

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) Reconsideration Decision dated January 11, 2016 which found that the appellant did not meet all of the 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 and that he has an impairment that is likely to continue for at least two years. However, the ministry was not satisfied that the evidence established that:

- the appellant has a severe mental or physical 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

## PART E – Summary of Facts

The evidence before the ministry at the time of the Reconsideration Decision included:

1. The appellant's Persons With Disabilities ("PWD") Application comprised of:
  - a. The Applicant Information and Self-report completed by the appellant and dated September 2, 2015 ("SR");
  - b. The Physician Report ("PR") and Assessor Report ("AR"), both dated August 28, 2015 and prepared by the appellant's general practitioner ("GP") of 7 years and who treated the appellant 2-10 times in the 12 months prior to completing the PR and AR;
2. A Diagnostic Imaging Report relating to the appellant's pelvis and right hip dated March 26, 2013 ("DIR #1")
3. A Diagnostic Imaging Report relating to the appellant's left hip joint injection dated August 6, 2014 ("DIR #2");
4. A Diagnostic Imaging Report relating to the appellant's pelvis and hips dated January 19, 2015 ("DIR #3");
5. A consultation report relating to the appellant dated November 5, 2013 and prepared by an orthopaedic surgeon and addressed to the GP ("Consult Report #1");
6. A consultation report relating to the appellant dated December 2, 2013 and prepared by an orthopaedic surgeon and addressed to the GP ("Consult Report #2");
7. A consultation report relating to the appellant dated April 15, 2015 and prepared by an orthopaedic surgeon and addressed to the GP ("Consult Report #3");
8. A consultation report relating to the appellant dated June 8, 2015 and prepared by an orthopaedic surgeon and addressed to the GP ("Consult Report #4");
9. The appellant's Request for Reconsideration dated December 17, 2015 ("RFR") to which is attached the following:
  - a. Two pages of written submissions prepared by the appellant ("RFR Submissions");
  - b. A "Pain Chart for PWD" form prepared by an advocacy centre and completed by the appellant on December 21, 2015 ("Pain Chart");
  - c. A "Daily Living Activities for PWD" form prepared by an advocacy centre and completed by the appellant on December 21, 2015 ("DLA Chart");
  - d. A fresh Assessor Report ("Fresh AR"). The panel notes that this document is undated and the author is not indicated.

### **Admissibility of Additional Evidence**

#### ***Documentary Evidence***

Attached to the appellant's Notice of Appeal are the following:

- a. One page of written submissions prepared by the appellant and dated January 25, 2016 ("Appeal Submissions");
- b. A letter dated January 18, 2016 prepared by an orthopaedic surgeon and addressed to "To Whom It May Concern" ("Surgeon Letter"); and
- c. A letter dated January 19, 2016 prepared by the GP and addressed to "To Whom It May Concern." ("GP Letter").

The ministry did not object to the appellant's written submissions or the two letters described above being admitted into evidence at this hearing. On review of the Surgeon Letter and the GP Letter, the panel is satisfied that neither raises new evidence. Both refer to the appellant's physical condition and its impact on him as was previously described in the PWD application. Similarly, the Appeal Submissions refer to facts known to the ministry at the time the Reconsideration Decision was written. The panel therefore finds that the Specialist Letter, the GP Letter and the Appeal Submissions are admissible as they are in support of the information and records that were before the minister when the decision being appealed was made pursuant to

[ ]

section 22(4)(b) of the *Employment and Assistance Act*.

### **Oral Evidence**

The appellant and a witness each gave oral evidence at the hearing. The appellant described his current physical and mental condition, the manner in which each impairs his enjoyment of life and ability to perform DLA and the help he requires. The witness gave evidence of her view of the appellant's physical and mental condition and the assistance that she provides to him in respect of his DLA. On review of the evidence, the panel notes that none of the appellant's or the witness's oral evidence was "new evidence" but rather, both specifically related to and referred to the documents that were before the ministry at reconsideration. The panel therefore finds that the appellant's and the witness's oral evidence is admissible as it is in support of the information and records that were before the minister when the decision being appealed was made pursuant to section 22(4)(b) of the *Employment and Assistance Act*.

