



## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated February 18, 2014 which found that the appellant did not meet two of the five statutory requirements of Section 2 of the *Employment and Assistance for Persons with Disabilities Act* for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement and that he has a severe physical impairment that, in the opinion of a medical practitioner, is likely to continue for at least two years. However, the ministry was not satisfied that the evidence establishes 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; and,
- as a result of these restrictions, the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

## PART D – Relevant Legislation

*Employment and Assistance for Persons with Disabilities Act* (EAPWDA), Section 2  
*Employment and Assistance for Persons with Disabilities Regulation* (EAPWDR), Section 2

## PART E – Summary of Facts

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

- 1) Person With Disabilities (PWD) Application comprised of the applicant information and self-report dated May 27, 2013, a physician report (PR) and an assessor report (AR) both dated September 30, 2013 and completed by the appellant's family physician who has known the appellant for approximately 3 years;
- 2) Letters from a physician who is a specialist in respirology and internal medicine dated February 27, May 1, June 26, and July 30, 2013;
- 3) Letter dated February 2, 2014 from the appellant's physician 'To Whom It May Concern'; and,
- 4) Request for Reconsideration dated February 3, 2013 and attached letter from the appellant dated January 27, 2014.

### ***Diagnoses***

In the PR, the appellant was diagnosed by his general practitioner with asthma, with onset approximately 2011, and query colitis with onset around 1985. There was no diagnosis included in the PR of a mental health condition.

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

In the PR, the general practitioner indicated that the appellant has not been prescribed medication and/or treatment that would interfere with his daily living activities.

In the AR, the general practitioner reported that:

- The appellant is independent with walking indoors and walking outdoors.
- The appellant is assessed as independent in all tasks of all listed DLA, including personal care, basic housekeeping, shopping, meals, paying rent and bills, and managing his medications and transportation.
- The section of the report relating to an applicant with an identified mental impairment, including brain injury, is "N/A" or not applicable to the appellant and he is independent in all aspects of social functioning.

In his self-report, the appellant wrote that:

- The problem with his lungs causes him to cough a lot, that he is tired a lot and needs two naps per day. He is short of breath and feels dizzy.
- Colitis causes constant diarrhea, he has had bowel problems for 30 years and he needs a washroom nearby at all times.
- Having 10 to 15 bowel movements per day causes a lot of problems in keeping a job.
- Having worked in the food industry, a chronic cough is a large set back in maintaining this type of employment.

The physician who is a specialist in respirology and internal medicine reported in his letters that:

- The appellant is able to walk reasonably long distances, about a mile, on flat ground but becomes short of breath with any hill.

In the letter dated February 2, 2014 from the appellant's physician, he reported that:

- He writes to help clarify information in his original letter as well as to update on the appellant's current health issues not included in the original PWD application.
- Since the original letter was sent, the appellant's obstructive lung disease and colitis have

progressed. He now has difficulty walking one block, secondary to his breathing issues as well as having significant issues negotiating a flight of stairs.

- The appellant is having issues with coughing spells that drain his energy and frequently result in fecal incontinence.
- The appellant has reduced strength and stamina secondary to his obstructive lung disease and has extreme difficulty with cleaning and bathing himself and performing basic housework.
- The impairments listed directly and significantly restrict the appellant's ability to perform DLA.

In his Request for Reconsideration, the appellant wrote that:

- Since being diagnosed on May 1, 2013 by the specialist in respirology with COPD and asthma with only 42% lung capacity, his condition continues to deteriorate. It is sometimes like breathing through a straw.
- He finds he is coughing all the time and waking up very tired. Sometimes a coughing fit is so extreme that he soils himself. The camper on his truck is a necessity with a bathroom and a bed to rest on after a coughing attack.
- His condition limits his ability to clean his surroundings and to bath on a daily basis.

#### ***Need for Help***

In the AR, in terms of the help required for DLA, the physician marked "N/A", or not applicable to the appellant. In the section of the report indicating assistance provided through the use of assistive devices, none of the items are identified and the physician again reported that this is not applicable.

