

## PART C – Decision under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Social Innovation (the ministry) dated August 29, 2016, which held 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* for designation as a person with disabilities (PWD). The ministry found that the Appellant met the age requirement that the Appellant, that a physician had confirmed that the Appellant has a severe mental impairment and that the impairment is likely to continue for at least 2 years. However the Minister was not satisfied that the evidence establishes

- that the Appellant has a severe physical impairment,
- that the severe mental impairment directly and significantly restricts the Appellant's ability to perform daily living activities either continuously or periodically for extended periods, and
- that as a result of those restrictions, the Appellant requires help to perform those activities

## 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

### **Documents and Information Before the Minister at Reconsideration**

The evidence before the ministry at the time of the reconsideration decision included

- The Persons With Disabilities (PWD) Application dated March 7, 2016 comprised of the applicant information and attached self-report dated March 15, 2016
- A Physician's Report (PR) completed by a neurosurgeon dated January 12, 2016, which included a section reporting on the Appellant's Daily Living Activities (DLAs)
- An Assessor's Report (AR) dated February 23, 2016 and completed by the Appellant's general practitioner physician who did not answer the section asking how long she had known the Appellant, but stated she had seen the Appellant between 2 and 10 times in the past year
- A computed tomography scan report dated December 18, 2015 in which the physician's conclusion was that the Appellant had a right disc protrusion between the 5<sup>th</sup> lumbar and 1<sup>st</sup> sacral vertebrae and sacroiliac joint disease.
- The Appellant's self-report dated March 15, 2016
- The appellant's Request for Reconsideration, which included
  - the Appellant's typed submission dated August 18, 2016 and
  - a letter from the Appellant's general practitioner dated August 17, 2016, which reported that the Appellant had severe, chronic psychiatric conditions that have been present for several years, and that while stable to some extent, he is severely impaired and the impairment is expected to continue for at least 2 years. The physician also stated that the specific impairments have been documented in the PWD application she completed earlier and that they affect the Appellant for extended periods. She said the Appellant obtains assistance from roommates, neighbours and friends when they are available and when not he often requires longer than normal to complete tasks.

### **Diagnoses**

In the PR (January 12, 2016), the neurosurgeon diagnosed the Appellant with low back pain with radiation to the lower extremities from degenerative disc disease, which has existed since January 2009. He said that the low back pain has been chronic for seven years and there has been no improvement treatment and the pain is strong. He said that a computed tomography scan of the spine confirms that two areas are responsible for the pain, at the herniated disc between the fifth lumbar and first sacroiliac vertebra and a partially fused first sacroiliac joint with osteophytes. There was a further diagnosis of arthritis with degenerative changes in the first sacral joint which will most likely continue to cause pain in the coming years. The neurosurgeon stated that the Appellant is awaiting assessment for depression.

The general practitioner in the AR (February 23, 2016) reported that the Appellant has chronic degenerative disc disease He said that the Appellant has periodic depression and anger to the extent of impairing his social relationships and that he has recurrent major depressive disorder.

## **Physical Impairment**

In the PR (January 12, 2016), the neurosurgeon reported that:

- The impairment caused by the chronic low back pain and degenerative changes is likely to continue for two or more years
- The Appellant's chronic low back pain arising from a herniated disc may or may not improve with surgery
- In terms of functional skills the neurosurgeon was told by the Appellant that he does not climb stairs but takes elevators, does not walk outside, does not ride a bike, but instead takes the bus, that 75% of the time the Appellant can lift no weight, and that he Appellant cannot even sit for one hour in a chair
- Whether or not the Appellant has significant deficits with cognitive and emotional function is unknown because the Appellant is waiting an assessment for depression.

In the AR (February 23, 2016), the general practitioner reported that:

- In the area of communication ability, the Appellant's speaking, reading, and writing are satisfactory, but his hearing is poor and that the Appellant reports a hearing loss
- In the area of mobility and physical ability the Appellant requires periodic assistance from someone else for walking indoors, walking outdoors, climbing stairs, and standing and he requires continuous assistance from another person or is unable to lift, or carry and hold, with the comment that the Appellant cannot carry heavy items 75% of the time, and
- The Appellant's degenerative disc disease really affects his mobility, and the Appellant is intermittingly immobilized by it.

