PART C – Decision under Appeal

The Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated 14 October 2015 determined that the appellant did not meet 3 of the 5 statutory requirements of section 2 of the Employment and Assistance for Persons with Disabilities Act (EAPWDA) for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement and that the appellant's impairment was likely to continue for at least 2 years. However, the ministry was not satisfied that

- the appellant had a severe mental or physical impairment and
- that the appellant's mental or physical impairment, in the opinion of a prescribed professional, directly and significantly restricted daily living activities (DLA) either continuously or periodically for extended periods and
- that as a result of those restrictions, in the opinion of a prescribed professional, the appellant required help to perform DLA.

PART D – Relevant Legislation

EAPWDA, section 2
Employment and Assistance for Persons with Disabilities Regulation (EAPWDR), section 2.

PART E – Summary of Facts

The ministry was not in attendance at the hearing. After confirming that the ministry was notified, the hearing proceeded under section 86 (b) of the Employment and Assistance Regulation (EAR).

The following evidence was before the ministry at the time of reconsideration:

- A PWD Application, divided in 3 sections: 1 Self Report (SR), 2 Physician Report (PR) and 3 Assessor Report (AR) as follows:
- Section 1 – a 3 page Applicant Information (SR) completed and signed by the appellant before his physician as a witness on 7 April 2015. The appellant described his medical condition and how it impacted on his daily activities.

- Section 2 – an 8 page PR dated 18 May 2015 completed and signed by the appellant's physician, a general practitioner (GP) who reported the following:
    - Specific diagnosis: End stage osteoarthritis (OA) left hip, "Progressive-? unknown time", diagnosed 1 October 2012.
    - Health history: "Severe end stage [OA] left hip", progressive pain and inability to mobilize, inability to sit for long (less than 1 hour) and severe morning stiffness.
    - The appellant was prescribed medication that interfered with his ability to perform DLA: anti-inflammatories to control pain and slow further progression.
    - The appellant does not require any prostheses or aids for his impairment – will need a total hip arthroplasty.
    - The impairment was likely to continue for 2 years or more from that date and the GP explained that the appellant has become progressively impaired since diagnosis.
    - In terms of functional skills, the GP indicated that the appellant could walk 1 to 2 blocks unaided, he could climb 2 to 5 steps unaided, he can lift up to 7 kg, he can remain seated for 1 to 2 hours and has no difficulties with communication.
    - In terms of cognitive and emotional functions, the GP indicated no significant deficit.
    - While the GP did complete the AR he nonetheless completed the DLA part of the PR as follows:
        - The impairment does directly restrict the appellant's ability to perform DLA;
        - He is continually restricted for basic housework, daily shopping, mobility inside and outside the house and use of transportation. He has no restriction for other DLA (personal self care, meal preparation, management of medications and of finances and social functioning). The GP commented that his condition has severe restrictions to mobility – chronic pain and restriction of activities for a young person. In terms of assistance required, the GP indicated that a family member supports him for transportation all the time and he is unable to leave home and attend courses.
    - In terms of additional comments, the GP indicated that the appellant has tried extensively to lose weight and continue with mobilization. Mobility severely restricted, chronic pain restricts him extensively in socializing and interaction.
    - The GP had known the appellant since 2010 and in the 12 months before the PR, the GP had seen the appellant 2 to 10 times.

- Section 3 – an 11 page AR completed by the same GP and also dated 18 May 2015 reported the following:

