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PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated July 6, 2015 which found that the appellant did not meet four of the five statutory requirements of Section 2 of the *Employment and Assistance for Persons with Disabilities Act* for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement. However, the ministry was not satisfied that the evidence establishes that:

- the appellant's impairment is likely to continue for at least two years;
- the appellant has a severe physical or mental impairment;
- the appellant's daily living activities (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.

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

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PART E – Summary of Facts

The evidence before the ministry at the time of the reconsideration decision included the Persons With Disabilities (PWD) Application comprised of the applicant information and self-report dated September 17, 2014, a physician report (PR) dated September 18, 2014 completed by a physician who is a specialist in PM & R [physical medicine and rehabilitation] and who does not indicate how long he has known the appellant and an assessor report (AR) dated September 17, 2014 and completed by a social worker who has known the appellant for approximately 7 weeks. The social worker indicated that she relied on a number of information sources to complete the AR, specifically an interview with the appellant, a home [hospital] assessment, file/chart information, family/friends/caregivers, and other professionals being the speech language pathologist and an occupational therapist (OT).

The evidence also included:

1) Letter dated October 8, 2014 from a speech-language pathologist;
2) Letter dated June 15, 2015 from a general practitioner who has been the appellant's family physician since the appellant's discharge from rehabilitation in September 2014; and,
3) The appellant's Request for Reconsideration dated June 16, 2015.

Diagnoses

In the PR, the appellant was diagnosed by the specialist in rehabilitation CVA [cerebral vascular accident] in May 2014. In the AR, asked to describe the mental or physical impairments that impact the appellant's ability to manage daily living activities, the social worker wrote: "patient has had a stroke resulting in aphasia which limits his ability to communicate and express himself."

Duration

In the PR, the rehabilitation specialist did not indicate a response to the question whether the appellant's impairment is likely to continue for two years or more and wrote: "uncertain."

In the letter dated June 15, 2015, the general practitioner wrote that the appellant "is now nearly one year post-stroke. Any further recovery will be minimal, and his symptoms will persist indefinitely."

Physical Impairment

In the PR the rehabilitation specialist reported that:

- In terms of health history, the appellant experienced "left parietal infarct- onset May 2014. Hospitalized to date, currently is in rehab unit, currently ambulatory without aids but with significant language/cognitive impairments; about to be discharged home with supports."
- The appellant does not require an aid for his impairment.
- In terms of functional skills, the appellant can walk 4 or more blocks unaided, he can climb 5 or more steps unaided, he can lift 2 to 7 kg. (5 to 15 lbs.) and there is no limitation with how long he can remain seated.
- The appellant is not restricted with mobility inside or outside the home.

In the AR the social worker reported that:

- The appellant is assessed as independent with all aspects of mobility and physical ability, specifically with walking indoors and walking outdoors, climbing stairs, standing, lifting and carrying and holding.

In his self-report, the appellant wrote:

- "I have a disability. My right arm shakes."

In the Request for Reconsideration, the appellant wrote that he has a prolonged illness that is severe when the combined deficits are considered.

In the letter dated June 15, 2015, the general practitioner wrote:

- The appellant was originally admitted to hospital with a left parietal and temporal embolic stroke which resulted in aphasia and left-sided weakness.
- At the time of the last visit, the appellant continued to suffer from left-sided weakness, though this had improved greatly.

Mental Impairment

In the PR, the rehabilitation specialist reported:

- In terms of health history, the appellant experienced "left parietal infarct- onset May 2014…with significant language/cognitive impairments; about to be discharged home with supports."
- The appellant has cognitive difficulty with communication, described as "mixed aphasia and cognitive difficulties."
- The appellant has significant deficits with cognitive and emotional function in 2 of the 11 listed areas, specifically: executive and language, with no comments added.
- The appellant is restricted with social functioning on a continuous basis, described as "communication skills" and the degree of restriction is described as "moderately severe."

In the AR the social worker reported that:

- The appellant has a satisfactory ability to communicate through hearing ("not formally assessed") but has a poor ability with speaking ("word finding and articulation difficulties"), reading ("can't read medication label"), and writing ("single word writing; spelling impairments"). The social worker wrote: "comprehension- mild to moderate impairments. Provides inappropriate responses to some questions when misunderstood."
- There is one major impact to the appellant's cognitive and emotional functioning in the area of language. The social worker wrote: "language impacts patient's ability to carry out more complex cognitive processes- i.e. medications, banking, grocery shopping, using public transport." There is a moderate impact in the area of emotion. There are minimal or no impacts assessed for the remaining 12 areas of functioning.
- With respect to social functioning, the appellant requires periodic support/supervision in the areas of making appropriate social decisions (note: "communication ability is limited"), developing and maintaining relationships ("communication/expression is limited"), and interacting appropriately with others ("difficulty with communication/ expression but able to interact socially"). He requires continuous support/supervision for dealing appropriately with unexpected demands ("requires assistance with any new task, experience, demand") and securing assistance from others ("speech limits ability to use phone").
- The appellant has good functioning in his immediate social networks and marginal functioning in his extended social networks ("is known in his community but is private/isolated due to speech").
- Asked to describe the support/supervision required by the appellant that would help to maintain him in the community, the social worker wrote "has an acquired brain injury community support worker assist him daily/ multiple times a day."

- In the additional comments, the social worker wrote that "due to patient's difficulty with comprehension, oral and written communication, as well as expression and language, patient's ability to function in the community is very limited. Without supports, his ability to socialize with others and make his needs/wishes known is difficult. From a safety point, reading medication labels, calling 9-1-1 (or accessing emergency services) as well as communicating with his doctor and pharmacist are all impacted."