## **Mental Impairment**

In the PR (January 12, 2016) , the neurosurgeon advised that it was unknown if the Appellant had significant deficits with cognitive and emotional function, and that the Appellant was awaiting clinical assessment for depression

In the AR (February 23, 2016), the physician reports that:

- In the area of cognitive and emotional functioning, with respect to bodily functions, emotion, impulse control, attention/concentration and executive, the Appellant's mental impairment impacts his functioning to a moderate degree of impact
- In the areas of consciousness, insight and judgment, motivation, motor activity, language, other neurophysiological problems and other emotional or mental problems the Appellant's impairment impacts his functioning to a minimal degree of impact
- In the area of memory or psychotic symptoms, the Appellant's mental impairment has no impact on his functioning
- The Appellant has a Major Depressive Disorder which is recurrent
- The Appellant's low mood affects his motivation, energy, planning, organization and initiation of activities and is present wil all activities
- The Appellant has problems with anger, impulsivity, and exhibits intermittent road rage episodes
- The Appellant is often distractible, has difficulty maintaining focus, and his speech is intermittent and rambling
- The Appellant's psychomotor problems are intermittent
- Anger is a recurring problem.

## Self-Report

In his self-report of March 15, 2016, the Appellant reported that:

- He suffers severe pain travelling down his right leg, lasting days, as a result of sciatica, and the pain is sharp and stabbing
- Most days the pain is so severe that the Appellant cannot get out of bed in the morning and he can be confined to bed for several days; the Appellant has to rest on his back and do exercising in bed in order to relieve the spinal pressure, and after a couple days of rest his back will relax enough for his mobility to improve to the point where he can function enough to almost move about in pain and discomfort but within a week his spine subluxates again, requiring chiropractic treatment which he cannot afford. He finds that regular chiropractic treatments are the only treatment modality which gives him temporarily relief
- The episodes of a sciatica attack confining him to bed are regular and unpredictable but are brought on by stressful situations and the pain is crippling debilitating and intense
- His neurosurgeon gave him injections of xylocaine and cortisone and prescribed anti-inflammatories which initially relieved his pain for several days, but then the pain became worse and the injectable medications were discontinued
- He attributes the onset of his severe depression and increasing thoughts of suicide to untreated chronic severe pain, and has severe anxiety, insomnia, chronic fatigue and his emotions are not stable.
- He has had foot surgery in the past for hammer toes and pinched nerve and requires corrective shoe orthotics to help relief pain when walking but cannot afford.
- In the areas of his emotional and mental functioning, his emotional stability is extremely tenuous and he suffers from depression and has frequent recurring suicide ideation. He says as a consequence he often feels chronically fatigued, has very little self-esteem, and anxiety episodes, insomnia and occasional emotional blow-ups. He says that these conditions decrease his ability to perform activities of daily living.
- His mobility is restricted indoors and outdoors; he does not walk at all outdoors because it will bring on a sciatic attack, and bicycling is therefore his primary form of transportation. Bicycling benefits his back as it seems to lessen the pressure on his spine if he has a special seat and good shock absorbers.
- He cannot drive due to the severity of pain when seated in a stationary position
- He cannot sit in a chair for even an hour
- He is unable to climb stairs and requires to use of an elevator
- 75% of the time he cannot lift any weight and needs assistance with all of the lifting and carrying
- The majority of his food comes from the food bank and he needs assistance to bring the groceries from the food bank to his home
- His single occupancy residence does not have a kitchen, so he is unable to prepare his own food. If he had a kitchen his need to travel to charitable location serving free food such as soup kitchens where he now goes, would be reduced.
- Laundry is a problem because it puts a lot of extra strain on his back and because there are no functioning laundry facilities at his residence he has to transport his laundry by bicycle to another social service agency where there are free laundry services
- His social functioning is limited because he moved to a new city just a few years ago and because of his disability he cannot work and is frequently bed bound and therefore has not

been able to build a supportive social network

- He is withdrawn and emotionally unstable due to his depression living alone in a single occupancy residence further increases his isolation
- He requires continuous assistance with all lifting, carrying and holding due to back pain, requires continuous assistance with basic housekeeping and laundry, requires continuous assistance with transporting groceries, requires orthotics, requires ongoing chiropractic treatment to manage his back pain and that his bicycle is essentially his wheel chair and his only form of local transportation but it lacks ergonomic customizations which would lessen the strain on his back and therefore he requires an ergonomically adjusted bicycle.

