



**PART C – Decision under Appeal**

The decision under appeal is the ministry's reconsideration decision dated 24 October 2013, which held that the appellant did not meet 3 of the 5 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 2 years. However, the ministry was not satisfied that the appellant has a severe physical or mental impairment or that 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. The ministry was also not satisfied that as a result of those restrictions, in the opinion of a prescribed professional, the appellant requires help 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 reconsideration consisted of:

- A 3 page Persons with Disabilities Designation Application self report dated 2 May 2013 completed and signed by the appellant stating the following:
  - He has constant headaches and at times does not get out of bed; this on occasion interferes with him seeing his children;
  - He also had difficulties retaining the food he eats and get bouts of dizziness;
  - He goes for short walks but he gets tired easily and since his condition is deteriorating, they are even getting shorter;
  - He has difficulties carrying bags as he has to climb stairs and has fallen a few times for getting dizzy and disoriented;
  - He cannot work in his trade anymore.
- A 5 page Physician Report (PR) dated 3 May 2013 completed and signed by the appellant's family doctor indicates the following:
  - Specific diagnosis: Chronic lung disease, muscle contraction headaches and depression / anxiety disorder.
  - Health history: Diagnosis recently clarified with detection of rare lung disease – Progressive impairment – medication management resulting in significant dyspnea and disability. He also indicates daily severe headaches – symptoms of nausea / vomiting, phonophotophobia and vise like head pain as well as anxiety and depression requiring ongoing psychiatric consultation and therapy mostly caused by marital discord, child access and financial issues including loss of income.
  - The appellant has not been prescribed any medication that interferes with his ability to perform daily living activities (DLA).
  - The appellant does not require any prostheses for his impairment.
  - The impairment will continue for more than 2 years and the physician indicates a progressive worsening of the appellant's respiratory situation with progressive disability.
  - He can walk on a flat surface unaided for 1 to 2 blocks.
  - He can climb more than 5 steps unaided.
  - He is limited in lifting between 7 and 16 kg.
  - He has no limitation for remaining seated.
  - He has no difficulties communicating.
  - The physician indicates emotional disturbance as a significant deficit with cognitive and emotional function. He further states that this emotional disorder is caused by disease, disability, poor financial status and persisting marital conflict and that "regular psychiatric therapy sessions and passage of time have been beneficial".
  - In terms of DLA, the physician mentions that the impairment directly restricts the appellant's ability to perform them but on the list of the following DLA, he indicates no restriction: Personal self care; meal preparation; management of medications; daily shopping; mobility inside the home and management of finances. He states that the appellant's mobility outside the home is restricted continuously, specifying that he has difficulty walking the distance to the bus stop from his residence. He reports periodic restriction for basic housework (specifying that the appellant requires assistance with some aspects of housework) and use of transportation. In general the physician states that anything requiring physical exertion is progressively restricted by dyspnea.



- The physician comments that they are working on finding ways of improving the appellant's respiratory functions but that a cure is not available at this time and that his severe head pain is likely a physical manifestation of anxiety caused in large part by prolonged, nasty marital discord.
- The physician states he has had this patient since 2005 approximately and has seen him between 2 to 10 times in the last 12 months.
- An 8 page Assessor Report (AR) also dated 3 May 2013 completed and signed by the same physician as the PR, indicating the following:
  - To the question "What are the [appellant's] mental or physical impairments that impact his ability to manage DLA?" he indicates: Shortness of breath, anxiety symptoms and severe head pain.
  - The appellant's ability to communicate is good for speaking and hearing but satisfactory for reading and writing because of headaches and blurred vision. He mentions that there are no significant communication issues.
  - In terms of mobility and physical ability, he is independent walking indoors and standing but needs periodic assistance from another person for lifting, carrying and holding. He takes significantly longer than typical for walking outdoors and climbing stairs for which the physician indicates a handrail is required. He also comments that progressive shortness of breath limits rate and distance walking and that the appellant needs assistance from another person to lift and carry heavier items.
  - In terms of cognitive and emotional functioning for someone who has an identified mental impairment or brain injury the AR indicates there are no impacts on bodily functions, consciousness, impulse control, insight and judgment, executive, motor activity, language, psychotic symptoms, other neuropsychological problems and other emotional or mental problems. It indicates a minimal impact on memory and motivation. There is a moderate impact on emotion and attention / concentration. The physician states that anxiety symptoms with dysphoria / depression are due to a bitter, prolonged marital discord and that regular psychiatric counseling has been beneficial.
  - In terms of assistance required related to impairments that directly restrict the appellant's ability to manage DLA, the assessor indicates that he is independent for personal care, for most shopping activities except going to and from stores and carrying purchases home where he needs periodic assistance from another person as he walks slower than others and cannot lift heavy items, he is mostly independent for meals except for food preparation where he takes significantly more time than typical but without explanation as to why, he is independent for paying rent and bills and medications. In terms of housekeeping, the appellant takes longer for his laundry as the equipment is located downstairs and he needs periodic assistance from another person for basic housekeeping. He is independent for getting in and out of a vehicle and for using transit schedules and arranging transportation but he takes significantly longer than typical for using public transit as it is a long walk to his closest rural bus stop – several miles from home.
  - He is independent for most social functioning activities except to deal appropriately with unexpected demands where the physician indicates problems with interaction with his spouse where lawyer or friend's assistance is required.
  - A mental impairment is reported to result in good functioning with friends and others but marginal functioning with spouse because of dysfunctional relationship.
  - The report mentions that his friend with whom he shares accommodation is his main

