

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 20 January 2014 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 his ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and,

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

The ministry determined that the appellant satisfied the other 2 criteria: he has reached 18 years of age and his 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 27 April 2013. The Application contained:
 - A Physician Report (PR) dated 21 August 2013, completed by the appellant's general practitioner (GP) who has known the appellant for 3 years and has seen him 11 or more times in the past year. Attached to the PR are a pulmonary function analysis dated 10 December 2011 and 2 medical imaging reports dated 19 March 2013 and 17 July 2013 (see below).
 - An Assessor Report (AR) of the same date completed by the GP.
 - A Self Report (SR) completed by the appellant.
2. The appellant's Request for Reconsideration, dated 16 December 2013.

In the PR, the GP diagnoses the appellant's impairment as severe COPD (chronic obstructive pulmonary disease), onset 2011.

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

Severity/health history

Physical impairment

PR:

Under health history, the GP writes: "shortness of breath on exertion, severe."

The GP indicates that the appellant has not been prescribed any medication and/or treatments that interfere with his ability to perform DLA. The GP also indicates that the appellant does not require any prostheses or aids for his impairment.

As to functional skills, the GP reports that the appellant can walk 1 to 2 blocks unaided, climb 5+ steps, with no limitations as to lifting or remaining seated.

AR:

The GP indicates that the appellant's impairment that impacts his ability to manage DLA is his shortness of breath on exertion.

Pulmonary function analysis:

O2 saturation of 94% on room air.

Diagnostic imaging report, 19 April 2013:

The lungs are quite overinflated with an attenuation; there is crowding of busy lower markings but there is no evidence of consolidation or plural effusions; no mass or adenopathy is identified. Impression: COPD. No acute findings or evidence of heart failure.

Diagnostic imaging report, 17 July 2013:

Impression: No evidence of diverticulitis. Sigmoid diverticulosis.

Mental impairment

PR:

The GP indicates that the appellant has no difficulties with communication

The GP assesses the appellant with no significant deficits with cognitive and emotional function.

AR:

The GP assesses as satisfactory the appellant's ability in speaking, reading, writing and hearing. No impacts on daily functioning are reported for any mental impairment.

Ability to perform DLA

PR:

The GP indicates that the appellant's impairments directly restrict the appellant's ability to perform DLA, referring to the AR.

AR:

The GP reports that the appellant lives with his father, but he is a caregiver for the father

Regarding mobility and physical ability, the GP provides the following assessments (her comments in parenthesis):

- Walking indoors, walking outdoors and climbing stairs – continuous assistance from another person or unable (+++shortness of breath).
- Standing – independent.
- Lifting and carrying and holding – periodic assistance from another person.

The GP comments: "severe COPD."

The GP assesses the assistance required for managing DLA as follows (the GP's comments in parentheses), noting that all DLA take 3x longer:

- Personal care – independent in all aspects.
- Basic housekeeping – periodic assistance from another person required for laundry and basic housekeeping (shortness of breath limits function).
- Shopping – continuous assistance from another person or unable for going to and from stores (shortness of breath); independent for reading prices and labels, making appropriate choices, and paying for purchases; periodic assistance from another person required for carrying purchases home.
- Meals – independent for meal planning, food preparation and safe storage of food; continuous assistance from another person or unable for cooking (shortness of breath on exertion).
- Pay rent and bills – independent in all aspects.
- Medications – independent in all aspects.
- Transportation – independent in all aspects

With respect to social functioning the GP assesses the appellant as independent for making appropriate social decisions, developing and maintaining relationships, interacting appropriately with

others, ability to deal appropriately with unexpected demands and ability to secure assistance from others.

The GP reports that the appellant has good functioning with his immediate and extended social networks.

Help provided/required

PR:

The GP indicates that the appellant does not require any prostheses or aids for his impairment.

AR:

The GP does not indicate that the appellant routinely uses any assistive device; nor does he have an assistance animal.

The GP states that the appellant will eventually need oxygen therapy.

Self report

In his SR, the appellant describes his disability as COPD. He writes that it affects him in the following ways:

- His shortness of breath comes on so strong doing simple tasks such as taking out the garbage and he has to stop to catch his breath. Just vacuuming some days seems to be a struggle.
- Walking up a flight of stairs, he needs to stop for a minute to catch his breath. Nowadays, to do a simple task he needs the help of friends.
- His breathing is difficult and near impossible without his inhalers. Sometimes he is very scared that he will not be able to catch his breath back.

He also has diverticulitis – this intestinal disease affects him in the following ways:

- Most days in the morning it takes him about an hour to two hours just to get the pain under control so he can start his day.
- When he has a bowel movement it usually leaves him in a lot of pain, so he needs to lie down for 15 to 20 minutes.
- The pain can come on at any time without warning, causing him to sweat profusely and be doubled over with waves of pain.
- It is very unpredictable when or how intense the attack will be.
- It always seems that he is in discomfort or excruciating pain.