### **Daily Living Activities (DLAs)**

In the PR (January 12, 2016), the neurosurgeon completed the DLA section of the PWD application and indicated that

- the Appellant has no restriction with the DLAs of
  - Personal self-care,
  - Meal preparation,
  - Management of medications or
  - Management of finances
- the Appellant has restricted ability with the DLAs of
  - basic house work for which he needs periodic assistance
  - daily shopping for which he requires periodic assistance
  - mobility inside the home for which he requires periodic assistance
  - mobility outside the home for which he requires continuous assistance
- regarding the DLA of use of transportation, it is unknown if the Appellant's ability to use it is restricted
- regarding the DLA of social functioning, it is both unknown if there is a restriction and that there is no restriction with the Appellant's social functioning, with the written comment that the Appellant is waiting for a psychiatric assessment.

For the periodic assistance required the neurosurgeon has clarified by saying the Appellant often has strong pain, is very restricted if the pain (conditions under which the pain causes restrictions is illegible) and with relation to social functioning if it is impacted, after checking the boxes asserting that it is not impacted and is unknown, says that as the Appellant becomes depressed, that he is not healed yet and is waiting for a clinical assessment. The neurosurgeon indicated that with respect to what assistance is required for daily living activities, the Appellant needs help with basic housework, (cooking, cleaning) on days when the pain is very strong.

In the AR (February 23, 2016), the general practitioner physician reports information obtained from office interview with the Appellant and medical records and imaging, that concerning Daily Living Activities (DLAs) that

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- Under the DLA “Personal Care” for all 8 tasks, the Appellant requires periodic assistance from someone else, commenting that the Appellant has intermittent impairment, related to the degenerative disc disease and severe pain
  - Under the DLA “Basic Housekeeping” for both tasks, the Appellant requires continuous assistance from another person or is unable to perform the tasks listed, explaining that he has continuous difficulties with motivation that affects these tasks
  - Under the DLS Shopping” the Appellant is independent in 3 of the 5 listed tasks, requires periodic assistance for 1 of the tasks for which he requires intermittent assistance due to back pain, and that he requires continuous assistance for 1 of the tasks, with the comment that he requires better transport to travel to and from stores for groceries, currently uses a bicycle which is old and in poor repair, is unable to use other transport, and needs assistance carrying his purchases home
  - Under the DLA “Meals” he is independent in 2 of the 4 listed tasks and requires periodic assistance from others for the remaining 2 two tasks, with the comment that the periodic assistance is required due to back pain
  - Under the DLA “Pay Rent and Bills” that he is independent with all 3 listed tasks
  - Under the DLA “Medications” he is dependent with all 3 tasks
  - Under the DLA “Transportation” he requires periodic assistance from another person in all 3 listed tasks with an explanation that he uses a bicycle and periodically is limited by severe pain
  - Under the DLA “Social Functioning” he requires periodic support or supervision in all 5 listed tasks with an explanation that the Appellant’s depression and periodic anger impair his social relationships
  - That the Appellant has marginal function in his relationships with the immediate social network
  - That the Appellant has marginal functioning with his extended social network and then the physician comments as to the help required, saying the Appellant periodically requires assistance from the landlord, friends, and social agencies (such as food banks, and community kitchens) and that he experiences intermittent suicidal ideation which increases the risk of self-harm.
  - Under “Assistance Provided for Applicant”, the physician says help comes from friends, health authority professionals, volunteers and community service agencies with the comment that assistance with meeting basic needs is periodically required
  - Under “Assistance Provided Through the Use of Assistive Devices” the physician has not indicated any of the listed devices, but has written in that a bicycle is the equipment or device used, and has confirmed that the Appellant does not use an assistance animal

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- Under “Additional Information” the physician says that the Appellant reported long standing adverse psychological effects related to poverty

### **Appellant’s Oral Evidentiary Submissions**

Orally, at the appeal the Appellant submitted that:

1. His first sciatic problem occurred in 2009
2. In 2010 he cut his leg severely with a circular saw
3. He can not afford a Functional Capacity Evaluation, but has gotten the government to pay for one through its vocational services, and he will have the evaluation in a week or so.

