

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the "ministry") reconsideration decision of November 22, 2013, which found that the appellant did not meet three of five statutory requirements of section 2 of the Employment and Assistance for Persons With Disabilities Act ("EAPWDA") for designation as a person with disabilities ("PWD"). The ministry found that the appellant met the age requirement and that in the opinion of medical practitioner the appellant's 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 that
- as a result of those restrictions, the appellant requires the significant help or supervision of another person, an assistive device, or the services of an assistance animal.

## PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Act ("EAPWDA"), section 2  
Employment and Assistance for Persons with Disabilities Regulation ("EAPWDR"), section 2

## PART E – Summary of Facts

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

- A physician's report ("PR") and assessor's report ("AR"), both completed by the appellant's physician and dated May 19, 2013.
- The appellant's handwritten self-report ("SR") dated May 24, 2013.
- The appellant's request for reconsideration dated October 23, 2013.

### Physical Impairment

- In the PR, the physician – who has known the appellant for 1 year and seen her 2-10 times - diagnosed the appellant with COPD, asthma, obstructive sleep apnea and hypoventilation syndrome with an on-set of more than 5 years.
- The physician noted that the appellant had developed pneumonia respiratory failure last year and has underlying asthma and COPD from lifelong smoking. The physician reports that the appellant is obese, of short stature with obstructive sleep apnea, has had a laparoscopic cholecystectomy 20 years ago and is constantly short of breath.
- In terms of functional skills, the physician reported that the appellant can walk 1 to 2 blocks unaided on a flat surface, can climb 5+ steps unaided, can lift 5 to 15 pounds, and can remain seated without limitation.
- The physician noted that the appellant must quit smoking to prevent significant further deterioration of her respiratory health. The physician indicated that he was awaiting a cardiac echo for confirmation of her cardiac status. Also, the physician noted that the appellant was a candidate for home oxygen and that she is trying to use home oxygen when sick or at times of increased oxygen demand.
- In the AR, the physician commented that the appellant's impairments that impact her ability to manage DLA are asthma and COPD.
- Also in the AR, the physician noted that the appellant is independent with respect to standing, requires periodic assistance from another person for lifting and carrying/holding and uses an assistive device for walking indoors, walking outdoors and climbing stairs. The assistive device specified by the physician is continuous oxygen support.
- In her self-report, the appellant wrote that she had been very ill and was hospitalized on December 30, 2012, diagnosed with pneumonia, became hypoxic and spent until January 31, 2013 in hospitals in her area. She reports that her lung function is very low and she requires oxygen for walking any distance or for any type of exertion and concentration. She indicated that a biopsy on her lymph gland has been postponed due to her low lung function and the need for more tests. She also indicated that she is waiting to hear from a specialist in order to have more tests for sleep apnea. The appellant is hoping that she can move into her own home as she would like to be assessed for in-home oxygen. She also finds that the stairs at her temporary residence are taxing with her low lung function.

### Mental Impairment

- In the PR, the physician indicates no to the question; "Are there any significant deficits with cognitive

and emotional function?"

- In terms of the appellant's ability to communicate, the physician reported that she has no difficulties with communication.
- In the AR, which provides an opportunity to provide more detail with respect to cognitive and emotional functioning, the physician has noted n/a.

#### **DLA**

- In the PR, the physician did not indicate whether or not the appellant suffered any restrictions to DLA as he was not required to complete this section if he was completing the AR, which he did complete.
- In the AR, the physician indicated that the appellant independently manages all aspects of Personal Care, Meals, Pay Rent and Bills, Medication with a note under Transportation that public transit is not available. Under Basic Housekeeping, the aspect of laundry is noted as independently managed whereas basic housekeeping requires periodic assistance from another person. Under Shopping, the physician also indicated the appellant needs periodic assistance with 2 of the 5 aspects specifically; going to and from stores and carrying purchases home whereas she independently manages; reading prices and labels, making appropriate choices and paying for purchases.
- Regarding social functioning, the physician noted the appellant is independent with respect to all aspects and has marginal functioning with both her immediate social network and her extended social networks.

#### **Help**

- In both the PR and the AR, the physician indicated that the appellant requires no aids or prostheses for her impairment, and that she does not have an assistance animal. The physician indicated that the appellant is provided with help from friends and community services agencies and that she needs housing, a breathing device and oxygen.