- The appellant lives with a family member who is his primary caregiver.
- In terms of physical or mental impairments that impact DLA, the GP indicated that the appellant's severe mobility restrictions resulted in both physical and mental deterioration and social isolation.
- The appellant's reading, writing and hearing abilities are good but his speaking ability is satisfactory because of stuttering with the comment "poor self-esteem with social isolation and deterioration".
- In terms of mobility and physical ability, the GP indicated that the appellant was independent for walking indoors but needed periodic assistance from another person for walking outdoors, climbing stairs (comment: need railing), standing, lifting (limited to 5 kg left shoulder) and carrying and holding with the additional comment that the appellant has "chronic stiffness + pain + significant inability to mobilize".
- In terms of "Cognitive and Emotional Functioning" the GP reported no impact for the majority of areas, minimal impact for bodily functions, insight and judgment, motivation and language; moderate impact for emotion. The GP commented that the appellant stuttering and social isolation are due to inability and chronic pain and discomfort. He could do online courses to boost confidence, self-esteem and might help to develop social skills and development but he is unable to do courses due to financial reasons. "Lack of motivation might be the reason" he wrote.
- In terms of DLA, the GP provided the following assessments (the GP's comments in brackets):
    - *Personal care*: independent except for dressing – needs periodic assistance from another person (about twice / week);
    - *Basic housekeeping*: independent for laundry but needs periodic assistance from another person for other basic housekeeping;
    - *Shopping*: independent for reading prices & labels, making appropriate choices and paying for purchases. Needs continuous assistance from another person or unable for going to and from stores and carrying purchases home. The GP added that the appellant gets help from a family member but has limited income to get all the support needed. Additional psychological support to help the family would be helpful.
    - *Meals*: independent;
    - *Pay rent & bills*: independent for banking and pay rent & bills but needs periodic assistance from another person for budgeting (lack of social development);
    - *Medications*: independent;
    - *Transportation*: needs periodic assistance from another person (gets help from family member to get in and out of a vehicle and lack of social development for using transit schedules and arranging transportation);
    - Additional comments: lack of interpersonal skills with poor social development – isolation contributing to poor self-esteem;
    - *Social functioning*: independent for the ability to secure assistance from others (assistance secured – family member) but needs periodic support / supervision for appropriate social decision (isolation with poor self-esteem + social development delay), ability to develop & maintain relationships (poor self-esteem due to isolation), ability to interact appropriately with others (occasional inappropriate comments mainly due to poor self-esteem + social skills) and ability to deal appropriately with unexpected demands (expectations resulted in anxiety + further isolation). Marginal

functioning in terms of immediate and extended social networks (poor self-esteem – poor social – developmental skills + isolation).
    - In terms of support/supervision required which would help maintain the appellant in the community, the GP wrote "social worker to assist in self-esteem – planning + motivation of future".
    - No safety issue is reported – poor mobility and referral for specific procedure to specialist.
    - In terms of assistance provided by others, the GP indicated "Family", indicating a specific family member.
    - To the question "If help is required but there is none available, please describe what assistance would be necessary", the GP wrote that a social worker could assist for emotional and financial planning and planning of future – help with goal setting, social interaction, skill development. Ongoing massage and chiropractor. Transport and financial support for family. Chair in bathtub.
    - In terms of assistive device, the appellant uses a cane and might need a wheelchair in the near future.
    - The appellant does not have an assistance animal.
    - The GP reiterated that the appellant's mobility was severely restricted due to end stage OA of left hip, poor interpersonal relationship, self-esteem and isolation, would benefit from social worker to determine further needs to assist in DLA.
    - The assessor's sources of information were:
        - Office interview with appellant;
        - File/chart information – notes from October 2012 and onward;
        - Family member;
        - Specialists.
    - The GP had known the appellant since 2010 and had seen him 2 to 10 times during the previous year.
    - Services provided by the GP's office: ongoing medical support and advice.

- With the PWD application the following documents were provided showing the history of the appellant's medical condition:
    - Attending Physician's Initial Statement – Claim for Long Term Disability Benefit dated 18 May 2015 completed by the same GP than the PR and AR confirming the diagnosis and the impact on the appellant in terms of an application for long term benefits.
    - A series of medical reports for exam/consultation dates 1, 7, 11, 23 October 2012, 5, 16 November 2012, 18 December 2012, 7 January 2013, 30 October 2013, and 27 February 2015.
    - A series of laboratory analyses and reports dated 25 September 2012, 3, 7, 17, 23, 24 October 2012, 18 May 2015.

- In support of the appellant's Request for Reconsideration dated 14 September 2015, the appellant provided the following documents:
    - A letter from a chiropractor dated 29 September 2015 indicating that in his opinion:
        - DLA take the appellant extended time to complete and those requiring walking or sitting leave him in physical pain for up to days afterward;
        - DLA involving bending forward and laterally flexing require excessive amount of time;

- The appellant's mental faculties and cognitive functions are intact but his ability to communicate is compromised by his stutter;
- The appellant's physical activities have been significantly reduced since his accident and he made numerous attempts to perform low-impact exercise that, when prolonged, left him in pain;
- When the appellant's conditions are exacerbated, the appellant is severely restricted in any DLA;
- In the chiropractor's opinion, the appellant's impairment would make it difficult to maintain a suitable living space without assistance, including driving a car and some aspects for dressing;
- In his opinion, the appellant would require help with many DLA but not supervision – he is able to be on his own – but would need help to maintain a living space to meet suitable standards. He believes the appellant "with time could learn to do most of these things on his own, with perhaps occupational therapy to assist him with regards to his [DLA]".

