

## 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 December 24, 2013 denying the appellant designation as a person with disabilities (PWD). The ministry determined that the appellant did not meet three of the five criteria required for PWD designation as set out in the *Employment and Assistance for Persons with Disabilities Act* (EAPWDA) section 2. The ministry found that the appellant meets the criteria of being 18 years of age or older and, that in the opinion of a medical practitioner, her impairment is likely to continue for two or more years. However, the ministry determined that, based on the information provided, the following criteria as set out in section 2(2)(b) of the EAPWDA were **not** met:

- The minister is satisfied that the appellant has a severe mental or physical impairment;
- In the opinion of a prescribed professional, the appellant's impairment significantly restricts her ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and
- As a result of the restrictions, the appellant requires the significant help or supervision of another person to perform the DLA restricted by her impairment.

## 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 reconsideration consisted of the following:

1. The appellant's PWD Designation Application, containing the following three parts:
  - The appellant's Self Report (SR) completed April 29, 2013;
  - The Physician Report (PR) dated July 3, 2013 completed by the appellant's family physician who has known the appellant since 2010 and indicated she had seen her 11 or more times in the previous year. Attached to the PR was a consultation report from the appellant's local hospital dated December 12, 2012 regarding the appellant's admission to hospital for injuries she sustained in a fall down stairs, as well as a letter from an occupational therapist to the appellant's family physician dated June 19, 2013 regarding a home visit the occupational therapist conducted of the appellant on May 10, 2013; and
  - The Assessor Report (AR) dated July 9, 2013 completed by the appellant's chiropractor who has known the appellant since 2006 and had seen her 11 or more times in the previous year.
2. The appellant's request for reconsideration dated November 26, 2013, attached to which were a written submission prepared by her advocate (2 pages) on December 6, 2013, a 2-page self report prepared and signed by the appellant on or about December 6, 2013, and revised pages of the PR and AR prepared by the appellant's family physician and chiropractor in early December 2013 (there are no dates on the revised pages, but the appellant's advocate indicated at the hearing that they were prepared for the ministry's reconsideration in early December 2013). The revised PR and AR were not included in the appeal record. The ministry submitted these documents the day before the hearing.

The appellant completed her notice of appeal on January 16, 2014, and on it she wrote that she has "never considered a GP for back or neck problems" and has never discussed these problems with any of her doctors "in 25 years". She wrote that her family doctor "never received recommendations for aids at home" as she has items due to having her disabled mother live with her. She also wrote that as her father was a doctor, she would talk to him about her health issues. She wrote, "also I have 2 boys and they do what I can't."

In her submissions at the appeal hearing, the appellant told the panel that she will be speaking with her family physician about her back pain and, although she did not have any additional information from her doctor for the hearing, she said she would be going for an x-ray soon. She said that she had always relied on her chiropractor for her back issues and had not thought to discuss it with her family physician. She said that her chiropractor knows her best. The appellant described the ways in which her impairments affect her ability to perform her DLA and this is noted where applicable in the following summary of the evidence.

The following is a summary of the evidence from the PR and AR, including the revised PR and AR regarding the appellant's impairments as they relate to the three PWD criteria at issue. The panel has also included reference to the appellant's SR in the PWD application, as well as her submissions on reconsideration and on appeal and at the hearing.

Severity of impairments (criteria set out in subs. 2(2) EAPWDA)

In the PR completed July 3, 2013, the appellant's physician diagnosed her with a traumatic brain injury that occurred in December 2012; this is confirmed in the information in the consultation report dated December 12, 2012 from the appellant's in patient record from her local hospital attached to the PR. In her comment regarding the severity of the appellant's conditions, the appellant's physician wrote in the PR, "see attached copies of in-hospital stay & consultation report." In the consultation report, the reason for the appellant's referral to hospital is identified as "basal skull fracture which was felt to be nonsurgical" and that at the date of the consult, the appellant was hospitalized in the intensive care unit for observation and discharged 2 days later. The consultation reports also notes that at the time of hospitalization, the appellant had "right flank and hip tenderness."

