

## 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 26 April 2017 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 section 2 of the *Employment and Assistance for Persons with Disabilities Act*, section 2. Specifically, the ministry determined that the information provided did not establish that the appellant has a severe mental or physical impairment that in the opinion of a prescribed professional

(i) directly and significantly restricts his ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and,

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

The ministry determined that the appellant satisfied the other 2 criteria: he has reached 18 years of age and his impairment in the opinion of a medical practitioner is likely to continue for at least 2 years.

## PART D – Relevant Legislation

*Employment and Assistance for Persons with Disabilities Act* (EAPWDA) – section 2  
*Employment and Assistance for Persons with Disabilities Regulation* (EAPWDR) – sections 2 and 2.1.

## PART E – Summary of Facts

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

1. The appellant's PWD Designation Application dated 28 December 2016. The Application contained:
  - A Self Report (SR).
  - A Medical Report Report (MR) dated 28 December 2016, completed by a general practitioner (GP). The appellant has been the GP's patient for one month, and the GP has seen him once in that period, but writes that he has known the appellant for 40 years.
  - An Assessor Report (AR) dated 28 December 2016, completed by the same GP.
2. The appellant's Request for Reconsideration dated 30 March 2017, to which is attached a letter from the GP dated 10 April 2017.

In the MR, the GP diagnoses the appellant with chronic obstructive lung disease (onset 2010), anxiety problems (onset 1976), requires glasses (onset 1992), degenerative arthritis (onset 2008), and deafness onset 2003).

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

### Severity/health history

#### *Physical impairment*

MR:

Under Health History, the GP writes:

"COPD – requires a rest after one block walk or one flight of stairs, worse with cold air or wind. [Secondary] to smoking & 2ndhand smoke plus pollution from steel plant next to his home growing up.

Arthritis secondary to old injuries – especially shoulders.

Deafness – high tone hearing loss up to 55dB."

Under additional comments, the GP writes, "Many activities he cannot do as it takes him an excessive amount of time to complete."

Regarding functional skills, the GP reports that the appellant can walk less than 1 block unaided, can climb 5+ steps unaided, is limited to lifting 15 to 35 lbs. and there are no limitations to remaining seated.

The GP indicates that the appellant has not been prescribed any medication and/or treatments that interfere with his ability to perform DLA. He also indicates that the appellant does not require any prostheses or aids for his impairment, noting that the appellant may need supplemental oxygen – awaiting results of testing.

AR:

Asked to describe the appellant's impairment that impacts his ability to manage DLA, the GP writes, "Extremely short of breath with minimal activity."

As to mobility and physical ability, the GP assesses the appellant as taking significantly longer than typical for walking indoors, walking outdoors, and climbing stairs (“stops after one block or flight of stairs to catch his breath”), independent for standing, and taking significantly longer than typical for lifting and carrying and holding (“restricts amount as SOB”).  
The GP comments, “even bending over to remove his boots causes him to be short of breath.”

### *Mental impairment*

MR:

Under Health History, the GP writes:

“Anxiety – couple events per month which may last more than one day. Especially related to interactions with [the ministry].”

The GP indicates that the appellant has no difficulties with communication.

The GP does not indicate whether the appellant has significant deficits with cognitive and emotional function. He does indicate that the appellant has significant deficits in the areas of emotional disturbance and motivation, commenting, “Anxiety issues couple times per month. Motivation reduced because he knows he will run out of air.”

AR:

The GP assesses the appellant's ability to communicate as good for all listed aspects: speaking, reading, writing, and hearing.

Regarding cognitive and emotional functioning, the GP indicates that the appellant's mental impairment has the following impacts in the specified areas:

- Major impact: none.
- Moderate impact: emotion (excessive or inappropriate anxiety), and motivation.
- Minimal impact: bodily functions (sleep disturbance) and memory.
- No impact: consciousness, impulse control, insight and judgment, attention/concentration, executive, motor activity, language, psychotic symptoms, other neuropsychological problems, and other emotional or mental problems.

The GP comments, “Couple bouts of anxiety per month. Self medicates with THC. Motivation reduction due to short of breath.”

### *Ability to perform DLA*

AR:

The GP assesses the assistance required for managing DLA as follows (the GP's comments in parenthesis):

- Personal care – takes significantly longer than typical for all listed tasks: dressing, grooming, bathing, toileting, feeding self, regulating diet, transfers in/out of bed, and transfers on/off chair (Has to pace activities to minimize the shortness of breath.)
- Basic housekeeping – takes significantly longer than typical for laundry and basic housekeeping (As above).
- Shopping – independent for going to and from stores (usually drives), reading prices and labels, making appropriate choices, and paying for purchases; takes significantly longer than typical for carrying purchases home (restricts amount carried).
- Meals – independent for meal planning; independent for food preparation, and cooking (does pace the rate at which he works); independent for safe storage of food.
- Pay rent and bills – independent for all tasks.