### **Diagnosis**

In the PR, the appellant is diagnosed by the GP with "severe osteoarthritis bilateral hips RTL" with the date of onset as February 2012.

### **Physical Impairment**

The three diagnostic imaging reports noted above cover a span of almost 2 years. Collectively, these reports document and confirm the aforementioned diagnosis of severe osteoarthritis in the appellant's hips along with injection treatment.

Similarly, the four consult reports which cover a span of approximately 19 months document the appellant's osteoarthritis diagnosis in his hips and low back. In Consult Report #1, the specialist suggests that the appellant change his job, perhaps returning to a previous occupation. Treatment suggestions such as low impact activities as well as pain medication and injection therapy are suggested. Surgery is not recommended.

In Consult Report #3, the specialist reports that the appellant advised that injection therapy had been successful allowing him to "walk and run up and downstairs 2 at a time" although the effects of that therapy were beginning to wear off. The appellant was reported at that time as working 3-4 hours per day. The specialist concludes that the appellant will ultimately require joint replacement although his age could require these to be redone at some stage. Further injection therapy was discussed.

In the SR, the appellant writes that he was diagnosed with severe osteoarthritis in 2012 and that since then, his condition has deteriorated exponentially to the point where he can no longer stand for more than 10 or 15 minutes. He writes that he is in constant pain varying between 3 and 10 on a scale of 1 to 10. He continues that his condition has affected all aspects of his life physically, mentally, emotionally, financially and socially. He writes that he goes for days and weeks at a time without sleep and that due to pain and discomfort he is no longer able to work or perform any kind of physical activity. He concludes that in the near future he will require bilateral hip replacement surgery in the hope that he will regain his mobility and sanity.

In the PR the GP comments that the appellant's condition causes him pain all day, everyday, much worse with any activity or standing and which significantly limits his daily physical activities given is severely reduced mobility. The GP reports that the appellant has seen an orthopaedic surgeon who is of the opinion that the appellant will ultimately require bilateral hip replacement surgery but that due to his young age, injection therapy is being done to "buy some time" until surgery occurs. Functionally, the GP notes that the appellant can walk 1-2 blocks unaided on a flat surface and climb 2-5 steps. Further, the appellant is noted as having no limitations lifting or remaining seated.

[ ]

In the AR, the GP indicates that the appellant is independent with all areas of mobility and physical ability but that he uses a cane and takes significantly longer than typical walking indoors and outdoors and that he holds onto rails and takes significantly longer than typical while climbing stairs.

In the Pain Chart, the appellant notes that he experiences pain in his lower body, particularly his right leg and hip, and that this pain began in 2010, progressing ever since. The appellant writes that his pain is constant and worsens with standing, walking, bending and crouching. Medication relieves his pain to a point but usually nothing helps. The appellant describes his pain as throbbing, steady, sharp, mind-numbing and unbearable and he describes the level of severity as “horrible” and “excruciating.” The appellant reports that his pain causes him to be unable to sleep or complete the simplest of tasks, he has lost interest and appetite and he has poor social skills.

In the RFR, the appellant describes himself as “crippled and incapacitated” at all times and unable to complete the simplest of tasks. He reports being in severe pain at all times and that his condition worsens every day with hip replacement surgery being required.

In the RFR Submissions, the appellant again notes that his condition is worsening on a weekly basis. He notes that surgery is likely, that he has difficulty getting out of bed or getting dressed and that his condition is severe.