In the functional skills assessment of the PR originally completed by the appellant's physician in July 2013, the physician indicated that the appellant could walk 4+ blocks unaided on a flat surface, that she could climb 5+ steps unaided, that she had no limitations in lifting and no limitations in remaining seated. She also indicated that the appellant had no difficulties with communication. In the revised PR of early December 2013 prepared for the reconsideration, the appellant's physician changed all of her answers in the functional skills assessment. She check marked "unknown" in answer to how far the appellant could walk unaided on a flat surface and wrote, "see chiropractic report." In the revised answer for how many stairs the appellant could climb unaided, the physician crossed out her previous answer (5+ steps) and wrote, "uses rails" but did not check any answers. In the revised answer for the appellant's limitations in lifting, the physician crossed out the original answer (no limitations), check marked "unknown" and wrote, "see [chiropractor's] report." The physician changed her answer to the question how long the appellant could remain seated - she crossed out "no limitation" and check marked "unknown."

In the PR of July 2013, the appellant's physician indicated that she has significant deficits with cognitive and emotional function in the following areas: "memory (ability to learn and recall information)", "emotional disturbance (e.g. depression, anxiety)", "attention or sustained concentration", and "other" noting "intermittent vertigo." In the comments section regarding these deficits, the physician wrote, "Patient is easily distracted and has difficulty staying focused." The appellant's physician did not change these answers on re-evaluation.

In the AR completed July 9, 2013, the appellant's chiropractor wrote that the appellant's impairments are "short-term memory loss. Vertigo. Chronic intermittent mid and lower back pain" and this answer was not revised in the early December 2013 re-evaluation. The chiropractor indicated that the appellant's levels of ability to communicate were good in all aspects and he did not revise this section on the December re-evaluation. In the original AR section regarding her mobility and physical ability, the chiropractor indicated that the appellant was able to independently perform walking indoors and outdoors and did not revise this answer on re-evaluation. In the original AR, the chiropractor indicated the appellant used rails for climbing stairs and did not change this answer on re-evaluation. In the original AR, the chiropractor indicated the appellant was independent for standing, with the comment "vertigo at times." On re-evaluation, the chiropractor crossed out the check mark for "independent" and checked "uses assistive device." The chiropractor originally check marked that the appellant required periodic assistance from another person for lifting and carrying and holding, but subsequently crossed out these check marks and checked "continuous assistance" on re-evaluation. In the original AR, the chiropractor wrote the comment, "Frequent low and mid back pain, requires

assistance lifting/carrying at times." In the re-evaluation AR of December 2013, the chiropractor crossed out the word "times" in the comment and wrote "all times" and added, "Cannot stand or bend over for prolonged periods. Cannot weed or bend over to clean."

In the AR section regarding the appellant's cognitive and emotional functioning, the chiropractor originally check marked that the appellant's mental impairment (brain injury) had a minimal impact in the areas of consciousness, executive and motivation, and a moderate impact in the areas of emotion, attention/concentration and memory. All of the other areas were check marked as no impact. In the re-evaluation of December 2013, the chiropractor changed the check mark beside consciousness from minimal impact to moderate impact, and changed the check marks beside emotion, attention/concentration and memory from moderate impact to major impact. The chiropractor did not change any of the check marks for the other areas where he had indicated there was no impact. The chiropractor did not provide any narrative or comments on the original AR of July 2013 or on the re-evaluation AR of early December 2013.

In the revised AR of early December 2013, the chiropractor wrote the following comment, "[the appellant] is impaired both by her brain injury as well as her chronic spinal issues. Her condition is generally spinal degeneration which makes her joints very unstable and susceptible to impingement and muscle spasms. She must take care with positioning and weight bearing to avoid these episodes. This I believe, in conjunction with her memory and equilibrium problems constitute a major disability in her life."

In her submissions on reconsideration, the appellant described the effects of her brain injury, which causes her dizziness, affects her memory and concentration, and causes "great stress and panic over new situations" (for example, she wrote that she uses both hands to go up and down stairs for balance and cannot stand on a chair or stool without getting dizzy; if she gets out of bed too quickly in the morning, she will be dizzy and may vomit; she gets confused easily and will get lost if she drives anywhere unfamiliar; if she doesn't set alarms when she is cooking, she will burn dinner as she forgets that she is cooking, and she also wrote that she forgets conversations with people). In these submissions, the appellant also described how she compensates for her back and neck pain; for example, she lies down to watch television, her children vacuum for her as it hurts her shoulder and back, she doesn't bend over to clean her tub as it will seize her back, her children carry the groceries so she doesn't hurt her back or shoulder, and the children also wash windows so she doesn't hurt her shoulder. At the hearing, the appellant told the panel that as a result of her brain injury, she suffers from dizziness and vertigo and that she finds it difficult to concentrate – for example, she said that she could not follow the panel chair's overview of the appeal process and was "lost within the first 30 seconds." She told the panel that she frequently gets very dizzy – she said she was only able to put 3 decorations on her Christmas tree this year before she got too dizzy to continue. She repeated several of the effects set out in the submissions on reconsideration.

