

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 09 December 2016 that denied 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's severe physical impairment, 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 3 criteria: he has a severe physical, though not a mental physical, impairment; 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

Due to vehicle malfunction, the appellant attended the in-person hearing by teleconference.

With the consent of the appellant, a ministry worker attended the hearing as an observer.

The evidence before the ministry at reconsideration consisted of the following:

1. The appellant's PWD Designation Application dated 01 September 2016. The Application contained:
  - A Self Report (SR) completed by the appellant.
  - A Physician Report (PR) dated 11 October 2016, completed by the appellant's general practitioner (GP) who has known the appellant for 1 month and seen him 2-10 times over that period.
  - An Assessor Report (AR) dated 11 October 2016, completed by the same GP.
2. The appellant's Request for Reconsideration dated 25 November 2016, attached to which are supplementary notes giving his reasons for requesting reconsideration

In the PR, the GP diagnoses the medical conditions related to the appellant's impairment as:

- Chronic obstructive sleep apnea [*sic*] [COPD] (onset 2013)
- Anxiety
- Asthma
- Right hand amputation index finger (onset 1980)

The panel will first summarize the evidence from the PR and the AR as it relates to the PWD criteria at issue in this appeal.

### Ability to perform DLA

#### *General*

PR:

Under health history, the GP writes:

"...He is severely Impacted by his COPD & is short of breath with minimal exertion. He is limited in how far he can walk and is unable to lift or carry items as this makes his COPD & asthma shortness of breath worse. His [unreadable rest of sentence.] He is anxious & when he is agitated his breathing is worse, further incapacitating him."

The GP indicates that the appellant has not been prescribed any medications that interfere with his ability to perform DLA.

The GP indicates that the appellant has no significant deficits to cognitive and emotional functioning.

The GP indicates that the appellant had no difficulties with communications and in the AR assesses the appellant's ability to communicate as satisfactory for speaking, reading, writing, and hearing.

AR:

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The GP assesses the impact of the appellant's mental impairment on daily functioning as having a moderate impact on bodily functions, commenting, "Severe breathing difficulties." No impact is reported for the remaining 13 listed areas.

Under additional comments, the GP writes:

"[The appellant] has severe COPD & asthma that limits his daily activities as he has limited stamina. He has to rest frequently in order to do his daily activities."

*Moving about indoors and outdoors*

PR:

The GP indicates that the appellant is able to walk less than 1 block unaided on a flat surface, can climb 2 to 5 steps unaided, and is limited to lifting 5 to 15 lbs.

AR:

The GP assesses the appellant's mobility and physical ability as follows:

- Walking indoors – independent but takes significantly longer than typical.
- Walking outdoors – independent but takes significantly longer than typical.
- Climbing stairs – independent, limited to five steps due to COPD
- Standing – independent
- Lifting – independent but take significantly longer than typical.
- Carrying and holding – Independent

*Daily living activities*

AR:

The GP assesses the assistance required to perform DLA as follows (his comments in parentheses):

- Personal care – independent in all aspects.
- Basic housekeeping – for laundry and basic housekeeping, independent, continuous assistance from another person or unable, and takes significantly longer than typical (frequent rests to do).
- Meals – independent in all aspects.
- Pay rent and bills – independent in all aspects.
- Medications – independent in all aspects.
- Transportation – independent for getting in and out of the vehicle; periodic assistance from another person for using public transit and using transit schedules and arranging transportation (unreadable).

*Social functioning*

AR:

The GP assesses the appellant as requiring continuous support/supervision for all listed areas: making appropriate social decisions, ability to develop and maintain relationships, interacting appropriately with others, ability to deal appropriately with unexpected demands, and the ability to secure assistance from others. The GP comments, "Few friends."

The GP assesses how the appellant's mental impairment impacts his relationship with his immediate social network and his extended social network as marginal functioning, commenting, "Few friends. New in town."

The GP provides no additional comments, including the identification of any safety issues.

### Help required

PR:

The GP does not indicate whether the appellant requires any prostheses or aids for his impairment.

AR:

The GP does not indicate that the appellant requires any of the listed equipment or devices to compensate for his impairment and indicates that the appellant does not have an assistance animal.

The GP indicates that the appellant is provided assistance from friends.

### Self Report

In his SR, the appellant writes that he was diagnosed in October 2013 with COPD. Since that time he frequently went to a doctor in another province. He moved to his current place of residence in BC in 2015. His condition has worsened to the point where he has a hard time breathing. He finds that it is very difficult to walk more than a block before he has to rest. He also finds it difficult to shower because of the steam from the hot water. Going up and down stairs is very difficult as well. Bending over to tie shoes and do his toenails is difficult for his breathing. Sleeping at night can be hard as well because of lying down – pressure on lungs. Lifting or carrying heavy things is almost impossible at this point. This condition makes it difficult to do regular household duties without getting out of breath and having to rest.