In his self-report, the appellant wrote:

- "There's something wrong with my mouth. It's hard, I can't speak. It's different than before."
- "I cannot speech. I cannot talk to you. It's hard to tell you, I try. I can watch, but I can't tell."

In the letter dated October 8, 2014, the speech-language pathologist wrote:

- The appellant was seen for an assessment of his speech and language on September 26 and 29, 2014.
- The appellant presented with aphasia and apraxia affecting all modalities of language.
- Auditory comprehension, reading comprehension and writing are moderately impaired, and verbal expression is moderately to severely impaired.
- A progress report will be provided following 3 months of authorized therapy, at which time progress will be reviewed and new recommendations provided.

In the letter dated June 15, 2015, the general practitioner wrote:

- At the last visit, the appellant still had significant difficulty with speech, cognition and emotional function, and continues to suffer from left-sided weakness. The combination of these individual impairments results in severe impairment to live independently.

Daily Living Activities (DLA)

In the PR, rehabilitation specialist indicated that:

- The appellant has not been prescribed any medication and/or treatments that interfere with his ability to perform daily living activities.
- The appellant is not restricted with some listed DLA, specifically: personal self care, basic housework, mobility inside and outside the home.
- It is unknown whether the appellant is restricted with the use of transportation.
- The appellant is restricted on a continuous basis with meal preparation, management of medications, daily shopping, management of finances and social functioning.
- The degree of restriction is described as "moderately severe."

In the AR the social worker reported that:

- The appellant is independent with moving about indoors and outdoors.
- The appellant is independent with all of the tasks of several listed DLA, including personal care, basic housekeeping, and meals.
- For the shopping DLA, the appellant is independent with making appropriate choices and carrying purchases home and requires periodic assistance with going to and from stores and paying for purchases and continuous assistance with reading prices and labels. The social worker commented: "familiar stores- patient is more independent with familiar places but requires some assistance in new situations."
- For the "pay rent and bills" DLA, the appellant requires periodic assistance from another person with banking, budgeting and paying rent and bills. The social worker did not provide a

further explanation or description.

- With respect to medications DLA, the appellant is independent with safe handling and storage and requires continuous assistance with filling/refilling prescriptions and taking as directed. The social worker wrote: "patient will require continuous assistance due to possibly negative effect of taking medications incorrectly."
- Regarding the transportation DLA, the appellant is independent with getting in and out of a vehicle and requires periodic assistance from another person with using public transit and using transit schedules and arranging transportation. There is no explanation or description provided by the social worker.

In the letter dated June 15, 2015, the general practitioner wrote:

- Any further improvement can be considered as a bonus to the appellant's recovery.
- He is not able to attain or maintain any sort of employment given his significant disability in his regular daily tasks.

Need for Help

In the PR, asked to describe the assistance needed with DLA, the rehabilitation specialist wrote: "supervision" and noted that the appellant was "about to be discharged home with supports." In the AR, the social worker reported that, with respect to the assistance provided by other people, it is provided by his family, health authority professionals and community service agencies. The social worker wrote: "home health to manage/assist with medications, community support worker to assist daily with functioning/ communication." In the section of the AR for indicating the assistance provided through the use of assistive devices, the social worker has identified communication devices, described as "pen/paper", "uses compensatory method of paper/pen, accessing speech language pathologist."

Appellant's additional information

In his Notice of Appeal dated July 16, 2015, the appellant expressed his disagreement with the ministry's reconsideration decision and wrote that there is sufficient information to confirm that he meets all the eligibility criteria for the PWD designation.

Prior to the hearing, the appellant provided the following additional documents:

1) Letter dated July 8, 2015 'To Whom It May Concern' in which the general practitioner wrote:

- The appellant's problems are diabetes, stroke, atrial fibrillation and heart failure.
- By the time he saw the appellant in September 2014, he was able to speak, though at his best he is only 75% understandable.
- Since he is not fully comprehensible, if he encounters some trouble doing chores, it would be extremely difficult to communicate for help.
- He had profound weakness as a result of his stroke and from being unable to walk (on admission to hospital) to being able to walk with frequent breaks is a significant improvement.
- He cannot walk more than 1 to 2 blocks without frequent breaks.
- He still has weakness, is quick to fatigue and requires frequent breaks, making transit quite difficult especially if he does not have a seat.
- He cannot shop for groceries as he does not have the strength to carry more than a few items. He cannot carry more than a few items more than 1 block at a time.
- He is able to sit without difficulty.
- However, despite these improvements, it is still not enough to live independently.

- The residual effects of the stroke have impacted his social and emotional functioning. He becomes quickly overwhelmed.
- These deficits have a profound impact on his mental well-being. The isolation that results from his impairments is also a barrier to performing his iADL's. He can become easily frustrated and maintaining organization is quite difficult for him.
- He has severe impairment in communication, primarily expressive. He also has difficulty with his executive functioning, which has been mentioned in his original application and the June 15, 2015 letter.

