

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated May 15, 2017 which found that the appellant did not meet three of the five statutory requirements of Section 2 of the *Employment and Assistance for Persons with Disabilities Act* for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement and that his impairment is likely to continue for at least two years. However, the ministry was not satisfied the evidence establishes that:

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

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Act (EAPWDA), Section 2

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR), Section 2

PART E – Summary of Facts

The evidence before the ministry at the time of the reconsideration decision included the appellant's Persons With Disabilities (PWD) Application comprised of the appellant's information and self-report dated December 6, 2016, a medical report (MR) dated December 14, 2016 completed by a general practitioner (GP) who has known the appellant for 7 ½ years and has seen him 2 to 10 times in the last year and an assessor report (AR) dated December 13, 2016 completed by a registered nurse (RN) and who had seen the appellant once for the purposes of completing the assessment.

The evidence also included the appellant's Request for Reconsideration dated May 3, 2017 with attached Reasons for the Request for Reconsideration that will be reviewed as argument in Part F-Reasons for Panel Decision.

Diagnoses

In the MR, the GP diagnosed the appellant with osteoarthritis C [cervical] and L [lumbar] spine, diabetes, and COPD [chronic obstructive pulmonary disease], with an onset more than 10 years ago, and diabetic neuropathy, with an onset about 5 years ago. There is no diagnosis of a condition within the mental disorders category of the MR. Asked to describe the mental or physical impairments that impact the appellant's ability to manage daily living activities (DLA), the RN wrote in the AR: "back pain- restricts movement and ability to lift, bend walk; headaches daily- has to take medication- often gets foot cramps and pain- query due to diabetic complications- neck pain...restricted neck movement- past history of alcohol abuse."

Physical Impairment

In the MR, the GP reported:

- With respect to the health history, "due to his several chronic medical conditions the patient finds any physical labor very difficult to do. He is in chronic pain from his back and neck and lifting is very limited. He feels short of breath with even light exertion. He is unlikely to find gainful employment due to his physical abilities/ inabilities."
- The appellant does not require any prostheses or aids for his impairment; the GP noted: "handrails for stairs where available."
- In terms of functional skills, the appellant can walk 2 to 4 blocks unaided on a flat surface, climb 5 or more stairs unaided, lift 2 to 7 kg. (5 to 15 lbs), and remain seated less than 1 hour.
- The appellant is periodically restricted with his mobility inside the home and outside the home. The GP noted: "especially during periods of increased pain flare-ups" and the degree of restriction is reported as "mild to moderate."
- For additional comments, the GP added that the appellant is "not a surgical candidate at this point for either his neck or back. Diabetic neuropathy in feet not really expected to improve."

In the AR, the RN indicated:

- The appellant is assessed as being independent with walking indoors and walking outdoors, and also taking significantly longer than typical with walking outdoors. The RN wrote: "can only walk about 4 blocks outside- back pain and feet cramp. Needs to rest about 3 to 5 minutes, then can go again." The appellant takes significantly longer with climbing stairs, and the RN noted: "states he can only go up 5 to 6 steps then needs to rest back and hips hurt him- waits a few minutes before he can continue; can only complete about 15 steps- has to use handrails." The appellant is independent with standing and the RN noted: "can only stand about 10 minutes- "get weak"- back and feet hurt him." The appellant requires periodic assistance from another person with lifting and continuous assistance with carrying and holding. The RN wrote that he can "only lift about 8 to 10 lbs.- unable to carry weight."
- In a supplemental page, the RN wrote regarding lifting that "due to back pain- also gets periodic numbness and cramping in hands- query complications of diabetes- has difficulty

holding on to things.”

- In the section of the AR relating to assistance provided, none of the listed assistive devices are indicated as applicable.
- In the additional information, the RN wrote that the appellant has had diabetes for 10 years and “now has numbness and cramping in hands and feet periodically- affect ability to hold onto things- stand- walk.” He had “...numerous injuries over the years and this probably contributed to his chronic back and neck pain. Now he has difficulty with headaches daily- ability to move neck side to side- lift and carry- sit for any length of time- this is getting progressively more painful and impairs his ability to do things independently.”