In his Request for Reconsideration, the appellant wrote that he has been using a cane more and more. In his letter dated February 2, 2014, the appellant's physician reported that the appellant now required the use of a cane to help aid with walking.

In his Notice of Appeal dated February 21, 2014, the appellant expressed his disagreement with the ministry's reconsideration decision and wrote that:

- The decision could not have been based on the physician's letter supporting the facts of this debilitating disease.
- The ministry is satisfied that the information establishes a severe physical impairment, yet not for DLA, contrary to the physician's letter.
- The physician states that the impairments are both permanent and severe and will continue for more than 2 years.
- The physician states that the appellant has extreme difficulty with cleaning and bathing himself and performing basic housework, and that he requires a cane to help with walking.
- It seems clear to the physician that the appellant's impairments significantly restrict his ability to perform DLA.
- He now needs to clear his lungs of phlegm about every 8 hours, or 3 times per day, and it takes long coughing "fits" to be able to breathe. He often soils himself and needs help cleaning himself up.

At the hearing, the appellant stated that:

- He met with his physician last week and the physician said he does not understand the ministry's decision given his letter dated February 2, 2014, which was quite explicit. His physician said there was no point in sending another letter.
- He has been "nearly homeless" for about 2 years since he lives in a 10' camper which is

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20 years old, on a 30-year-old truck. He has been squatting on a property and finds that he is getting "sicker and sicker" over the years.

- With his colitis, he always needs to have a bathroom nearby since he has little control over his bowels. He does not get much warning that he has to go.
- With his COPD, he has been told that his lung capacity is down to around 40%, which limits his ability to even ride a bicycle.
- Over the winter he found that his coughing was "out of control." He needs to clear his lungs of mucous and his nose is always running.
- The other day, he was at the grocery store and he had to leave his cart and run out to the camper to use the toilet, but he did not make it in time. He soiled himself and had to clean himself up and rest before going back into the store to complete his shopping.
- He uses a cane for stairs or if he has a coughing fit and starts to "see black spots" and needs to maintain his balance.
- He is wheezing all the time and no one wants to hire someone who is sick all the time.
- He now wears an adult diaper so if he soils himself it is contained.
- He used to support himself in the food industry and was self-employed for a while but he cannot stand long enough to work in this area plus people worry that he is contagious with all the coughing he does.
- He gave his physician a copy of the ministry's reconsideration decision and his physician said he read it. The ministry will not give the physician another pamphlet to fill out since they already paid for the physician to complete the first application. He is a young doctor so he may not have understood how to complete the checklists in the application.
- Regarding the physician's comment that he has extreme difficulty with cleaning and bathing himself and performing basic housework, the appellant provided clarification. He stated that his camper has a small shower and a person needs to be a contortionist to properly shower, standing on one leg. He tries to get to a community pool to shower whenever he has the funds. Making the bed in the top of his camper has always been difficult for him, even before he got sick, and he does not like housework much.
- He can use an inhaler and it will help after he has cleared his lungs, which takes 20 minutes to an hour about every 8 hours.
- He uses his camper and truck for both transportation and accommodation. He has not been able to take public transit for a long time due to his colitis.
- His living quarters are very cramped and it is hard to say how he would be able to perform his personal care and housework and other DLA in larger accommodations.
- He agrees that he has no physical restriction to bathing. He does not have a problem doing his laundry.
- He can do his banking, shopping, and picking up medications but always needs to have a washroom nearby.
- He is "financially strapped" but he is very good with stretching a dollar and goes to the food bank once per month and gets marked down goods from the grocery store.

The ministry did not raise an objection to the admissibility of the appellant's oral testimony or the information in his Notice of Appeal. The panel admitted the appellant's evidence as further detail of the impact from his previously diagnosed medical conditions and, therefore, being in support of the information and records before the ministry on reconsideration, pursuant to section 22(4)(b) of the *Employment and Assistance Act*.



The ministry relied on its reconsideration decision. At the hearing, the ministry pointed out that employability is not one of the eligibility criteria for designation as a PWD, while it is relevant to status as a Person with Persistent Multiple Barriers to employment (PPMB), an option that may be open to the appellant.