2) Letter dated July 13, 2015 in which the speech-language pathologist wrote:
    - The appellant has a significant speech and language impairment affecting all modalities of language functioning.
    - He has impaired auditory comprehension, which means he does not always understand what people say to him.
    - He has severely impaired verbal expression, which means he is not able to communicate his needs effectively and is often reliant on someone trying to interpret his message.
    - He is unable to read or write effectively.
    - These deficits significantly impact on the appellant's ability to socialize, work, and fully participate in his family life as well as engage with his community.
    - These factors combined can lead to social isolation and will have negative effects on his quality of life; and,
3) Letter dated July 14, 2015 in which a social worker with the Acquired Brain Injury Service (ABIS) wrote:
    - Multiple errors are noted to the AR, likely due to the appellant being assessed while still in hospital as numerous clinical factors which impact individual functioning following a stroke are not present when individuals are in hospital.
    - They have determined that the appellant has a severe long-term disability as they anticipate the service will be required on an indefinite basis. They have provided extensive rehabilitation and community supports to support his activities of daily living.
    - Without the program's involvement and support, in addition to significant family support, with activities of daily living, the appellant would be unable to manage safely in his own home.
    - The AR does not acknowledge cognitive impairments in the description of the appellant's disability, which is a gross error in the assessment.
    - Being in his home is significantly different in terms of demands on cognitive functioning, memory, impact of fatigue and ability to communicate vs. being in hospital where all aspects of daily living are managed.
    - The AR notes that aphasia is the appellant's main disability. However, the appellant has multiple disabilities as stroke is a cluster of deficits.
    - The appellant's aphasia is far more significant than identified on the AR. It impacts his ability to read and write as well as understand communication.
    - The appellant relies on his community support worker (CSW) to manage medical appointments due to inability to communicate effectively via telephone to schedule, remember appointments, communicate his concerns and has difficulty with written communication, which is why he requires significant community support to manage his complex health concerns.
    - The appellant is severely isolated due to his inability to communicate with others and to

travel distances due to fatigue.

- He has been formally assessed, by an OT as having difficulty with insight into his condition, significant difficulty with executive functioning and planning.
- He is unable to budget without assistance and cannot manage his banking independently.
- He requires assistance with grocery shopping and community access due to severe fatigue resulting from his stroke.
- While he has recovered his ability to mobilize independently without aids, this does not mean he is not disabled in his physical abilities. He has residual impairments in motor function and extreme fatigue.
- The assessor identified minimal impact on insight and judgment as well as memory, motivation and executive functions. An OT identified all of these areas as severe deficits.
- We continue to see severe impairments in these areas and provide community support worker services to manage the deficits.
- The appellant was identified as independent with shopping, but he is unable to manage this activity without support due to physical, speech and cognitive impairments. He cannot go to and from stores on his own and he cannot carry purchases home.
- In terms of paying rent and bills, he requires ongoing full support in all areas.
- The assessor's note is contradictory in terms of medications, but it is noted that professional assistance was requested for medication management. The appellant is in need of support with ensuring he obtains his correct prescriptions and his medications are routinely reviewed with his CSW. This is an ongoing requirement.
- The appellant requires assistance with all transportation planning and can only manage short distances due to fatigue.
- All of the appellant's social relationships have been severely impacted. He has become extremely socially isolated and family is extremely exhausted due to the significant demands of long-term support.
- The application was filled out incorrectly due to being completed in an inpatient setting with no ability to know how he would actually manage in his home.
- The comments made by the assessor contradict the levels of impairment marked in the boxes.
- The office interview is highly reliant on self-report which is clearly identified in research literature as not reliable in an individual with documented impairments to memory, cognition, executive functioning and planning.

At the hearing, the appellant provided an additional letter dated August 4, 2015 in which the advocate requested that the general practitioner respond to the question whether it is reasonable to conclude that the appellant's impairment is likely to continue for 2 or more years, and he wrote:

- The appellant's impairment will continue for 2 or more years, i.e. for the rest of his life.

At the hearing, the appellant stated:

- Before his stroke, he was working. Now he cannot do things. He cannot use his head.
- He is good some days and some days are bad. Today is a bad day.
- He takes lots of pills. He takes 2 medications for his diabetes and some for his heart that he takes every day. Sometimes he cannot sleep. He knows which pills he has to take. He takes them from the package.
- He gets tired and has no energy. Before he could walk for a long time but now "not much."
- Sometimes he does not want to take his pills. They make him sleepy.

- The CSW helps him with groceries.
- His sister helps with money. He does not like having to be helped. She helps him with meals. She works and has children and is busy. That is why he has community support.
- He did art and music before and he cannot do these things. He cannot play.
- He is living on his own and the CSW comes Monday and Friday to help with groceries.
- His sister helps him all the time. She lives a long way away so it is hard. She looks after the bills. She helps him go to the doctors. His family doctor and the heart specialist.
- He can prepare his own meals. He used to be a chef a long time ago. He does housework because he has to do something or he will "go crazy." He does not like mess.
- He wants to work but he cannot.

At the hearing, the appellant's advocate stated:

- When he met the appellant, his impression was that the assessment does not match the appellant's condition. The application was completed almost a year ago, when the appellant was in hospital. He is now living in the community and his situation has changed.
- The appellant was in hospital in September, since the time of his stroke in May 2014.
- In the PR, the rehabilitation specialist refers to "significant" language and cognitive impairments.
- In the AR, although the assessments refer to moderate to severe impairment, the social worker who wrote the letter dated July 14, 2014 is of the opinion that the assessment does not match the appellant's situation.
- The difference results from a different standard being applied in the hospital, as opposed to community standards, and also because there are more stressors in the community.
- The appellant's family doctor wrote in his letter dated June 15, 2015 that the appellant requires ongoing rehabilitation and community support. He also indicated that the impairments result in severe impairment to the appellant living independently.
- The appellant gets support from the ABIS and the remainder of the time he has support from his family members. The additional letter from his family doctor confirms that this condition will continue for the rest of his life.
- Although the family doctor's additional letter of July 8, 2015 refers to medical conditions other than stroke, there is sufficient information in the letter to show that the primary impairment is stroke. It is reiterating the information that the doctor previously provided regarding the appellant's stroke and is clarifying that information.
- The appellant's heart condition developed years ago.

