

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (“Ministry”) reconsideration decision dated April 10, 2015 in which the Ministry found that the Appellant was not eligible for designation as a Person With Disabilities (“PWD”) because he did not meet all of the requirements for PWD designation in Section 2(2) of the *Employment and Assistance for Persons with Disabilities Act* (EAPWDA). The Ministry was satisfied that the Appellant has reached 18 years of age and that his impairment is likely to continue for at least two years. However, based on the information provided in the PWD Designation Application (“PWD application”), the Ministry was not satisfied:

- That the Appellant has a severe mental or physical impairment; and
- That the impairment, in the opinion of a prescribed professional, directly and significantly restricts his ability to perform daily living activities (“DLA”) either continuously or periodically for extended periods; and
- As a result of these restrictions, the Appellant requires help to perform those activities.

## 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 consisted of the following:

1. The Appellant's Request for Reconsideration signed by the Appellant on March 11, 2015.
2. A PWD Application comprised of the Applicant Information and self-report completed by the Appellant in September 2014, a Physician Report ("PR") dated November 7, 2014 and an Assessor Report ("AR") dated November 2, 2014, both completed by the Appellant's family physician who has known the Appellant for twenty months, and has seen him 2-10 times in the past year.
3. An undated letter to a physician from an advocate to which are attached Parts C to E of a PR ("Advocate's PR"), and Parts A to D of an AR ("Advocate's AR") with some sections filled in and others left blank. In the letter, the Advocate stated that she and the Appellant completed the Advocate's PR and AR together in red pen, to indicate how the Appellant perceives his restrictions to DLA and the assistance he needs for DLA.

The Appellant presented the Advocate's PR and AR to his physician to use as a guide for filling out the PWD application. The Advocate wrote that it is important for the Ministry "to have a good idea as to the severity of the medical or mental health condition" and to receive as much information as possible "in order to make an informed decision" regarding PWD eligibility. The Advocate stated that she is not a qualified assessor; they included the Advocate's PR and AR for information only, and it should not be included with the Appellant's PWD application.

The PWD application included the following information. The panel notes that the Advocate's PR and AR contain information that is identical to the information provided by the physician in the PWD application, with the exception of one addition in the PR where the Advocate noted under *Functional Skills* that the Appellant can climb "<10" steps unaided.

### ***Diagnoses:***

- In the PR, the Appellant was diagnosed with COPD, onset in 2000.
- In his self-report, the Appellant stated that he was diagnosed with COPD which causes shortness of breath and dizziness in hot weather.

### ***Physical or Mental Impairment:***

In the PR, under Health History, the Appellant's physician reported "severe COPD with permanent lung damage". The physician check marked "yes", the Appellant has been prescribed medication/treatment that interferes with his ability to perform DLA. No explanation was provided. The physician check marked "no" the Appellant does not require any prostheses or aids.

**Functional Skills**

In the PR, the Appellant was reported as able to walk less than one block unaided on a flat surface, with the notation "SOB" (shortness of breath). The physician further reported that the Appellant can climb five or more steps unaided, lift five to fifteen pounds, and remain seated for less than one hour, with the notation "leg pain".

In the AR, regarding *Mobility and Physical Ability*, the physician check marked that the Appellant is independent in all areas including walking indoors, walking outdoors, climbing stairs, standing, lifting, and carrying and holding. The physician reported that the Appellant takes significantly longer or has limitations in the following areas:

- walking indoors, "2 x longer";
- walking outdoors, "< 1 block, 3 x longer";
- climbing stairs, "< 10 stairs, 2 x longer";
- standing, "< 30 mins.";
- lifting, "< 15 lbs."; and
- carrying and holding, "< 1 lb., (illegible) 200 feet".

Under Comments, the physician wrote "S.O.B. causes above restrictions; also loses breath with environmental things: heat, car fumes, perfume, cleaners, etc."

In the PR, under communication, and cognitive and emotional function, the physician check marked "no" with regard to any difficulties or deficits. In the AR, under *Ability to Communicate*, the physician check marked "good" for all areas including speaking, reading, writing, and hearing. Further, in the AR the physician crossed out the section pertaining to *Social Functioning* as no mental impairment was identified.

In the PR, under *Additional Comments* regarding the significance of the Appellant's medical condition and the impact of the impairment on daily functioning, the physician wrote "severe fixed airway obstruction". In the AR, regarding *Mental or Physical Impairment* that impacts the Appellant's ability to manage DLA, the physician wrote "COPD with limited movement; lower leg pain and cramping limits mobility".