#### **On appeal the appellant presented the following documents as follows:**

1. An advocate prepared, typed form in which the appellant's physician checked off boxes from pre-printed sections dated October 29, 2013. Noted is that that some of those pre-printed sections referred to restrictions, rather than the options relating to assistance as provided in the AR. The physician has written either periodically or continuously beside the restrictions as follows:

##### Continuous restrictions:

- With basic mobility, walking outdoors and banking due to her use and transport of an oxygen tank.
- With lifting/carrying/holding takes longer due to chronic fatigue.
- With laundry/housekeeping due to lack of motivation and desire.
- With going to and from a store due to mobility issues- does not have a car and cannot walk distance to store.
- With filling/refilling prescriptions due to lack of transportation.

##### Mental Health Conditions and Symptoms:

Periodically: anxiety, panic attacks and difficulty securing assistance from others.

Continuous: sleep disturbance, difficulty concentrating and paying attention and lack of motivation.

Assistance Required, continuously from friends, family and or roommate:

With basic mobility, walking outdoors laundry/housekeeping, going to and from stores, paying for purchases, meal planning, banking and filling/refilling prescriptions.

Assistive Devices Required:

Continuous oxygen, positive airway pressure machine and a support chair.

2. A self-report dated October 23, 2013 as follows:

- After short walks and a few stairs, the appellant would be gasping for air and have to stop and catch her breath;
- Uses oxygen to concentrate on reading, filling out forms, writing tasks;
- Hasn't been able to walk 1-2 blocks for well over a year;
- Finds that her weight hinders her;
- Finds that regular swimming could strengthen her lungs and with a small amount of weight loss at a time, she would be able to walk more;
- On good days without oxygen, she struggles going up 5 stairs to the main living area while walking very slowly up and stopping halfway to the landing to rest, then up to the top and straight to the table where she sits down to catch her breath;
- On bad days she or her friend carry the oxygen tank which is taxing in itself - going up and down the stairs one step at a time;
- Can lift 7-16 kg or more, however cannot do anything with it other than set it down;
- Can walk very short distances with and sometimes without oxygen depending on her breathing at the time;
- Went to the pool 25 times over a 5-6 week period last April until she could no longer afford the \$5.25 session;
- Continues to go to the pool 1-2 times per month;
- Battles mild depression;
- Suffers from anxiety with breathing issues which are frightening;
- Stays with friends although she finds the stairs especially difficult on bad days;
- Requires the physical help of friends such as driving her to appointments, grocery shopping to get her out and walking and help when she is sick to carry her oxygen;
- Needs oxygen on bad days to do dishes;
- Rarely vacuums or washes the floors;
- Some days making her bed after washing bedding takes a long time as she takes mini- breaks and sits;
- Her asthma triggers are chemical and scented items.

3. A letter dated November 4, 2013 from the appellant's roommate indicated that she drives the appellant to appointments, carries the appellant's oxygen when she is not well, while she is using it and has seen the appellant gasping for air at the top of the stairs.

4. A letter dated October 30, 2013 from a respiratory specialist indicated that the appellant has ongoing respiratory failure and her condition is not reversible.

5. An Oximetry Summary Report dated October 1, 2013 with comments crossed out and handwriting unidentifiable.

6. A Doppler Flow Mapping of heart Report dated June 25, 2013 concluded – limited examination but no

specific abnormality is identified.

7. A Pulmonary Function Report dated May 22, 2013 with an interpretation noted as Moderate Obstructive Pulmonary Impairment.
8. A Pulmonary Function Report dated April 24, 2013 with an interpretation noted as Moderate Obstructive Pulmonary Impairment.
9. A 3-page Pulmonary Function Report dated March 20, 2013 with an interpretation noted as Moderate Obstructive Pulmonary Impairment.
10. A Plain Chest X-Ray dated March 20, 2013 reported – lung fields are well inflated and clear, no focal consolidation or pleural reaction is present.
11. A series of notes regarding 6 Medical Clinic Visits from March 6 – August 1, 2013.
12. An XR Chest PA/Lat Final Report dated January 6, 2013 which impression notes that resolving pneumonia in the right lower lung- ongoing changes of chronic pulmonary disease should also be considered clinically.
13. A series of Laboratory Tests undertaken by the appellant from January 2 – March 26, 2013.
14. An Ultrasound scan of soft tissue mass dated January 13, 2013 reported – increased vascularity, small surrounding satellite lymph nodes are present.

At the hearing, the appellant testified that she took the advocate prepared form to her physician to have it completed and in her opinion her medical condition has become worse since the PR. In response to a question by the ministry, the appellant stated that the PR was completed with her oxygen machine. The appellant indicated that she had used a walker when she was in the hospital for 31 days, however; declined it after discharge because it is a hindrance as she cannot use it where she lives due to stairs, no sidewalks and the winter season. The oxygen machine is on wheels and weighs about 20 lbs. The appellant states that she does not live alone and receives help for most things from the friend she lives with. The appellant states that she hopes to get her own place where she would need help with basic housekeeping and that her son is trying to find her a car. The appellant indicates that she can prepare a salad but not cook an entire meal and she can vacuum for about 10 minute at a time, however; rarely does, as it raises dust which affects her breathing. On good days she can shop using a cart and can do her own banking but needs to sit when line-ups are long. The appellant also testified that while she can carry her oxygen, she sometimes needs help to carry her purchases from the car into her home.

