PART C – Decision under Appeal

The Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated 10 December 2015 determined that the appellant did not meet 2 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, that his impairment was likely to continue for at least 2 years and that he had a severe mental impairment. However, the ministry was not satisfied that

- the appellant had a severe physical impairment;
- 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
- 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 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 – Applicant Information (SR) not completed but signed by the appellant before a witness on 2 July 2015. An attachment to the form was completed by an advocate and confirmed the diagnoses of the GP. Chronic pain in arm, leg hip and neck, unable to climb more than 2 to 5 steps unaided, cannot use his left arm and unable to lift and carry weights over 5 lbs. The appellant has reading difficulties caused by inability to focus, vision problems and reduced comprehension – his poor ability to focus prevents him from driving. His balance is affected and suffers from vertigo; lacks motivation and suffers from severe anxiety such that he cannot concentrate on anything. He cannot curl his left arm and needs to use the furniture or railings for support when moving around; regularly needs help to stand and takes ages to do anything physical. He is unable to do more than 4 hours before needing to sleep. He cannot sit for more than 1 or 2 hours without his joints locking and cannot walk more than a mile – unable to rise from a crouch or a kneeling position unaided. The appellant cannot carry out most housekeeping tasks, needs help to carry heavy articles and someone to drive him when public transit is impractical (shopping). He needs help doing any household activity including shopping, carrying groceries, cooking, dishwashing or laundry.

- Section 2 – the PR, undated, completed and signed by the appellant's general practitioner (GP) who has known him for approximately 10 years and seen him 2 to 10 times, indicated the following:
    - Specific diagnosis: post concussion syndrome (onset Oct. 2012), osteoarthritis (OA – onset 2002), Hepatitis C (onset 1997) and hypothyroidism (onset unknown).
    - Health history: forgetfulness, less concentration, balance – mild impairment, chronic knee, left hip and left elbow pain and fatigue.
    - The appellant was prescribed no medication and/or treatment that interfered with his ability to perform DLA.
    - The appellant does not require any prostheses or aids for his impairment.
    - The impairment was likely to continue for 2 years or more from that date.
    - In terms of functional skills, the GP indicated that the appellant could walk 4+ blocks unaided, he could climb 5+ steps unaided, he can lift under 2 kg, can remain seated 1 to 2 hours and has cognitive difficulties with communication (loses train of thought easily).
    - The appellant has significant deficits with the following cognitive and emotional functions: executive, memory, perceptual psychomotor, emotional disturbance, motivation, impulse control, motor activity and attention or sustained concentration but the GP did not provide any comment.
    - Despite the fact that the GP also completed the AR, he nonetheless completed the DLA section of the PR as follows: DLA that are continuously restricted: daily shopping and social functioning; no restriction for personal self care, meal preparation, management of medications, basic housework, mobility inside and outside the home, use of transportation and management of finances. For social functioning the GP commented:

agitation, withdrawal. For the degree of restriction, the GP indicated that the appellant tends to be a “loner”. In terms of assistance, the GP noted that the appellant needed help shopping and lifting groceries.

- Section 3 – the AR completed by the same GP who wrote the PR, also undated, indicated the following:
    - The appellant lives alone.
    - In terms of physical or mental impairments that impact DLA, the GP indicated that post-concussion syndrome, forgetfulness, concentration difficulty, OA, left elbow, left hip and knee pain.
    - The appellant’s speaking and reading abilities are good, writing and hearing are satisfactory.
    - In terms of mobility and physical ability, the GP indicated that the appellant was independent for walking indoors and outdoors, climbing stairs and standing, but needed periodic assistance from another person for lifting, carrying and holding but provided no explanation or comment.
    - In terms of cognitive and emotional functioning, the GP indicated a major impact for the following areas: attention, concentration and motivation; moderate impact for emotion, insight & judgment, executive, memory, motor activity, language, other neuropsychological problems and other emotional or mental problems; minimal impact for consciousness and impulse control; no impact for bodily functions, and psychotic symptoms. The GP commented: depressed mood, anxiety, withdrawal.
    - For DLA, the GP provided the following assessments – his comments in brackets:
        - *Personal care*: independent in all aspects.
        - *Basic housekeeping*: independent for laundry but needs periodic assistance for basic housekeeping with no explanation.
        - *Shopping*: independent for going to and from stores, reading prices & labels and paying for purchases but needs periodic assistance for making appropriate choices and carrying purchases home (requires help with lifting).
        - *Meals*: independent in all aspects.
        - *Pay rent and bills*: independent in all aspects.
        - *Medications*: independent in all aspects.
        - *Transportation*: independent in all aspects.
        - *Social functioning*: independent for appropriate social decisions; periodic supervision for ability to develop and maintain relationships, interacting appropriately with others, ability to deal appropriately with unexpected demands and ability to secure assistance from others but no explanation / description provided.
            - Marginal functioning for immediate social network and very disrupted functioning for extended social networks.
    - In terms of help required that would maintain him in his community the GP indicated he requires help from loved ones and no safety issue is identified.
    - For assistance provided by others, the GP indicated friends with no further comment.
    - Assistance provided by assistive devices: tensor bandage for knee and elbow but no further detail provided.
    - The appellant does not have an assistance animal.