The Fresh AR was prepared by the appellant’s advocate following two meetings with him. The advocate confirmed that she is not a Prescribed Professional as defined in section 2(2) of the *EAPWDR*. In the Fresh AR, the advocate notes that the appellant has been diagnosed with severe osteoarthritis. With respect to the appellant’s mobility and physical ability the advocate writes as follows:

- Walking indoors – the appellant is independent but takes significantly longer than typical while using a cane.
- Walking outdoors – the appellant is independent but takes significantly longer than typical while using a cane on level surfaces.
- Climbing stairs – the appellant is unable to climb stairs even with the assistance of rails.
- Standing – the appellant cannot stand in one place but rather must sit.
- Lifting – the appellant cannot lift, bend or reach above his chest.
- Carrying and holding – the appellant requires continuous assistance and takes significantly longer than typical and must have someone carry, lift or hold things for him.

The advocate adds that over the last three years the appellant’s condition has worsened and that he cannot do the simplest things without assistance including getting out of bed or getting out of a chair. He is unable to bend over or kneel and if he falls he cannot get up without assistance.

In the Surgeon Letter, the author writes that the appellant has “end-stage arthritis” in his hips with the right hip being particularly bad and that the appellant is currently unable to do any physical work. The author writes that he is hopeful that the appellant will have a hip replacement done in the next 3 months which may allow the appellant to return to some form of employment.

In the GP Letter, the GP writes that the appellant has severe bilateral hip arthritis and that he is on the wait list for total bilateral hip replacements but that it is estimated that it could take up to 2 years to have both hips done. The GP adds that the appellant is unable to work in any capacity and has been unable since September 2015. The GP notes that the appellant experiences poor mobility and constant pain which a trial of injections did not improve.

In the DLA Chart the appellant makes reference to his physical impairment, in particular his mobility inside and

outside the home. He checks the following boxes to indicate that on his worst day he either cannot do the listed activities or that it takes him much longer than most people – walking from room to room, going up or down stairs or ramps, getting in and out of chairs, getting into bed and out of bed, bending to pick things from the floor and kneeling and getting up from the kneeling position (the latter two are noted as especially painful) and the appellant notes that he hurts in any position. With respect to mobility outside the home, the appellant checks the following boxes – walking very far, walking on uneven ground (“bad”), going up or down stairs or ramps (“even worst”), going out without being anxious or scared.

### ***Mental Impairment***

In the SR, the appellant writes that his physical condition has affected his mental and emotional health.

In the PR, the GP has not diagnosed the appellant with a mental condition or brain injury. She comments that his physical condition and chronic pain affect him emotionally and socially as he tends to keep to himself and limit social interaction. The GP adds that the appellant experiences significant deficits in cognitive and emotional function in the area of motivation and adds the comment that he is increasingly frustrated by the limitations he experiences as a result of his arthritis and pain on daily function.

In the AR, the GP indicates that the appellant’s ability to communicate through speaking, reading, writing and hearing are all good and that he does not experience any impacts on daily functioning due to a mental impairment or brain injury.

In the RFR, the appellant writes that he experiences depression and anxiety due to his severe pain. In the RFR Submissions, he writes that he suffers from a lack of motivation and that he considers his inability to complete simple tasks to be due to a psychological impediment in the form of depression and anxiety. He describes himself as being “in a constant battle with depression and anxiety”.

In the Fresh AR, the advocate writes that the appellant has no problems with communication. With respect to the impact of the appellant’s mental impairment or brain injury on daily functioning she provides the following:

- Major impact on bodily functions, emotion, memory, motivation, motor activity and other emotional or mental problems;
- Minimal impact on consciousness, insight and judgment, attention/concentration, executive and language; and
- No impact on impulse control or psychotic symptoms.

The advocate adds that the appellant has difficulty sitting at the toilet resulting in chronic constipation. Emotionally, the appellant is depressed and expresses no motivation to do the simplest tasks. Due to pain, he has become short-tempered and distractible and he is unable to remember simple things due to a poor attention span. The appellant finds himself confused and forgetful and the stress he is undergoing causes him to become irritable and hostile at times.