- Medications – independent for all tasks.
- Transportation – independent for getting in and out of a vehicle and using transit schedules and arranging transportation. Using public transit -- not available.

The GP comments: “Recently got firewood in for home heating. Took over 4 hours for something he previously did in 45 minutes.” And:

“No safety issues with respect to meals, meds or finances. All activities are restricted by his breathing.”

With respect to social functioning, the GP assesses the appellant as independent for making appropriate social decisions, developing and maintaining relationships, interacting appropriately with others, and securing assistance from others. The GP assesses the appellant is requiring periodic support/supervision for dealing appropriately with unexpected demands (“Develops anxiety with unexpected demands. Even worse if it involves physical activity”).

The GP assesses the impact of the appellant's mental impairment on his immediate social and extended social networks as good functioning.

#### Help provided/required

PR:

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

AR:

The GP indicates that help is provided to the appellant by family and friends. The GP comments: “He is dependent upon others for transportation to get food, meds, firewood, etc.”

Regarding assistive devices, the GP does not indicate that the appellant routinely any of the listed devices to compensate for his impairment. The GP notes. “May require supplemental oxygen in the future.”

#### Self report

In the SR, the appellant writes:

“I have trouble with my breathing. I cannot walk a block without having to stop to catch my breath. It gets worse if there is a wind blowing in my face or the air is cold. During a flight of stairs I have to stop to catch my breath.

To take my boots off I need to sit down because I get short of breath. I take a friend with me when I am out looking for firewood.”

#### Request for Reconsideration

In his letter, the GP writes:

“... While he can climb 5 stairs, lifting 35 pounds and sit for an indeterminate length of time this does not define a lack of a disability. Recently I observed him shoveling some light snow off the deck. What would've taken an average person 10 minutes took this man well over an hour.

With respect to getting his groceries he has to wait till someone can give him a ride to town. He will rarely get more than one bag because he can't carry two. If he can't get help

things are usually not done.

He will periodically get an emotional outburst or breakdown due to the frustration of not being able to do the activities he could formally [*sic*] do.

In addition his pulmonary function will continue to deteriorate as this is a progressive disease. He will eventually reach the point where he requires supplemental oxygen.”

### **Notice of Appeal**

The appellant’s Notice of Appeal is dated 05 May 2017. Under Reasons, the appellant writes:

“The ministry did not originally receive a complete medical assessment of my full condition(s). This will be provided during the appeal hearing.”

### **The Hearing**

At the hearing, the appellant explained how his breathing makes it impossible to do a good day's work. After doing anything for 15 minutes, he has to take 15 minutes off to regain his breath. He stated that he had recently seen a physician at a walk-in clinic who told him that he was close to needing supplemental oxygen. The physician also told him that his breathing difficulties are such that he should no longer have a driver's license (though he has not driven for a couple of years because he can't afford it).

The appellant stated that even bending over to tie up his boots takes a long time, as doing one leaves him short of breath so he has to wait a few minutes before doing the other. Similarly, with bending over to lift anything, this also makes him breathless. He has to sit when preparing meals. Fortunately, his home is on one level, so that he doesn't have to climb any stairs. If he does have to climb stairs, three or four steps are about all that he can manage, and then he is finished.

The appellant stated that he is now using three different puffers, but he feels what he really needs is supplemental oxygen. Apart from getting rides from friends to town (a distance of 25 km.) for shopping and appointments, the supplemental oxygen would be all the help he needs. He explained that he does not have a family physician and it would be very difficult to find a doctor in town who would spend the time necessary to prescribe supplemental oxygen. The GP who completed the PWD application for him is in another city 600 km away and arranging to see him for this purpose would be difficult.

The ministry stood by its position at reconsideration. The ministry representative stated that, according to information she had been given, supplemental oxygen would be considered a breathing aid and, as such, an assistive device.

### **Admissibility of additional 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 appellant’s medical condition and limitations as assessed in the appellant’s PWD Designation Application. The panel therefore admits this information as evidence 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 three 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. The ministry found that the appellant met the age requirement and that, in the opinion of a medical practitioner, his impairment is likely to continue for at least two years. However, the ministry was not satisfied that the evidence establishes that:

- the appellant has a severe physical or mental impairment;
- the appellant's 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.