*Ability to perform DLA (criteria set out in subs. 2(2)(b) EAPWDA)*

In the PR, the appellant's physician check marked "no" in response to the question "does the impairment directly restrict the person's ability to perform [DLA]?" This answer was not revised in the early December 2013 re-evaluation.

In the section of the AR indicating the degree of restriction the appellant's impairments cause on her

DLA, the appellant's chiropractor originally indicated that the appellant was independent in 7 of the 8 listed tasks of the DLA of personal care, writing "takes her time when dizzy" for transfers in/out of bed and on/off chair, and check marking that the appellant uses an assistive device for bathing with the comment, "seat in shower." The chiropractor did not revise these answers in the re-evaluation AR. The chiropractor originally check marked that the appellant was independent and also takes significantly longer than typical in performing the 2 tasks of the DLA of basic housekeeping, writing "occasionally when dizzy." In the revised AR, the chiropractor changed the check marks from independent to continuous assistance and added the comment, "needs assistance if gets back spasms." For the 5 listed tasks under the DLA of shopping, the chiropractor originally checked that the appellant was independent for all of the tasks. In the re-evaluation AR, the chiropractor changed the check mark for the task of carrying purchases home from independent to continuous assistance and wrote, "son carries groceries." In the re-evaluation AR, the chiropractor has also added the comment, "[the appellant's] children must continuously assist her in her daily life to prevent excessive strain on her lower and upper back."

In the original AR, for the tasks listed under the DLA of meals, the appellant's chiropractor check marked that the appellant was independent in performing the tasks of meal planning and safe storage of food, and that she takes significantly longer than typical with the tasks of food preparation and cooking, commenting, "forgets what's cooking." The chiropractor did not revise these answers in the re-evaluation. For the DLAs of pay rent and bills, and medications, the chiropractor has check marked independent and did not revise these answers on re-evaluation. For the DLA of transportation, the chiropractor indicated in the AR that the appellant was independent for all of the listed tasks, but took significantly longer than typical for getting in and out of a vehicle "longer if back is flared." The chiropractor did not change any of these answers on re-evaluation.

In the original AR, the chiropractor check marked that the appellant was independent for 4 of the listed aspects of social functioning and he did not revise these answers on the re-evaluation AR. The chiropractor indicated in the original AR that she had good functioning in her immediate and extended social networks, but revised his answer on the re-evaluation AR to marginal functioning for the appellant's social networks with the comment, "she stays home to avoid confusing situations."

In the letter from the occupational therapist of June 19, 2013, the occupational therapist wrote that the appellant "reports being largely independent with activities of daily living. Her main complaints were of vertigo, physical de-conditioning and short term memory impairment." The occupational therapist continued that the appellant "reports feeling dizzy or vertiginous when mobilizing; she holds onto furniture or shopping carts for stability. Her balance is adequate ... She does not require a walker. She is able to shower safely using a shower seat." The occupational therapist also wrote, "In conversation, [the appellant] appears to have significant short term memory deficits and distractibility. She often loses her train of thought. She prepares basic meals but states that she occasionally forgets she is cooking if distracted, though she has not had any incidents ... and uses good compensatory strategies (i.e., cooks on low or medium heat). She also reports incidents of getting lost in familiar places. [The appellant] appears to become anxious and frustrated easily; and her cognitive abilities (attention, memory, problem-solving) are worsened under stressful situations."

In her submissions at the hearing, the appellant told the panel that her children assist her with many of her daily living activities: they carry the laundry up and down stairs as she needs both her hands to balance; they load and unload the groceries for her so she doesn't lose her balance or hurt her back

and shoulders; and they vacuum and pick up things around the house. The appellant told the panel she prepares the meals for the family, but she sets alarms and timers and cooks on low to medium heat as she is worried she will forget she is cooking and burn food. She said that she drives to the store and to run her errands, but her children help with lifting and carrying purchases. She uses her late mother's scooter when she has to walk the dog, but only if it is dark as she's concerned about being able to see where she is walking and the dog is active. She has a cane and will sometimes use this for assistance when walking and if she stands for more than 30-60 minutes she uses her late mother's walker. She said that when she has gone hiking or camping, she has also used ski poles for assistance walking. She uses a shower seat because she loses her balance when standing too long and when she cleans her bathroom, she will just spray the tub with cleaner as she can't bend over and scrub the tub.