- A letter from the appellant's mother dated 30 September 2015 confirmed that the appellant had developed OA of the right hip as of September 2012 and was unable to go to school or work. The appellant needs help for his day to day care such as shower, getting dressed, putting his shoes on and preparing meals. He is unable to stand for any period of time without pain to make meals for himself.

Prior to the hearing the appellant filed an email from a third party that has known the appellant since July 2013 indicating that he struggled with everyday simple tasks and almost always had to seek help from those around him for things he was unable to do like walking without a cane as he was being in pain and limping. Sitting for long periods of time also caused unbearable pain. "Putting on socks and tying shoes was virtually impossible because he was unable to bend" and she witnessed him working at bettering himself with his disability.

At the hearing the appellant's mother testified that she helps the appellant taking showers (there is a seat also to assist him) and dress, in particular putting socks and shoes on. Since he is unable to stand up for any length of time, she cooks for him. She also gets his clothes for him and drives him anywhere he needs to go. On bad days, which happen approximately 2 to 3 times a week, it takes him between ½ hour to 45 minutes to get dressed as he cannot bend and it takes him about ½ hour to take a shower. The appellant has a bed with a remote control that helps him getting in and out of his bed. She does all the shopping for him since he cannot walk around in stores. On bad days he may not even get up to have a shower and she boils water for hot packs to alleviate his pain. The appellant does not use any particular tool to help him get dressed.

The appellant testified that he finds it hard to move around because of pain. His remote control for his bed helps him get seated and get up. Once he is up, he goes to the kitchen to have breakfast that his mother has prepared and after he does exercise – he has a stationary bike – but finds it difficult because of hip pain. When the weather is good, he goes out and can walk about one block before he gets sore. Usually he sleeps through the night but for about once or twice every 2 weeks when he wakes up during the night because bed sores. He can sit but gets sore after ½ hour – 45 minutes. He indicated he was involved in an accident as a passenger in his mother's vehicle years ago when he was in school but no more recent accident but thinks that it might have been acne medication that

has triggered his OA in his hip. The appellant feels depressed because he cannot anymore do things he used to do and he takes no prescription medication.

The appellant's advocate filed a copy of the BC government website page on Persons with Persistent Mobility Barriers as an argument for an option for the ministry in the appellant's condition.

The panel determined the additional oral and documentary evidence was admissible under s. 22 (4) of the Employment and Assistance Act (EAA) as it was in support of the records before the minister at reconsideration, providing more information on the appellant's impairment and its impact on DLA and corroborated the medical evidence.

The panel notes the BC government document pertaining to PPMB is not additional evidence but an argument on behalf of the appellant.

PART F – Reasons for Panel Decision

The issue under appeal is whether the ministry's determination that the appellant has not met all of the eligibility criteria of section 2 of the EAPWDA for designation as a PWD was either a reasonable application of the legislation or reasonably supported by the evidence. The ministry was not satisfied that

- the appellant had a severe mental or physical impairment and
- that the appellant's mental or physical impairment, in the opinion of a prescribed professional, directly and significantly restricted DLA either continuously or periodically for extended periods and
- that as a result of those restrictions, in the opinion of a prescribed professional, the appellant required help to perform DLA

The ministry determined that the age requirement and that his impairment was likely to continue for at least 2 years had been met.

The criteria for being designated as a person with disabilities are set out in s. 2 of the EAPWDA and s. 2 of the EAPWDR. Section 2 of the EAPWDA states:

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;
"health professional" repealed
"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 of the EAPWDR provides further clarification:
2 (1)For the purposes of the Act and this regulation, **"daily living activities"**,
(a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following activities:
(i) prepare own meals;

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

(b) in relation to a person who has a severe mental impairment, includes the following activities:
(i) make decisions about personal activities, care or finances;
(ii) relate to, communicate or interact with others effectively.