At the hearing, the social worker who wrote the July 14, 2015 letter stated:

- The appellant went through an intake process for the ABIS which requires that need for the services is proved. She is a registered social worker and is qualified as a prescribed professional and had prepared assessments for the purposes of an AR in the past.
- In hospital, an individual's day-to-day needs are taken care of. For example, the person does not get dressed and his meals are prepared for him.
- Stroke is a cluster of deficits and the picture becomes more apparent when the person is at home.
- Stroke is a brain injury. Executive functioning is like the "manager" in the brain. It does not mean that the appellant cannot do things, but he may need cueing. His judgment and insight and memory may also be affected. He might forget to eat, for example, and that needs to be checked.

- Stroke can impact many areas of the brain and they rarely see a point where their services are no longer needed. Aphasia results in a cluster of communication deficits and is related to language. They consider it a severe disability. It impacts speaking but also reading and writing. It can cause the highest level of social isolation since people are not able to make connections and this impacts their social functioning. Due to aphasia, the appellant is not able to fill out documents, not able to communicate and not able to socialize.
- The support needed is mostly the supervisory elements regarding medications and meals. He needs to be reminded and it will also take him more time than normal to complete a task such as prepare a meal.
- The appellant's sister also helps him often. She takes him to the bank. She is playing a critical role in his support. If she were not available, the ABIS program would need to provide more support to the appellant. He is requiring the support of his doctor, the ABIS program, an OT, speech pathologist and his family. The appellant cannot receive a document in the mail and understand what it is about, how to fill it out, or how to take the next step.
- The errors identified in the AR likely resulted from not knowing how the appellant would function out in the community and there was some guessing regarding the level of impairment. Also, it is not clear whether the social worker had any particular training or experience with aphasia.
- The assessor's information regarding medications is contradictory. The appellant requires a "blister pack" which allows them to plan the weekly medications. They still have to monitor his ability to take the medications.
- She is not personally involved in the appellant's care but she receives quarterly reports which conclude that the appellant is impaired in his executive function.
- The report by the OT that concluded he has significant difficulty with executive functioning and planning is not available for the hearing. The OT did a full assessment 3 months after the appellant returned home and he will be reviewed again after 1 year.
- Although in the October 8, 2014 letter the speech language pathologist recommended additional sessions of therapy, there is no formal budget for the services of a speech language pathologist.
- The appellant receives services 2 days per week, for a total of 5 hours. Sometimes, there will be additional time if he must attend an extra medical appointment.
- The appellant also experiences significant fatigue and that is all the time. The assessor did not identify the appellant's exhaustion and this may be as a result of lack of training in this area.

At the hearing, the appellant's care advisor stated:

- Regarding the appellant's iADLs [instrumental activities of daily living], he needs support with banking, shopping, and to help maintain a safe living environment.
- They provide services for the appellant 5 hours per week, which includes grocery shopping, banking and paper work (regarding MSP or PWD, for example), and cueing for meals and medications.
- They will check to see what he has eaten and sometimes he forgets to eat a meal. It is important that he eats his meals because it has an impact on his other health concerns.
- The appellant may think that he has food, but there will be nothing in the fridge to make a proper meal. With grocery shopping, when he does this on his own he may over-buy and go over his budget.
- He also needs exercise and to get out into the community. The other days, his family will help him. The CSW is a critical piece of his support as it keeps him as independent as possible

and the appellant does not want his family to be too burdened.

- It has been hard for the appellant to adapt to his new situation. Endurance is an issue and they have to remind him about his limitations. He will recover better with their support.
- He is unable to interact effectively at the store or at the bank.
- The monitoring that they provide is crucial for meals and for medications. The appellant has gone days without meals when not reminded. His sister will call him to remind him to eat lunch. Even with the blister pack, they sometimes find that his medications have not been taken. He sometimes needs prompting when he resists taking the medications due to the side effects, such as drowsiness.
- Their services will be maintained indefinitely. His rate of progress is currently stable. There has been some discussion about increasing services. He is assessed on an on-going basis, every 3 months. They would provide more services if he was regularly missing his medications, for example. His sister is currently heavily involved in his care but they have told her to let them know if it is too much and they will increase the service they provide.
- He can go to doctor's appointments by himself, if they are nearby. He can walk for 15 minutes. Usually his sister or the CSW go with him.

The ministry relied on its reconsideration decision. At the hearing, the ministry added:

- The new information provided by the appellant is a different, fuller picture and the ministry may have possibly made a different decision, but the ministry did not have this information available at reconsideration. The ministry made a reasonable decision based on the picture presented at reconsideration and whether that picture accurately reflected the appellant's situation is an entirely different thing.
- The speech language pathologist described moderate impacts in the letter dated October 8, 2014. The appellant was said to be a good candidate for speech therapy and it was recommended that a progress report be completed after 3 months. There have been no follow-up reports and the appellant does not appear to be receiving the recommended therapy.
- Although the medical practitioner wrote in the June 15, 2015 letter that his symptoms will persist indefinitely, he had previously written in the PR that the prognosis was uncertain and he still has not provided a specific time frame.
- In the AR, the assessment of impacts to the appellant's cognitive and emotional functioning indicates only one major impact.
- For meals, the appellant has said that he can prepare his meals and his care advisor says he misses meals and needs reminders.
- For grocery shopping, he receives assistance 2 times per week. Although it may take the appellant longer to complete tasks, there is no evidence that it takes an unreasonable amount of time.
- The appellant's impairments are not significant enough that the ABIS services have been stepped up and the appellant's health has been described as stable.
- The ministry acknowledged that there are certain areas of functioning that are impacted but the impact is more of a minimal or moderate impact.
- While the medical practitioner indicated there are continuous restrictions to some daily living activities, the assessor has not reported a need for a significant level of assistance.
- The information presented at the hearing indicates that the appellant requires periodic assistance with meal preparation and medications.
- The ministry considered the letter dated June 15, 2015 from the medical practitioner as it was mentioned in the reconsideration decision.