Assistance required/provided (criteria set out in subs. 2(2)(b)(ii) EAPWDA)

In the section of the AR describing the assistance provided for the appellant, the chiropractor originally wrote, "Assistance has not been utilized so far" and in answer to the question "if help is required but there is none available, please describe what assistance would be necessary", wrote, "Help for heavier house-work would be necessary at times of spinal flare-up or vertigo episodes." The chiropractor check marked that the appellant used a bathing aid, "seat." In the re-evaluation AR of December 2013, the chiropractor crossed out the comment "Assistance has not been utilized so far," check marked "family" and wrote, "Sons continuously assist her." The chiropractor also revised his original answer to, "Help for all house-work would be necessary at all times to avoid spinal flare-up or vertigo episodes."

At the hearing, the appellant told the panel that her mother lived with them and the lower part of the house has been equipped with grab bars and rails, including in the bathroom, and that these things help her a great deal. As set out previously, the appellant described how her children help her a great deal with carrying items such as groceries, lifting things, vacuuming, and carrying the laundry up and down stairs. She described setting timers and cooking on low to moderate heat so she doesn't burn food.

The panel finds that the new information provided by the appellant at the hearing is in support of the information before the ministry at the time of the reconsideration. The testimony of the appellant clarifies the nature of her impairments and the help provided her in managing her DLAs. The panel therefore admits the appellant's testimony pursuant to section 22(4)(b) of the *Employment and Assistance Act*.

## PART F – Reasons for Panel Decision

The issue in this appeal is whether the ministry reasonably determined that the appellant is ineligible for PWD designation because she did not meet all the requirements in section 2 of the EAPWDA. Specifically, the ministry determined that the information provided did not establish that the appellant has a severe mental or physical impairment, that her physical impairment in the opinion of a prescribed professional directly and significantly restricts her ability to perform daily living activities either continuously or periodically for extended periods, and, as a result of those restrictions she requires help to perform those activities.

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 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 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;

(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(2) For the purpose of the Act, "prescribed professional" means a person who is authorized under an enactment to practice the profession of

- (a) medical practitioner;
- (b) registered psychologist;
- (c) registered nurse or registered psychiatric nurse;
- (d) occupational therapist;
- (e) physical therapist;
- (f) social worker;
- (g) chiropractor; or
- (h) nurse practitioner.

### Existence and severity of impairments

The appellant told the panel that when her doctor completed the PWD application in July 2013, she and her doctor focused on her brain injury impairment, as she had not discussed her back problems with her doctor, but had relied on her chiropractor who she sees frequently and knows about both her back problems and her mental impairment. As stated by her advocate in the submission on reconsideration, the appellant's physician "was not fully aware of the extent to which [the appellant] is affected by her mental and physical health impairments." The appellant's advocate noted that the appellant's physician in her revised answers to the functional skills section of the PR completed in early December 2013 had deferred to the appellant's chiropractor through the comment "see chiropractor report." The advocate said that the PR and AR must be read together to determine the existence and severity of the appellant's impairments and argued that the ministry had discounted the information provided by the appellant's chiropractor in the AR that establishes the appellant has a severe physical impairment – back pain. The appellant and her advocate submit that her impairments are both a brain injury (which was accepted by the ministry) and back pain, and that both of these impairments are severe.

The appellant told the panel that she has frequent dizziness and vertigo which affects her daily and she has learned "tricks" to compensate for the effect of her brain injury (such as cooking on low heat and using alarms and timers to remind her she is cooking, using a shower seat so she doesn't lose her balance in the shower, using both hands to go up and down the stairs). She also described that her back and neck/shoulder pain negatively affect her daily living activities and as a result, she relies on the assistance of her children for carrying and lifting.