### **Admissibility of the Facts Set Out in the Appellant’s Oral Submissions**

The panel finds pursuant to the *Employment and Assistance Act*, section 22(4) that the facts referred to evidence outlined in (2) & (3) above are not admissible because they are not oral or written testimony in support of information and records that were before the minister when the decision being appealed was made.

The panel finds pursuant to the *Employment and Assistance Act*, section 22(4) that the fact referred to evidence outlined in (1) above is admissible because it is oral testimony in support of information and records that were before the minister when the decision being appealed was made, namely the Appellant’s pain.

### **Appellant’s Further Written Evidence:**

Additionally, at the appeal, the Appellant, in further written submissions, relied upon further facts as follows:

1. The Appellant requires periodic assistance for extended periods of time to complete daily living activities and without assistance he takes much longer to do things on his own as a direct result of his disability
2. The Appellant’s ability to manage daily living activities requires help from a family member or a caregiver to care for him daily and that those daily living activities include personal care, help for transportation, help for managing finances and social functioning. His physical health condition indicates all of the foregoing tasks are performed with difficulty and he is restricted periodically by his disabilities. He requires assistance paying his phone bill which is paid monthly, and requires assistance with other important bills. Without being reminded to pay the bills he forgets to pay them every month
3. The Appellant requires help with cleaning and cooking which he requires from a caregiver, family member, or friend and all of them are not available to help the Appellant with daily living tasks during the day
4. The Appellant must take medication on time and needs to be reminded when to take it because without assistance the medication does not get taken properly
5. The Appellant has a severe lower back injury, is in constant pain, not competitively employable, and has a number of medical conditions which combine to severely impair his functioning and the physical disabilities expected to continue for at least two years

### **Admissibility of the Facts Set Out in the Appellant’s Further Written Submissions**

The panel finds pursuant to the *Employment and Assistance Act*, section 22(4) that the witness’

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evidence outlined in (1) through (5) above is admissible because it is oral testimony in support of information and records that were before the minister when the decision being appealed was made, namely the DLAs in section 2(1)(a)(i),(ii),(vi),(vii) & (viii) “preparing own meals”, “managing personal finances”, “using public or personal transportation facilities”, “performing personal hygiene and self care” and “manage personal medication”, and evidence of the Appellant’s abilities regarding all of these were before the minister at reconsideration

**Appellant’s Witness – Evidence at Appeal**

1. The Appellant’s witness gave extensive evidence concerning her own disabilities and PWD status and how she knows what the Appellant is suffering because of her own experience
2. She gave evidence that the Appellant goes looking for cans to sell, obtains food from the food bank, and if he is granted PWD status he could pay for treatments such as with his chiropractor
3. That he can volunteer and make his way about the community and make social connections
4. That the Appellant does not smoke or use drugs but makes good coffee, makes his own health food, and recently applied for work
5. That he likes to work and then gets sore
6. That she used to see the Appellant two or three times a week and now sees him about once a week and he is irritable
7. That she has seen the Appellant walk, and do daily tasks at home but has difficulty with them because he has too much pain
8. That she has seen him having to lie in bed and endure the pain so what he can do is extremely limited
9. That because of his mobility issues the Appellant is limited to about ten city blocks around his Residence
10. That he can only ride his bike for about 20 minutes without having to stop because of pain
11. That he is limited in what he can do
12. That he is severely physically impaired and this contributes to his lack of mental health
13. That after attending an outdoor dance, a social activity, the Appellant is in pain
14. That after kayaking the Appellant is in pain
15. That the Appellant does volunteer work, but after 3 days, he is in pain

**Admissibility of Witness’ Evidence**

The panel finds pursuant to the *Employment and Assistance Act*, section 22(4) that the witness’ evidence outlined in (1) is not admissible because it is not oral testimony in support of information and records that were before the minister when the decision being appealed was made.