**Daily Living Activities (DLA):**

In the PR, the physician indicated that the Appellant has been prescribed medication/treatments that interfere with his ability to perform DLA but did not provide any explanation.

In the AR, under *Daily Living Activities*, the physician check marked that the Appellant is independent in all areas of personal care, basic housekeeping, shopping, meals, pay rent and bills, medications, and transportation. The Appellant was reported to take significantly longer in the following aspects of four DLA:

- *Personal Care*: transfers in and out of bed, "leg cramps, 2-3 x longer", and transfers on/ off of chair, "2 x longer";
- *Basic Housekeeping*, both laundry and basic housekeeping, "2 x longer";
- *Shopping*, carrying purchases home, " < 15 lbs., 2-3 x longer"; and
- *Transportation*, getting in and out of a vehicle, "2 x longer".

In the AR, under *Additional Information* regarding the Appellant's impairment and its effect on DLA, the physician wrote "No chance of recovery from damage to his lungs. Will progress (illegible) morbidity. Struggle to quit smoking".

In his self-report, the Appellant reported that "climbing stairs causes lack of breath - shortness when walking, have to walk slower and shorter distances. Not a good feeling when dizzy and short of breath." The Advocate's PR added that he can climb fewer than ten steps. The Appellant further reported "chest pain if on feet for very long." His calf muscles also tighten when he is trying to sleep and he has to get up to try and un-clench the spasms in his calves and feet. He gets short of breath and his chest "feels like it's going to explode" when he takes the garbage to the bins at the end of the driveway. He cannot sit in one place for very long due to leg and knee pain. In addition, some perfumes, soaps, and air fresheners at the stores make it hard to breathe.

***Need for Help:***

In the AR, the physician indicated that the Appellant lives with his wife. The physician left blank the sections for *Assistance Provided for Applicant* by other people and through the use of assistive devices. The physician check marked "no" the Appellant does not have an assistance animal. In his self-report, the Appellant did not comment on any need for assistance with his DLA.

***Appellant's additional evidence***

In his Notice of Appeal dated April 16, 2015, the Appellant indicated that he disagrees with the Ministry's reconsideration decision due to his "severe COPD, short of breath and low back pain, chronic" and "Depression (major)". At the hearing, in response to questions from the panel about the additional medical conditions of chronic back pain and depression, the Appellant explained that these are separate issues from his COPD and leg cramps. His physician filled out the Notice of Appeal, listing these diagnoses and signed below them. The Appellant's signature appears at the bottom of the Notice of Appeal.

At the hearing, the Appellant further explained that he has been seeing the physician for only about a year after not having a family doctor, and he could not tell the physician everything at once when appointments are limited to fifteen minutes. He believes that the physician addressed his back pain and depression "around January". Regarding the date of these diagnoses, the Ministry reported that it did not have information about the Appellant's back pain or depression as of the date of the reconsideration decision, April 10, 2015.

The panel finds that the physician's statement in the Notice of Appeal regarding COPD and shortness of breath substantiates the information the Ministry had for the reconsideration which included both a diagnosis of COPD and the symptom of shortness of breath. The panel therefore admits this information under section 22(4)(b) of the *Employment and Assistance Act* (EAA) as evidence in support of the information and records that were before the Ministry at the time the decision being appealed was made.

The panel acknowledges that the Appellant has a new physician and may not have had all of his conditions assessed prior to the reconsideration. However, the panel cannot admit the information regarding back pain and depression under section 22(4) of the EAA because these conditions were not before the Ministry at the reconsideration and are therefore "new" conditions that were not dealt

with in the reconsideration decision. There is no diagnosis of low back pain or depression in the reconsideration record.

*Testimony at the hearing*

With regard to his COPD, the Appellant stated that it is “pretty hard breathing”. He cannot breathe at all if it is hot outside, and it feels like he is breathing through a straw. He cannot mow the lawn and when he takes the garbage out to the road, he can only take one garbage bag at a time. He then has to stop and wait five minutes to catch his breath before he can get the other bag.

Groceries and chores are difficult for him and he certainly cannot work at an eight hour job. Groceries sometimes require two or three trips. In response to questions from the panel regarding whether the physician accurately captured the Appellant’s ability to perform DLA, the Appellant stated “yes, pretty close” and although he does not use a cane, he needs to use the hand railing when going up and down stairs. He confirmed that stairs take him two times longer than typical. He does not need help with dressing or feeding himself.

