

PART C – Decision under Appeal

The decision being appealed is the July 14, 2014 reconsideration decision of the Ministry of Social Development and Social Innovation (the “Ministry”) in which the Ministry determined that the Appellant was not eligible for Persons with Disabilities (“PWD”) designation because he did not meet all the requirements for PWD designation in section 2(2) of the *Employment and Assistance for Persons with Disabilities Act*. Based on the information provided, the Ministry was not satisfied 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 was satisfied that the Appellant has reached 18 years of age and in the opinion of a medical practitioner his impairment is likely to continue for at least 2 years.

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Act (“EAPWDA”) Section 2(2) and 2(3).

Employment and Assistance for Persons with Disabilities Regulation (“EAPWDR”) Section 2.

PART E – Summary of Facts

For its reconsideration decision, the Ministry had the following evidence:

1. Appellant's PWD application consisting of the following three parts:
 - The Appellant's self report ("SR") signed by him on October 17, 2013;
 - A physician's report ("PR") dated February 2, 2014 completed by a physician who indicated that she has been the Appellant's family doctor since August 2011 and she'd seen the Appellant 2-10 times in the 12 months preceding the report; and
 - An assessor's report ("AR") dated February 10, 2014, also completed by the Appellant's family physician.
2. With the PWD application, the Appellant's family physician attached several reports regarding his medical conditions, all of which were before the Ministry, summarized as follows:
 - Spirometry test reports dated December 16, 2013 and November 19, 2012, both of which indicate the Appellant's test results are "consistent with severe COPD."
 - Cardiopulmonary exercise test report of September 24, 2013.
 - Neurologist report of September 12, 2013 for management of Appellant's gait imbalance in which neurologist notes, "diagnosis is alcohol-induced midline cerebellar degeneration" and that the Appellant had been prescribed medication.
 - Three reports from a Respiriologist – the September 13, 2013 report notes that the Appellant will be attending a respiratory rehabilitation program in the next month (September-October 2013), has been using medication, and has been cutting down his smoking; December 12, 2012 report indicates Appellant has returned for follow up of "severe COPD and bullae"; and November 20, 2012 report indicates reassessed Appellant for "severe COPD and bullae" and had been last seen in 2009.
 - CT scan September 2, 2013 indicating "severe upper lobe bilateral bullous disease."
 - Report dated June 17, 2013 from a thoracic and esophageal surgeon confirming Appellant has "upper lobe predominant bullous disease" and recommended he quit smoking so he can get stronger before he is booked for surgery.
 - Pulmonary function analysis tests report dated May 24, 2013 noting "consistent with severe COPD (Gold grade 3) with a significant bronchodilator response."
 - Reports dated November 7, 2012 and October 28, 2011 of an orthopedic surgeon regarding the Appellant's herniated disc, but noting in November 2012 report that the right lower lumbar disc herniation symptoms had largely resolved by the time of the report and no further investigation or active management was thought warranted at the time.
 - Echocardiography report dated May 23, 2013;
 - Quantitative lung perfusion study report dated May 10, 2013.
3. Appellant's request for reconsideration dated June 17, 2014 with attached July 11, 2014 submission prepared by his advocate.
4. Two copies of a 2-page document "Information for Person with Disabilities for [the Appellant]" prepared by the Appellant's advocate setting out a series of statements about the Appellant's medical impairments, and the impact of his impairment on his daily living activities ("July Documents"). One copy of the 2-page document is signed by the Appellant's family physician

and dated July 9, 2014. One copy of the 2-page document is signed by the Appellant's respirologist and dated July 8, 2014. At the bottom of the second page of each July Document is the following statement: "It is my medical opinion that [the Appellant] has severe conditions that will last for more than 2 years. I have checked the applicable boxes where I confirm that he is directly and significantly restricted in his ability to perform his daily living activities and requires significant help to perform the activities, noted above. I have reviewed the above information and amended inconsistencies with medical opinion." Both July Documents are worded identically, and space is provided for the signing physician to indicate the medications prescribed to the Appellant; however, there are no designated spaces for additional comments and there are no boxes for the signing physician to check.

The following is a summary of the relevant evidence from the PWD application, as well as the information before the Ministry at reconsideration, and the Appellant's evidence at the hearing.