In the Request for Reconsideration the appellant writes:

“After rereading my explanation of how my COPD (emphysema) affects me, I realize I didn't go into enough detail. My ability to do any strenuous thing is gone. Just showering I have to stop to catch my breath. Walking to the front door of the house is hard to do. After 30 to 40 feet I have to stop to catch my breath. Sometimes this can take up to 2 to 3 min. In the cold weather or hot temp it is even worse. I cannot mow the lawn for example. I have to ask friends to help me out with simple tasks such as housecleaning and taking in the garbage.”

In his Notice of Appeal, dated 28 January 2014, the appellant writes:

“My ability to walk distances & lift things is very limited. My doctor wants to go over what

[Redacted]

she wrote as well and send me to a specialist so u people can be better informed as to my limitations."

At the hearing, the appellant pointed to an error in the AR: he is not his father's caregiver; rather, under circumstances that the panel considers not relevant to this appeal, they simply live under the same roof.

The appellant expressed his frustration that throughout this process the hearing was the first time he had had the opportunity to actually talk to a human being concerning his disability. He stated that he was not able to do the work he used to do and that his doctor had provided the form to the ministry two years ago confirming that he was unemployable. He described how he is constantly taking puffers and steroids for his shortness of breath, that he could walk only 30-40 feet before having to stop and take a breath. Anything that a healthy person could do in 5 minutes would take him 15 to 20 minutes. He can drive to the store and can walk to the store entrance as long as he parks close by, but he has to lean on a shopping cart and take frequent rests. He can cook his own meals, but these tend to be simple ones and he will have to sit down while peeling vegetables, etc.

The appellant submitted the following documents:

- A note from his GP dated 12 February 2014 which reads:
[The appellant] has friends help him with groceries, frequently stops to catch his breath on all tasks. He uses multiple inhalers on daily basis. His Dad is simply his roommate."
- A "To whom it may concern" letter dated 16 February 2014 from a friend who has known the appellant for around 10 years. She writes that she has watched his health declined due to his emphysema, more so in the past two years. She writes:
"I have taken it upon myself to help [the appellant] with keeping his home and yard in relative upkeep, repair and cleanliness. I decided I would help my friend after noticing that he struggles to catch his breath just from carrying his groceries... I will come over after work to make sure he's okay and I usually do the dishes for him and do a quick clean up around the house. I take the garbage out for him as walking and carrying things is difficult for him, as well as laundry because the washer and dryer is downstairs... [The appellant] has trouble with stairs. I am scared for my friend and I see him having a hard time breathing just from putting his shoes on...."
- A "To whom it may concern" letter dated 17 February 2014 from another friend, who has known the appellant for 12 years. She describes how his health has gradually changed, and goes on to write:
".... I take it upon myself to assist [the appellant] with as much of his day-to-day living as I can. I do the more intense cleaning around the house, about every two weeks. There is no way [the appellant] could scrub out a bathtub let alone inhale the cleaning products! I also help him run errands like picking up groceries or prescriptions. [The appellant] tires easily because of his breathing and has to use a cart to stabilize himself if we are on a particularly long (longer than 10-15 mins.) shopping trip..."

The ministry presented a written submission which summarized the reconsideration decision. The ministry did not object to the admissibility of the documents submitted by the appellant. The panel finds that the information provided by the appellant in his Notice of Appeal, in his oral testimony and in the documents submitted at the hearing is in support of the evidence before the ministry when it made the decision under appeal, clarifying his references to help provided in his self report and

Request for Reconsideration. The panel therefore admits the information provided the appellant under section 22(4) 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 he 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 his ability to perform daily living activities either continuously or periodically for extended periods; and,
- (ii) as a result of those restrictions he requires help to perform those activities.

The ministry determined that he 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, injury 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.

The panel also notes that the legislation requires that for PWD designation, the minister must be "satisfied" that the person has a severe mental or physical impairment. For the minister to be "satisfied" that the person's impairment is severe, the panel considers it reasonable for the ministry to expect that the information provided presents a clear and complete picture of the nature and extent of the impacts of the person's medical conditions on daily functioning.

Physical impairment

In the reconsideration decision, the ministry reviews the GP's assessment that the appellant requires continuous assistance with walking indoors and outdoors and climbing stairs due to shortness of breath and periodic assistance with lifting and carrying and holding, noting that no information is provided on how often he requires assistance. The ministry finds it difficult to develop a clear and coherent picture regarding the appellant's physical and mobility abilities as the GP indicated that the appellant is able to walk 1-2 blocks unaided, climb 5+ steps unaided and has no limitations in lifting. Based on the information provided the ministry found that there is not enough evidence to establish a severe physical impairment.

The position of the appellant is that his COPD and resulting shortness of breath limits his every activity: after just walking 30 -- 40 feet he must stop to catch his breath, taking 2 -- 4 minutes to do so. And while would take a normal person 5 minutes takes him 15-20 minutes. This is sufficient evidence to establish a severe physical impairment.