In response to a question regarding any assistance he gets from other people, he stated that due to her own medical conditions, his wife cannot assist with anything that requires hanging on to something. Therefore, the Appellant does the dishes, scrubbing, etc. His relatives who live upstairs help him “once in awhile”.

In response to a question regarding any medications that interfere with his ability to perform DLA, the Appellant stated that he takes a medication for leg cramps at night and it helps him sleep. He also takes medication for depression which makes him feel doxy in the daytime so he has to take it at night. He has puffers for his COPD but these do not cause any side effects. The Appellant concluded his testimony by saying that he is not “trying to BS. When it feels like breathing through a straw, it is hard.” His biggest regret is that he cannot walk by the river anymore.

The panel finds that the Appellant’s oral testimony regarding his COPD and leg cramps and how these affect his functioning substantiates the information in the PR, AR, and self-report regarding these conditions, and expands on the information in the AR regarding any assistance from others. The panel admits these oral statements under section 22(4)(b) of the EAA as evidence in support of the information and records that were before the Ministry at the time the decision being appealed was made. The panel further admits the statements regarding medications for leg cramps and COPD as these conditions were before the Ministry at the reconsideration. With regard to the Appellant’s testimony that his depression medication causes drowsiness, this statement relates to a condition (depression) which, as noted above, was not the physician’s diagnosis at the time of the reconsideration. In accordance with EAA section 22(4), the panel does not admit the statement regarding medication for depression.

The Ministry relied on and re-affirmed its reconsideration decision and did not present any new evidence. At the hearing, the Ministry stated that it is clear that the Appellant has health issues and it definitely recognizes that the Appellant has some restrictions. The Ministry made its decision on the basis of the information that was provided by the Appellant’s physician for the reconsideration. If the physician has diagnosed additional medical conditions, such as chronic back pain or depression, the Appellant can submit a new PWD application at any time.

## PART F – Reasons for Panel Decision

The issue in this appeal is whether the Ministry's reconsideration decision, which found that the Appellant is not eligible for PWD designation, was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the Appellant. Based on the information provided in the PWD application, the Ministry was not satisfied that the following criteria in EAPWDA section 2(2) were met: the Appellant has a severe physical or mental impairment; and the impairment, in the opinion of a prescribed professional, directly and significantly restricts the Appellant's ability to perform DLA either continuously or periodically for extended periods; and, as a result of these restrictions, the Appellant requires help to perform those activities.

The eligibility criteria for PWD designation are set out in section 2(2) of the EAPWDA as follows:

- (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 section 2 of the EAPWDR as:

### 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.

### Severe mental or physical impairment

#### *Appellant's position*

The Appellant argued that his COPD leaves him short of breath to the degree that his chest "feels like it is going to explode" and he

feels like he is “breathing through a straw” especially when he walks, climbs stairs, takes the garbage out, or does the shopping. He is restricted to climbing “< 10” stairs and he cannot breathe at all in hot weather. His leg cramps cause pain in his calves and knees when he does activities that require staying in one place or transferring positions. His physician reported “severe fixed airway obstruction” (PR), “severe COPD with permanent lung damage” and “COPD with limited movement” (AR) and “no chance of recovery from damage to his lungs” (AR).

#### *Ministry’s position*

The Ministry argued that the physician’s information indicated the Appellant has a moderate, rather than severe degree of impairment. The Ministry noted that the Appellant was assessed as being able to walk less than one block due to shortness of breath, and able to climb five or more stairs, lift five to fifteen pounds, and remain seated for less than one hour due to leg pain. The physician indicated the Appellant is independent in all aspects of mobility and physical abilities; however he takes two to three times longer walking; two times longer climbing stairs; and he is limited to standing for less than thirty minutes and carrying purchases that weigh less than fifteen pounds due to shortness of breath. The Ministry submitted that there is not enough evidence to establish a severe physical impairment. Further, the physician provided no information regarding a mental impairment, indicating instead that the Appellant has no deficits with cognitive and emotional functioning or communication.

#### *Panel decision:*

The diagnosis of a serious medical condition does not in itself determine PWD eligibility or provide evidence of a severe impairment. 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 a prescribed professional regarding the nature of the impairment and its impact on the Appellant’s ability to manage the DLA listed in section 2(1) of the EAPWDR. However, section 2(2)(b) of the EAPWDA clearly sets out that the fundamental basis for the analysis of restrictions is the evidence from a prescribed professional - in this case, the Appellant’s physician.