In his self-report, the appellant wrote:

- He has Type 2 diabetes, lower back pain, neck pain, headaches, fatigue and alcoholism.
- The only relief he gets from the constant lower back pain is to keep moving. He cannot sit for more than 15 minutes because of increasing pain and stiffness.
- He does not sleep well due to back and neck pain.
- He suffers from daily headaches that last up to half an hour.
- He is unable to concentrate or focus on things due to the pain and he has to be in constant motion.
- He is always tired and feels weak. He naps several times a day.
- He is unable to lift or carry items weighing more than 10 lbs. due to back pain and pressure.
- When walking outdoors, he needs to frequently stop for rest breaks.
- Stairs are a struggle due to increased pain and he needs to stop and rest.
- His diabetes is controlled by medications.

Mental Impairment

In the MR, the GP reported:

- There is no assessment of difficulties with communication.
- The appellant has significant deficits with cognitive and emotional function in the areas of consciousness, executive, memory, motivation and attention and sustained concentration. The GP did not add any comments.
- The appellant is periodically restricted with social functioning. The GP reported the degree of restriction as “mild to moderate” and the GP wrote: “avoids going out to social gatherings if pain too much.”

In the AR, the RN reported:

- The appellant has a satisfactory ability to communicate with speaking, reading and writing, with no assessment for hearing. The RN noted that the appellant “...can read and write basically; unable to complete forms without help; states he has some hearing loss and eyes also give him problems- get blurry and unable to focus- worse with headaches- query cataracts.”
- With respect to daily impacts to the appellant’s cognitive and emotional functioning, the RN assessed the appellant with a no major impacts, with moderate impacts in the areas of bodily functions (sleep disturbance), consciousness (drowsy), attention/concentration, executive, and memory. There is a minimal impact to motivation. The RN commented that the appellant “...has no mental illness but does have difficulty sleeping due to back pain- can only sleep 3 to 4 hours at a time, naps 4 to 5 times per day- states frequently drowsy. States memory is poor- can’t remember people- names- has difficulty focusing at times due to pain and headaches.”
- In a supplemental page, the RN wrote that the area of motivation is “only affected but fact that he tires easily and is restricted due to pain.”
- The appellant is independent and requires no support or supervision in all areas of social

functioning, specifically: making appropriate social decisions, developing and maintaining relationships, interacting appropriately with others, dealing appropriately with unexpected demands, and securing assistance from others.

- The appellant has good functioning in both his immediate and extended social networks.
- Asked to describe the support/supervision required which would help maintain the appellant in the community, the GP provided no comments.
- In the additional comments, the RN wrote that the appellant "...used/abused alcohol for many years- chronic use is known to affect memory and thought processes and this may be what has caused problems for client. This is not reversible."

Daily Living Activities (DLA)

In the MR, the GP reported:

- Regarding his health history, that the appellant is "unlikely to find gainful employment due to his physical abilities/ inabilities."
- The appellant has not been prescribed any medication and/or treatment that interfere with his ability to perform DLA.
- The appellant is not restricted with the meal preparation DLA, the management of medications DLA, the use of transportation DLA, and the management of finances DLA.
- The appellant is periodically restricted with the personal self care DLA, the basic housework DLA, the mobility inside and outside the home DLA, and the social functioning DLA. Regarding "periodic," the GP wrote "especially during periods of increased pain flare-ups." For social functioning, the GP noted that the appellant "avoids going out to social gatherings if pain too much."
- The appellant is restricted with the daily shopping DLA but there is no indication if the restrictions are continuous or periodic.
- Regarding the degree of restriction, the GP indicated "mild to moderate."
- Asked to describe the assistance the appellant requires with DLA, the GP wrote: "roommate will help with cleaning house and moving around heavy objects."