Diagnoses and Severity of Impairments

In the PR, the Appellant's physician diagnosed the Appellant with "severe COPD [with] bullae" and "degenerative disc disease with herniated discs", indicating that the Appellant had suffered from these conditions for several years, the period of impairment was indefinite, but that "cessation of smoking should be helpful." The medical reports attached to the PWD application confirm that the Appellant suffers from severe COPD (December 16, 2013 and November 19, 2012 spirometry test reports; December 12 and November 20, 2012 respirologist's reports; and May 24, 2013 pulmonary function analysis tests report), with bullae in his lungs (repirologist's reports, CT scan, and report of thoracic surgeon), a herniated disc (reports of orthopedic surgeon) and cerebellar degeneration (neurologist report).

In the July Documents, the following is listed under the heading "conditions, severity and time requirement": degenerative disc disease with herniated discs – 2011; severe COPD with bullae – 2000; and diverticulitis – 2014. At the hearing, the Appellant told the panel that he expects to have surgery in the near future to remove the top third of each of his lungs, but it is not yet scheduled.

In the functional skills section of the PR, the Appellant's physician indicated that the Appellant can walk unaided 4+ blocks, climb 2-5 stairs unaided, lift 2-7 kg (5-15 lbs), and had no limitation remaining seated. In the mobility and physical ability section of the AR, the Appellant's physician indicated that the Appellant could independently perform 4 of the 6 listed activities (walking indoors, walking outdoors, climbing stairs, and standing), that he required continuous assistance from other people with lifting, and that he required periodic assistance from another person with carrying and holding. The Appellant's physician did not provide any commentary regarding her answers in the AR. In the AR, the Appellant's physician reported his impairment as "shortness of breath on exertion."

Under the heading "restrictions," the July Documents state that the Appellant is "unable to walk more than one block due to the severe breathing problems and aching pain in his back" and that climbing "more than 1-2 stairs produces the same pain." The July Documents state that the Appellant "has difficulty bending down to retrieve items from the floor or from bottom cupboards and utilizes counters and furniture to pull himself back up" and that he has "difficulty reaching above his head to retrieve items or tend to his own personal hygiene."

In the PR, the physician indicated that the Appellant had no deficits with cognitive and emotional function as a result of his impairments. In the AR, the Appellant's physician wrote "N/A" beside the underlined words "identified mental impairment or brain injury" and checked "no impact" beside the first 3 listed items (bodily function, consciousness and emotion) and left the rest of the list blank. The Appellant's physician also left the section of the AR on social functioning blank.

The July Documents contain the following statement: "... [the Appellant] has become withdrawn, isolated and finds he is isolating himself frequently as a means of coping with his pain ... his short-term memory and recall have become increasingly poor [he] experiences confusion and has difficulty organizing his [thoughts] ... avoids crowds ... [he] also finds it difficult to ask others for help, even though he would benefit from the assistance of others."

Daily Living Activities

In the AR, the Appellant's physician reported that the Appellant could independently perform all but one of the tasks of all of the listed DLA. For the task of carrying purchases home under the DLA of shopping, the Appellant's physician checked that the Appellant required periodic assistance from another person, but she did not provide any commentary or explanation for this answer in the AR. Earlier in the AR, the Appellant's physician had commented "difficulty with vacuuming" in describing the Appellant's impairments.

The July Documents state the following about the impact of the Appellant's impairments on his DLA:

- Personal Care – "requires much more time than a normal person same age would require ... gets very tired after taking shower or getting dressed. ... everyday activities will take significant amount of time (3-5 longer) for [the Appellant]"
- Meal Preparation – "unable to stand in one place for more than a few minutes and as a result he no longer stands in front of the stove or counter to prepare and cook meals. ..."
- Basic Housework – "...is unable to vacuum or clean his bathtub due to the pain in his back and severe breathing problems."
- Daily Shopping, Banking, Paying Bills, Appointments and Errands – "unable to carry any weight above ... 5-10 lbs" and "[The Appellant] ... states that his memory is very poor, and he finds that he is forgetting tasks and errands more frequently."
- Mobility Inside/Outside of the Home and Transportation – "Public transit causes severe pain in his back due to the rough bouncing of the bus or skytrain. Walking and stairs are also a barrier to taking transit. He [can] drive a short distance on his good days."