#### ***Severe mental Impairment:***

The physician has not diagnosed the appellant with a mental impairment as of the date of the reconsideration decision. The physician has not indicated the appellant has any deficits with cognitive or emotional function, and in the AR the physician indicated a good ability to communicate in all areas of that DLA. The physician also indicated that the Appellant is independent in all areas of personal care, pay rent and bills, and medications. Given that there was insufficient evidence of a mental impairment, the panel finds that the Ministry reasonably determined that the Appellant does not have a severe mental impairment as set out in EAPWDA section 2(2).

#### ***Severe physical Impairment:***

The Appellant’s diagnosis is COPD, onset year 2000. In the PR, when indicating the severity of the Appellant’s condition under *Health History*, the physician wrote “COPD with permanent lung damage” and in the AR under *Additional Information*, the physician wrote “no chance of recovery from damage to lungs”. However, the physician also indicated that the Appellant does not require any prostheses or aids for his impairment, and that the Appellant can perform all of his functional skills and DLA independently although he does have some restrictions due to shortness of breath and leg pain and cramps.

With respect to the Appellant’s physical functional limitations, in the PR the physician indicated that the Appellant has shortness of breath when walking less than one block, and reported in the AR that although the Appellant is independent in all areas of *Mobility and Physical Ability*, his shortness of breath causes him

limitations that include taking two to three times longer with walking and stairs, as well as time/weight/distance restrictions for standing, lifting, carrying and holding. In the AR, the physician further reported that the Appellant takes significantly longer (two or three times longer) with other physical DLA including transfers from bed or a chair, basic housekeeping, shopping - carrying purchases home, and transportation - getting in and out of a vehicle.

The panel finds that the Ministry reasonably determined that the information provided by the Appellant's physician is not sufficient to confirm a severe physical impairment. While the Appellant has some restrictions in his physical functioning and DLA, primarily due to shortness of breath from COPD, the panel notes that he is nevertheless independent in all of the physical functions and tasks listed in the PWD application despite taking two to three times longer for many of them. The panel notes that the Appellant reported leg and foot cramps and pain in his self-report, and the physician confirmed leg pain and cramps in the PR and AR; however, there is no information from the physician to indicate whether the leg pain is connected to the diagnosis of COPD.

Further, other than the Appellant's oral testimony indicating he needs to use a hand railing on the stairs, there is no information regarding any need for an assistive device, assistance animal, or significant help from other persons. In fact, the Appellant testified that he handles all of his DLA independently with assistance "once in awhile" from his upstairs relatives. The panel finds that the Ministry was therefore reasonable in concluding that the Appellant's restrictions indicate a moderate, rather than severe impairment. Overall, as the Appellant is independent in all of his physical functions and physical DLA, the panel finds that the Ministry was reasonable in not being satisfied that he has a severe physical impairment pursuant to EAPWDA section 2(2).

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

##### *Appellant's position*

The Appellant's position is that his shortness of breath restricts him in the areas of walking and climbing stairs, household chores (taking out the garbage and mowing the lawn) and shopping because his chest "feels like it's going to explode" and he feels like he is "breathing through a straw". Further, his leg cramps cause pain in his calves and knees for specific activities.

In the AR, the physician confirmed that the Appellant's shortness of breath restricts all areas in the DLA of *Mobility and Physical Ability* even though the Appellant is, at the same time, independent in all areas. Further, the physician reported that the Appellant takes two or three times longer in two areas of the DLA of *Personal Care* (transfers from a bed and chair), all areas of *Basic Housekeeping* (laundry and basic housekeeping), one area of *Shopping* (carrying purchases home), and one area of *Transportation* (getting in and out of a vehicle). The physician noted "leg cramps" for *Personal Care* - transfers in and out of bed, but did not specifically report leg cramps for any of the other DLA although under *Mental or Physical Impairment*, the physician noted that "lower leg pain and cramps limits mobility", thereby impacting the Appellant's ability to manage his DLA overall. In the PR under *Functional Skills*, although the physician indicated that shortness of breath causes restrictions with walking, the Appellant is able to climb five or more steps unaided ("< 10" steps in the AR), and lift five to fifteen pounds.