## PART F – Reasons for Panel Decision

The issue on the appeal is whether the ministry's decision, which found that the appellant is not eligible for designation as a person with disabilities (PWD) as he does not meet all the criteria in Section 2 of the EAPWDA, was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. The ministry found that the appellant has a severe physical impairment but that his daily living activities (DLA) are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods and that, as a result of those restrictions, it could not be determined that the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

The criteria for being designated as a person with disabilities (PWD) are set out in Section 2 of the EAPWDA as follows:

### **Persons with disabilities**

2 (1) In this section:

"**assistive device**" means a device designed to enable a person to perform a daily living activity that, because of a severe mental or physical impairment, the person is unable to perform;

"**daily living activity**" has the prescribed meaning;

"**prescribed professional**" has the prescribed meaning.

(2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act if the minister is satisfied that the person has a severe mental or physical impairment that

(a) in the opinion of a medical practitioner is likely to continue for at least 2 years, and

(b) in the opinion of a prescribed professional

(i) directly and significantly restricts the person's ability to perform daily living activities either

(A) continuously, or

(B) periodically for extended periods, and

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

(3) For the purposes of subsection (2),

(a) a person who has a severe mental impairment includes a person with a mental disorder, and

(b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires

(i) an assistive device,

(ii) the significant help or supervision of another person, or

(iii) the services of an assistance animal.

(4) The minister may rescind a designation under subsection (2).

Section 2(1)(a) of the EAPWDR defines DLA for a person who has a severe physical or mental impairment as follows:

### **Definitions for Act**

2 (1) For the purposes of the Act and this regulation, "**daily living activities**",

(a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following activities:

(i) prepare own meals;

- (ii) manage personal finances;
  - (iii) shop for personal needs;
  - (iv) use public or personal transportation facilities;
  - (v) perform housework to maintain the person's place of residence in acceptable sanitary condition;
  - (vi) move about indoors and outdoors;
  - (vii) perform personal hygiene and self care;
  - (viii) manage personal medication, and
- (b) in relation to a person who has a severe mental impairment, includes the following activities:
- (i) make decisions about personal activities, care or finances;
  - (ii) relate to, communicate or interact with others effectively.
- (2) For the purposes of the Act, "prescribed professional" means a person who is authorized under an enactment to practice the profession of
- (a) medical practitioner,
  - (b) registered psychologist,
  - (c) registered nurse or registered psychiatric nurse,
  - (d) occupational therapist,
  - (e) physical therapist,
  - (f) social worker,
  - (g) chiropractor, or
  - (h) nurse practitioner.

At reconsideration, the ministry was satisfied that the information provided is evidence of a severe physical impairment.

### **Restrictions in the ability to perform DLA**

The appellant's position is that his severe physical impairment directly and significantly restricts his ability to perform DLA and he requires the significant assistance of another person or the use of a cane as an assistive device to perform many DLA.

The ministry's position is that the evidence of the prescribed professionals does not establish that the appellant's impairment significantly restricts DLA either continuously or periodically for extended periods of time. The ministry argued that the physician indicated in the AR that the appellant is independent in all aspects of DLA and there was no indication that they take the appellant significantly longer to perform. The ministry argued that while the physician wrote in his letter that the appellant has reduced strength and stamina secondary to his obstructive lung disease which causes him extreme difficulty with cleaning, bathing and performing basic housework, there was no further assessment provided to indicate if the appellant needs continuous or periodic support in these aspects.

### ***Panel Decision***

Section 2(2)(b) of the EAPWDA requires that a prescribed professional provide an opinion that an applicant's severe impairment directly and significantly restricts his DLA, continuously or periodically for extended periods. In this case, the appellant's family physician is the prescribed professional.

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DLA are defined in section 2(1) of the EAPWDR and are also listed in the PR and, with additional details, in the AR. Therefore, a prescribed professional completing any of these forms has the opportunity to directly indicate which, if any, DLA are significantly restricted by the appellant's impairments, continuously or periodically for extended periods.