In the DLA Chart the appellant makes reference to his mental impairment. In particular, he provides comments concerning his mental and emotional skills. He checks the following boxes to indicate that on his worst day he either cannot do the listed activities or that it takes him much longer than most people – coping with anxiety and agitation, depression, stress and confusion, planning ahead, attending to the most important things first, remembering information and appointments, completing tasks, coping with sensitivity to sound, light or motion and a lack of patience or focus. The appellant adds that he cannot relieve stress or relax.

### ***Daily Living Activities***

In the PR, the GP notes that the appellant has not been prescribed any medication that interferes with his

[ ]

ability to perform DLA. The GP continues by indicating that the appellant is continuously restricted with a number of DLA including meal preparation, basic housework, daily shopping and mobility inside and outside the home. The GP adds that the appellant is not restricted in personal self care, management of medications, use of transportation, management of finances or social functioning.

In addition to completing the PR, the GP also completed the section relating to the appellant's ability to manage his DLA in the AR as follows:

- Personal Care: The appellant is independent with all tasks but takes significantly longer dressing, bathing, toileting and transfers from bed and chair due to decreased range of motion in hips and pain.
- Basic Housekeeping: The appellant is independent with all tasks but takes significantly longer than typical. The GP has added that the appellant's partner does laundry, that basic housekeeping causes the appellant pain in his hips and that he has difficulty reaching the floor.
- Shopping: The appellant is independent with all tasks but takes significantly longer than typical going to and from stores and carrying purchases home. The GP adds that on some days, the appellant's pain is so bad that he can't walk to stores and that he pushes groceries in a cart to a vehicle while walking slowly.
- Meals: The appellant is independent with all tasks but takes significantly longer than typical with food preparation and cooking as he cannot stand for more than 5-10 minutes before having to sit down.
- Paying Rent and Bills: The appellant is independent with all tasks.
- Medications: The appellant is independent with all tasks.
- Transportation: The appellant is independent but takes significantly longer than typical getting in and out of a vehicle due to reduced range of motion and pain in hips. The appellant is independent using transit schedules and arranging transportation but requires continuous assistance using public transit as the bus stop is too far to walk to.

The GP adds the comment that the appellant's partner does most of the household chores and shopping due to the appellant's limited mobility. She continues that it takes a lot longer for the appellant to do chores than it would if he had no pain from arthritis.

With respect to social functioning, the GP indicates that the appellant is independent with all aspects and that he has marginal functioning with both his immediate and extended social networks. The GP adds the comment that the appellant often does not feel like socializing due to pain and wants to avoid people's comments about his struggles with mobility.

In the RFR Submissions, the appellant writes that his osteoarthritis has become a severe impediment on his daily living including getting out of bed and getting dressed as well as motivating himself to cook or clean.

The DLA Chart is a document that is prepared by an advocacy centre and completed by the appellant. The chart sets out 13 general categories of DLA with each having specific examples and a separate space for comments. The chart's instructions state in part "Think about your **worst day** and mark the activities you cannot do without help or activities that take you much longer than most people. Add notes and details about **how often** you are affected, **how severely** you are affected, **how long** it takes you to do things, or **who helps you** get these things done, and what happens when there is no help available." The appellant has completed the chart as follows:

- Preparing meals: the appellant writes that he could check off all of the listed tasks. He says pain makes him lose any enjoyment in performing any of these tasks and that he used to love cooking. He has checked chopping food, peeling fruit and vegetables, standing at the sink or stove, lifting food from cupboards to counters and remembering food left on the stove or in the oven.
- Shopping: the appellant writes that he tries to avoid stores due to standing, walking or anything to

[ ]

minimize his pain. He has checked walking around stores, putting groceries in and out of a cart, carrying groceries to a bus or car and into the house, being in a crowded store without feeling anxious or scared and being able to wait in line without becoming frustrated or angry.