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

Severity of the impairment:

A diagnosis of a serious medical condition, in this case severe end stage OA left hip, does not in itself determine PWD eligibility or establish a severe impairment. While the legislation does not define "impairment", the ministry's PR and AR forms define "impairment" as 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." While this is not a legislative definition, and is therefore not binding on the panel, in the panel's opinion, it reflects the legislative intent and provides an appropriate analytical framework for assessing the degree of impairment *resulting from a medical condition*.

The panel notes that the legislation clearly provides that the determination of severity of impairment is at the discretion of the minister, taking into account all of the evidence including that of the appellant. However, the legislation is also clear that the fundamental basis for the analysis is the *evidence from a prescribed professional* respecting the nature of the impairment and its impact on daily functioning.

Severe physical impairment:

The appellant argued that his impairment is severe since he cannot do the majority of his normal activities or because it takes much longer to do them and he needs help from a family member to

perform most of them.

The ministry argued that based on medical evidence and taking into account the appellant's SR, the information provided spoke to a moderate rather than severe physical impairment.

Panel decision:

The panel notes that to the question how far could the appellant walk *unaided* on a flat surface, the GP indicated 1 to 2 blocks in the PR while for walking outdoors in the AR, he indicated the appellant required periodic assistance from another person without indicating how another person could assist and what he meant by "periodic". On the PR form, *unaided* is explained as meaning "without the assistance of another person, assistive device or assistance animal". Likewise for climbing stairs: the GP indicated he could climb 2 to 5 steps *unaided* in the PR but needed periodic assistance from another person in the AR, again without specifying what the other person could do to assist and what he meant by "periodic", adding that he needed a railing. Further, in the AR, the GP indicated that the appellant needed periodic assistance from another person for standing, lifting (limited to 5 kg left shoulder), carrying and holding but did not indicate how another person could assist nor how often he meant by "periodic". A railing does not meet the definition of "assistive device" of s. 2 (1) of the EAPWDA: that is 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 – a railing is not *designed* for that purpose.

Given the appellant's physical abilities as reported by the GP and taking into account some inconsistencies between the PR and the AR completed by the same physician, the panel finds that the ministry, while acknowledging that he experiences limitations to his physical functioning due to end stage OA in his left hip with chronic pain and stiffness, was reasonable in determining that the assessments of the GP speak to a moderate impairment and that the evidence provided did not establish a *severe* physical impairment.

Severe mental impairment:

The appellant argued that he suffered from depression resulting from the pain from his OA and resulting in isolating himself, poor self-esteem and needing support for social functioning. He also argued that when stressed because of his condition, he stuttered and had difficulties to express himself, compounding his isolation.

The ministry argued that there was no diagnosis of a mental condition giving rise to an impairment and that the information provided by the medical practitioners demonstrated that the appellant experienced poor self-esteem due to isolation but that the information provided did not establish that he had a severe mental impairment.

Panel decision:

At the outset, the panel notes that there is no diagnosis of a mental disorder by a medical practitioner. Further, when asked if there were any significant deficits with cognitive and emotional function, the GP indicated "No" in the PR but still found a moderate impact in the AR for emotion and minimal for

bodily functions, insight and judgment, motivation and language - this appears inconsistent with his first assessment in the PR. As well, in terms of social functioning where there is "an identified mental impairment, including brain injury" the GP identified a number of issues in the areas of appropriate social decisions, developing and maintaining relationships, interacting appropriately with others and ability to deal appropriately with unexpected demands and marginal functioning for immediate and extended social networks – however, in the PR the same GP did not identify any difficulties with communication. Additionally the chiropractor in his letter of 29 September 2015 indicated that the appellant's "mental faculties and cognitive functions are intact."

In terms of DLA that are specific to a mental impairment under s. 2 (1)(b) of the EAPWDR, making decision about personal activities, care or finances, the AR suggests the appellant is independent for the vast majority (personal care except for dressing, reading prices & labels, making appropriate choices, paying for purchases, meal planning, banking, pay rent & bills, medications). With respect to the other aspect of mental functioning, "relate to, communicate or interact with others effectively", he has no communication difficulties according to the PR and his interaction with others is marginal due to poor self-esteem and social developmental skills and isolation.

Given those inconsistencies and the lack of a diagnosis of mental disorder, it is difficult to have a clear understanding of the appellant's mental impairment and the panel finds the ministry reasonably determined that the information provided did not establish that the appellant has a severe mental impairment.