- No additional information was provided.
- The assessor's source of information was office interview with appellant.

With his Request for Reconsideration dated 28 October 2015, the appellant provided the following documents:

- A 2-page report dated 26 November 2015 from his GP who completed the PR and the AR indicating the following:
  - The GP hopes that the appellant's eligibility may be established.
  - The appellant's conditions are severe and impact his ability to function independently.
  - The appellant's OA is exacerbated by cold and damp weather and when this occurs, he often has to stay home because his mobility is restricted by pain. When the GP wrote in the PR that the appellant was able to walk 4 + blocks unaided, this was a reflection of his abilities on a good day but when the pain levels are aggravated, he is unable to do this.
  - The GP would like to clarify his notes pertaining to the appellant's cognitive and emotional functioning: in addition to attention/concentration and motivation, he also experiences major impacts to bodily functions, emotion, memory and motor activity. He also suffers from severe insomnia and gets an average of 3 hours of sleep per night because in part of regular anxiety attacks.
  - The appellant has difficulties with memory and concentration and has to write everything down and may miss appointments due to forgetfulness.
  - The appellant requires assistance with his DLA as a result of his impairments. He receives continuous assistance with grocery shopping and banking – he only goes grocery shopping once per month and a friend drives him to the bank to cash his income assistance cheque and takes him to the grocery store and the drug store.
  - The appellant is not in touch with any family or friends as a result of having been abused when he was a child and is extremely socially isolated.
- A 2-page Medical Report – Persons with Persistent Multiple Barriers (PPMB) completed also by the same GP and dated 23 November 2015. The report indicated the following:
  - Primary medical condition: Hepatitis C, onset 2011.
  - Secondary medical condition: depression, anxiety, PTSD and arthritis, onset 2008.
  - Treatments and outcome: mental health referral, infectious disease specialist and arthritis: medical marijuana.
  - The condition existed for more than 5 years and is expected to last 2 years or more with the comments: treatment both mental health / hepatitis C pending.
  - Restrictions: social anxiety, withdrawal, reduced concentration, forgetfulness, fatigue, dizziness, no heavy lifting, no repetitive standing, avoid above shoulder [illegible].

In his Notice of Appeal dated 21 December 2015, the appellant reiterates his SR and adds that he does not rely on loved ones, that his pain and symptoms are daily and that he uses medical marijuana that he pays himself. He stated that his GP and his advocate have failed to clearly state his problems. His GP failed to mention his problem of reading temporary blindness, constant headache and assumed a relationship with the friend who drives him to the grocery store and the bank each month. He has to relocate soon and that adds to his anxiety and stress. He was recommended for counseling that he will have to pay for and he will take medications for his liver that can alter his mental state with possible high levels of depression, fatigue, joint pain and possible psychotic episode. He concluded by stating he will get worse before he gets better.

Prior to the hearing before this tribunal the appellant submitted 2 documents:

- A letter dated 12 January 2016 signed by the appellant and by his GP explaining the appellant's past medical history and its causes. He indicated that his past injuries are coming back and that he needs a tensor for his left shoulder and elbow as well for his left knee since without he cannot walk more than one mile – he must also relieve the pressure on the left leg occasionally and stop walking. He wears a tensor also on his left ankle because of rheumatism and the fact that it has a pin as a result of an injury sustained in the 1970's. He wakes up in the morning with a dull headache and he uses medicinal marijuana to relieve this as well as stress and anxiety attacks. The appellant is concerned about memory loss and asked to see a neurologist for a CT scan as well as seeking help for psychiatric problems. He has to pay for his treatments and medicinal marijuana but he finds it difficult to attend to his treatments because he has to take the bus and cannot afford the fares and may consider abandoning his treatments.
- A letter dated 5 October 2015 by a neurologist indicating that he saw the appellant and summarizing his medical history and noting that he was right handed. In the neurologist's opinion, neurologically, the appellant is normal and "[t]he constant headache, which has been with him for three years since he had a concussion, probably has stress factors involved although any underlying migraine tendency may well be playing a part." The neurologist reassured the appellant that he does not have any evidence of any worrisome intracranial pathology.