The evidence of the appellant's physician is set out in the PR and AR as well as the additional letter dated February 2, 2014, at which time the physician provided an update regarding the appellant's medical condition as well as clarification of the impacts from the appellant's impairment. The physician reported in the PR that the appellant has not been prescribed medication and/or treatment that interfere with his DLA. In the AR, the physician indicated that the appellant is independent with all tasks of each listed DLA, including preparing his own meals, managing his personal finances, shopping for personal needs, using public or personal transportation facilities, performing housework to maintain his place of residence in acceptable sanitary condition, moving about indoors and outdoors, performing personal hygiene and self care, and managing personal medication. In the letter dated February 2, 2014, the physician reported that the appellant's obstructive lung disease and colitis have progressed, and he now has difficulty walking one block, secondary to his breathing issues, and has required the use of a cane to help aid with walking. At the hearing, the appellant stated that he does not use his cane all the time, but mostly for stairs and to maintain his balance when he has a coughing fit. The physician indicated that the section of the AR relating to an applicant with an identified mental impairment is not applicable to the appellant and he is independent in all aspects of social functioning.

In the February 2, 2014 letter, the physician also wrote that the appellant is having issues with coughing spells that drain his energy and frequently result in fecal incontinence. The physician reported that the appellant has reduced strength and stamina secondary to his obstructive lung disease and has extreme difficulty with cleaning and bathing himself and performing basic housework. At the hearing, the appellant clarified that his difficulty with showering and with making the bed in his camper is mostly as a result of his cramped quarters and that, when he has the funds, he can shower successfully at the community pool. The appellant agreed that he has no physical restriction to bathing and does not have a problem doing his laundry. The appellant stated that he can also do his banking, shopping, and picking up medications but always needs to have a washroom nearby. The appellant described a recent experience at the grocery store where he needed to rush out to the washroom in his camper, did not make it in time, and had to clean himself and rest before continuing his shopping. The appellant also stated that he has not been able to use public transit for years because of his bowel condition. While the appellant provided evidence that his bowel condition and possible colitis cause him to take more time to accomplish his shopping DLA and also impacts his use of public transportation, the appellant's physician has not confirmed a restrictions to shopping or use of transportation, and section 2(2)(b) of the EAPWDA requires the opinion of the prescribed professional regarding restrictions to DLA.

The physician wrote in his February 2, 2014 letter that the appellant's impairments directly and significantly restrict his ability to perform DLA; however, there is little supporting detail of the extent of the restrictions in any DLA other than moving about indoors and outdoors. The panel concludes that the ministry reasonably determined that there is not sufficient supporting evidence to establish that the appellant's physical impairment directly and significantly restricts his DLA either continuously or periodically for extended periods, thereby not satisfying the legislative criterion of Section 2(2)(b)(i) of the EAPWDA.





**Help to perform DLA**

The appellant's position is that he requires the significant assistance of another person, or the use of a cane as an assistive device, to perform DLA.

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

***Panel Decision***

Section 2(2)(b)(ii) of the EAPWDA requires that, as a result of direct and significant restrictions in the ability to perform DLA, a person requires help to perform those activities. Help is defined in subsection (3) as the requirement for an assistive device or the significant help or supervision of another person or the services of an assistance animal in order to perform a DLA.

The physician indicated in the AR that help required for DLA is not applicable to the appellant. In his letter dated February 2, 2014, however, the physician confirmed that the appellant uses a cane to help with walking. At the hearing, the appellant stated that he uses his cane mostly for stairs and, when experiencing a coughing fit, for maintaining his balance. While the panel finds that the evidence of the prescribed professional establishes that the appellant requires some assistance with use of a cane for moving about indoors and outdoors, the panel also finds that the ministry reasonably determined that, as direct and significant restrictions in the appellant's ability to perform DLA have not been established, it cannot be determined that the appellant requires help to perform DLA as a result of those restrictions.

**Conclusion**

Having reviewed and considered all of the evidence and relevant legislation, the panel finds that the ministry's reconsideration decision which determined that the appellant was not eligible for PWD designation was reasonably supported by the evidence, and therefore confirms the decision.