source of assistance and that he is able and available for assistance as required while professional services are available in a nearby main centre.

- No assistive device or assistance animal is required.
- The physician also mentions that the appellant has developed a chronic lung condition that will progressively worsen, resulting in increasing respiratory disability and that he has been referred to a lung specialist.
- A one-page doctor's note which appears to be dated 11 July 2013 and signed by a psychiatrist stating that the appellant is "completely medically disabled and is incapable of managing the paperwork required by you."
- A one-page "Medical Report – Persons with Persistent Multiple Barriers" (PPMB) form dated by the appellant as 2 October 2013 apparently filled by the appellant's physician who completed the PR and the AR but not signed stating (the full document was presented at the hearing):
  - The appellant suffers from chronic lung disease and congenital heart valve. Treatments are scheduled to start soon but there is likelihood that the appellant will need bilateral lung transplantation as his condition is assessed as "constant and worsening". Restrictions are stated as "limited ambulation, increasing restricted function".
- A one-page letter dated 9 October 2013 by the appellant, indicating that he has difficulties taking a shower and that he walks very slowly because leg pain and shortness of breath. He cannot do the laundry as he cannot carry it downstairs and cannot go shopping to the grocery store and a friend is doing that for him but this friend is awaiting surgery and may not be available anymore. He states that on occasion he will not get out of bed for a day or two and that he cannot cook for himself, cannot go for walks anymore and has to go to hospital regularly for headaches, shortness of breath and poor mobility. He can no longer clean his house or do the dishes and this is done by his friend. He mentions he may need a lung transplant and that visiting his family is impossible because of the distance and his health condition.
- A two-page undated, unsigned letter from the appellant written by his advocate starting by "I am [the appellant's] physician." But the letter switches between the appellant and a third party. For instance: "These limitations on my mobility have severe impacts on his daily living activities." It reiterates mostly the content of the letter dated 9 October, adding that his medication has changed and that his new medication makes him very tired and that he cannot focus or do anything but sit in the dark and quiet. At the hearing the appellant clarified that this letter was not a letter from his physician but rather his own letter and that a clerical error was made when the letter was drafted.
- A one-page letter dated 9 October 2013 signed by a social worker indicating that he advocated for the appellant so that he gets PWD benefits and that he has a vehicle that is very useful not only for him but also for others that he helps and that the appellant should be able to use handicapped parking spaces and that the fee be waived.
- A four-page letter, undated and unsigned but apparently drafted by the appellant's advocate presenting submissions to the reconsideration officer. It takes issue with the way the adjudicator reviewed the medical evidence as being a misapplication of the legislation and suggesting a handrail is an assistive device needed by the appellant to climb stairs. The letter states that new medical information was difficult to obtain given the difficulties in reaching specialists and for other reasons.

In his Notice of Appeal dated 4 November 2013, the appellant states that he is considerably more disabled than when he first applied for PWD designation and that he is struggling with his DLA. He

also states that given his medical appointments he could not have all his documentation ready for reconsideration.

The appellant further submitted prior to the hearing a one-page letter dated 4 October 2013 signed by a physician, specialist in internal medicine (SIM), qualifying the appellant's health condition as a "very severe chronic obstructive pulmonary disease" and that he is undergoing treatment with the hope of averting a lung transplantation. He indicates that the appellant has also been in consultation with another specialist and that his condition is deteriorating to the extent he cannot walk 50 feet. He states that the appellant's condition "certainly classifies as completely disabled, has no potential for return to work in any capacity".