- The ministry acknowledged that the appellant requires assistance in some areas, but there are other areas where no help is needed.
- The ministry weighed the available evidence and the ministry's judgment is that there was not sufficient information to show the required degree of impairment, that the evidence showed a moderate degree of impairment.

Admissibility of Additional Information

Section 22(4)(b) of the *Employment and Assistance Act* is designed to strike a balance between a pure appeal on the record of the ministry decision and a hearing *de novo* (a completely new hearing). It contemplates that while a party may wish to submit additional evidence to the panel on the appeal, the panel is only empowered to admit "oral or written testimony in support of" the record of the ministry decision; it provides a limited opportunity to augment evidence on appeal but it does not provide a hearing *de novo* or new hearing. If the additional evidence substantiates or corroborates the information and records before the minister at the reconsideration stage, the evidence is to be admitted; if it does not, then it does not meet the test of admissibility under section 22(4)(b) of the *EAA* and cannot be admitted.

The ministry did not object to the additional documents provided by the appellant prior to or at the hearing. The panel considered the testimony by the appellant and his care advisor and the letter from the speech language pathologist dated July 13, 2015, as well as the additional letter from the general practitioner dated August 5, 2015, as additional information that corroborates and tends to substantiate the extent of the appellant's impairment from the previously diagnosed condition, which was before the ministry at reconsideration. Therefore, the panel admitted this additional information as being in support of information and records that were before the ministry at the time of the reconsideration, in accordance with Section 22(4)(b) of the *Employment and Assistance Act.*

With respect to the letters from the general practitioner dated July 8, 2015 and the social worker dated July 14, 2015 as well as her oral testimony, the focus of this evidence is either on physical impairment that was not evident at reconsideration as a result of extreme fatigue or a significantly different assessment of the appellant's mental functioning than that conducted while in hospital and attributed, in part, to his now living in the community. In the PWD application, for example, the medical practitioner identified significant deficits to the appellant's cognitive and emotional functioning in the areas of executive and language (with no deficits in the other listed areas, including memory, emotional disturbance, or motivation) and the social worker assessed a major impact only in the area of language, with a moderate impact in emotion and a minimal impact to executive.

On appeal, a different social worker described the results of an OT assessment which indicated assistance required due to "extreme fatigue" and severe, or major, deficits in insight and judgment, memory, motivation and executive functions. The social worker wrote that the failure to acknowledge cognitive impairments in the description of the appellant's disability in the AR "is a gross error in his assessment." In the letter dated July 8, 2015, the general practitioner also described "profound weakness" and fatigue as a result of stroke with associated impacts to walking and carrying that had been previously assessed as independent. In the panel's view, this constitutes additional evidence that describes new symptoms, not raised in the PWD application or at reconsideration, and also presents a sufficiently disparate picture of the appellant's mental and physical functioning as to constitute a new application that is properly put before the ministry for review. Given these inconsistencies, and pursuant to section 22(4)(b) of the *EAA,* the panel does not admit this evidence for consideration on the appeal.

APPEAL #

PART F – Reasons for Panel Decision

The issue on the appeal is whether the ministry's reconsideration decision, which found that the appellant is not eligible for designation as a person with disabilities (PWD), was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. The ministry found that the appellant does not have a severe mental or physical impairment that, in the opinion of a medical practitioner, is likely to continue for at least 2 years. The ministry also found that his daily living activities (DLA) are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods and that, as a result of those restrictions, it could not be determined that 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 criteria for being designated as a person with disabilities (PWD) are set out in Section 2 of the EAPWDA as follows:

Persons with disabilities

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.

(4) The minister may rescind a designation under subsection (2).

Section 2(1) and (2) of the EAPWDR provide definitions of DLA and prescribed professionals as follows:

Definitions for Act

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

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

(i) prepare own meals;

(ii) manage personal finances;

(iii) shop for personal needs;

(iv) use public or personal transportation facilities;

(v) perform housework to maintain the person's place of residence in acceptable sanitary condition;

(vi) move about indoors and outdoors;

(vii) perform personal hygiene and self care;

(viii) manage personal medication, and

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

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

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

(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.

Duration

The appellant's position is that his doctor clarified in his letters provided at reconsideration and at the hearing that his impairments will continue for 2 years of more.

The ministry's position is that the appellant's general practitioner has not confirmed, in either the PR or the letter provided at reconsideration, that the appellant's impairment will continue for two years or more.

Panel Decision

Section 2(2)(a) of the EAPWDR requires that there must be the opinion of a medical practitioner indicating that the appellant's impairment is likely to continue for at least two years. In response to the question in the PR whether the appellant's impairment is likely to continue for two years or more, the general practitioner indicated neither "yes" or "no" and wrote "uncertain." At reconsideration, the general practitioner provided a letter dated June 15, 2015, in which he wrote that the appellant is now nearly one year post-stroke and "any further recovery will be minimal, and his symptoms will persist indefinitely." In a letter dated August 5, 2015, the general practitioner wrote that the appellant's impairment" will continue for 2 or more years, i.e. for the rest of his life." Given this clarification, the panel finds that the ministry's determination that the medical practitioner had not confirmed that the appellant's impairment will continue for two or more years from the date of the application was not

reasonable.