In the reconsideration decision, the ministry based its determination that the appellant's impairments were not severe on the information provided by the appellant's physician in the PR completed July 3, 2013 and revised in December 2013, as well as the letter from the occupational therapist of June 19, 2013, and the information provided by the appellant's chiropractor in the AR of July 9, 2013, and revised in early December 2013. The ministry noted that the appellant's physician on re-evaluation had changed her answers in the functional skills assessment of the PR and referred to the chiropractor's report. However, the ministry found that in the AR, the appellant's chiropractor "does not address [the appellant's] ability to perform these specific physical functionalities, making it difficult to determine his evaluation." The ministry noted that the appellant's physician did not add a diagnosis of physical impairment, back pain, in the re-evaluation PR of early December 2013. The

ministry also referred to the occupational therapist's letter and the appellant's own self reports, and that in neither of these was there reference to back pain or "physical issues" regarding a physical impairment. For these reasons, the ministry determined that the information provided did not establish the appellant has a severe physical impairment.

In terms of the appellant's mental impairment, in its reconsideration decision, the ministry noted the answers of the appellant's physician in the PR that she had significant deficits with cognitive and emotional functioning and is easily distracted and has difficulty staying focused. The ministry also noted that the appellant's chiropractor in the AR had indicated the appellant was independent in all aspects of social functioning. The ministry noted the chiropractor had changed the answers on the AR regarding the impact of the appellant's mental impairment – changing the three moderate impacts in emotion, attention/concentration and memory to major, and changing the minimal impact in consciousness to moderate. However, the ministry noted that the chiropractor "made no comments in this section to explain the degree of [the appellant's] restrictions, or explain what changed from the time of the original PWD application." The ministry made the comment that "given this lack of information in combination with the consideration of [the doctor's] chiropractic profession, as [he] describes his services to [the appellant] as episodic visits for back and neck pain, and does not reference mental health" the ministry was not satisfied the information provided was evidence of a severe mental impairment.

#### *Analysis and decision*

The legislation provides that the minister may designate a person as a PWD if the minister is satisfied that the person has a severe mental or physical impairment that in the opinion of a medical practitioner is likely to continue for at least 2 years (subs. 2(2)(a) of the EAPWDA). The appellant's physician confirmed in the PWD application that her impairment is a traumatic brain injury and that it is a condition that is likely to continue for at least 2 years. The appellant also asserts that she has a physical impairment of chronic back pain and that it is severe. The issue before this panel is whether the information provided confirms both that the appellant has a physical impairment of chronic back pain (in addition to the recognized mental impairment) and the severity of the impairment(s).

In the PWD application form, the ministry has provided a definition of "impairment" which, although it is not set out in the applicable legislation, offers guidance in considering the existence and severity of an applicant's impairment. The ministry states, "impairment" is a "loss or abnormality of psychological, anatomical or physiological structure or functioning causing a restriction in the ability to function independently, effectively, appropriately or for a reasonable duration." To determine the severity of an impairment, there is both a cause – the impairment itself – and an effect – the degree to which it restricts the ability to function independently, effectively, appropriately or for a reasonable duration.

#### *Physical impairment*

In this case, the appellant's physician has diagnosed her with a brain injury and the ministry has accepted this as her impairment. The panel understands that the impact of a brain injury may have both mental and/or physical components. The panel will address the physical component here. The physician has not diagnosed her with a back injury and, as noted by the ministry, has not commented on the appellant's back, neck and shoulder pain in the PR (both in the original and on re-evaluation).

The appellant told the panel she had not discussed her back, neck and shoulder pain with her doctor, but would do this in future visits and obtain an x-ray. The appellant asserts that her chiropractor has diagnosed her with back and neck pain, and argues that the ministry should consider this evidence of physical impairment and its severity in assessing her for PWD designation. In the AR, the appellant's chiropractor indicated her physical impairment was "chronic intermittent mid and lower back pain" but does not articulate the cause of the appellant's back pain, other than to write the comment "her condition is generally spinal degeneration which makes her joints very unstable and susceptible to impingement and muscle spasm." The appellant told the panel that she has suffered from back pain "for years" and recalled visits to a previous chiropractor when she lived in another city. The chiropractor indicates in the AR that he has been treating her for seven years (since April 25, 2006), describing his services as "episodic visits for care of mid or [lower back pain] also occasional problems with neck strain – was treated for this issue after her fall." The appellant's advocate pointed to the hospital consultation report of December 2012 where "right flank and hip tenderness" is noted as part of the physical examination as evidence of the appellant's existing back impairment. However, the panel finds that it is more likely than not that this note in the hospital consultation report of December 2012 was in reference to pain arising from the appellant's fall down the stairs which caused her brain injury and is not evidence of a back injury as there is no other reference to back pain or back injury in the hospital consultation report.