At the hearing, further documentary evidence was provided:

- A memo dated 25 November 2013 by the appellant's advocate with a handwritten inscription on it by the appellant's physician to the effect that trial medication has been prescribed for him and he is likely to require a bilateral double lung transplantation. With it, a two-page statement to the effect that the physician agrees with the following statements:
  - The appellant can no longer walk more than 50 feet;
  - He needs friend to stand by the door to the shower in case he collapses;
  - Showers exhaust him – Takes 35-30 minutes to get dressed after;
  - Cannot use any stairs without significant shortness of breath and a need to rest;
  - Exertion of mobility causes him to vomit (approx. 3x/week);
  - Exertion of mobility causes him to collapse from dizziness and shortness of breath (approx. 2x/week);
  - Needs continuous assistance with laundry and basic housekeeping;
  - All aspects of personal care (dressing, grooming, bathing, toileting, transfers in and out of bed/chair) take longer because of shortness of breath and need to rest;
  - Needs continuous assistance with food preparations and cooking;
  - Needs periodic assistance (almost all the time) with transportation.
- A complete 2-page Medical Report for PPMB dated 9 October 2013 filled and signed by the appellant's physician. The first page had been filed prior to reconsideration (above) and the second page includes the date and identifies the appellant's physician with signature.
- A letter from the ministry dated 14 November 2013 advising the appellant that his PPMB designation has been approved.
- A filled prescription from a pharmacy for medication provided by the SIM to the appellant dated 17 October 2013 for a value of over \$5,000.00.

As well, oral testimonies were heard from the appellant and his roommate (the roommate) of over 20 years who was not present while the appellant testified but was waiting outside the hearing room.

The appellant testified that:

- His health condition is deteriorating and he has increased difficulties and needs his roommate to assist him most of the time.
- When he starts coughing he occasionally passes out and needs oxygen that his roommate must provide.
- He tried to do house work but it takes over twice as much time and it's generally his roommate who does all the chores.
- He gets weekly transfusions and gets completely incapacitated for over 2 days after as he must

rest in bed and cannot do anything.

- His case is so rare that his family doctor did not know anything about it until he was referred to a specialist and even he had to consult information from abroad to learn more about his rare condition.
- He does not own a vehicle but his roommate does and it is his roommate who drives him when needed.
- Walking to a bus stop is not even an option as he would have to walk over 300 yards and even then the matter is very complicated as he would need to take a small ferry across a river before getting to a bus stop.
- No new assessor report was done since the one done by his physician in May.
- He had difficulties getting the doctors to provide reports because they were busy and were difficult to reach.
- He has also seen another lung specialist in a major centre who transferred his medical file to surgeons who are waiting for the organs to be available to perform the double lung transplantation.

The roommate testified that:

- He has known the appellant for 23 years.
- He cooks for him every time he wants to eat but it is not regular since on many occasions the appellant cannot eat, being so sick.
- He does most of the housework, keeping house clean and always does the appellant's laundry since he cannot access the laundry room because of his inability to climb those stairs with laundry.
- After his transfusion, the appellant was a whole day in bed and the next day there was only a slight improvement in his condition.
- He sees the appellant's health deteriorating constantly and is very concerned about him and must check on him regularly.
- He must monitor the appellant when he wants to shower because he is concerned that he could fall in the shower stall and hurt himself.
- He witnessed the appellant climbing outside stairs at their residence and he had to stop for over 10 minutes to catch his breath.
- He considers the appellant cannot take care of himself if he is not there to assist him.

The panel determined that the additional oral and documentary evidence was admissible under s. 22(4) of the Employment and Assistance Act (EAA) as it was in support of the records before the minister at reconsideration, in particular that it provided more information on the medical condition of the appellant as to the impact of the ailment and confirmed some of the information that was available at the time of reconsideration to the effect that his health condition was deteriorating. However, the panel gave little if any weight to the Social Worker's letter as the evidence showed that the vehicle belonged to the roommate and the sole purpose of that letter was to obtain a handicapped parking permit. No weight is given to the ministry letter of 14 November 2013 indicating the appellant was approved for PPMB since this program is different from the PWD designation and its criteria also differ.