The panel finds pursuant to the *Employment and Assistance Act*, section 22(4) that the witness’ evidence outlined in (2) through (15) is admissible because it is oral testimony in support of information and records that were before the minister when the decision being appealed was made, namely the DLAs in section 2(1)(a)(v) & (vi), “performing housework to maintain the person’s place of residence in acceptable sanitary condition” and to “move about indoors and outdoors”, evidence of the Appellant’s abilities regarding both of which were before the minister at reconsideration.



## PART F – Reasons for Panel Decision

### Issue on Appeal

The decision on appeal is whether the Ministry's reconsideration decision dated August 29, 2016, which held that the appellant was not eligible for designation as a Person With Disabilities (PWD) was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. The ministry found that the Appellant met the age requirement, that the Appellant has a severe mental impairment and that the impairment is likely to continue for at least 2 years. However the Minister was not satisfied that the evidence establishes

- that the Appellant has a severe physical impairment,
- that the severe mental impairment directly and significantly restricts the Appellant's ability to perform daily living activities either continuously or periodically for extended periods, and
- that as a result of those restrictions, the Appellant requires help to perform those activities

### Relevant Legislation

#### *Employment and Assistance for Persons With Disabilities Act, Section 2 (EAPDWA)*

**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.

#### *Employment and Assistance for Persons With Disabilities Regulation, Section 2 (EAPDWR)*

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

**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.

### **General Scheme of the Legislation**

The general scheme of section 2 *EAPDWA* and section 2 *EAPDWR* is that in order to be designated as a Person With Disabilities, an applicant must satisfy the Minister that he has a severe mental or physical impairment which is likely to continue for at least 2 years, and that impairment, in the opinion of one of the members of a prescribed class of professionals, directly and significantly affects his ability to perform Daily Living Activities continuously or periodically for extended periods, and as a result he requires help to perform them.

### **Parties' Positions at Appeal**

#### **Appellant's Position**

The Appellant provided substantial argument as follows:

1. That the Ministry accepted his physician's report that he cannot climb stairs unaided but disregarded that when noting that the Appellant was able to ride a bicycle periodically
2. That the Ministry worker is not qualified to disregard the physician's assessment of stair climbing ability unaided by presuming that the ability to ride a bicycle establishes sufficient mobility
3. Emphasized the part of the AR dealing with his ability to shop for personal needs but being unable to use any other means of transportation without causing severe and immobilizing back pain such as being unable to ride in a car
4. That the PR establishes inside the home mobility is periodically restricted and outside the home mobility is continuously restricted, that the AR notes he is intermittently immobilized by chronic degenerative disc disease and requires periodic assistance going to and from stores and

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continuance assistance carry purchases home, requires the use of hand rails and continuance assistance traversing stairs or ramps, getting in or out of chairs and bending or stretching to reach things from high or low places and that without assistance it takes him a significantly longer time than average to move about inside the home or walk outside on flat or uneven ground.

5. That the decision denying him PWD status mischaracterizes the physician's report by saying he is able to sit upright for "up to one hour unaided" when the PR reported that he cannot sit upright in a chair "for even one hour" and the box "less than one hour" was checked which sufficiently establishes severe impairment that significantly restricts DLAs
6. That because of his restrictions he is unable to use public transportation or cars to get around and is therefore significantly restricted and where and how far he can travel and what he can bring with him
7. That when he is able to ride a bicycle it is only at low speeds on smooth surfaces, and not long enough to travel more than a few kilometers
8. That the Ministry misinterpreted the PR by accepting the report the Appellant was unable to lift 75% of the time but the PR did not indicate how much weight the Appellant was able to lift unaided, especially in light of the PR which checked the box "no lifting" and then stated that the Appellant cannot lift "any weight" 75% of the time and by not giving credence to the PR when the physician wrote that the Appellant required extended assistance with basic house work (cooking and cleaning) especially when the pain was severe
9. By not giving appropriate weight to the AR indicating that the Appellant required "continuous assistance" lifting, carrying, holding, doing laundry, basic housekeeping and carrying purchases home from the store and by not giving credence to the AR for the comments that the Appellant required periodic assistance in order to meet basic needs.
10. That the decision established that the Appellant required periodic assistance for walking, stairs and standing but concludes that the frequency and duration of periodic assistance is not adequately described to establish help is required for extended periods and argued that Applicants are not required to establish exactly how long they require assistance for in order to meet the statutory requirement for PWD
11. The PR indicates that the Appellant is unable to lift or carry any weight 75% of the time, with a condition described as long term chronic illness causing permanent pain and that the physician clearly indicated by his assessment that the Appellant's ability to complete daily living activities and mobility outside of the home is "continuously" restricted and his abilities to do basic house work, daily shopping and mobility inside the home are periodically restricted
12. The Appellant further argued that the physician's assessment that the Appellant required assistance with basic housework such as cooking, cleaning when the back pain was severe was not given weight and that the AR corroborates the PR that the Appellant requires both continuous and periodic mobility assistance, especially when immobilized by pain
13. That the AR report to the effect that the Appellant requires periodic assistance performing personal care because of intermittent impairment related to this severe pain was not given proper weight and that because the evidence was that the experiences severe pain and is immobilized for several days straight during which time the Appellant is unable to bend, reach, sit up or stand unaided and therefore is unable to independently conduct daily living activities for extended periods of time and that during such episodes of severe pain consistent assistance with basic tasks such as personal care preparing food and housekeeping is required because he is unable to function independently or effectively or for a reasonable duration.