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 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 sections of the *EAPWDR* applies to this appeal:

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

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

- (i) prepare own meals;
- (ii) manage personal finances;
- (iii) shop for personal needs;
- (iv) use public or personal transportation facilities;
- (v) perform housework to maintain the person's place of residence in acceptable sanitary condition;
- (vi) move about indoors and outdoors;
- (vii) perform personal hygiene and self care;
- (viii) manage personal medication, and

(b) in relation to a person who has a severe mental impairment, includes the following activities:

- (i) make decisions about personal activities, care or finances;

(ii) relate to, communicate or interact with others effectively.

(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.

## **Severity of impairment**

### General considerations

The legislation is clear that the determination of severity of impairment is at the discretion of the minister, taking into account all of the evidence. The legislation requires that for PWD designation, the minister must be "satisfied" that the person has a severe mental or physical impairment.

For the minister to be "satisfied" that the person's impairment is severe, the panel considers it reasonable for the ministry to expect that the information provided by the independent and professional medical practitioner and prescribed professional (in this case the GP) permits the ministry to form a comprehensive overview of the nature and extent of the impacts of the person's medical conditions on daily functioning. It is therefore reasonable for the ministry to expect that the MR and the AR include explanations, descriptions or examples in the spaces provided.

### Physical impairment

In the reconsideration decision, the ministry determined that the appellant does not have a severe physical impairment. In reaching this conclusion, the ministry noted that the diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a severe impairment. To assess the severity of the physical impairment the ministry must consider the nature of the impairment and the extent of its impact on daily functioning, as evidenced by limitations/restrictions in mobility, physical ability, and functional skills. Considering the focus of the legislation on restrictions and help required, the panel considers this a reasonable approach for the ministry to take when analyzing the information provided regarding severity of physical impairment.

Consistent with this approach, the ministry considered the assessments and narratives in the MR, the AR and the GP's letter as these related to physical impairment. In reviewing these assessments/narratives, as summarized by the panel in Part E above and as listed below, the ministry noted the following:

PR:

Health history: The GP does not describe the duration of rest required after the appellant walks one block or climbs one flight of stairs. Although the GP states that the appellant has the medical

condition of deafness, he does not describe impacts/restrictions caused by the hearing impairment. Functional skills [able to walk less than 1 block unaided, etc.]: The GP's assessments of the appellant's abilities with climbing steps unaided, lifting, and remaining seated are not indicative of a severe impairment of physical functioning.

AR:  
Mobility and physical ability [walking indoors, outdoors, climbing stairs, lifting, carrying and holding]: The GP does not describe how much longer than typical the appellant takes with the assessed areas of mobility and physical ability. Furthermore, the GP does not describe the duration of rest required after walking 1 block or climbing 1 flight of stairs. Although the GP indicates restrictions with lifting and carrying/holding, stating "restricts amount as SOB," under functional skills the GP indicates that the appellant can lift 15 to 35 lbs. it is noted that the ability to lift 15 to 35 lbs. is not considered indicative of an impairment of physical functioning.

GP's letter: It is difficult to establish the combined weight of "light snow" and a snow shovel. Furthermore, it is difficult to establish the amount of physical exertion required to shovel snow from a deck, which may or may not involve dumping snow over a railing of an undetermined height. Therefore it is difficult to establish an impairment of physical functioning based on the GP statement regarding shoveling some light snow off a deck.

The ministry concluded by stating that, based on the assessments provided by the GP in the appellant's PWD application/reconsideration and his self-report, the ministry acknowledges that although the appellant is limited with regard to his ability to walk long distances unaided, a severe impairment of his physical functioning has not been established.

The panel finds reasonable the ministry's analysis that it is difficult to assess the degree to which the appellant's physical functioning is restricted by his COPD, given the lack of detailed information provided by the GP regarding the length of time the appellant can exert himself for any given day-to-day task and how much time he requires to rest before resuming any exertion.

The panel also notes that the information provided, including that with regard to his ability to perform DLA, suggests that the appellant's impairment is not so severe that he is restricted in his physical functioning to the point that help is required, either from another person or using an assistive device. (The one exception is his reliance on friends to drive him the 25 km. to and from town; at the hearing he stated that a physician had recently advised him that due to his breathing difficulties he should not be driving, but that in any event he has not driven for a couple of years, because he cannot afford to drive.)

At the hearing, the appellant asked that consideration be given to the difficulties he faces, with the shortage of physicians locally and the logistics of seeing the GP some 600 km distant, that constrain him from obtaining approval for, and being able to use, supplemental oxygen. However, given that the GP stated in his letter at reconsideration only that "[The appellant] will eventually reach the point where he requires supplemental oxygen," the ministry did not have before it a definitive statement from a prescribed professional that the appellant requires the use of an assistive device in the form of a supplemental oxygen apparatus.