The July Documents also state that the Appellant] "continues to strive for independence to the best of his ability. His conditions and symptoms vary from day to day and as a result his need for assistance varies from day to day, however, overall can be considered a significant need for assistance with his daily living activities."

At the hearing, the Appellant said that he is fine when he is sitting down and not doing anything, but whenever he tries to do anything that requires any effort, it takes him a lot longer than it would a normal person because of his COPD. He said that he can't lift anything heavier than a few pounds and can't walk any distance or climb any stairs because he is so short of breath.

Help with Daily Living Activities

The Appellant's physician noted in the AR that the Appellant "needs help of friends to carry grocery bags, [and] vacuuming [his] home" but noted he did not need assistive devices or an assistance animal.

The July Documents contain statements that the Appellant requires the assistance of others to help cook and prepare proper meals and to carry groceries from the store to his residence, and that his girlfriend assists with basic housework. As noted above, the July Documents contain a statement that the Appellant's need for assistance varies from day to day, but that he has a significant need for assistance with his DLA.

PART F – Reasons for Panel Decision

The issue in this appeal is whether the Ministry reasonably determined that the Appellant was not eligible for PWD designation because he did not meet all of the requirements in section 2(2) of the EAPWDA, and specifically, that the Appellant does not have 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 eligibility criteria for PWD designation are set out in the following sections of the EAPWDA:

2 (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 “daily living activities” referred to in EAPWDA section 2(2)(b) are defined in the EAPWDR as:

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.

Panel's decision

The panel will now consider each party's position regarding the reasonableness of the Ministry's decision under the applicable PWD criteria at issue in this appeal.

Severe Physical Impairment

The Appellant submitted that he suffers from a severe physical impairment that significantly impairs his ability to manage his daily tasks, namely his severe COPD with bullae in his lungs and pain

caused by his herniated disc. The Appellant notes the references by his doctor and his specialists in the PWD application and medical reports that he suffers from "severe COPD." The Appellant argues that the information in the July Documents should be given more weight than the information in the PR and AR and that the Ministry was unreasonable not to give the July Documents more weight in its reconsideration decision. The Appellant says that an advocate prepared the July Documents for his physicians to sign because it is easier to get information from busy physicians in this manner, as opposed to asking them to complete a questionnaire, such as the PWD application. He argues that because the July Documents were signed by both his family physician and his respirologist, the statements contained in the July Documents should be attributed to his physicians, who would not have signed the July Documents if they disagreed with the prepared statements set out in the July Documents. The Appellant says that he thinks his family physician did not really understand how to complete the PR and the AR and that this explains the discrepancies in the information in the PR and AR and the July Documents. He says that because the information in the July Documents is more recent than in the PWD application, it should be given more weight. The Appellant also argues that the Ministry is incorrectly conflating two criteria – severity of his impairments and the impact of his impairments on his ability to perform his daily living activities – in its reconsideration decision.

The Ministry considered the information in the Appellant's PWD application, the attached medical reports, and the July Documents. It determined that while the Appellant experiences limitations to his physical functioning, particularly lifting, carrying and holding, the information provided in the PWD application and confirmed in the documents submitted at reconsideration speak to a "moderate degree of physical impairment." The Ministry noted in its reconsideration decision that the July Documents "are virtually identical" and that in the July Documents, the Appellant's restrictions had substantially changed from the PWD application completed five months earlier, but that there was no rationale provided at reconsideration to confirm "why there would be so significant a deterioration in physical functionality in so short a period of time." The Ministry found that it was "reasonable to assume that [the July Documents are] self-reported information provided to [the] advocate, rather than a personalized response, chart analysis and reflection on the part of each of [the Appellant's] physicians." The Ministry also noted that the Appellant did not provide updated test results or findings at reconsideration to confirm the significant decline from the PWD application of February 2014 to the July Documents. The Ministry was not satisfied that the July Documents establish a "severe physical impairment giving rise to a need for significant assistance."