- Eating: the appellant writes that he is never hungry or motivated to eat because of a lack of activity and loss of motivation. He has checked remembering or being motivated to eat regular meals.
- Managing money or paying bills: the appellant writes that he has no feeling of trust or motivation to walk into a store and pay bills. He has checked understanding and remembering to pay bills, budgeting and stopping himself from buying things he does not need.
- Housework: the appellant writes that he is severely dysfunctional in all of the listed tasks and usually needs help because of severe pain. The appellant has checked all of the listed tasks which include basic housework and laundry tasks.
- Using transportation: the appellant writes that he is “without wheels” and relies on friends to do his errands. He has checked standing at a bus stop and on a bus, going up or down stairs or ramps and recognizing his stop. He adds that he cannot walk to a bus stop.
- Social skills: the appellant writes that he can’t face his kids because of humiliation and depression. He has checked all of the listed tasks and adds that his self-esteem is gone.
- Personal hygiene: the appellant has checked standing in the shower, getting in and out of the bathtub, reaching out to wash his body all over, remembering or having energy/motivation to bathe and brush teeth and hair every day. The appellant adds that he has low energy and motivation.
- Taking medications: the appellant writes that he is scared of addiction if he is prescribed anything stronger than Tylenol 3’s. He has checked taking the right amount of medications, remembering to have prescriptions filled and getting prescriptions filled.

### ***Need for Help***

In the PR, the GP notes that the appellant uses a cane and leans heavily on rails and furniture for support while moving. In the AR, the GP adds that the appellant receives assistance from his partner with most household chores and shopping.

In the Fresh AR, the advocate writes notes that the appellant uses a cane and that a friend helps him with housekeeping and shopping. The advocate writes that the appellant requires support from close friends and possibly intervention from a social worker or mental health support. She continues that the appellant will require some form of assisted living or home support once settled in an apartment. She writes that the appellant requires a walker, toilet riser and a seat for a shower.

### **Evidence On Appeal**

#### ***Appellant’s Evidence At Hearing***

The appellant stated at the hearing that his condition has changed drastically. He stated that he was once productive and hard-working but that he is now totally devoted to fighting pain and becoming a functional person. He described his pain as a chronic, severe condition causing depression, anxiety and insomnia. He says that without the help of friends he would be destitute and that he can barely function. He described being unable to walk to the store and barely being able to get off the couch to take a shower, saying that he needs help on a daily basis along with replacement of both hips due to pain which now extends to his knees, ankles and feet. The appellant stated that when he first met with the GP regarding his PWD application in August 2015, he was still able to do some things out of pride and stubbornness but given his pride and also given that the GP is very busy, he did not tell her everything. Now, he barely socializes because he feels ashamed due to his condition.

In response to questions, the appellant stated that he is not receiving homecare assistance from a local health

authority but rather relies on friends who take him to the doctor or shopping and to do his household chores such as laundry. The appellant stated that surgery for his hips has not been scheduled yet but that he believes it will be in the next 3 months and that returning to work will be dependent on the results of the surgery. The appellant said that the last time he worked was in August 2015 and was approximately 15-20 hours per week at that time. The appellant does not take medication for his emotional suffering but rather takes pain medication only.

The appellant described what he considered to be a “good day.” He said that this includes getting out of bed, “shimmying” to the kitchen and making breakfast after which he would leave the house to get groceries with friends. A bad day would include staying on the couch trying to avoid taking medication. The appellant stated that he has not had a good night’s sleep in a year. He has used a cane but that does not help so he began using crutches in December 2015.

The appellant stated that the Fresh AR was completed with the assistance of the advocate. He explained that he completed this document because he did not want to re-apply for the PWD designation. He says that the Fresh AR more accurately describes his current situation. He does not recall seeing the GP between August 2015 and January 2016 but did receive injection therapy in September 2015

The advocate who appeared at the hearing with the appellant confirmed that she was not a prescribed professional as described in section 2 of the *EAPWDR*.