#### **Admissibility of New Information**

The new information the appellant provided prior to the hearing regarding her impairment and the nature and frequency of the assistance she receives with DLA and her oral testimony provided additional detail with respect to issues addressed in the original PWD application forms. Accordingly, the panel has admitted this new information as being in support of information and records that were before the ministry at the time of reconsideration, in accordance with Section 22(4) of the Employment and Assistance Act.

The ministry relied on its reconsideration decision and submitted no new information.

## PART F – Reasons for Panel Decision

The issue under appeal is whether the ministry's decision to deny the appellant designation as a PWD was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. In particular, was the ministry reasonable in determining that the appellant does not have a severe physical or mental impairment, and that in the opinion of a prescribed professional the appellant's impairments do not directly and significantly restrict her from performing DLA either continuously or periodically for extended periods, and that as a result of those restrictions the appellant does not require help to perform DLA?

The relevant legislation is as follows:

### **EAPWDA:**

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.

### **EAPWDR section 2(1):**

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.

### **Severe Physical Impairment**

The appellant's position is that her lung function is very low and she requires oxygen for walking any distance or for any type of exertion and concentration. She indicated that she is waiting to hear from a specialist in order to have more tests for sleep apnea. She also finds that the stairs at her temporary residence are taxing with her low lung function.

The ministry's position, as set out in its reconsideration decision, notes that that the appellant is able to perform basic functional activities independently with the assistance of oxygen and concludes that the evidence does not establish that the appellant has a severe physical impairment.

### **Panel Decision**

The determination of severity of impairment is at the discretion of the ministry – the ministry must be "satisfied" that the statutory criteria for granting PWD designation are fulfilled. In making its determination the ministry must act reasonably and consider all the relevant evidence, including that of the appellant. While the legislation is clear that the fundamental basis for the analysis is the evidence from prescribed professionals, the professional evidence has to be weighed and assessed like any other evidence.

The evidence of the medical practitioner is that the appellant's main disabilities that impact her ability to manage DLA are asthma and COPD. In terms of functional skills, the physician reported that the appellant can walk 1 to 2 blocks unaided on a flat surface, can climb 5+ steps unaided, can lift 5 to 15 pounds, and can remain seated without limitation. The physician noted that the appellant is independent with respect to standing, requires periodic assistance from another person for lifting and carrying/holding and uses an assistive device being continuous oxygen support for walking indoors, walking outdoors and climbing stairs. In the panel's view, the appellant's functional skills, as described by the physician are more in keeping with a moderate impairment rather than a severe impairment. This is consistent with the Pulmonary Function Reports that indicate that the appellant has Moderate Obstructive Pulmonary Impairment and with the information provided by the appellant in her SR where she indicated that her lung function is very low and she requires oxygen for walking any distance, or for any type of exertion. While noting that although climbing stairs at her temporary residence is taxing, the appellant wrote that swimming can strengthen her lungs and help her lose weight. Also, the appellant has testified that she hopes to find her own place and to drive. The panel therefore concludes that the ministry was reasonable in finding that the appellant does not have a severe physical impairment.

### **Severe Mental Impairment**

The appellant stated that she battles mild depression and suffers from anxiety with breathing issues.

The ministry's position, as set out in its reconsideration decision, notes that the physician did not diagnose a mental disorder, identify any significant deficits with cognitive and emotional function or describe any impacts to cognitive and emotional functioning and concludes that the evidence does not establish that the appellant has a severe mental impairment.

### **Panel Decision**

The physician has not reported that the appellant suffers from a mental impairment; that she has any

significant deficits with cognitive and emotional function or that she has difficulties with communication. The physician has confirmed in the AR, which provides an opportunity to provide more detail with respect to cognitive and emotional functioning, that it is n/a. In the advocate prepared form, the same physician has checked off a couple of boxes which referred to anxiety, etc., but there was no diagnoses or treatment indicated.

Section 2(1)(b) of the EAPWDR prescribes two DLA that are specific to mental impairment – make decisions about personal activities, care or finances (decision making), and relate to, communicate or interact with others effectively (social functioning).