Severe Physical Impairment

The appellant 's position is that he has a severe physical impairment as a result of the left-sided weakness caused by his stroke in May of 2014.

The ministry's position is that there is not sufficient evidence from the rehabilitation specialist and the general practitioner to demonstrate a severe physical impairment. The ministry wrote that the rehabilitation specialist indicated that the appellant is able to walk 4 or more blocks unaided, climb 5 or more steps unaided, lift 5 to 15 lbs. and there is no limitation on how long he can remain seated. The ministry argued that the social worker assessed the appellant as being independent in all aspects of his mobility and physical abilities.

Panel Decision

A diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a severe impairment. An "impairment" is a medical condition that results in restrictions to a person's ability to function independently or effectively.

To assess the severity of an impairment the ministry must consider the nature of the impairment and the extent of its impact on daily functioning as evidenced by functional skill limitations and the degree to which the ability to perform DLA is restricted. In making its determination the ministry must consider all the relevant evidence, including that of the appellant. However, the legislation is clear that the fundamental basis for the analysis is the evidence from a "prescribed professional" – in this case, the rehabilitation specialist who consulted with the appellant in hospital and the appellant's general practitioner who saw him after discharge.

The rehabilitation specialist diagnosed the appellant with CVA which occurred in May of 2014 and wrote that the appellant experienced "left parietal infarct- onset May 2014. Hospitalized to date [September 2014], currently is in rehab unit, currently ambulatory without aids…about to be discharged home with supports." The physician, who is a specialist in rehabilitation, reported that the appellant does not require an aid for his impairment. In terms of functional skills, the rehabilitation specialist indicated that the appellant can walk 5 or more blocks unaided, climb 5 or more steps unaided, lift 5 to 15 lbs., and there is no limitation with how long he can remain seated. The rehabilitation specialist also reported that the appellant is not restricted with mobility inside or outside the home.

In the AR the social worker indicated that the appellant is independent with all aspects of mobility and physical ability, specifically with walking indoors and walking outdoors, climbing stairs, standing, lifting and carrying and holding. Although the appellant wrote in his self-report, that he has a disability and his "right arm shakes," he did not address this problem at the hearing.

In the letter dated June 15, 2015 provided at reconsideration, the appellant's general practitioner wrote that the appellant was originally admitted to hospital with a left parietal and temporal embolic stroke which resulted in aphasia and left-sided weakness. The general practitioner updated the appellant's condition at the time of the last visit as continuing to suffer from left-sided weakness, though he noted that this had improved greatly. The general practitioner reported that the appellant still had significant difficulty with speech, cognition and emotional function, and continues to suffer from left-sided weakness and that the combination of these individual impairments results in severe

impairment to live independently.

Although the general practitioner referred to a "severe impairment to live independently," the only limitation to the appellant's physical functioning at that time was to his lifting, assessed by the rehabilitation specialist at 5 to 15 lbs., and there was no comment whether the limitation is with both sides, or with only the left. At the hearing, the appellant stated that he gets tired and has no energy; before he could walk for a long time but now "not much." The appellant's care advisor stated that it has been hard for the appellant to adapt to his new situation. Endurance is an issue and they have to remind him about his limitations. She stated that the appellant can go to doctor's appointments by himself, if they are nearby, as he can walk for 15 minutes. Given the absence of an assessment of significant impacts to the appellant's physical functioning, the panel finds that the ministry reasonably determined that there is not sufficient evidence to establish that the appellant has a severe physical impairment under Section 2(2) of the EAPWDA.

Severe Mental Impairment

The appellant's position is that he has a severe mental impairment due to the "mixed aphasia and cognitive difficulties" as a result of the stroke experienced in May 2014.

The ministry's position is that there is insufficient evidence to establish that the appellant has a severe mental impairment as required by Section 2(2) of the EAPWDA. The ministry argued that while the rehabilitation specialist reported that there are significant deficits in a two areas of the appellant's cognitive and emotional functioning, the impacts are assessed by the social worker as mostly minimal, with the exception of language (major) and emotion (moderate). The ministry argued that the social worker indicated that the impairment to the appellant's comprehension is "mild to moderate." The ministry argued that the rehabilitation specialist reported in the PR that the restrictions to the appellant's social functioning are "moderately severe" and the social worker has not defined the degree and duration of the periodic support/supervision required in specific areas of social functioning.

Panel Decision

In the PR, the rehabilitation specialist reported that the appellant has cognitive difficulty with communication, described as "mixed aphasia and cognitive difficulties." The rehabilitation specialist indicated that the appellant has significant deficits with cognitive and emotional function in 2 of the 11 listed areas, specifically: executive and language, with no comments added. In the AR, the social worker assessed one major impact to the appellant's cognitive and emotional functioning in the area of language. The social worker wrote: "language impacts patient's ability to carry out more complex cognitive processes- i.e. medications, banking, grocery shopping, using public transport." The social worker assessed a moderate impact in the area of emotion, and minimal or no impacts for the remaining 12 areas of functioning, including a minimal impact to executive (e.g. planning, organizing, sequencing, abstract thinking, problem solving, calculations). In his self-report, the appellant wrote: "There's something wrong with my mouth. It's hard, I can't speak. It's different than before;" "I cannot speech. I cannot talk to you. It's hard to tell you, I try. I can watch, but I can't tell." In the letter dated June 15, 2015, the general practitioner wrote that the appellant has significant difficulty with speech, cognition and emotional function, and continues to suffer from left-sided weakness. The combination of these individual impairments results in severe impairment to live independently. No further detail of the specific relative impacts to speech, cognition or emotional function is provided by the general practitioner in his letter.