The Panel's Findings

The Appellant argues that the Ministry incorrectly conflates the two criteria of severity of impairment and restriction to DLA. The Appellant also argues that there is no definition for "severe impairment" and it is unreasonable of the Ministry to look to information about the impact of the impairment on a person's ability to perform DLA in order to determine the severity of the impairment. The panel acknowledges that in its documents, the Ministry sets out a list of five separate criteria that must be met in order to be designated a PWD based on the provisions in section 2(2) of the EAPWDA. The Ministry will indicate to applicants through the use of check boxes which of the listed criteria an applicant has met and which an applicant has failed to meet.

The diagnosis of a medical condition is not by itself evidence of the severity of impairment – an applicant can suffer from a severe medical condition without being severely impaired. To satisfy the requirements in section 2(2) of the EAPWDA, evidence of how and the extent to which a medical

condition restricts daily functioning must be considered. This includes the evidence from the Appellant and from the prescribed professionals regarding the nature of the impairment and its impact on the Appellant's ability to manage the daily living activities listed in section 2(1) of the EAPWDR.

Information about the Appellant's circumstances was provided by the Appellant's family physician of 3 years in the PR and AR completed in early February 2014. Information was also provided in the medical tests and reports dating from 2011-2013 submitted with the PWD application. The panel notes that there are several references by medical professionals in the PWD application and accompanying medical reports to the Appellant suffering from "severe COPD" and the panel finds that the Appellant suffers from severe COPD.

In considering whether the information provided about the Appellant's severe COPD (together with his other medical conditions) establishes that the Appellant suffers from a severe impairment, the information about the Appellant's functional skills and ability to perform his DLA must be considered. This information was provided in the PWD application and in the July Documents – the medical reports attached to the PWD application do not speak to the impact of the Appellant's medical conditions on his ability to perform his DLA.

In the PR completed in February 2014, the Appellant's physician indicated that the Appellant can walk unaided 4+ blocks, climb 2-5 stairs unaided, lift 2-7 kg (5-15 lbs), and had no limitation remaining seated. She reiterated this information in the mobility and physical ability section of the AR, noting only that the Appellant required continuous assistance from other people with lifting, and that he required periodic assistance from another person with carrying and holding (but without explanation). In the July Documents, it states that the Appellant is unable to walk more than one block or climb more than 1-2 stairs due to severe breathing problems and pain in his back and that he has difficulty bending down and reaching above his head to retrieve items. Although the Appellant argues that his physician did not understand how to complete the PWD application, which accounts for the discrepancies between the information in the PR and AR and the July Documents, the panel notes that there is no information from the Appellant's physician set out in the July Documents to support this assertion and the panel cannot draw this inference. Further, the panel notes that because the wording of the July Documents is identical reflecting the Appellant's statements to his advocate (as opposed to a physician's assessment of his statements) and they do not contain any information provided directly from the Appellant's physicians (other than the names of the types of medications) (e.g. no corrections or editing, no personal comments of the physicians, no check boxes agreeing or disagreeing with the statements), the panel cannot draw the inference that the July Documents contain "better" or more accurate information about the Appellant's impairments than the PWD application. The panel places more weight on the information provided in the PWD application.

Therefore, when the professional assessment of the Appellant's physician is considered, the panel finds that it was reasonable for the Ministry to determine that the information provided did not establish that the Appellant has a severe physical impairment.

Severe Mental Impairment

In the PWD application, the Appellant's physician indicated that the Appellant had no deficits with cognitive and emotional function as a result of his impairments and wrote "N/A" beside the underlined words "identified mental impairment or brain injury," checking "no impact" 3 listed items (bodily

function, consciousness and emotion) and leaving the rest of the list and the section on social functioning blank. However, the July Documents contain a statement that the Appellant has become withdrawn and isolated, has increasingly poor short-term memory and recall, and experiences confusion. At the hearing, the Appellant confirmed that he does not assert that he suffers from a severe mental impairment.

The Ministry found that based on the information provided, it could not determine that the Appellant has a severe mental impairment. The Ministry found that the information about the Appellant's ability to manage those DLA that involve the ability to make decisions about personal activities, care or finance and relating to, communicating or interacting with others effectively, demonstrated that these DLA are not restricted.

