

PART C – Decision under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Social Innovation (the ministry) dated 26 June 2013 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 her ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and,

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

The ministry determined that the appellant satisfied the other 2 criteria: she has reached 18 years of age and her 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

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

1. The appellant's PWD Designation Application dated 17 September 2012. The Application contained:
 - A Physician Report (PR) dated 20 December 2012 completed by the appellant's general practitioner (GP) who has known the appellant for 20 years and has seen her 2 – 10 times in the past year.
 - An Assessor Report (AR) of the same date, completed by the same GP.
 - A Self Report (SR) completed by the appellant.
2. The appellant's Request for Reconsideration, dated 06 April 2013, to which was attached:
 - A Medical Report – Employability (MR – Emp) dated 14 June 2013, completed by a specialist in respiratory medicine who had known the appellant for over 6 months.
 - A Supplemental Medical Opinion dated 13 June 2013, completed by the appellant's GP.

In the PR, the GP diagnoses the appellant's impairment as COPD, emphysema, asthma and p[neumo] thorax. In the AR, the GP adds "mild mood related issues."

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

Severity/health history

Physical impairment

PR:

The GP reports that the appellant has ongoing COPD, with increasing respiratory disturbance. The GP reports that the appellant has been prescribed medication and/or treatments that interfere with her ability to perform DLA, with the explanation "SOB [shortness of breath] – ongoing." The GP indicates that the appellant's impairment is likely to continue for two years or more.

Functional skills: The GP reports that the appellant is able to walk 1 to 2 blocks unaided, climb 2 to 5 steps unaided (slowly), has no limitations in lifting, and has no limitation in remaining seated.

The GP reports that the appellant has no difficulties with communication.

Mental impairment

PR:

The GP reports that the appellant has no significant deficits with cognitive and emotional function.

AR:

The GP reports that, with respect to cognitive and emotional functioning, the appellant's impairment has a minimal impact on daily functioning in the areas of emotion and motivation. No impact is reported in the other 11 listed areas.

Ability to perform DLA

PR:

The GP reports that the appellant's mobility outside the home is restricted (but did not indicate whether the restriction was continuous or periodic). All other DLA are assessed as not restricted, including social functioning.

AR:

The GP made the following assessments:

- Mobility and physical ability: independent for walking indoors, walking outdoors, climbing stairs, standing, lifting, carrying and holding (increased activity = SOB).
- Personal self care: independent in all aspects.
- Basic housekeeping: independent in all aspects.
- Shopping: periodic assistance from another person required for going to and from stores; independent for reading prices and labels, making appropriate choices, paying for purchases and for carrying purchases home.
- Meals: independent in all aspects.
- Pay rent and bills: independent in all aspects.
- Medications: independent in all aspects.
- Transportation: independent in all aspects.
- Social functioning: independent in all aspects
- The GP describes the impact of the appellant's impairment on her immediate and extended social networks as good functioning.

Assistance required/provided

PR:

The GP reports that the appellant does not require any prostheses or aids for her impairment.

AR:

The GP reports that the appellant lives with family.

The GP does not provide any information on assistance provided by other people, the use of assistive devices or by assistance animals, indicating "N/A" for each area.

Self Report

In her SR, the appellant writes that she was diagnosed with COPD in October 2010 when she went to hospital because she could not breathe. She also went to hospital in March 2011 and in March 2012 for the same reason. The last time was the worst as her right lung collapsed and she went into cardiac arrest. Now she has a hard time going for walks and stairs are the worst. After nine stairs, she has to rest. She takes her puffers a lot. She has a hard time carrying anything over 10 pounds, including groceries. When there is bad air quality in town she has to stay in as she can barely breathe when outside.

She writes that her disability has slowed her down doing her housework. When she cleans her bathroom or washes her floors she gets really tired and has a hard time breathing. When she puts her hair up, her arms get really sore. The chemicals to clean the bathroom get to her. It takes her one

hour to clean her bathroom instead of 20 minutes. When she has a shower, she feels out of breath when she gets out. She wakes up the odd night coughing really badly, so she has to take her puffers so she can get back to sleep. When she carries things in her hand, sometimes it will let go without her knowing it. Doing laundry is hard as it takes her a while to climb up and down stairs and to fold her clothes. She has a hard time playing with her grandchildren, as it tires her out and she has to use her puffers. She has to take her time loading her van to go camping.