The witness who appeared at the hearing on the appellant’s behalf confirmed that she has known the appellant since 2008 and considers him a dear friend. She has observed his condition deteriorate and finds that he has become a miserable person. She assists the appellant with DLA 2-3 times per week. She sees the appellant as having become a different person.

In response to questions, the witness stated that she does the appellant’s laundry and his grocery shopping and drives him to his doctor’s appointments and to the pharmacy. She added that she prepares meals for him and freezes them for easy preparation. The witness stated that the appellant receives help on a daily basis from her and his roommates and that during some weeks he will need more help and less on others. She added that she began helping the appellant in 2014 and that the amount of assistance has increased over time.

***Ministry’s Evidence At Hearing***

At the hearing, the ministry indicated that it would rely on the reconsideration decision and commented that the decline of the appellant’s overall condition would be considered but only if brought to the ministry’s attention prior to the reconsideration decision being prepared.



## 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 PWD under section 2 of the *EAPWDA*, 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 met the age requirement and that he has an impairment that is likely to continue for at least two years. However, the ministry was not satisfied that the evidence establishes that:

- the appellant has a severe mental or physical impairment;
- the appellant's DLA are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and,
- as a result of these restrictions, the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

The criteria for being designated as a 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)(a) of the *EAPWDR* defines DLA for a person who has a severe physical or mental impairment 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.

### **Positions of the Parties**

At the hearing, the appellant argued that he met each of the legislative requirements for designation as a PWD. In his Notice of Appeal dated January 22, 2016 the appellant writes that based on the medical evidence and the applicable legislation he should be designated as a PWD.

The ministry takes the position as set out in the Reconsideration Decision that the appellant is ineligible for designation as a Person With Disabilities.

### **Severity of impairment**

Section 2(2)(a) of the *EAPWDA* provides that when addressing the issue of a severe physical or mental impairment in the context of a person applying for a PWD designation, that person must be found to have a severe physical or mental impairment that, in the opinion of a medical practitioner, is likely to continue for at least 2 years.

A diagnosis of a serious medical condition or conditions 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 one must consider the nature of the impairment and the extent of its impact on daily functioning. 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 prescribed professionals – in this case, the GP.

### **Severity of mental impairment**

At the hearing the appellant argued that he suffers from depression and anxiety secondary to his deteriorating physical condition.

The ministry takes the position that the evidence does not support a finding that the appellant suffers from a severe mental impairment.

*Panel Decision*

The GP has not diagnosed the appellant with a mental condition or brain injury in the PR. She does however note that the appellant's chronic pain has had an impact on him emotionally and socially. Further, the GP has indicated in the PR that the appellant suffers from a significant deficit with cognitive and emotional functioning in the area of motivation.

In the AR the GP has not indicated any impact on the appellant's cognitive and emotional functioning and for those DLA that require some level of mental acuity such as paying rent and bills and medications the GP has indicated that the appellant is independent in all respects.

While the appellant did submit the Fresh AR in support of his argument that he suffers from a severe mental impairment, the panel prefers and places more weight on the evidence of the GP. The GP has treated the appellant for 7 years and had met with the appellant between 2 and 10 times in the 12 months prior to completing the PR. The GP was provided the opportunity to note any mental condition or brain injury suffered by the appellant but did not.

In the Fresh AR, the advocate similarly did not indicate that the appellant suffered from a mental condition or brain injury despite the instructions to the AR directing the person completing it to "indicate to what degree the appellant's mental impairment or brain injury restricts or impacts his/her functioning." Further, the comments in the Fresh AR are written in the first person which would indicate that the information contained in it is the opinion of the appellant rather than that of a person tasked with assessing the appellant. While the evidence of the appellant is relevant, the purpose of an Assessor Report is to provide someone with the prescribed training and expertise to assess an individual to assist in determining if they meet the necessary legislative requirements for designation as a PWD. Completing this form in the first person does not accomplish that purpose and the panel considers it as the equivalent to a self-report.