### **Request for Reconsideration**

Under Reasons, the appellant writes that the original decision is unfair and should be looked at again. His problem is with the GP's comments on his application. Since the original application, the health has gone from bad to worse.

In his supplementary notes, the appellant reviews his recent history moving from another province to BC and his frustration with his experience with the GP. He goes on to list his reasons for requesting reconsideration:

- It is hard for him to keep good hygiene because of breathing issues.
- Emotions – anxiety due to lack of breath
- Short-term memory, lack of energy due to breathing issues.
- Motivation – no motivation, hard to move around.
- Motor activity – hard to do anything longer than a minute or two.
- Disorganized thinking.
- Walking outdoors – very limited; walking indoors – very limited; climbing stairs – almost

impossible; standing – only for a few minutes then he must sit and rest; lifting – cannot move garbage or laundry without loss of breath; carrying and holding – can't carry anything heavier than 5 pounds.

- Food preparation – needs help cooking, hard to stand for long.
- Hard to get in and out of the vehicle.
- Need help some days getting in and out of bed and chairs.
- Dressing – very difficult bending over.
- Grooming, bathing – loss of breath.
- Basic housekeeping – needs help.
- Travelling to stores – impossible unless he has a driver; he lost extra money so grocery shopping is difficult!
- Carrying parcels – needs help.

### **Notice of Appeal**

In his undated Notice of Appeal, received by the Tribunal on 22 December 2016, the appellant gives as reasons for appeal, “Needs assistance.”

### **The hearing**

At the hearing, the appellant emphasized that his condition has worsened since he began the PWD application process. He can barely walk half a block without having to stop to get his breath back, and he relies on his roommate to help him with his daily activities. His roommate does the cooking and housework and drives him to appointments. The roommate's help even extends to cutting his toenails for him, as bending down puts him out of breath.

The appellant described his dismay and disappointment with how the GP completed the PR and AR. The GP works out of a very busy clinic and the appellant feels that his application was not given the attention it warranted. He stated that he had given the GP the application form in August 2016, but while he had seen the GP a couple of times after giving the application to him, the GP never questioned him or discussed his assessments with him and never showed him the completed form, sending it in directly to the ministry in October, 2016.

The ministry stood by its position at reconsideration.

### **Admissibility of new information**

The panel finds that the information provided by the appellant in his testimony at the hearing is in support of the information before the ministry at reconsideration, as it tends to corroborate the supplementary notes provided by the appellant in his Request for Reconsideration. The panel therefore admits as evidence the appellant's testimony pursuant to section 22(4) of the *Employment and Assistance Act*.

## PART F – Reasons for Panel Decision

The issue in this appeal is whether the ministry decision that determined that the appellant did not meet two of the five statutory requirements of Section 2 of the *EAPWDA* for designation as a person with disabilities (PWD) is reasonably supported by the evidence or is a reasonable application of the legislation in the circumstances of the appellant. Specifically, the ministry determined that the information provided did not establish that the appellant's severe physical impairment, 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 3 criteria: he has a severe physical, though not a severe mental, impairment; 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.

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 is in a prescribed class of persons or that the person has a severe mental or physical impairment that

(a) in the opinion of a medical practitioner or nurse 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 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;

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- (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
- (a) authorized under an enactment to practise the profession of
    - (i) medical practitioner,
    - (ii) registered psychologist,
    - (iii) registered nurse or registered psychiatric nurse,
    - (iv) occupational therapist,
    - (v) physical therapist,
    - (vi) social worker,
    - (vii) chiropractor, or
    - (viii) nurse practitioner, or
  - (b) acting in the course of the person's employment as a school psychologist by
    - (i) an authority, as that term is defined in section 1 (1) of the *Independent School Act*, or
    - (ii) a board or a francophone education authority, as those terms are defined in section 1 (1) of the *School Act*,
- if qualifications in psychology are a condition of such employment.

## **Direct and significant restrictions in the ability to perform DLA**

### *The appellant's position*

At the hearing, the appellant acknowledged that the assessments provided by the GP fell short of providing an adequate description of the degree of his restrictions in performing DLA. He referred the panel to the supplementary notes attached to his Request for Reconsideration as they provide a better description of how his impairment restricts his daily functioning.