## Analysis

### Section 2(2) EAPDWA

#### Age, Duration and Severe Impairment Requirement

Section 2(2) EAPDWA requires that an applicant for PWD status must be 18 years of age or older, have a severe mental or physical impairment, and that in the opinion of a prescribed professional, is likely to continue for at least 2 years.

At reconsideration the ministry found that the Appellant met the age requirement, that the Appellant, in the opinion of a physician, had a severe mental impairment, and that it was likely to continue for at least 2 years, but did not have a severe physical impairment.

#### Severe Physical Impairment

At reconsideration the ministry found that the Appellant did not have a severe physical impairment.

#### Appellant's Position

The Appellant's position was that due to his pain, and physical limitations in the evidence, he has a physical impairment which is severe. His position was that while the decision said he had an inability to sit upright for "*up to one hour unaided*", that was a mischaracterization of the physician's report which clearly stated that he could not sit "*upright in a chair for even one hour*" and the physician checked the box for "*less than one hour*".

His position was that due to his physical impairment, he could not use transportation other than his bicycle, without causing severe and immobilizing back pain and that he could not ride in a car because he could not remain seated upright for even a single hour.

His position was that he required the use of handrails and continuous assistance going up or down stairs or ramps, getting in and out of chairs in bed and bending or stretching to reach things from high and low places and without assistance it takes him significantly longer than average to move about his home or walk outdoors on both flat and uneven ground.

#### Ministry's Position

The Ministry's position was that while the Appellant is limited with regard to lifting and other physical limitations, the limitations were based on his self-report, without clinical assessment; the general practitioner was relying upon what the Appellant told her. There was nothing in either the physician's report or the assessor's report to objectively show that the Appellant was severely limited. The neurosurgeon does not know how far the Appellant can walk unaided and doesn't describe how much less than 1 hour the Appellant can remain seated. The Ministry noted that the general practitioner did not describe the frequency or duration of the period's immobilization, so it was not known if the immobilization was only rarely or occasionally and for short periods or was more frequent or for longer periods, and without such evidence it could not be concluded that the Appellant has a severe impairment.

#### Panel Finding

The information from the neurosurgeon and general practitioner establishes that the medical conditions result in some physical limitations. However the degree of restriction is not clear. For example the neurosurgeon does not know how far the Appellant can walk unaided and the general

practitioner does not indicate how often the Appellant is episodically immobilized and requires assistance with walking. Similarly, the information respecting the Appellant's ability to lift is unclear with the Appellant advising the neurosurgeon that he can do no lifting 75% of the time, the neurosurgeon ticking the "no lifting" box, and the general practitioner noting that the Appellant cannot carry "heavy" items 75% of the time. The panel notes that the additional evidence provided at appeal including the facts that the Appellant was limited to travelling within a range of about ten blocks from his residence, could perform volunteer activities, both of which mean that the Appellant has mobility outside the home, at least to travel in a ten block radius, and to get to and from his volunteer duties. He can go dancing and kayaking, which speaks to his mobility outside the home, which, although he may have pain and limitations, shows he is not severely restricted. His submission that he required handrails and assistance using stairs and ramps and that it takes significantly longer to move about indoors and out is indicative of a reduced ability, not an impairment which is severe.