The Panel's Findings

The panel finds that there is no diagnosis of a mental health condition or mental impairment, only the statement in the July Documents that the Appellant is withdrawn and isolated. The panel also notes that the Appellant confirmed at the hearing that he does not assert that he suffers from a severe mental impairment. The panel finds that the Ministry reasonably determined that the evidence does not establish a severe mental impairment.

Restrictions to Daily Living Activities

The Appellant submitted that his ability to manage daily living activities is significantly restricted, pointing to the information provided in the July Documents. The Appellant's physician (the prescribed professional) reported in the AR that he is periodically restricted with the task of carrying purchases home (without comment), noting in a comment further in the AR that the Appellant needs the help of his friends to carry groceries and vacuum. In the July Documents, it is stated that the Appellant takes significantly longer than a normal person to perform the DLA of personal care, requires assistance from others to perform the DLA of meal preparation, basic housework and shopping. The Appellant argues that because his physicians signed their names on the July Documents, the statements in the July Documents are their professional opinion and should be given more weight than the AR.

The Ministry determined in its reconsideration decision that the information provided by the Appellant's physician does not establish that a severe impairment significantly restricts his ability to perform DLA either continuously or periodically for extended periods. The Ministry noted that the term "directly" "means there must be a causal link between the severe impairment and the restriction." The Ministry also noted that the direct restriction must be significant and there is a component of time or duration. The Ministry found that the restrictions indicated for the Appellant are "more mid-range than severe" and do not speak to a need for assistance.

The Panel's Findings

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 daily living activities, continuously or periodically for extended periods. In this case, the Appellant's physician is the prescribed professional. Daily living activities are defined in section 2(1) of the EAPWDR and are also listed in the PR and in the AR.

In the AR completed in February 2014, the Appellant's physician reported that the Appellant could independently perform all except one of the listed tasks of his DLA (the task of carrying purchases home for the DLA of shopping). In the July Documents, there are general statements about the restrictions to the Appellant's abilities to perform the DLA of personal care, meal preparation, basic housework, and daily shopping; however, the panel notes that these statements do not provide information linking the Appellant's impairment to the restrictions in his DLA and do not provide information about the duration of his need for assistance. The panel notes that there is no explanation from the Appellant's physician to account for the deterioration in the Appellant's abilities to perform his DLA from the date of the PWD application to the July Documents, and as noted above, the panel cannot infer that the physician did not know how to complete the PWD application.

The Panel finds that when reading together the information in the July Documents with the information provided by the Appellant's physician in the AR that the Appellant's impairment periodically restricts his ability to perform one task of the DLA of shopping, the causal link and the duration and frequency of the restriction is not clear. Accordingly, the panel finds that the Ministry was reasonable in determining that the Appellant's impairments do not significantly restrict daily living activities either continuously or periodically for extended periods.

Help with Daily Living Activities

The Appellant submits that because of his impairments, he needs assistance from others with DLA, in particular housework and shopping because his COPD restricts his ability to exert himself in any way and he cannot carry anything weighing more than a few pounds. In the PWD application, the Appellant's physician noted that the Appellant requires continuous assistance carrying purchases home, but did not provide any commentary. The Appellant's physician also noted in the AR that the Appellant needs the help of friends to carry groceries and with vacuuming. In the July Documents, the statements refer to the Appellant's need for assistance with cooking and meal preparation, carrying groceries and basic housework, noting that his need for assistance varies, but that he has "a significant need for assistance with his DLA."

The Ministry's position is that because the evidence does not establish that daily living activities are significantly restricted, it cannot be determined that significant help is required from other persons.

The Panel's Findings

Section 2(2)(b)(ii) of the EAPWDA also requires the opinion of a prescribed professional confirming that because of restrictions in his ability to manage daily living activities, the Appellant requires help with those activities. In the AR, there is information that the Appellant requires assistance carrying groceries and with vacuuming – information restated in the July Documents. However, the panel notes that there is no information from a prescribed professional indicating the amount and duration of assistance required – other than it varies. Therefore, the panel finds that the Ministry reasonably concluded that it could not determine whether the Appellant needs significant help from other persons to manage daily living activities.

Conclusion

Having reviewed and considered all of the evidence and the 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. Therefore the panel confirms that decision.