##### *Ministry's position*

The Ministry submitted that it did not have enough evidence from the physician to confirm that the Appellant's impairment significantly restricts his ability to perform his DLA continuously or periodically for extended periods and that no additional information was submitted by the physician in the Appellant's Request for Reconsideration. The Ministry argued that the Appellant can manage all of his DLA independently. In the areas where he is reported to take significantly longer than typical (walking, climbing stairs, transfers to and from bed and chairs, laundry, basic housekeeping, carrying purchases, and getting in and out of a vehicle) the Ministry



argued that “2-3 times longer is not considered significant” and the remainder of the DLA “do not take you significantly longer to perform them.”

*Panel decision*

Section 2(2)(b)(i) of the *EAPWDA* requires that the Ministry is satisfied that in the opinion of a prescribed professional an applicant’s severe impairment directly and significantly restricts his DLA, continuously or periodically for extended periods. In this case, the Appellant’s physician is the prescribed professional. DLA are defined in section 2(1) of the *EAPWDR* and are also listed in the AR and, with additional details, in the PR. Therefore, a prescribed professional completing these forms has the opportunity to indicate which, if any, DLA are significantly restricted by the Appellant’s impairments either continuously or periodically for extended periods.

In the Appellant’s circumstances, the physician indicated that the Appellant can perform *Functional Skills* including walking, climbing stairs, lifting, and remaining seated, and the only severe restrictions in these areas are that the Appellant is limited to walking less than one block due to his shortness of breath and he can remain seated for less than one hour. Although the Appellant reported that stairs aggravate his shortness of breath, his physician, in the PR, check marked the lowest level of restriction (“5+ steps”), to a maximum of ten steps in the AR. In the PR with regard to lifting, the physician check marked a moderate level of restriction (the middle range of “5 to 15 lbs”).

Although the physician indicated the Appellant is taking medications that interfere with his ability to perform DLA, no details were provided. At the hearing, the Appellant stated that he takes medication at night for leg cramps, which helps him sleep and that his puffer medications for COPD do not have any side effects that impact his DLA.

In the AR, the physician indicated that the Appellant can perform all DLA independently. The Appellant testified at the hearing that he can get dressed and feed himself without assistance. While the AR notes restrictions in all areas of *Mobility and Physical Ability* due to the Appellant’s shortness of breath, the physician nevertheless indicated that the Appellant is independent in all areas: walking, climbing stairs, standing, lifting, carrying and holding.

In the AR, the physician noted that for four other DLA, the Appellant is independent but takes two or three times longer than typical. The panel notes that although the Appellant is reported to take two times longer in all areas of *Basic Housekeeping* and *Transportation*, he is reported to take significantly longer than typical in only two areas of *Personal Care* and one area of *Shopping*.

Further, although the physician wrote that that the Appellant lives with his wife, he did not indicate that she provides any assistance with DLA and the Appellant testified that he does not receive significant help from her or his upstairs relatives. Further, the physician did not indicate the use of assistive devices, and he check marked that the Appellant does not have an assistance animal.

Given that the physician’s information indicates the Appellant is independent with all DLA, and that his restrictions mainly involve taking two or three times longer than typical, the panel finds that the Ministry reasonably determined that he has a moderate level of impairment and there is not enough evidence to establish that his impairments significantly restrict his ability to manage DLA either continuously or periodically for extended periods as required under section 2(2)(b)(i) of the *EAPWDA*.

**Help to perform DLA:***Appellant's position*

The Appellant's position is that he performs his DLA independently but his shortness of breath is severe and this causes him great difficulty. His wife is unable to assist him due to her medical conditions so he does the dishes, scrubbing, and laundry and his upstairs relatives provide occasional help only. Although he does not use any assistive devices, he needs to hold onto the hand railing when climbing stairs.

*Ministry's position*

The Ministry's position is that because it has not been established that DLA are significantly restricted, it cannot be determined that the Appellant requires significant help from other persons. The Ministry noted that no assistive devices are required and the Appellant does not require the services of an assistance animal.

*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, the significant help or supervision of another person, or the services of an assistance animal in order to perform a DLA. In the AR, although the physician reported that the Appellant lives with his wife, he did not indicate that she helps the Appellant with DLA and the Appellant confirmed that she cannot assist him with kitchen chores. Further, the physician did not indicate a need for any assistive devices such as crutches, a scooter, or braces, and the physician indicated that the Appellant does not have an Assistance Animal.

On the basis of the above noted evidence, the panel 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, as defined by section 2(3)(b) of the EAPWDA.

**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 pursuant to EAPWDA section 2(2) was reasonably supported by the evidence. The panel confirms the reconsideration decision.