Considering the two DLA that are specific to mental impairment – make decisions about personal activities, care or finances (decision making), and relate to, communicate or interact with others effectively (social functioning), the evidence does not indicate that the appellant is significantly restricted in either. With respect to decision making, the social worker reported in the AR that the appellant is independent with the decision-making components of the DLA of personal care (regulate diet), daily shopping (make appropriate choices), and meal preparation (meal planning and safe storage of food). The social worker indicated that the appellant requires periodic assistance from another person with the decision-making components of paying rent and bills (including budgeting) but did not include an explanation or description to allow the ministry to determine that the assistance is required for extended periods of time. With respect to taking his medications as directed, the social worker wrote that the appellant "will require continuous assistance due to possibly negative effect of taking medications incorrectly." At the hearing, the appellant stated that he knows which pills he has to take and that he "takes them from the package." The appellant's care advisor stated that even with the blister pack, they sometimes find that the appellant has not taken his medications. He sometimes needs prompting when he resists taking the medications due to the side effects, such as drowsiness. However, she also stated that the appellant's rate of progress is currently stable, he is assessed on an on-going basis every 3 months, and they would provide more services if he was regularly missing his medications, for example.

The social worker reported in the AR that the appellant requires periodic support/supervision with making appropriate social decisions, and wrote that his "communication ability is limited." When asked to describe the support/supervision required which would help to maintain the appellant in the community, she wrote: "has an acquired brain injury community support worker assist him daily/multiple times a day." At the hearing, the appellant's care advisor clarified that the ABIS program provides services for the appellant on 2 days per week for a total of 5 hours, which includes grocery shopping, banking and paper work (regarding MSP or PWD, for example), and cueing for meals and medications, and that his family also provides support and supervision. The care advisor stated that the CSW is a critical piece of the appellant's support as it keeps him as independent as possible and the appellant does not want his family to be too burdened. The appellant stated at the hearing that he is currently living alone.

Regarding the DLA of social functioning, the appellant is assessed in the PR as restricted on a continuous basis, noted as "communication skills" and the degree of restriction is described as "moderately severe." Asked to describe the assistance required with daily living activities, the rehabilitation specialist wrote "supervision." In the AR, the social worker indicated that the appellant requires periodic support/supervision with developing and maintaining relationships (note: "communication/ expression is limited") and interacting appropriately with others (note: "difficulty with communication/expression but able to interact socially") and continuous support/supervision with securing assistance from others (note: "speech limits ability to use phone"). The appellant is assessed as having good functioning in his immediate social networks and marginal functioning in his extended social networks (note: "is known in his community, but private/isolated due to speech"). In the additional comments to the AR, the social worker wrote that "due to patient's difficulty with comprehension, oral and written communication, as well as expression and language, patient's ability to function in the community is very limited. Without supports, his ability to socialize with others and make his needs/wishes known is difficult. From a safety point, reading medication labels, calling 9-1-1 (or accessing emergency services) as well as communicating with his doctor and pharmacist are all impacted." However, in assessing the appellant's ability to communicate, the social worker also wrote in the AR "comprehension- mild to moderate impairments. Provides inappropriate responses to

some questions when misunderstood."

Considering the assessment of the speech-language pathologist, the specialist wrote in a letter dated October 8, 2014, that the appellant presented with aphasia and apraxia affecting all modalities of language. The speech-language pathologist reported that the appellant's auditory comprehension, reading comprehension, and writing are 'moderately' impaired, and his verbal expression is 'moderately to severely' impaired. In the letter dated July 13, 2015, the speech-language pathologist wrote that the appellant has a significant speech and language impairment affecting all modalities of language functioning. She clarified that the appellant has impaired auditory comprehension, which means he does not always understand what people say to him. He has severely impaired verbal expression, which means he is not able to communicate his needs effectively and is often reliant on someone trying to interpret his message.

The speech-language pathologist wrote that these deficits significantly impact on the appellant's "ability to socialize, work, and fully participate in his family life as well as engage with his community. These factors combined can lead to social isolation and will have negative effects on his quality of life." In the letter dated June 15, 2015, the general practitioner wrote that the appellant is not able to attain or maintain any sort of employment given his significant disability in his regular daily tasks, and the appellant stated several times at the hearing that he is no longer able to work. As for finding work and/or working, the panel notes that employability is not a criterion in section 2(2) of the EAPWDA nor is it listed among the prescribed daily living activities in section 2 of the EAPWDR.

Given the assessment of mostly moderate impacts to the appellant's cognitive and emotional functioning and good/marginal social functioning as well as the references in the letters from the general practitioner and the speech-language pathologist to the inability of the appellant to work, the panel finds that the ministry reasonably determined that a severe mental impairment was not established under Section 2(2) of the EAPWDA.

Restrictions in the ability to perform DLA

The appellant's position is that his physical and mental impairments directly and significantly restrict his ability to perform DLA on an ongoing basis such that he requires the significant assistance of another person, specifically the ABIS program and his family.

The ministry's position is that the information from the prescribed professional does not establish that the appellant's impairments significantly restrict his DLA either continuously or periodically for extended periods of time. The ministry argued that although the social worker assessed the appellant as requiring periodic assistance from another person with tasks of the shopping, "pay rent and bills" and transportation DLA, the social worker does not provide any comments or descriptions to indicate how often the appellant requires assistance. The ministry argued that there is insufficient information to demonstrate that the appellant requires this assistance for extended periods of time. The ministry argued that while the social worker reported the need for continuous assistance in filling/refilling prescriptions and taking medications as directed and continuous support/supervision required for aspects of social functioning, the appellant has been assessed as independent with the majority of the other tasks of DLA.