In the AR, the RN reported:

- The appellant is independent with all of the tasks of the personal care DLA, taking significantly longer than typical with the task of transfers in/out of bed. The RN wrote that he is "slow to get out of bed due to back pain and stiffness." The appellant is also independent with all of the tasks of the pay rent and bills DLA, the medications DLA, and the transportation DLA, taking longer with the task of getting in and out of a vehicle with the comment: "states that he is unable to sit for more than one hour in a vehicle; gets back pain- stiffness has to use "hand pulls."
- Regarding the basic housekeeping DLA, the appellant requires periodic assistance from another person with both doing laundry and housekeeping and he takes significantly longer with housekeeping. The RN wrote that the appellant is "able to do laundry most of time- sometimes restricted due to pain- can do lighter chores- often having to plan to do only a few things then rest- especially with chores that require bending."
- For the shopping DLA, the appellant is independent with the tasks of reading prices and labels, making appropriate choices and paying for purchases and requires periodic assistance from another person with going to and from stores and carrying purchases home, with the comment: "needs help to carry heavier items- usually goes with roommate who will help him reach for items on higher/lower shelves and carry heavier (more than 10 lbs.) items."
- Regarding the meals DLA, the appellant requires periodic assistance from another person with all tasks and also takes longer than typical with food preparation and cooking. The RN wrote: "states that he and roommate share cooking- works short periods due to back pain- feet

cramping; also has difficulty using utensils- knives, peelers as hands cramp. Needs to stop- rest then he will continue after 10 to 15 minutes.”

In his self-report, the appellant wrote:

- It is a struggle to get up off a chair and out of bed due to extreme pain and stiffness.
- He lives with two roommates and they share the daily chores and shopping.

Need for Help

With respect to the assistance provided by other people, the GP reported that the appellant’s “roommate will help with cleaning house and moving around heavy objects.” The RN reported in the AR that the appellant receives help from his family and friends. In the section of the AR for identifying assistance provided through the use of assistive devices, the GP did not indicate any of the listed items as being required by the appellant.

Additional information

In his Notice of Appeal dated May 30, 2017, the appellant expressed his disagreement with the ministry’s reconsideration decision and wrote that he believes he is disabled as per EAPWD legislation.

At the hearing, the appellant’s advocate stated:

- The ministry is overstepping its authority in creating additional criteria for PWD designation that are not set out in the legislation. This has the effect of denying a benefit to eligible applicants and is unauthorized by the legislation and amounts to an illegal fettering of the ministry’s discretion to determine if an individual meets the legislated criteria.
- The ministry noted in the reconsideration decision that the application was problematic as the AR was completed by an RN who met with the appellant only once when completing the AR, which is intended to be completed by a prescribed professional having a history of contact and to be based on observations. The ministry wrote that since the RN met with the appellant only once and has not consulted the appellant’s medical records, the ministry considered her information to be more of a self-report and not an opinion of a prescribed professional.
- There is nothing in the legislation that requires that the prescribed professional has knowledge of the applicant. The RN has more than 30 years of experience and is well-qualified to provide an assessment as a prescribed professional. The ministry’s comment about the AR must be disregarded and the AR given a fair consideration.
- The appellant has several health conditions, including chronic low back pain, OA of his C and L spine, Type 2 diabetes, diabetic neuropathy, headaches, and COPD. The RN essentially confirms these diagnoses in the AR and her many notes.
- The Mayo Clinic provided an online definition of diabetic neuropathy as a type of nerve damage that can occur if a person has diabetes. High blood sugar can injure nerve fibers throughout the body, but diabetic neuropathy most often damages nerves in legs and feet. Depending on the affected nerves, symptoms can range from pain and numbness in the extremities to many other problems. For some symptoms are mild while for others symptoms are painful, disabling and can even be fatal. Diabetic neuropathy is a common serious complication of diabetes.
- The GP confirmed that the appellant is not a surgical candidate and his conditions are not expected to improve.
- The GP confirmed that the appellant is periodically restricted in several DLA, including personal self care, basic housework, mobility inside and outside the home, and social functioning. The GP wrote that these restrictions occur especially during periods of increased pain flare-ups.
- The degree of restriction with social functioning is stated to be mild to moderate.