At the hearing the appellant provided a letter from his landlord dated 1 February 2016 indicating that the appellant used to help in the garden but that in the past 2 years it has been more difficult to do physical work and that he has had to use a heating pad on his shoulder at night for the pain. She noticed that his limp is more prominent when it is cold or raining and that since he started taking medicinal marijuana in November 2015, he no longer complains of headaches and has become less agitated. She confirmed driving him to the bank where he pays his rent in cash and then to the grocery store. Due to his less functional left arm, she assists him with carrying groceries to the car and then into the house but other than that, they are independent from each other. She advised the appellant that she planned to sell her house this summer, meaning he will have to find other suitable living accommodations for himself.

The appellant provided a history of his health conditions and indicated that he was taking medicinal marijuana to alleviate his headaches and pays approximately $60/month for a high quality product that he takes daily; he acknowledges that when he smokes, he is impaired and cannot drive. He indicated that the psychiatrists would provide antidepressants and painkillers but that he was adverse to taking this type of medication because of side effects. Despite the indication by the GP that he relies on "loved ones" the appellant testified that he does not have any "loved ones" like family members or close friends and that he is not in any intimate relationship with his friend landlord. He met with a psychologist once but could not get an assessment because he would need to attend 10 sessions before the psychologist could provide an assessment and the appellant could not return for more sessions as he did not have the money to pay his bus fare. The appellant has concerns that when the house where he lives will sell, he will have to find other accommodations and that raises his anxiety.

The appellant also testified that his living quarters are quite small, in fact a room, and he has access to shared bathroom and laundry room. He cleans his own room but has not much to do as he does

not eat there and the landlord maintains the bathroom and the laundry room. With his landlord he goes monthly for grocery shopping, to the bank and pharmacy. He first goes to the bank and withdraw his assistance and pays in cash his rent and whatever money he owes to his landlord. Then they go to the grocery store and he chooses what he needs for one month, planning with what is left from his monthly assistance accordingly. His landlord helps him identify any good deals that he may miss but he manages his money to ensure he has the funds to buy his monthly groceries. It may happen that he falls short during the month and will borrow money from his landlord and reimburse her the next time they go to the bank for his income assistance.

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 since the documentary evidence from the GP and the neurologist corroborated the previous medical evidence and that of the appellant at reconsideration. As well, the oral evidence provided more information substantiating the nature and the impact of his impairment on the appellant and his living circumstances.

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 physical impairment;
- 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
- 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, that his impairment was likely to continue for at least 2 years and that he had a severe mental impairment 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.

Severe physical impairment:

The appellant argued that his multiple medical impairments, some caused decades ago, others more recent, are severe and were not well explained by his GP. The cumulative effect of his medical impairments affects his daily life and while he could benefit from treatment, his access to treatment is limited due to his lack of funds for bus fares.

The ministry argued that the appellant's functional skills are not indicative of a severe physical impairment. As well, there is no indication of the frequency or duration of the periods during which the appellant's pain levels are aggravated and the GP does not describe the severity of the pain and stiffness due to OA and does not describe the nature or severity of his restricted mobility during cold/damp weather. Given the difficulty to confirm a severe physical impairment based on the evidence submitted, the ministry argued that the appellant has not established a severe physical impairment.

Panel decision:

A diagnosis of a serious medical condition 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.

The panel notes that the appellant's physical abilities are described by the GP in both the PR and the AR as well as in the GP's letter of 12 January 2016 as being limited mostly for lifting, carrying and holding, which is confirmed by the appellant and his landlord. The GP indicated that the appellant can walk 4+ blocks unaided on a flat surface and climb 5+ stairs unaided, he can remain seated between 1 and 2 hours and is independent walking indoors and outdoors, climbing stairs and standing. The GP's only comments on the appellant's physical abilities are to the effect that he needs help shopping / lifting groceries.

The panel also notes that the GP wrote in the letter dated 26 November 2015 that the appellant requires assistance with his DLA as a result of his impairments but did not provide any specifics other than stating that the appellant "*requires* assistance with lifting anything over 5 pounds" but continued stating that he "*receives* continuous assistance with grocery shopping and banking from his landlord"; it is not clear why the difference the GP made between "requires" and "receives". As well, the panel notes that the evidence of the assistance provided for shopping and banking is limited to lifting and carrying.

Given the appellant's mobility and physical abilities as reported by the GP in the PR, the AR and the letters of 26 November 2015 and 12 January 2016, that the limitations are mainly about lifting and carrying more than 5 lbs, the panel finds that the ministry was reasonable in determining that there was not enough information to support a severe physical impairment.

Daily living activities:

The appellant argued that he was limited in most of DLA and that he needed help from his landlord for banking, grocery shopping and going to the pharmacy. He also argued that he lives in small quarters because he is limited in what he can do and that to alleviate the pain caused by his headaches, he used medicinal marijuana that caused him to be impaired for many tasks like driving and mathematics. He also argued that he was forgetful because of his impairments.