Her chest gets so sore and she has a hard time breathing. She has to take her puffers for the pain to go away and she is now on 4 puffers. These help a lot when she's in pain and cannot breathe. Doing grocery shopping takes longer than it used to, as she has to take her time or she gets tired out fast.

There are times when she is driving her van that she feels like she is going to pass out so she pulls over and passes out for 10 minutes. She also gets tired out just sweeping her floors. There are also times she starts coughing and can't stop until she takes her puffers and then it still takes a while. In the winter when she has to shovel the driveway it takes her 3 to 4 hours as she has to take a half-hour break as her lungs get sore as do her arms. To do a walkway takes one hour, and then she has to rest for the night. The trades she has for work – delivery and housekeeping – she cannot do because of lifting and the chemicals.

At her appointment with the respirologist in June 2012, she was told not to lift anything over 10 pounds and to limit herself from long walks and stairs. She likes long walks and since she was in the hospital in April she has had to limit them to 15 minutes, as if she goes any longer she gets tired and sore. Her left hand gives out on her at times. She could be holding something and then the next thing she knows, whatever she's holding is on the floor. Ever since she put her shoulder out in a car accident in 1996, she can be just sitting watching TV when her right shoulder will start hurting for no reason. She has also been told that her lungs function at 50% or less. She could be walking down the street and her knees will lock and give out on her and she almost falls unless she grabs something or someone. When she landed in the hospital the last time, when she woke up she had a tube in her right lung and a tube down her throat. There are also times that her left wrist is so sore that her fingers will not cooperate. She can't even put pressure on it to get off the couch or floor.

In the MR - Emp, the respirologist diagnoses the appellant's primary medical condition as COPD (onset three years ago) and secondary medical condition as pneumo thorax (onset March 2012). Asked to describe the overall medical condition as mild, moderate or severe, the respirologist indicates "moderate." The expected duration of these conditions is more than two years. She had a single episode of pneumo thorax and she is at a 50% risk for recurrence. The COPD is expected to be lifelong. The respirologist describes the following restrictions specific to these medical conditions: "Activity requiring moderate to heavy physical exertion will be limited by shortness of breath. Climbing stairs, lifting, walking distances will be limited. Light duties only."

The Supplemental Medical Opinion is in the form of an advocate-prepared questionnaire. The GP is asked, "In your professional opinion, is [the appellant's] ability to perform her daily living activities considered severely restricted due to her impairment? If so, please check the box beside the DLA if there is a restriction beyond that of a typical healthy person..." "In relation to a person who has a severe physical or mental impairment," the GP checks the boxes beside all the following listed DLA:

- prepare own meals
- shop for personal needs

- use of public or personal transportation facilities
- perform housework to maintain acceptable sanitary conditions
- move about indoors and outdoors
- manage personal medication.

The GP also checks boxes against the DLA "in relation to a person who has a severe mental impairment" (as stated on the form):

- make decisions about personal activities, care, or finances
- relate to, communicate or interact with others.

The GP also indicates yes in answer to the question: "In your professional opinion, is [the appellant's] ability to perform these daily living activities directly and significantly restricted?" The panel notes that, though explanatory details are requested, none is provided.

In her Notice of Appeal, dated 11 July 2013, the appellant writes that she needs help shopping and going for walks. She gets dizzy if she walks too far on her own. And if she gets too much pain she just goes to the hospital as her GP does not check her out when she sees him.

She writes that she needs help when she goes shopping and she gets sore in the chest and gets breathless. She has gotten so sore that she has to stop in her tracks and wait until the pain goes away before she finishes her shopping.

She has tried working by helping friends and family with work around their houses, but she has a hard time as it takes her 20 minutes longer to do anything outside the house.

When she goes for walks she has to take a 5 minute break every 15 minutes and she takes someone with her as her chest pain gets the best of her.

When there is bad air quality in town, she has to stay at home and she can't breathe right and she coughs the whole time she is out.

When she goes to see her GP and tells him her chest is really sore, he says she is OK and he doesn't even check her out. She passed out in his office and all he asked her is "Have you eaten?" Her answer was yes at that time. After that she passed out in her car driving; she was able to stop her vehicle before having a seizure. Her daughter was with her and she had to take over the driving. The appellant lists the prescription and over-the-counter medications she takes.