Panel findings

The evidence is that his GP has diagnosed the appellant with COPD, resulting in severe shortness of breath on exertion. The panel notes that the diagnosis of a chronic condition is in itself not determinative of a severe impairment. The issue is the degree to which the appellant's medical condition restricts his daily functioning, and specifically his ability to perform DLA.

Before proceeding further, the panel notes that in the SR the appellant described at some length the difficulties he has experienced with his flare-ups of diverticulitis. One of the medical imaging reports found "No evidence of diverticulitis. Sigmoid diverticulosis." Further, as the GP did not diagnose diverticulosis/diverticulitis as an impairment that would continue for at least 2 years, the panel finds that the ministry was reasonable in not considering this condition in its determination of the severity of the appellant's physical impairment.

The ministry's reconsideration decision reviewed above noted the inconsistencies between the assessments related to mobility in the PR and the AR: in the PR the GP reports that the appellant is able to walk 1 to 2 blocks unaided and climb 5+ steps unaided, while in the AR he is assessed as requiring continuous assistance from another person or unable for walking indoors, walking outdoors and climbing stairs, with the comment "+++ shortness of breath." The appellant explained that he can only walk 30-40 feet before he has to stop to catch his breath. The panel notes that despite these limitations in the AR the GP assesses the appellant independent for the majority of aspects of other DLA requiring physical effort, including personal care and transportation. (See also below regarding DLA). Based on the evidence provided by the appellant at the hearing, he benefits from assistance provided from his friends for daily washing dishes, a major cleanup of his home every two weeks and help with occasional errands such as taking the garbage out or while shopping. Based on all this evidence however, the panel finds that the ministry was reasonable in determining that a severe physical impairment had not been established.

Mental impairment.

The position of the ministry is that as the GP has not indicated any impacts with cognitive and emotional functions and no difficulties with communication, a severe mental impairment has not been established. At the hearing the appellant indicated that he his impairment was entirely physical, not mental. As the GP has not diagnosed a mental health condition and for the reasons given by the ministry, the panel finds the ministry was reasonable in determining that a severe mental impairment had not been established.

Significant restrictions in the ability to perform DLA.

The position of the ministry is that, while acknowledging that the appellant has a serious medical condition, considering all of the information provided by the GP, the ministry does not have enough evidence to confirm that the appellant's impairments directly and significantly restrict his ability to perform DLA either continuously or periodically for extended periods. The ministry came to this conclusion after reviewing the AR, where the GP indicates that the appellant needs continuous

assistance with going to/from stores and cooking due to shortness of breath, and that he requires periodic assistance with laundry, basic housekeeping and carrying purchases home. The ministry notes, however, that no information is provided on how often he requires this assistance. The remainder of his DLA are independent and there was no indication that they take significantly longer to perform. In addition the GP indicates that the appellant is independent in all aspects of his social functioning.

The appellant's position is that his COPD and resulting shortness of breath significantly restrict his ability to manage his DLA on an ongoing basis, to the point where he needs the help of friends to do his dishes, clean his house, run errands and assist him with grocery shopping. He submits that the evidence clearly shows that this criterion has been met.

Panel findings

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, a criterion which has not been established in this appeal. This DLA criterion must also be considered in terms of the preceding legislative language of section 2 of the *EAPWDA*, 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 from the prescribed professional that would satisfy the minister that there are direct and significant restrictions in the ability to perform DLA, either continuously or periodically for extended periods, by presenting a clear and complete picture of the nature and extent of these restrictions.

The appellant's prescribed professional -- his GP -- has assessed the appellant as requiring continuous assistance from another person or unable for moving about indoors and outdoors, while reporting that he can walk 1-2 blocks unaided. He is also assessed as requiring continuous assistance for cooking, but at the hearing the appellant stated that he is able to do his own cooking. The GP also assessed the appellant as requiring continuous assistance from another person for going to/from stores, while at the hearing the appellant stated that he can drive his vehicle to stores, but sometimes needs help from a friend in the store, while leaning on a shopping cart while shopping. In the letters submitted on appeal, the GP states that the appellant has friends help him with groceries, and that he frequently stops to catch his breath on all tasks, albeit slowly. The letters from his friends indicate that he benefits from their help for daily washing dishes, a major cleanup of his home every two weeks and with occasional errands such as taking the garbage out or while shopping. Considering the inconsistencies in the evidence, the modest level of help provided by his friends and the absence of any detailed narrative from the GP as to how, how often, in what way and under what circumstances the appellant's shortness of breath restricts his ability to perform DLA, the panel finds that the ministry, while acknowledging that the appellant has a serious medical condition, reasonably determined that there was not have enough evidence to confirm that his DLA are directly and significantly restricted either continuously or periodically for extended periods.

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 that the letters from his friends demonstrate that he requires their help around his home and for errands outside the home.

Panel findings

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 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 PVD designation was reasonably supported by the evidence. The panel therefore confirms the ministry's decision.