The ministry argued that the appellant's GP did not indicate the frequency/duration of the periodic assistance from another person required to perform the DLA of basic housekeeping, making appropriate shopping choices and carrying purchases home. The ministry also argued that while the appellant experiences restrictions with DLA that require heavy lifting, there was not enough evidence to confirm that the appellant had a severe impairment that significantly restricted his ability to perform DLA continuously or periodically for extended periods.

Panel decision:

The panel notes that in the PR, the GP indicated only 2 DLA that were restricted: daily shopping and social functioning. For daily shopping the GP indicated that the appellant needed help shopping / lifting groceries and for social functioning, the GP indicated "agitation, withdrawal – tends to be a loner". However, in terms of basic housework, the GP indicated no restrictions in the PR but in the AR he indicated "periodic assistance from another person" for basic housekeeping but without any explanation or description other than "requires help with lifting" – the panel considers that this relates to the appellant's inability to lift or carry anything over 5 pounds.

Given that the ministry found that a severe mental impairment was established, the panel notes that s. 2 (1)(b) of the EAPWDR specifies two DLA that are relevant to a severe mental impairment:

(i) make decisions about personal activities, care or finances;
(ii) relate to, communicate or interact with others effectively.

In terms of decision-making, the evidence does not disclose a significant degree of impairment. According to the GP, the appellant is independent for reading prices and labels, paying for purchases, meal planning, feeding self/regulating diet, food preparation, banking, budgeting, paying rent and bills, filling/refilling prescriptions, taking as directed medications, safe handling and storage of medications, using transit schedules and arranging transportation. The only element in that category where the GP indicated that periodic assistance from another person was required is "shopping: making appropriate choices"; however, the GP did not provide an explanation and the appellant's evidence was not consistent as he testified he was making his own choices when shopping. The appellant confirmed his ability to independently manage all the other elements.

For social functioning, the GP indicated "periodic support/supervision" for ability to develop/maintain relationships, appropriate interaction with others, ability to deal appropriately with unexpected demands and ability to secure assistance from others but did not provide any explanation or a description of the degree and duration of the support/supervision required. The GP also indicated marginal functioning for immediate social network and very disrupted functioning for extended social network but did not provide any explanation and thus it is difficult to determine whether those impairments are significant. As mentioned above, the GP commented "agitation, withdrawal – tends to be a loner" for social functioning in the PR and without more comments it is difficult to determine whether it is caused by a medical condition or by the appellant's other circumstances. As well, nothing in the neurologist's letter of 5 October 2015 suggests any restrictions – quite the contrary as he confirms the appellant is normal neurologically and that there is no evidence of any worrisome intracranial pathology.

From the GP, it is difficult to have a clear picture of the impact of the appellant's medical impairment on DLA. Obviously the appellant's main challenge is lifting and carrying and the panel notes that the appellant is in fact independent for shopping and banking when he goes with his landlord. According to his evidence, the appellant is able to perform all the housework that is required, taking into account his present, limited accommodations and there is no evidence the appellant would have to perform the "heavier aspect of housecleaning" as mentioned by the GP in the letter of 26 November 2015.

In his evidence the appellant indicated he needed tensors for left elbow and shoulder and that he was

wearing a tensor for his left knee and ankle if he wanted to walk a mile and the GP confirmed the appellant was using tensor bandages for knee and elbow without providing any details or describing the equipment that might be needed. According to the legislation, an assistive device 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" and the panel notes that tensors or bandages are not assistive devices. Further, the evidence from the GP or the appellant does not suggest that he would be unable to perform a DLA without those tensors since it is not clear whether he does wear them or whether it would be useful for him in order to extend his activities and control the pain.

Given the evidence presented and taking into account the opinion of the appellant's prescribed professional that the appellant is independent for the majority of DLA and requires little help from others except for carrying and lifting, the panel finds that the ministry reasonably determined that the information from a prescribed professional does not establish that the appellant's *impairments directly and significantly restrict* DLA continuously or periodically for extended periods.

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

The appellant argued that because of his condition, he requires help with some of his DLA.

The ministry argued that since DLA are not significantly restricted, it cannot be determined that significant help is required from other persons.

Panel decision:

It is clear that the appellant does have help with some of his DLA but the assistance is limited to lifting and carrying objects and providing transportation. Further, a finding that a severe impairment directly and significantly restricts a person's ability to manage her DLA either continuously or periodically for an extended period is a precondition to a person requiring "help" as defined by section 2(3)(b) of the EAPWDA. For the reasons provided above, that precondition has not been satisfied in this case.

Accordingly, the panel finds that the ministry reasonably concluded it could not be determined that the appellant requires help with DLA as defined by section 2(3)(b) of the EAPWDA.

Conclusion:

The panel acknowledges the difficulties caused to the appellant by his medical condition and the impact it has on his life as well as the forthcoming changes the appellant will undergo when the house where he lives will be sold. However, the panel is bound by the legislation and 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.