- Both the GP and the RN confirm restrictions to the same DLA.
- In the AR, the RN provided many explanatory comments about why some tasks take the appellant longer or why he needs periodic assistance. The RN wrote that the appellant can only walk 4 blocks and needs to rest, that he can only climb 5 to 6 steps and stand 10 minutes. While the appellant can lift up to 10 lbs., he cannot carry that weight.
- The appellant is a tall and large person so lifting 10 lbs. is more of a restriction for him than for someone who is smaller of stature.
- The appellant's restrictions in his ability to hold, stand, and walk impact his ability to perform DLA and his conditions are becoming progressively more painful.
- In the appellant's community, the GP's typically will not complete the MR until the appellant has completed the self-report and the prescribed professional has completed the AR. The RN typically takes an hour or more to review the AR and usually more if she does not have access to the medical files.
- The appellant used to be an extremely active person and very strong and now he has difficulty standing for any length of time.

At the hearing, the appellant stated:

- If he has been sitting for more than an hour, he gets flare-ups of pain and has to move.
- He often wakes up in the night and has to get up and wander to allow the pain to let up.
- His roommate will help him when she is around, but he manages on his own when she is not there.

The ministry relied on the reconsideration decision, as summarized at the hearing.

Admissibility of Additional Information

The ministry did not object to the admissibility of the oral testimony on behalf of the appellant. The panel considered the information from the appellant as being in support of, and tending to corroborate, the impact from medical conditions referred to in the PWD application and the Request for Reconsideration, which were before the ministry at reconsideration. Therefore, the panel admitted this oral testimony in accordance with Section 22(4)(b) of the *Employment and Assistance Act*.

The panel considered the print out of the online information from the Mayo Clinic regarding diabetic neuropathy as part of the argument on the appellant's behalf.

PART F – Reasons for Panel Decision

The issue on appeal is whether the ministry's reconsideration decision, which found that the appellant is not eligible for designation as a 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 evidence does not establish that the appellant has a severe mental or physical impairment and that his DLA are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods. Also, as a result of those restrictions, it could not be determined that the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

The criteria for being designated as a 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 is in a prescribed class of persons or that the person has a severe mental or physical impairment that

(a) in the opinion of a medical practitioner or nurse 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).

The EAPWDR provides as follows:

Definitions for Act

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

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

(i) prepare own meals;

(ii) manage personal finances;

(iii) shop for personal needs;

(iv) use public or personal transportation facilities;

- (v) perform housework to maintain the person's place of residence in acceptable sanitary condition;
 - (vi) move about indoors and outdoors;
 - (vii) perform personal hygiene and self care;
 - (viii) manage personal medication, and
- (b) in relation to a person who has a severe mental impairment, includes the following activities:
- (i) make decisions about personal activities, care or finances;
 - (ii) relate to, communicate or interact with others effectively.

(2) For the purposes of the Act, "**prescribed professional**" means a person who is

(a) authorized under an enactment to practise the profession of

- (i) medical practitioner,
- (ii) registered psychologist,
- (iii) registered nurse or registered psychiatric nurse,
- (iv) occupational therapist,
- (v) physical therapist,
- (vi) social worker,
- (vii) chiropractor, or
- (viii) nurse practitioner, or

(b) acting in the course of the person's employment as a school psychologist by

- (i) an authority, as that term is defined in section 1 (1) of the Independent School Act, or
 - (ii) a board or a francophone education authority, as those terms are defined in section 1 (1) of the School Act,
- if qualifications in psychology are a condition of such employment.