The panel finds therefore that the Ministry's determination at reconsideration that the Appellant does not have a severe physical impairment was a reasonable application of Section 2(2) of the *EAPWDA* in the circumstances of the Appellant and is reasonably supported by the evidence.

**Section 2(2)(d) *EAPWD*  
Direct and Significant Restriction**

Section 2(2)(d) *EAPWDA* requires that a prescribed professional provide an opinion that the Appellant's mental or physical impairment directly and significantly restrict the person's ability to perform daily living activities either continuously or periodically for extended periods.

While the ministry commented that severe physical impairment was not established, when looking at the physical restrictions, the ministry did assess the information and noted the lack of explanation as to the frequency and duration of the restrictions described as periodic or intermittent. Further the ministry noted that a bicycle is not an "assistive device" and that some of the Appellant's restrictions are financial. The ministry noted there are contradictions between the PR and the AR, one example being the PR says the Appellant requires periodic assistance with the housekeeping and the AR reports the Appellant requires continuous assistance. Another example is that in the PR the Appellant is said to require periodic assistance with shopping while the AR reports the Appellant requires continuous assistance with one of the tasks listed under "shopping".

As the ministry found that the Appellant had no severe physical impairment and the Panel has found that the ministry's determination was a reasonable application of Section 2(2) of the *EAPWDA* in the circumstances of the Appellant and is reasonably supported by the evidence, the issue is then whether or not the severe mental impairment directly and significantly restricts the Appellant's ability to perform daily living activities either continuously or periodically for extended periods.

**Appellant's Position**

The Appellant's position was that his abilities to perform daily living activities were directly and significantly restricted, but he concentrated his evidence on physical issues; he gave evidence that his spinal issues caused pain and that did impact his ability to perform daily living activities. His submission on his severe mental impairment was that he suffered from psychomotor problems, depression, and recurring anger. He argued that the AR indicated that his cognitive and emotional

function were moderately impacted, 5 points of cognitive emotional function were moderately impacted, 7 were minimally impacted and that memory and psychotic systems were indicated in the AR as having no impact. He argued that the AR pointed out that he was marginally functional within social networks and was undergoing psychiatric treatment. He argued that depression and anger made it tremendously difficult to socialize or interact with strangers in public and has a lot of trouble making good decisions and adequate planning, and is unable to finish tasks he has begun he says that the AR reports that he has intermittent suicidal ideation which increases the risk of self-harm.

### **Ministry's Position**

The Ministry's position was that there was no evidence that the Appellant's severe mental impairment directly and significantly restrict his social functioning. The Ministry observed that the neurosurgeon opined that the Appellant on occasion becomes depressed, is not healed and is waiting for a psychiatric assessment, and that the general practitioner diagnosed the Appellant with a major depressive order, a low mood, chronic insomnia, and anger issues, but had no major impact to his cognitive or emotional functioning and then argued that there was no evidence that the severe mental impairment significantly restricted the Appellant's ability to perform DLAs continuously or periodically for extended periods. Further the ministry argued that there was no evidence that the restrictions the Appellant experienced were a direct result of the Appellant's impairment.

### **Panel Finding**

#### **DLAs – Analysis**

In the PR, the neurosurgeon said that the Appellant had no restrictions with the DLAs of "personal self-care", "meal preparation", "management of medications" or "management of finances" and as regards "social functioning" said that he had no restrictions, but was waiting for a psychiatric assessment.

In that same PR, the neurosurgeon said that the Appellant's restrictions with DLAs of "basic housework" were that he needed periodic help, was restricted with "daily shopping" in that he needed period help, was restricted with "mobility inside the home" because he needed periodic help, and was restricted continuously with "mobility outside the home".

In the AR, the general practitioner said that the Appellant has intermittent impairment related to degenerative disc disease and severe pain and therefore requires periodic assistance in performing the DLA "personal care".

This assessment is at odds with the PR where the neurosurgeon found that there are no restrictions with personal self-care.