### *The ministry's position*

In the reconsideration decision, the ministry reviewed the assessments provided by the GP in the PR and AR, noting that the GP had indicated that the appellant is independently able to manage most areas of daily living, including personal care, making appropriate choices while shopping, paying for purchases, meals, paying rent and bills, medications and getting in and out of a vehicle. In addition the GP indicated that the appellant does not require the use of aids or assistive devices to help compensate for his impairment. The ministry acknowledged that as a result of his physical impairment the appellant experiences limitations in his ability to manage his DLA. However, as the majority of DLA are performed independently or require little help from others, the information from the appellant's prescribed professional does not establish that his impairment significantly restricts DLA either continuously or periodically for extended periods.

### *Panel decision*

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 established in this appeal. The

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legislation – section 2(2)(b)(i) of the *EAPWDA* – requires the minister to assess direct and significant restrictions of DLA in consideration of the opinion of a prescribed professional, in this case the appellant’s GP. This does not mean that other evidence should not be factored in as required to provide clarification of the professional evidence, but the legislative language makes it clear that a prescribed professional’s evidence is fundamental to the ministry’s determination as to whether it is “satisfied.” And for the minister to be “satisfied,” it is reasonable for the ministry to expect that a prescribed professional provides a clear picture of the degree to which the ability to perform DLA is restricted in order for the ministry to determine whether the restrictions are “significant.”

At issue is the degree of restriction in the appellant's ability to perform the 8 DLA listed in section 2(1)(a) of the *EAPWDR* applicable to a person with a severe mental or physical impairment. In the reconsideration decision, the ministry found that the information provided established that the appellant has a severe physical impairment, but not a severe mental impairment. In making this determination, the ministry reviewed the assessments provided by the GP, noting that the GP had reported no difficulties with communications, had not identified any significant deficits to cognitive and emotional functioning, and in assessing the impact of mental impairment on daily functioning, the GP had indicated that the appellant has one moderate impact in the area of bodily functions, noting “breathing difficulty,” with no impact in all other areas. Based on these assessments, the panel finds that the ministry was reasonable in determining that a severe mental impairment has not been established. Accordingly, the 2 DLA (the “social functioning” DLA) listed in section 2(1)(b) of the *EAPWDR* applicable to a person with a severe mental impairment (make decisions about personal activities, care or finances and relate to, communicate or interact with others effectively) are not at issue in this appeal.

In the PR, the GP assesses the appellant as being able to walk less than 1 block unaided and climb 2-5 steps. The panel considers these reported restrictions as demonstrating a marked restriction in the appellant's ability to perform the DLA of moving about indoors and outdoors. However, in the AR the GP indicates that the appellant is independent, though taking significantly longer than typical, for walking indoors and walking outdoors – that is, the GP has not indicated that the appellant requires help with this DLA, either by having to be accompanied by another person or using an assistive device such as a cane for a walker.

In terms of the other DLA applicable to a person with a severe physical or mental impairment, the GP assesses the appellant as independent for all aspects of personal care, meals, paying rent and bills and medications. For the DLA of basic housekeeping – laundry and basic housekeeping – the GP has provided conflicting assessments: that the appellant is independent but requires continuous assistance from another person or unable, while taking significantly longer than typical, commenting “frequently rests to do.” For the DLA of shopping, the GP assesses the appellant as requiring periodic assistance from another person for going to and from stores, reading prices and labels and carrying purchases home, but has not provided any description of the nature, extent, or frequency and duration of such assistance, making it difficult for the ministry to assess the degree to which the appellant is restricted in performing this DLA. Similarly for the DLA of transportation, the GP has assessed the appellant as independent for getting in and out of the vehicle, but requiring periodic assistance from another person for using public transit and using transit schedules and arranging transportation, but again without providing any explanation that would cast further light on the degree of restriction.



Given the extent to which the GP as the prescribed professional has assessed the appellant as independent in performing most DLA, the panel finds that the ministry was reasonable in determining that the information provided did not establish that, as a result of his severe impairment, the appellant is directly and significantly restricted in the ability to perform DLA.

### **Help with DLA**

#### *The appellant's position*

The position of the appellant is that, in light of his worsening condition, he requires significant help from his roommate

#### *The ministry's position*

The position of the ministry is that, as it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required.

#### *Panel decision*

Section 2(2)(b)(ii) of the *EAPWDA* requires that, as a result of being directly and significantly restricted in the ability to perform DLA either continuously or periodically for extended periods, a person must also require help to perform those activities. That is, the establishment of direct and significant restrictions under section 2(2)(b)(i) is a precondition of meeting the need for help criterion. 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.

While the appellant benefits from the help from his roommate, as the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established, the panel finds that the ministry reasonably concluded that under section 2(2)(b)(ii) of the *EAPWDA* it cannot be determined that the appellant requires help to perform DLA.

### **Conclusion**

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. The appellant is thus not successful on appeal.