The panel notes that the legislation provides that the determination of the severity of an impairment is at the discretion of the minister, taking into account all of the evidence, including that of the appellant. However, the starting point must be the medical evidence, with the legislation requiring that a medical practitioner identify the impairment and confirm that it will continue for at least two years. Although a chiropractor is a prescribed professional for the purposes of completing the AR, a chiropractor is not a medical practitioner for the purposes of diagnosing a physical impairment that is likely to continue for at least 2 years – the first required criteria to determine if an applicant qualifies for PWD designation. The panel places weight on the information provided by the appellant's physician in the PR (both the original and revised) as she is the appellant's treating medical practitioner who has known her for 3 years and, although the panel accepts that the appellant has relied on treatment by her chiropractor for back pain, finds that the diagnosis of an impairment related to back, shoulder and neck pain is not set out in the information. Although the appellant accommodates for her back, neck and shoulder pain by limiting several of her activities – for example, she does not bend over to clean her bathtub, she relies on her children to carry laundry up and down the stairs and to carry groceries and vacuum – she also said that she restricts these activities because she loses her balance.

In the revised PR, the physician did not change her answer of "no" to the question whether the appellant's impairment of a brain injury directly restricts her ability to perform DLA. In the revised PR, the physician referred to the chiropractor's report (in the AR) in her changed answers to the assessment of the appellant's ability to walk unaided on a flat surface (changed from 4+ blocks to unknown) and limitations in lifting (changed from no limitations to unknown) in the functional skills assessment. In the AR (both original and revised), the chiropractor indicated the appellant was independent walking indoors and outdoors and used rails to climb stairs. In the original AR, the chiropractor wrote "vertigo at times" beside standing, but changed the answer from independent to uses assistive device in the revised AR. At the hearing, the appellant said she occasionally uses a cane when she walks and ski poles when she hikes, but did not say she needed these devices all the time, and can walk without the cane. In the revised AR in the section addressing the impact of the appellant's brain injury on her cognitive and emotional functioning where the effects of vertigo and

dizziness could be assessed, the chiropractor has indicated that it has no impact on the appellant's motor activity or other neuropsychological problems (eg. Visual/spatial problems, psychomotor problems).

The panel finds that the ministry's determination that the information provided does not establish a severe physical impairment is reasonable.

### *Mental Impairment*

It is established that the appellant has a traumatic brain injury. The panel will address the mental impacts of this impairment in this section. The appellant and her advocate argue that the information before the ministry, particularly as set out by the chiropractor in the AR both original and revised, supports that the appellant's brain injury is a severe impairment. The appellant and her advocate take issue with the ministry's comment in the reconsideration decision that "given this lack of information in combination with the consideration of [the doctor's name] chiropractic profession", asserting that the ministry gave less weight than it should have to the chiropractor's information. The appellant described to the panel (and in her earlier submissions to the ministry) that her mental impairment causes both physical effects (dizziness and/or vertigo and balance problems) as well as mental effects (inability to concentrate and remember).

As stated previously, the panel notes that the determination of the severity of an impairment is at the discretion of the minister, taking into account all of the evidence, including that of the appellant, but that the starting point must be the medical evidence. In the original PR, the physician confirmed that the appellant has significant deficits with cognitive and emotional function in the areas of memory, emotional disturbance and attention or sustained concentration, as well as "intermittent vertigo" with the comment "[the appellant] is easily distracted and has difficulty staying focused." These answers were not changed on re-evaluation in December 2013. The chiropractor revised his answers regarding the impact of the appellant's mental impairment from the original AR to the revised AR – changing the three moderate impacts in emotion, attention/concentration and memory to major impact, and changing the minimal impact in consciousness to moderate. The panel notes, as did the ministry, that the chiropractor has not provided any narrative or commentary in this section to explain the degree or severity of these restrictions. As well, in the AR the chiropractor indicated that she was independent in all aspects of social functioning, with good functioning with her immediate social network, and did not change these answers on re-evaluation. The chiropractor revised the answer in the AR on re-evaluation writing that she has marginal functioning with extended social networks and adding the comment, "she stays home to avoid confusing situations." Based on this evidence, the panel finds that without further information from the appellant's physician or from her chiropractor, explaining the severity or restriction of her brain injury on her "ability to function independently, effectively, appropriately or for a reasonable duration," the ministry's determination that it has not been established that the appellant has a severe mental impairment is reasonable.