Despite there being no diagnosed mental condition the panel has considered whether the evidence of the GP as set out above is indicative of a severe mental impairment. While the evidence in the PR and the AR demonstrates that the appellant has some deficits, the panel finds that the ministry was reasonable in its determination that the evidence did not support a finding that the appellant suffers from a severe mental impairment as provided by section 2(2) of the *EAPWDA*.

### **Severity of physical impairment**

The appellant takes the position that his chronic pain, his diagnosed physical condition and its impact on his functional capacity support a finding that he has a severe physical impairment.

The ministry takes the position that the evidence as a whole, including the appellant's functional skill limitations, does not support a finding that he suffers from a severe physical impairment.

### *Panel Decision*

The PR was prepared by the appellant's GP of seven years. In it, she describes the appellant as suffering from severe bilateral osteoarthritis in both hips with hip replacement surgery contemplated. This diagnosis is confirmed by the various Diagnostic Imaging Reports, the Consultation Reports, the Surgeon Letter and the GP Letter. Functionally, the appellant is described in the PR as able to walk 1-2 blocks and climb 2-5 steps while experiencing no limitations lifting or remaining seated.

The AR was also prepared by the GP. In it, she describes the appellant as suffering from severe, constant, bilateral hip pain which is significantly aggravated by movement and standing. Functionally, the appellant is described by the GP as being independent with all activities, noting that he uses a cane while walking as well as rails/walls while climbing stairs. The appellant is described as taking significantly longer with these tasks

however.

In determining the severity of the appellant's physical impairment, it is useful to consider the appellant's ability to perform those DLA that are of a physical nature. The panel finds that the medical evidence clearly supports the appellant's position that he suffers from a medical *condition* which causes him pain but the legislative test that must be met is that he must suffer from a severe physical *impairment*.

The panel notes that for almost all of the listed tasks of DLA in the AR, the GP indicates that the appellant is independent. The appellant does take significantly longer to complete many of those tasks but on balance, it is the GP's view in the PR that the appellant is independently able to manage his DLA including those that are of a physical nature.

The appellant argues that his condition has deteriorated and that the Fresh AR is the most accurate measure of his physical impairment. While the panel has reviewed that document and considered the appellant's oral evidence in that respect, the panel notes that the Fresh AR is undated, unsigned and was not prepared by the GP but rather by an advocate with no medical or related training. Further, as discussed above the evidence in the Fresh AR that relates to the appellant's mobility and physical ability are in the first person which would indicate that the evidence in the Fresh AR is that of the appellant rather than someone tasked to perform an objective assessment. For these reasons, the panel prefers the evidence of the GP in the PR and AR over that of the advocate in the Fresh AR.

Finally, the panel notes that the appellant conceded at the hearing that he did not provide the GP with all of the relevant information when they met to prepare the PR and AR due to his own pride and his view that she was busy and that despite the deterioration of his condition, he did not return to the GP for more than five months following the completion of the PR and AR but rather completed the Fresh AR with the assistance of the advocate.

While the panel finds that the evidence indicates that the appellant has a physical condition which causes him pain and has an impact on his functional capacity, for the reasons as set out above, the panel finds that the ministry was reasonable in its determination that the evidence did not support a finding that the appellant suffers from a severe physical impairment as provided by section 2(2) of the *EAPWDA*.

### **Restrictions in the ability to perform DLA**

The appellant argues that the evidence supports a finding that he is significantly restricted in his ability to perform tasks of DLA. Further, the appellant's advocate argues that the B.C. Supreme Court in *Hudson v. British Columbia (Employment and Assistance Appeal Tribunal)* 2009 BSCS 1461 supports the argument that if a determination is made that DLA are limited in at least 2 areas, then the legislative test under section 2(2)(b) of the *EAPWDA* is satisfied.