Panel Decision

Section 2(2)(b) of the EAPWDA requires that the ministry be satisfied that a prescribed professional has provided an opinion that an applicant's severe impairment directly and significantly restricts his

DLA, continuously or periodically for extended periods. In this case, the rehabilitations specialist, the social worker and the general practitioner are the prescribed professionals. DLA are defined in Section 2(1) of the EAPWDR and are also listed in the PR and, with additional details, in the AR. Therefore, the prescribed professional completing these forms has the opportunity to indicate which, if any, DLA are significantly restricted by the appellant's impairments continuously or periodically for extended periods.

In the appellant's circumstances, the rehabilitation specialist reported that the appellant has not been prescribed medications and/or treatments that interfere with his ability to perform DLA. In the PR, the rehabilitation specialist reported that the appellant is not restricted with mobility inside or outside the home, and, in the AR, the appellant is assessed as independent with both moving about indoors and outdoors. The general practitioner also indicated in the PR that the appellant is not restricted with the DLA of personal self care and basic housework, and it is unknown whether the appellant is restricted with the use of transportation. At the hearing, the appellant stated that he does his housework because he does not like it when it is messy and he has to do something or he will "go crazy." In the AR, the social worker assessed the appellant as independent in all tasks of personal care and housework. For transportation, the social worker reported that the appellant independently gets in and out of a vehicle and requires periodic assistance with using public transit and with using transit schedules and arranging transportation. The social worker did not provide an explanation or a description of the assistance required in order to allow the ministry to determine that the periodic assistance is required for extended periods of time.

In the PR, the rehabilitation specialist also reported that the appellant is restricted on a continuous basis with meal preparation, daily shopping, management of finances, management of medications, and social functioning. The degree of restriction is described as "moderately severe." However, the social worker assessed the appellant as being independent with all tasks of the meals DLA, specifically meal planning, food preparation, cooking and safe storage of food. For daily shopping, the appellant is independent with making appropriate choices and carrying purchases home and requires periodic assistance going to and from stores and paying for purchases and continuous assistance with reading prices and labels. The social worker commented that the appellant is more independent with familiar places but "requires some assistance in new situations." At the hearing, the appellant's care advisor clarified that the ABIS program provides support to the appellant two days per week for a total of 5 hours per week and that part of this is to help monitor his grocery shopping and provide assistance with necessary interactions. She stated that when the appellant does the grocery shopping on his own, he may "over-buy" and go over his budget.

Regarding the management of finances DLA, the social worker indicated that the appellant requires periodic assistance with banking, budgeting and paying rent and bills. At the hearing, the appellant and his care advisor both stated that the appellant's sister helps him with his finances, but there is no detail on the tasks or the amount and frequency of assistance that the appellant's sister provides. With respect to medications DLA, the appellant is independent with safe handling and storage and requires continuous assistance with filling/refilling prescriptions and taking as directed. The social worker wrote: "patient will require continuous assistance due to possibly negative effect of taking medications incorrectly." At the hearing, the care advisor stated that the appellant's rate of progress is currently stable and they would provide more services if he was regularly missing his medications, for example. In the letter dated June 15, 2015, the general practitioner wrote that any further improvement can be considered as a bonus to the appellant's recovery and he is not able to attain or maintain any sort of employment given his significant disability in his regular daily tasks.

As previously discussed, the evidence of the prescribed professionals does not clearly indicate that the appellant is significantly restricted in either DLA specific to mental impairment, namely decision making or social functioning, and employability is not listed among the prescribed daily living activities in section 2 of the EAPWDR. Therefore, the panel finds that the ministry was reasonable to conclude that the evidence is insufficient to show that the appellant's overall ability to perform his DLA is significantly restricted either continuously or periodically for extended periods, pursuant to Section 2(2)(b)(i) of the EAPWDA.

Help to perform DLA

The appellant's position is that his physical and mental impairments significantly restrict his daily living functions such that significant assistance is required.

The ministry's position is that because 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 direct and significant restrictions in the ability to perform DLA, a person requires help to perform those activities. Help is defined in subsection (3) as the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform a DLA.

In the PR, asked to describe the assistance needed with DLA, the rehabilitation specialist wrote "supervision." In the AR, the social worker reported that, with respect to the assistance provided by other people, it is provided by his family, health authority professionals and community service agencies. The social worker wrote: "home health to manage/assist with medications, community support worker to assist daily with functioning/ communication." In the section of the AR for indicating the assistance provided through the use of assistive devices, the social worker has identified communication devices, described as "pen/paper", "uses compensatory method of paper/pen, accessing speech language pathologist." At the hearing, the appellant's care advisor clarified that the ABIS program does not assist the appellant daily but, rather, two days per week for a total of 5 hours and the appellant's family assists him the remaining time.

The panel finds that the ministry reasonably determined that as direct and significant restrictions in the appellant's ability to perform DLA have not been established, it cannot be determined that the appellant requires help to perform DLA as a result of those restrictions, as defined by section 2(3)(b) of the EAPWDA.

Conclusion

Having reviewed and considered all of the evidence and relevant legislation, the panel finds that the ministry's reconsideration decision which determined that the appellant was not eligible for PWD designation pursuant to Section 2(2) of the EAPWDA was reasonably supported by the evidence, and therefore confirms the decision.