The evidence indicates that the appellant independently manages all aspects of Personal Care, Basic Housekeeping, Shopping, (except going to and from stores and carrying purchases home where it is indicated that she requires periodic support from another person for transportation and to help carry her oxygen tank), Meals, Pay Rent and Bills, Medication and Transportation under which public transportation is indicated as not available. Under Social Functioning, the appellant was described as independent in all aspects and as having marginal functioning with both her immediate social network extended social networks. Considering the evidence as a whole, the panel finds that the ministry reasonably determined that it does not demonstrate a severe mental impairment.

#### **Significant Restrictions to DLA**

The appellant's position is that she requires continuous assistance with basic mobility, walking outdoors, laundry/housekeeping, going to and from stores, paying for purchases, meal planning, banking and filling/refilling prescriptions.

The ministry's position, as set out in the reconsideration decision, is that the appellant does not have a severe impairment that, in the opinion of a prescribed professional, directly and significantly restricts the appellant's ability to perform the prescribed daily living activities continuously or periodically for extended periods.

#### **Panel Decision**

The evidence provided by the physician is consistent in both the PR and the AR that the appellant is independent with the majority of DLA while being restricted by requiring continuous oxygen support and requiring transportation. In the AR, the physician commented that the appellant's impairments that impact her ability to manage DLA are asthma and COPD. While, the physician further reports in the advocate prepared form that assistance is required, continuously from friends, family and/or roommate with basic mobility, walking outdoors laundry/housekeeping, going to and from stores, paying for purchases, meal planning, banking and filling/refilling prescriptions; there was no explanation provided with those notations or for the inconsistency with the AR. Also noted by the physician was that the appellant lacks motivation and desire with laundry and housekeeping.

The legislation – Section 2(2)(b)(i) of the EAPWDA – requires the minister to substantially assess direct and significant restrictions of DLA in consideration of the opinion of a prescribed professional, in this case the appellant's physician. This doesn't mean that other evidence – such as that from the appellant - shouldn't be factored in as required to provide clarification of the professional evidence, but the legislative language makes it clear that the prescribed professional's opinion is fundamental to the ministry's determination as to whether it is "satisfied". In the appellant's case, the prescribed professional has supplied little in the way of narrative to provide detail to the degree of restriction to DLA.

The legislation requires that a severe impairment directly and significantly restricts the appellant's ability to



perform DLA either continuously or periodically for extended periods. The term "directly" means that there must be a causal link between the severe impairment and the restriction. There is also a component related to time or duration. The direct and significant restriction may be either continuous or periodic. If it is periodic it must be for an extended time. Inherently, any analysis of periodicity must also include consideration of the frequency. In circumstances where the evidence indicates that a restriction arises periodically, it is entirely appropriate for the ministry to require evidence of the duration and frequency of the restriction in order to be "satisfied" that this legislative criterion is met.

The panel notes that in the AR, the physician reports that the appellant independently manages the majority of her DLA, with the exception that she requires periodic assistance with basic housekeeping; and under shopping, the physician also indicated the appellant needs periodic assistance with 2 of the 5 aspects specifically; going to and from stores and carrying purchases home, although, no description of help required is provided.

The onus is on the appellant to prove on the balance of probabilities that she satisfies the legislative criteria with respect to direct and severe restrictions to her ability to manage her DLA independently. In the panel's view, while the evidence indicates that the appellant has some difficulty with her DLA, specifically she needs continuous oxygen support, it does not establish impairments that directly and significantly restrict her ability to manage her DLA either continuously or periodically for extended periods. Accordingly, the panel finds that the ministry reasonably found that this legislative criterion is not satisfied.

#### **Help with DLA**

The appellant's position is that she requires the physical help of friends to drive her to appointments, to grocery shop - which gets her out and walking, and to help carry her oxygen when she is sick.

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

#### **Panel Decision**

Findings that a severe impairment directly and significantly restricts a person's ability to manage her DLA either continuously or periodically for an extended period are a precondition to a person requiring "help" as defined by section 2(3)(b) of the EAPWDA.

In both the PR and the AR, the physician indicated that the appellant requires no aids or prostheses for her impairment other than a breathing device, and that she does not have an assistance animal. In the advocate prepared form, the physician adds that a chair for support in the bathroom is periodically required. The physician also indicated that the appellant is provided with help from friends and community services agencies. Therefore, in view of the above evidence and as direct and significant restrictions with DLA were not established, the panel finds that the ministry reasonably concluded it could not be determined that the appellant requires help with DLA as defined by the legislation.

#### **Conclusion**

The panel acknowledges that the appellant's medical conditions affect her ability to function. However, having reviewed and considered all of the evidence and the relevant legislation, the panel finds that the ministry's decision finding the appellant ineligible for PWD designation is reasonably supported by the evidence and confirms the reconsideration decision.