The ministry's position is that it has not been established by the evidence of a prescribed professional that the appellant's ability to perform DLA has been directly and significantly restricted by his physical or mental impairments either continuously or periodically for extended periods as required by section 2(2) of the *EAPWDA*. More specifically, the ministry argues that as the advocate who prepared the Fresh AR is not a prescribed professional as described in section 2(2)(a) of the *EAPWDR*, that document should carry little weight.

### *Panel Decision*

Section 2(2)(b) of the *EAPWDA* requires that a prescribed professional provide an opinion that an applicant's severe impairment directly and significantly restricts his or her DLA, continuously or periodically for extended periods. In the present case, while the appellant has provided evidence in the SR, the DLA Chart and the

Fresh AR as well as at the hearing of the challenges that he faces with DLA, the legislation is clear that to satisfy the criteria the evidence must come from a prescribed professional. In the present case, this evidence has been provided by one prescribed professional - the GP.

As noted previously in this decision, while the Fresh AR sets out the difficulties that the appellant has completing tasks of DLA that document was completed by an advocate who confirmed that she did not meet the legislative definition of “prescribed professional.” Similarly, the DLA Chart was completed by the appellant himself. The panel therefore places more weight on the evidence of the GP in making its determination as the GP is a prescribed professional as defined in the *EAPWDR*.

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, a prescribed professional completing these forms has the opportunity to indicate which DLA, if any, are significantly restricted by the appellant’s impairments, either continuously or periodically for extended periods. Employability is not a listed criterion in the legislation and as such is not a consideration in the determination of whether an applicant’s DLA are restricted by a severe impairment.

In the PR, the appellant’s GP has indicated that the appellant requires continuous assistance with meal preparation, basic housework, daily shopping and mobility inside and outside the home. The GP did not provide any additional comments as to the degree of restriction faced by the appellant. However, this evidence must be viewed in light of the AR which was also prepared by the GP. In it, the GP notes that the appellant is independent in all but one of the listed tasks of DLA. For approximately half of those tasks, the GP indicates that the appellant takes significantly longer than typical to complete them but the panel finds this evidence to be contradictory to that in the PR.

In an attempt to resolve this contradiction, the panel has looked to the comments added by the GP in the AR. For example, for tasks of personal care the GP writes that the appellant is slow while dressing, bathing and with transfers in and out of bed. For basic housekeeping, the appellant’s partner “does most of the household chores” as well as shopping. For tasks relating to meals, the appellant is described as taking breaks from standing while cooking and preparing food.

The panel has considered the contradictory nature of the PR and the AR. Given the added comments included in the DLA section in the AR, the panel places more weight on it than the same section in the PR as the comments would indicate that the GP turned her mind to each of the listed tasks.

As noted above, the panel finds that the best evidence from a prescribed professional of the appellant’s ability to complete tasks of DLA is that of the GP in the AR. In the AR, the GP indicates that the appellant is independent with all but one task of DLA. While mindful of the dicta in *Hudson*, section 2(2) of the *EAPWDA* provides that the restriction on a person’s ability to perform DLA be both direct and significant. Considering the evidence as a whole, the panel concludes that the ministry reasonably concluded that the evidence was insufficient to establish that the appellant’s impairment significantly restricts his ability to perform tasks of DLA either continuously or periodically for extended periods.

### **Help with DLA**

The appellant argues that he requires help with various tasks of DLA with that help coming from his friends.

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. Section 2(3) of the *EAPWDA* provides that a person requires help in relation to a DLA if, in order to perform it, the person requires an assistive device, the significant help or supervision of another person, or the services of an assistance animal. In other words, it is a pre-condition to a person requiring help that there be a finding that a severe impairment directly and significantly restricts a person's ability to manage his or her DLA either continuously or periodically for an extended period.

Given the panel's finding that the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established, the panel further 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, as defined by section 2(3)(b) of the *EAPWDA*, was reasonable.

**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 under section 2 of the *EAPWDA* was a reasonable application of the applicable enactment in the circumstances of the appellant, and therefore confirms the decision.