires continuous assistance with tasks of DLA including dressing, laundry, basic housekeeping, carrying purchases home, food preparation, cooking and using public transit, the panel finds that the ministry reasonably placed more weight on the evidence of the general practitioner who has known the appellant for close to 15 years. Without more reliable information that would give a clear picture of the frequency and duration of the exacerbations, the panel finds that the ministry reasonably concluded that there is not enough evidence from the prescribed professional to establish that the appellant's impairment significantly restricts his ability to manage his DLA either continuously or periodically for extended periods, thereby not satisfying the legislative criterion of Section 2(2)(b)(i) of the EAPWDA.

Help to perform DLA

The appellant's position is that he requires the significant assistance of his friends to perform DLA and the ongoing use of a grab bar, in the shower and by the toilet, as an assistive device.

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. The ministry acknowledged that a grab bar in the shower is used.

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.

The panel finds that the evidence of the prescribed professional establishes that the appellant lives with his partner, receives assistance for DLA from friends and require the use of a grab bar as an assistive device. The panel finds that the ministry reasonably concluded that as it has not been established that DLA are significantly restricted, it could not be determined that the appellant requires the significant help or supervision of another person with DLA, as defined by Section 2(3)(b) of the EAPWDA.

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.