Daily living activities:

The appellant argued that because of his impairments, he needed help to perform most DLA and that he had the assistance of a family member to help him accordingly. He argued that it took him much longer than typical to take a shower and that he needed help to put his socks and shoes on because he could not bend. The family member does prepare his meals and provides transportation when and where required. He argued he uses a cane to walk and must hold on handrails to climb stairs.

The ministry argued that the information was incomplete and somewhat inconsistent and that it indicated a moderate not a significant restriction of the appellant's ability to perform DLA.

Panel decision:

According to the appellant's evidence, he needs help continuously from a family member for most aspects of DLA but when asked how often, he and his mother testified that it could be 2 to 3 times a week. It is important to note that under s. 2 (2)(b) of the EAPWDA, the minister must be satisfied that *in the opinion of a prescribed professional*, the appellant's impairment directly and significantly restricts the person's ability to perform DLA either continuously, or periodically for extended periods. In other words, if there are contradictions between the evidence of the appellant and that of the prescribed professional, it is reasonable for the ministry to rely on the opinion of the latter.

However, the panel notes that there are also inconsistencies between the PR and the AR that were completed by the same physician. In the PR, the GP indicated that the appellant was *continuously* restricted for basic housework, daily shopping, mobility inside and outside the house and use of

transportation. In the AR, his opinion was somewhat different: the only activities where the appellant needed continuous assistance were going to & from stores and carrying purchases home. In terms of basic housework or housekeeping, in the AR he indicated periodic assistance, not specifying how often periodic meant. In terms of daily shopping, he indicated independent for reading prices & labels, making appropriate choices and paying for purchases (and the panel also notes that the appellant's mother indicated he did not go shopping, not being able to walk around in the stores). For mobility inside the house, in the AR the GP indicated the appellant was independent and for walking outside the house, he needed *periodic* assistance, not continuous (without indicating how often was 'periodic'). Finally, for transportation, the GP mentioned periodic assistance in the AR, not continuous.

The chiropractor's letter of 29 September 2015 provided additional information, stating that the appellant's ability to perform DLA were restricted on a daily basis on many of them, specifying "when his conditions are exacerbated he is severely restricted in any and all activities", which is rather inconsistent with the GP's reports and did not provide any information as to how often the appellant's conditions are exacerbated. In the chiropractor's opinion, the appellant's impairment would make it difficult to maintain a suitable living space without assistance but there is no indication as to what a *suitable living space* is, in his opinion and, consequently what assistance would be required. As well, while the chiropractor estimates the appellant needs help in "many" DLA, he still does not feel that he would require supervision and that he would be able to be on his own. Then he wrote that he believes the appellant, with time, could learn to do most of these things (DLA?) on his own.

Despite clarifications by the appellant and his witnesses as to how often his condition was exacerbated and how much longer it took him to take a shower or dress, there are still a number of inconsistencies in the prescribed professionals' reports making it difficult for the panel to have a clear picture of the impact of the appellant's impairment on DLA. Overall though, the panel finds that the ministry reasonably determined that the evidence was indicative of a moderate level of restriction and that there was not enough information from a prescribed professional to establish that the appellant's severe *impairment directly and significantly restricted* DLA continuously or periodically for extended periods.

As a result of those restrictions, help is required to perform DLA:

The appellant argued that he needed help from a family member to perform most of his DLA because of his OA in his left hip.

The ministry argued that since DLA are not significantly restricted, it cannot be determined that significant help is required from other persons. As well, the ministry argued that the occasional use of a simple device like a cane did not establish the existence of a severe impairment.

Panel decision:

The panel notes that in the AR, the GP indicated that the appellant uses currently a cane and that he might eventually need a wheelchair but in the PR, the GP did not indicate the use of a cane when asked if the appellant required any prostheses or aids for his impairments. At the hearing, the appellant did not use a cane to move around. The panel finds that the ministry reasonably determined

that the use of a simple assistive device, a cane, did not establish the existence of a severe impairment. As well, while the appellant benefits from the extensive help of a family member, the evidence suggests it is in the nature of the duty of family members to help each other when in need but it does not necessarily establish that such help is required as a result of a severe impairment.

Consequently, and since the panel found that the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established, the panel finds that the ministry's conclusion that it cannot be determined that the appellant requires help to perform DLA as a result of those restrictions was reasonable.

Conclusion:

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