She writes that she does not see her GP much as he does not check her out when she sees him. He just says that she is OK and he writes out her prescriptions. When she is in too much pain she would rather go to the hospital than go to his office.

At the hearing, the appellant's advocate reviewed the PR, AR, MR-Emp and the Supplementary Medical Opinion. She also detailed the appellant's daily medications, consisting of a prescription drug, 4 puffers taken frequently during the day (one up to 8 times a day), and over-the-counter analgesics for lung pain. She explained that the appellant lives with her brother who helps her with cooking and cleaning. Out of concern for her well-being, her brother will find someone else for the appellant to live with when he goes out of town. The balance of the advocate's presentation went to argument (see Part F, Reasons for Panel Decision, below).

In answer to a question, the appellant stated that there had been no significant change in her condition between when her GP completed the PR and AR, and when her GP filled out the Supplementary Medical Opinion. Her advocate explained that the purpose of the Supplementary Medical Opinion was to obtain more information from the GP.

The ministry stood by its position at reconsideration.

The panel finds that the information provided by the appellant in her Notice of Appeal and at the hearing is in support of the information before the ministry at the time of the reconsideration. The information relating to the appellant living with her brother clarifies the notation by the GP that she lives with family. The panel therefore admits the appellant's submissions pursuant to Section 22(4)(b) of the *Employment and Assistance Act*.

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 she 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 her ability to perform daily living activities either continuously or periodically for extended periods; and,
- (ii) as a result of those restrictions she requires help to perform those activities.

The ministry determined that she 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

For PWD designation, the legislation requires that a severe mental or physical impairment be established. The determination of the severity of impairment is at the discretion of the minister, taking into account all the evidence, including that of the applicant. However, the starting point must be medical evidence, with the legislation requiring that a medical practitioner (in this case, the appellant's GP) identify the impairment and confirm that impairment will continue for at least two years.

In the discussion below concerning the information provided regarding the severity of the appellant's impairments, the panel has drawn upon the ministry's definition of "impairment." This definition consists of "cause" and "impact" components: "impairment is a loss or abnormality of psychological, anatomical or physiological structure or function [the cause] causing a restriction in the ability to function independently, effectively, appropriately or for a reasonable duration [impact]." This definition is not set out in legislation and is not binding on the panel, but in the panel's view it appropriately describes the legislative intent. The cause is usually set out as a disease, condition, syndrome or even a symptom (e.g. pain or shortness of breath). A severe impairment requires the identified cause to have a significant impact on daily functioning.

Mental impairment

The ministry's position is that, while her GP has indicated that the appellant has "mild mood related issues," the GP has indicated that there are no significant deficits in the areas of cognitive and emotional functions, though indicating in the AR that there are minimal impacts to emotion and motivation. Referring to the Supplemental Medical Opinion, the ministry notes that the GP checks off that due to a severe mental impairment the appellant is unable to manage personal medication, make decisions about personal activities, care or finances, or relate to, communicate or interact with others. However the ministry is unclear about these restrictions as the appellant's GP has not identified a severe mental impairment (either in the PWD application or in the Supplemental Medical Opinion). Based on the information provided by the GP, the ministry found that there is not enough evidence to establish a severe mental impairment.

The position of the appellant is that her GP has identified mood related issues as an impairment, confirming in the Supplemental Medical Opinion that in the GP's professional opinion, as a result of this impairment, the appellant's ability to perform the DLA of making decisions about personal activities, care or finances and relate to, communicate or interact with others is directly and significantly restricted. The appellant argues that this is sufficient evidence to establish a severe mental impairment.

The panel notes that the appellant's GP has diagnosed the appellant with "mild mood related issues."

However, the GP has not identified any significant deficits in cognitive and emotional functioning, while the impacts on daily functioning are limited to the areas of emotion and motivation, and assessed as minimal. The panel further notes that no explanatory details are provided in the Supplemental Medical Opinion relating to how, to what extent, or under what circumstances the appellant is restricted in her ability to make decisions about personal activities, care or finances or relate to, communicate or interact with others. The panel finds that, based on the information provided, the ministry was reasonable in determining that a severe mental impairment had not been established.