Based on the foregoing, the panel finds that the ministry was reasonable in determining that the information provided did not establish that the appellant has a severe physical impairment.



## Mental impairment

In its decision, the ministry determined that the appellant does not have a severe mental impairment. In reaching this decision, the ministry reviewed the information provided by the GP in the MR and AR regarding mental impairment and social functioning, (see Part E above) noting the following:

- The GP's statement under health history: "Anxiety – couple events per month which may last more than one day. Especially related to interactions [with the ministry]." This does not describe the nature of impacts to cognitive and emotional functioning caused by anxiety.
- Although the GP indicates in the MR deficits with cognitive and emotional functioning in the areas of emotional disturbances and motivation, in the AR the GP indicates moderate impacts to cognitive and emotional functioning in these areas.
- In the AR, under impacts of mental impairment, the GP indicates no major impacts to cognitive and emotional functioning, moderate impacts in two areas, and minimal impacts in two areas, with no impacts in 10 areas. The cumulative impact of cognitive and emotional functioning, as indicated by the GP, is not considered indicative of a severe impairment of mental functioning.
- Regarding support/supervision required for social functioning, the GP does not describe the frequency or duration of periodic support/supervision required with being able to deal appropriately with unexpected demands. The GP indicates that the appellant is independent with the other listed areas of social functioning. Further, the GP indicates good functioning with both the appellant's immediate and extended social networks and makes no indication of safety issues with regard to social functioning. While the GP states "periodic problems [with] cost of shelter [and] keeping food on the table," this is not indicative of restrictions with social functioning.
- The ministry also noted the GPs statement in his letter and reconsideration that "He will periodically get an emotional outburst or breakdown due to the frustration of not being able to do the activities he could formally [*sic*] do."

As noted by the ministry, given that the appellant's reported bouts of anxiety are limited to a couple of times a month, that the GP has not reported any major impacts of the appellant's mental impairment on cognitive and emotional functioning, that the appellant is assessed as independent in all but one area of social functioning and that he is reported to have good functioning with his immediate and extended social networks, the panel finds that the ministry was reasonable in determining that the information provided did not establish a severe mental impairment.

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

According to the legislation, the direct and significant restriction in the ability to perform DLA must be a result of a severe impairment. The legislation – section 2(2)(b)(i) of the EAPWDA – requires the minister to assess direct and significant restrictions of DLA, either continuously or periodically for extended periods, in consideration of the opinion of a prescribed professional, in this case the appellant's GP. 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."

In the reconsideration decision, the ministry found that it was not satisfied that the appellant has a severe impairment that, in the opinion of a prescribed professional, directly and significantly restricts DLA continuously or periodically for extended periods. In making this determination, the ministry noted the GP had indicated in the MR that the appellant has not been prescribed any medications or treatments that interfere with his ability to perform DLA. The ministry also referred to the GP's statement under Health history that "Many activities he cannot do or it takes him an excessive

amount of time to complete,” noting that the GP did not describe the type of activities he cannot do or how much longer than typical he takes to complete them.

In reviewing the assessments provided by the GP in the AR (see Part E above for the panel’s summary), the ministry noted that the GP does not describe how much longer than typical the appellant takes with those tasks of DLA assessed as taking significantly longer than typical. The ministry also noted that although the GP indicated restrictions with carrying purchases home, stating “restricts amount carried,” the GP had assessed the appellant as being able to lift 15 to 35 lbs. The ministry also noted that it is difficult to establish restrictions to DLA based on taking longer to complete tasks of heavy physical labour, such as manually transporting firewood. The ministry concluded that it is difficult to establish significant restrictions to DLA based on the GPs assessments in the AR.

The ministry also reviewed the information provided in the GPs letter at reconsideration, noting again that the GP had assessed the appellant as being able to lift 15 to 35 lbs. with regard to the GP’s statement that “He will rarely get more than one bag [of groceries] because he can’t carry two.”

The panel notes that the GP has not assessed the appellant with requiring the assistance of another person or the use of assistive device for any of the DLA requiring physical effort. Further, as the ministry pointed out, the GP has not provided detail to explain what “takes significantly longer than typical” means in terms of how much more time it takes for the appellant to complete a task, including rest periods. The panel therefore considers it reasonable that the ministry finds it difficult to establish whether the appellant’s impairment significantly restricts his ability to perform DLA either continuously or periodically for extended periods. The panel therefore finds that the ministry reasonably determined that it has not been established that this criterion has been met.

### **Help with DLA**

In the reconsideration decision, the ministry held that, as it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required.

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 help from friends in driving him to and from town, since 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. The panel therefore confirms the ministry’s decision. The appellant is thus not successful on appeal.