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

The appellant told the panel that because of her brain injury and her back pain, she finds it difficult to perform her DLA. As set out previously, the appellant described that she is often dizzy and suffering from vertigo and so she must use both hands when going up and down stairs to maintain her balance, and she must take her time getting into and out of bed and into and out of a chair so she

doesn't fall. She said that she often feels dizzy in her bed when she rolls over, she cannot watch certain television shows as it will make her feel dizzy. She lies on the floor to watch television so that her back doesn't seize, which she says it will do after 10 minutes. She relies on her children to carry laundry up and down stairs, both so she can balance on the stairs and because it could hurt her back and shoulder to lift. For the same reason, her children help her carry groceries and shopping. She told the panel she cannot bend over to clean her bathtub because it hurts her back, and she relies on her children to vacuum and help with housework. The appellant has developed coping mechanisms such as setting timers and using low or medium heat when she cooks so she doesn't burn food. She told the panel she has difficulty concentrating and often forgets things.

In the reconsideration decision, the ministry noted that a severe impairment was not established, and found that although the appellant "has certain limitations as a result" of her medical condition(s), the information provided "does not establish that an impairment significantly restricts daily living activities continuously or periodically for extended periods." The ministry referred to the fact that the physician in the PR indicated that the appellant's impairment does not directly restrict her ability to perform DLA, and that her physician did not change this answer in the PR on the re-evaluation. The reconsideration decision noted that in the AR, the chiropractor originally indicated that the appellant could independently perform "32 out of 38" of the DLAs, but that the chiropractor revised this answer on the AR after re-evaluation, indicating that the appellant was independent in "28 out of 38" of the DLAs. The ministry noted that, when evaluating the appellant's ability to perform DLAs that are not indicated as independent, the narrative of the appellant's chiropractor includes "comments such as 'takes her time when dizzy', 'occasionally when dizzy', 'vertigo at times', 'longer if back is flared. These comments indicate that [the appellant's] ability to perform some of [her] DLAs is episodic in nature, and the frequency and length of time in a day/week/ month that [the appellant's] DLAs are affected is not clear." The ministry also noted the statement of the occupational therapist in the June 19, 2013 letter that the appellant reports being largely independent with her activities of daily living.

### *Analysis and decision*

The legislation requires in subs. 2(2)(b) of the EAPWDA that a prescribed professional confirm that the appellant's impairments directly and significantly restrict her ability to perform her DLA continuously or periodically for extended periods. The panel notes that although a prescribed professional may indicate that, because of a restriction, an individual requires assistance either continuously or periodically for extended periods, this does not necessarily meet the legislative test of being a "direct and significant restriction." The DLA to be considered for a person with a mental impairment are, as set out in subs. 2(1) of the EAPWDR, as follows:

- Prepare own meals;
- Manage personal finances;
- Shop for personal needs;
- Use public or personal transportation facilities;
- Perform housework;
- Move about indoors and outdoors;
- Perform personal hygiene and self care;
- Manage personal medication;
- Make decisions about personal activities, care or finances; and
- Relate to, communicate or interact with others effectively.

In the appellant's case, while her physician indicated in the PR that she was easily distracted and has difficulty staying focused, her physician deferred to the appellant's chiropractor in the assessment of functional skills and indicated that the appellant's impairment did not affect her ability to perform DLA. The appellant's chiropractor (a prescribed professional) provided the information regarding the appellant's ability to perform her DLA in the AR (both the original and re-evaluation). The chiropractor indicates that the appellant is independent in 2 of the 4 tasks associated with the DLA of meal preparation, but takes significantly longer with cooking and food preparation "forgets what's cooking." In this respect, the appellant told the panel that she prepares the meals for her family, but cooks on low to moderate heat and sets timers to remind her that she is cooking so that she doesn't burn food.

The appellant's chiropractor indicated that she was independent in all aspects of paying rent and bills – the DLA of manage personal finances – as well as independent in all 3 of the listed tasks for the DLA of managing personal medication. The appellant did not challenge this information.