Physical impairment

In the reconsideration decision, the ministry noted that the appellant's GP indicates that she is independent in all aspects of her mobility and physical abilities, though increased activities equals shortness of breath. In the ministry's opinion, the impacts described by the GP are more in keeping with a moderate degree of impairment as she can walk 1 to 2 blocks unaided and can climb 2 to 5 stairs slowly due to shortness of breath. Based on information provided by the GP and the information in the MR-Emp provided by the respirologist, the ministry found there is not enough evidence to establish a severe physical impairment.

The appellant's position is that the evidence establishes a severe physical impairment. As a result of her COPD, emphysema and asthma, and resulting SOB, she is able to walk only 1 to 2 blocks unaided and climb 2 to 5 steps unaided (slowly). To get through the day she needs to use her puffers frequently, one up to 8 times a day. Her respirologist has reported that "Activity requiring moderate to heavy physical exertion will be limited by shortness of breath. Climbing stairs, lifting, walking distances will be limited." Further, the appellant argues that her GP in the Supplemental Medical Opinion has indicated that in his professional opinion the appellant has a severe physical impairment.

The panel notes that the GP has diagnosed the appellant with COPD, emphysema and asthma and, as the panel understands the evidence from the respirologist in the MR-Emp, one episode of pneumo thorax, with a 50% risk of recurrence. The respirologist assesses these conditions as "moderate." What are important in the assessment of the severity of the impairment resulting from these conditions are the impacts on daily functioning. The GP notes several times that physical exertion leads to shortness of breath, a result that the panel considers a symptom, not a description of the extent to which her ability to function is restricted. Apart from the GP's assessment that the appellant is able to walk 1 to 2 blocks unaided and climb 2 to 5 steps unaided (slowly), the respirologist's report that "Activity requiring moderate to heavy physical exertion will be limited by shortness of breath. Climbing stairs, lifting, walking distances will be limited," and the GP's assessment that periodic assistance is required going to and from stores, no detailed information has been provided as to how, to what extent or under what circumstances her medical conditions restrict the appellant's ability to function independently, effectively or for a reasonable duration. The panel therefore finds that the ministry was reasonable in determining that a severe physical impairment had not been established.

Significant restrictions in the ability to perform DLA.

The position of the ministry is that there is not enough evidence from the appellant's GP to establish that the appellant's impairments significantly restrict her ability to manage her DLA either continuously or periodically for extended periods.

The appellant's position is that her GP has provided a Supplemental Medical Opinion in which the legislative requirement is met: the GP has indicated that in his opinion as a prescribed professional, the appellant's severe mental or physical impairment directly and significantly restricts her ability to perform daily living activities.

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, which is not established in this appeal. This DLA criterion must also be considered in the broader context of the legislation, which provides that the minister may designate a person as a person with disabilities "if the minister is satisfied that" the criteria are met, including this one. In exercising the discretion conferred by the legislation, it is reasonable that the minister would expect that the opinion of a prescribed professional be substantiated by information that would satisfy the minister that the direct and significant restrictions in the ability to perform DLA, either continuously or periodically for an extended period, are validated.

The panel has reviewed all the evidence. The panel is of the view that the Supplemental Medical Opinion, a 1 page advocate-prepared questionnaire with the GP checking boxes and signing the form, cannot be considered an adequate substitute for a PR and AR personally prepared with due diligence by a medical practitioner/prescribed professional. The issue is whether the reported restrictions to DLA meet the criterion of being "significant." For the DLA requiring physical ability, some degree of restriction is reported in the PR and AR, notably for the DLA of moving about indoors and outdoors, with the appellant restricted to being able to walk 1 to 2 blocks unaided and climb 2 to 5 steps unaided (slowly), with increased activity equaling SOB. The only other DLA for which a restriction is assessed is shopping for personal needs, where the GP reports periodic assistance from another person is required for going to and from stores. In the panel's view, considering that a severe mental or physical impairment has not been established and assessing the appellant's overall ability to function as reported in the PR and AR, it is difficult to assess the GP's opinion as confirming that the restrictions to her ability to manage her DLA are "significant." The panel therefore finds that the ministry reasonably determined that this legislative criterion had not been met.

Help with DLA

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

The appellant's position is simply that she relies on ongoing help from others, particularly from her brother for cooking, housekeeping and shopping.

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 also notes that there is no reference in the AR confirming the help provided by the appellant's brother, with the GP noting "N/A" in the section relating to assistance provided by other people. 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.