In the AR the general physician said that the Appellant requires continuous assistance with the DLA "basic housekeeping" which is at odds with the neurosurgeon's PR report where the Appellant was said to need periodic assistance with basic housework.

With "daily shopping", in the AR the general physician found that the Appellant is independent with three of the five tasks, requires periodic assistance as a result of pain for the task of "going to and from stores" and requires continuous assistance with the task of "carrying purchases home", whereas the neurosurgeon stated in the PR that while the Appellant does require assistance for "daily shopping", it is only periodic assistance.

[ ]

In the AR, for “meals” the general physician reported that the Appellant is independent with 2 tasks and requires periodic assistance due to pain with 2 tasks, whereas the neurosurgeon in the PR found that the Appellant is not restricted in “meal preparation”.

In the PR for “transportation” the neurosurgeon stated that whether or not the Appellant’s use of transportation was restricted was unknown, whereas the general physician said in the AR that the Appellant required periodic assistance for all three tasks listed under that DLA, and noted that the Appellant uses a bicycle for transportation.

In the PR where the neurosurgeon reported the Appellant’s restrictions in the four daily living activities was restricted, the neurosurgeon did not say the restrictions were as a direct result of the Appellant’s physical condition or mental impairment, nor did the neurosurgeon say, or explain if, the restrictions were significant.

In the AR, the general physician reported periodic assistance being required in 2 of the 4 tasks under “meals”, periodic assistance being required in all 3 tasks under “transportation”, continuous assistance being required under both tasks for “basic housekeeping”, periodic assistance being required for 1 task and continuous assistance being required for 1 task of the 5 under “shopping” and periodic assistance being required for all 5 tasks under “social functioning”. The general physician did not say that any of these restrictions were as a direct result of the Appellant’s physical condition or mental impairment, nor did the general physician explain if any of these restrictions were significant. For example, the general physician explained that with “shopping” the Appellant required better transport, used a bicycle in poor repair, and is unable to use other transport.

The panel finds that the evidence does not show that the Appellant’s severe mental impairment directly and significantly restricted his ability to perform daily living activities either continuously or periodically for extended periods; the periodicity of the periodic or intermittent restrictions was not described by either physician, and the evidence shows that while the Appellant took significantly longer to perform various DLAs when he did not have assistance, he was able to perform them.

The panel finds that there was no evidence before the reconsideration officer to show that without assistance the Appellant was unable to perform DLAs, and that the Appellant’s ability, despite his severe mental impairment, to engage in volunteer activities, and travel within a ten block radius of his residence, attend a dance and go kayaking show that his DLAs were not directly and significantly restricted, but that on the contrary he was able to function with others in public, and engage in normal activities.

The Panel therefore finds that the Ministry’s determination at reconsideration that the Appellant was not directly and significantly restricted by his severe mental impairment, either continuously or periodically for extended periods was a reasonable application of Section 2(2)(d) of the *EAPDWR* in the circumstances of the Appellant and was reasonably supported by the evidence.

**Section 2(2)(b)(ii) EAPWDA  
Help to Perform DLAs**

Section 2(2)(d) *EAPWDA* requires that an applicant for PWD designation require help to perform DLAs as a result of his restrictions. Help is defined in section (3) as a requirement for an assistive

device, the significant help or supervision of another person or the services of an assistance animal.

**Appellant's Position**

The Appellant's position is that he requires the significant assistance of other people to perform his DLAs.

**Ministry's Position**

The ministry's position is that because it has not been established that DLAs are as a direct result of impairment or are significantly restricted, it can not be determined that help to perform them is required.

**Panel Finding**

The establishment of direct and significant restrictions with DLAs is a precondition of the need for help criterion. As the panel has found that the ministry reasonably determined that direct and significant restrictions in the Appellant's ability to perform DLAs have not been established, the panel also finds that the ministry reasonable concluded that it can not be determined that the Appellant requires help to perform DLAs as required by section 2(2)(b)(ii) of the *EAPWDA*.

**Conclusion**

The panel finds that the Ministry's decision in denying the Appellant Persons With Disability designation was a reasonable application of the evidence in the circumstances of the Appellant and was reasonably supported by the evidence.

The panel confirms the Ministry decision and the Appellant is not successful in his appeal.