## PART F – Reasons for Panel Decision

The issue under appeal is whether the ministry's determination that the appellant has not met the all of the eligibility criteria for designation as a PWD because it was not satisfied that the appellant had a severe physical or mental impairment that, in the opinion of a prescribed professional, directly and significantly restricts his ability to perform DLA either continuously or periodically for extended periods resulting in the need for help to perform DLA was either a reasonable application of the legislation or reasonably supported by the evidence. The ministry determined that the age requirement had been met and that the appellant has an impairment that will last for 2 years.

The criteria for being designated as a person with disabilities (PWD) are set out in s. 2 of the EAPWDA and s. 2 of the EAPWDR, which are set out below.

Section 2 of the EAPWDA states:

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;

**"health professional"** repealed

**"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 further clarification:

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
- (a) authorized under an enactment to practise the profession of
    - (i) medical practitioner,
    - (ii) registered psychologist,
    - (iii) registered nurse or registered psychiatric nurse,
    - (iv) occupational therapist,
    - (v) physical therapist,
    - (vi) social worker,
    - (vii) chiropractor, or
    - (viii) nurse practitioner, or
  - (b) acting in the course of the person's employment as a school psychologist by
    - (i) an authority, as that term is defined in section 1 (1) of the *Independent School Act*, or
    - (ii) a board or a francophone education authority, as those terms are defined in section 1 (1) of the *School Act*, if qualifications in psychology are a condition of such employment.

The ministry acknowledges that the appellant meets 2 of the conditions for PWD designation in that he is at least 18 years of age and his impairment is likely to continue for 2 years or more. However, the ministry argues that he does not meet the 3 other criteria.

*Severe physical or mental impairment:*

While the ministry acknowledges that the appellant has limitations in terms of lifting, carrying and holding heavier items and that he takes significantly longer walking outdoors and climbing stairs, it argues that the evidence is not sufficient to establish a severe physical impairment. Further, in terms of mental impairment, the ministry argues that while there are some areas where there is a moderate impact to emotion and attention/concentration, it is due to marital problems and otherwise there is no significant impact on the appellant's mental condition and, thus, insufficient evidence to establish a severe mental impairment.

The appellant argued that the ministry failed to consider the evidence in its entirety, choosing rather to focus on the AR and did not take into consideration the evidence provide by the appellant that included further information from medical practitioners that confirmed the severity of the appellant's physical and mental impairments. He argued that it was unreasonable to ignore so much evidence and that the evidence taken in its whole, including the appellant's own statements, established he had a severe physical and mental impairment.

The panel notes that the reconsideration officer did not take into account the psychiatrist's letter of 11 July 2013 since it is not mentioned in the decision while the other evidence submitted by the



appellant was found to have not provided additional information submitted by the appellant's physician in the PR and the AR. Further, the ministry did not consider the one-page PPMB application filled by the appellant's physician because this form "is related to your work options not your PWD application" while, nonetheless, it confirmed the diagnosis previously established by the physician plus a secondary medical condition, congenital heart valve. It also indicates that the appellant is a candidate for a "possible/likely bilateral lung transplantation" adding "Likely to require lung transplantation". It also confirms a constant and worsening condition, limited ambulation and increasingly restricted function.

In the PR, the physician describes the appellant's condition resulting "in significant dyspnoea and disability"; "progressive worsening of respiratory status anticipated with progressive disability despite use of appropriate medication"; "anything requiring physical exertion is progressively restricted by dyspnoea"; "Progressive dyspnoea (shortness of breath) is and will continue to be [the appellant's] main source of disability"; and in the AR, "[The appellant] has developed an unusual chronic lung condition... which causes progressive worsening of pulmonary function, resulting in increasing respiratory disability." This medical evidence corroborates the appellant's statements and testimony to the effect that his health condition is severe, constantly deteriorating, that he is significantly disabled and for all those reasons, the panel finds that the ministry unreasonably determined the information provided did not establish a severe physical impairment.

In terms of mental impairment, the panel finds that the evidence shows symptoms of anxiety and depression caused mostly by a "bitter, prolonged marital discord" and that counselling has been beneficial. There is no other diagnosis of any mental impairment or brain injury and his mental condition is also assessed as secondary to his physical condition. The panel finds that the ministry reasonably determined the information did not establish a severe mental impairment.

#### *Daily Living Activities (DLA):*

The ministry submits there are only few, minor aspects of DLA that are impacted by the appellant's physical condition. While there is some indication the appellant has difficulties with mobility outside the home and some aspects of housework, the ministry argues that there is little if any evidence on how often assistance is required in terms of lifting, carrying heavy objects, nor any evidence of how much longer it takes to perform certain tasks like doing laundry, going to stores, using transit, thus insufficient evidence by the appellant's physician of significant restrictions of DLA continuously or periodically for extended periods. The ministry indicates relying exclusively on the appellant's physician evidence in the PR and the AR.