The chiropractor indicated that she was independent in 4 of the 5 tasks of the DLA of shopping for personal needs, noting that "son carries groceries" and that the appellant's children "must continuously assist her in her daily life to prevent excessive strain on her lower and upper back." In her evidence, the appellant agreed she does the shopping for the family, but her children help with the loading and unloading of the cart and carrying purchases inside the home. Her chiropractor indicated that the appellant was independent in the 3 listed aspects of the DLA of using public or personal transportation facilities, but getting into and out of a vehicle takes her significantly longer "if back is flared." The appellant told the panel she is able to drive her vehicle. The chiropractor in the revised AR indicated that the appellant required continuous assistance to perform the 2 tasks of the DLA of housework, but wrote the following comment, which qualifies the check mark of continuous assistance, "occasionally when dizzy. Needs assistance if gets back spasm." The appellant told the panel that her son vacuums as it hurts her shoulder, and that her children carry the laundry up and down the stairs because she requires both hands for balance. She also said that she cleans the bathroom, but only sprays the bathtub with cleaner because she can't bend down to scrub the tub. For the DLA of moving about indoors and outdoors, the chiropractor indicated that she is independent walking indoors and outdoors, uses rails to climb stairs, and has vertigo at times when standing. The appellant told the panel that she occasionally uses a cane to walk or ski poles when she is hiking. For the DLA of personal hygiene and self care, the chiropractor indicated that the appellant is independent in 7 of the 8 listed tasks, but uses a seat in the shower when bathing and "takes her time when dizzy" getting in and out of bed and on and off a chair. The appellant confirmed this evidence in her testimony.

For the DLA specifically related to persons with a mental impairment, there is no information provided by her chiropractor in the AR or by her physician in the PR to indicate that her mental impairment has a direct and significant impact on her performance of the DLA of making decisions about personal activities, care or finances (the chiropractor indicated she was independent in all tasks of managing her personal finances and medications). For the DLA of relating to, communicating or interacting with others effectively, the chiropractor indicated in the AR that she was independent in all aspects of social functioning and had good functioning with her immediate social network (and the chiropractor did not revise these answers on re-evaluation). The chiropractor indicated that the appellant has marginal functioning with extended social networks, writing the comment, "she stays home to avoid confusing situations."

The chiropractor has indicated that she takes significantly longer than typical to perform two of the four tasks of the DLA of meal preparation, and one of the tasks of using public and personal transportation (if her back is flared). The chiropractor has also indicated that she requires continuous assistance – albeit only if she is dizzy or if her back spasms – to perform the DLA of housework. However, the appellant has confirmed that she is able to perform the tasks of these DLA, with some assistance if she is dizzy or if her back hurts. The panel concurs with the ministry's comments regarding the lack of information surrounding the frequency and duration of the appellant's dizziness episodes. Nor has the appellant's chiropractor provided any narrative to support his cognitive and emotional impact assessments. Without such information, and based on the evidence provided, the panel finds that the ministry's determination that - although the appellant has certain limitations as a result of her medical conditions - the information provided does not establish that her brain injury significantly restricts her DLA continuously or periodically for extended periods is reasonable.

### Help with DLA

The appellant told the panel that she needs help from her children to perform her DLA – that because of her back pain, dizziness and vertigo, she needs their help carrying laundry, carrying groceries, and vacuuming. The appellant described how she sets alarms and timers and cooks on low to medium heat so that she won't forget things on the stove, and how she has restricted herself to stores that are familiar. The appellant also said that she had several assistive devices in her house from when her mother lived with them, such as bath rails and bath chair, and that she did not discuss her use of these things with her doctor because they were from her mother.

In its reconsideration, the ministry noted that the appellant's physician said she uses a bath chair and stair rails, but determined that as it "had not been established that [DLA] are significantly restricted ... it cannot be determined that significant help is required from other persons."

The legislation requires in subs. 2(b)(iii) that in the opinion of a prescribed professional, as a result of the appellant's restrictions, the appellant requires help to perform DLA. The panel notes the evidence before the ministry at the reconsideration as set out by the chiropractor in the AR was that the appellant needs assistance with carrying purchases home, housework, and going to and from stores. The chiropractor has also written in the AR that the appellant's sons "continuously assist her" and that "help for all house-work would be necessary at all times to avoid spinal flare-up or vertigo episodes." However, the chiropractor does not indicate that the appellant's need for assistance is as a direct result of her brain injury, but rather is to prevent "spinal flare up or vertigo episodes" and the panel finds that the ministry's determination that because it has not been established that DLA are directly and significantly restricted, it cannot be determined that help is required as provided under section 2(2)(b)(ii) of the EAPWDA, is reasonable.

### Conclusion

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