The appellant submits that it was unreasonable for the ministry to ignore all the other evidence that was provided, including more evidence from the appellant's physician, the psychiatrist and the appellant himself with respect to his DLA. He argues that more than one DLA as defined by the legislation is significantly impacted by the appellant's health condition and that it was unreasonable for the ministry to determine that there were no significant restrictions of DLA.

The panel notes that the ministry did not take into consideration any other evidence but the evidence provided by the appellant's physician in the PR and the AR. These reports dated back to May 2013 and indicated the potential for significant deterioration of the appellant's ability to perform his DLA but



the ministry disregarded the psychiatrist letter of 11 July 2013 to the effect that the appellant was "completely medically disabled". While the ministry appropriately submitted this letter did not provide any reason why the appellant was disabled, the panel finds it nonetheless could be considered with the other background information but it was not. By the beginning of October the evidence is that the appellant was increasingly disabled as is confirmed by his physician on the PPMB medical report (7 October 2013) indicating that the episodes were becoming "constant and worsening" and in terms of restrictions, he indicated "Limited ambulation, increasing restricted function". Even back in May, there were already a number of limitations noted in the AR: Walking outdoors required continuous assistance and climbing stairs was impaired. In terms of basic housekeeping he needed periodic assistance from another person and the evidence he provided showed, even before the reconsideration decision, that he needed his roommate for most of those chores while laundry went from taking longer "as located downstairs" to "I am unable to do laundry because I can't carry it down stairs" and needed help from roommate continuously. In the AR, his physician already indicated that he needed help from others to do shopping which was confirmed by his own statement and his roommate's testimony. In terms of cooking and food preparation, the physician indicated that he was independent for cooking but was taking significantly longer for food preparation. The appellant provided further clarification in his statement that by October he wasn't cooking or doing any food preparation. The panel finds this is consistent with a progressive deterioration of his health as predicted by the appellant's physician and eventually confirmed in his statement of 25 November 2013.

Given the evidence outlined above that showed significant continuous restrictions for mobility (walking outdoors and climbing stairs), basic housework (particularly the laundry), shopping for personal needs and the ability to prepare his own meals, the panel finds it was unreasonable for the ministry to determine the appellant's DLA were not significantly restricted either continuously or periodically for extended periods.

*Help required to perform DLA:*

The ministry argues that since DLA are not significantly restricted, it cannot be determined that significant help is required from other persons and that no assistive devices are required as the ministry considered that handrails were not an assistive device.

The appellant argues that he is heavily reliant on his roommate to take care of him and assist him in his DLA and that without his help he states that he is unable to afford any of the services that might be available. He submits that in the appellant's case, a handrail is an assistive device as he needs them to climb stairs.

The panel notes that since the first AR, the evidence established that the appellant needed help from his roommate to perform some of his DLA. The appellant's physician notes that he shares a house in a remote rural community and that his roommate, who is a friend, is able and available for assistance as required. In the PR, he states that the appellant "requires assistance with some aspects of housework". In his statement dated 9 October 2013, the appellant also indicated that he needed his roommate to do a number of DLA: laundry, grocery shopping, cooking, cleaning his house and doing the dishes. This was eventually confirmed by the appellant's physician in his 25 November 2013 statement.

Based on the above, the panel finds that the ministry reasonably determined a handrail is not an assistive device as the definition of assistive device at s. 2(1) of the EAPWDA clearly states it is a device *designed* to enable a person to perform a DLA while handrails are not designed for that purpose but are generally found to enhance public safety. However, the panel finds it was unreasonable for the ministry to determine that the appellant did not require help in relation to a DLA since the evidence is overwhelming that he is unable to perform a number of DLA and that in order to perform them, he needs the significant help of another person, his roommate.

*Conclusion:*

The panel comes to the conclusion that the ministry unreasonably determined that the appellant did not establish he had a severe physical impairment that in the opinion of a prescribed professional directly and significantly restricted the his ability to perform DLA either continuously or periodically for extended periods and that, as a result of those restrictions, he required help to perform those activities. Consequently, the panel finds the ministry's decision was not reasonably supported by the evidence and rescinds the decision. Therefore, the ministry's decision is overturned in favour of the appellant.