Part 1.1 — Persons with Disabilities

Alternative grounds for designation under section 2 of Act

2.1 The following classes of persons are prescribed for the purposes of section 2 (2) [persons with disabilities] of the Act:

- (a) a person who is enrolled in Plan P (Palliative Care) under the Drug Plans Regulation, B.C. Reg. 73/2015;
- (b) a person who has at any time been determined to be eligible to be the subject of payments made through the Ministry of Children and Family Development's At Home Program;
- (c) a person who has at any time been determined by Community Living British Columbia to be eligible to receive community living support under the Community Living Authority Act;
- (d) a person whose family has at any time been determined by Community Living British Columbia to be eligible to receive community living support under the Community Living Authority Act to assist that family in caring for the person;
- (e) a person who is considered to be disabled under section 42 (2) of the Canada Pension Plan (Canada).

Severe Physical Impairment

In the reconsideration decision, the ministry was not satisfied that the information provided establishes a severe physical impairment. The ministry acknowledged that the GP diagnosed a number of medical conditions, namely OA of the cervical and lumbar spine, COPD, and diabetes with diabetic neuropathy, and noted the GP's comments that the appellant "finds any physical labor very difficult to do. He is in chronic pain from his back and neck and lifting is very limited. He feels short of breath with even light exertion. He is unlikely to find gainful employment due to his physical

abilities/ inabilities.” The ministry reasonably considered that employability is not a criterion for determining PWD designation as it is not set out in section 2(2) of the EAPWDA nor is it listed among the prescribed daily living activities in section 2 of the EAPWDR. The ministry found that the evidence does not sufficiently describe or portray a severe impairment and is more reflective of a moderate impairment. The ministry acknowledged that the appellant experiences some degree of restriction due to his impairment, but the ministry was not satisfied that the combination of his functional skills, mobility and physical abilities exhibits a severe physical impairment.

A diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a severe impairment. An “impairment” is a medical condition that results in restrictions to a person’s ability to function independently or effectively or for a reasonable duration. To assess the severity of an impairment, the ministry must consider the nature of the impairment and the extent of its impact on daily functioning.

Therefore, the ministry reasonably considered the impacts of the appellant’s diagnosed medical conditions on his daily functioning, beginning with the assessments provided in the MR and in the AR. The ministry wrote that the GP has known the appellant for 7 ½ years while the RN who completed the AR met the appellant only once and she did not indicate any approaches or information sources used to complete the form other than an interview with the appellant. The ministry appropriately placed more weight on the information from the GP as the medical professional who has much more history of interaction with the appellant; however, the panel finds that the information in the AR is also an opinion of a prescribed professional that is appropriately considered in conjunction with the information in the AR, as argued by the appellant’s advocate.

For the ministry to be “satisfied” that an impairment is severe, the panel considers it reasonable for the ministry to expect that the information provided by the medical practitioner and prescribed professional presents a comprehensive overview of the nature and extent of the impacts of the medical conditions on daily functioning, including by providing the explanations, descriptions or examples in the spaces provided in the MR and in the AR forms.

The ministry considered that the GP assessed the appellant in the moderate level of the scale for functional skills, being able to walk 2 to 4 blocks unaided on a flat surface, climb 5 or more steps unaided, lift from 5 to 15 lbs., and remain seated less than 1 hour. The GP also reported in the MR that the appellant does not require any aids for his impairment, but noted that he uses “handrails for stairs where available.” The GP indicated that the appellant is periodically restricted with his mobility inside the home and outside the home, “especially during periods of increased pain flare-ups” and the GP did not provide an explanation of how often the appellant experiences these flare-ups. The GP reported the degree of restriction with mobility as “mild to moderate.” While the advocate asserted that the degree of restriction applies specifically to social functioning, the panel finds that there is a separate section to explain if social functioning is impacted, and the additional comments with respect to the degree of restriction apply to all the DLA previously listed.

The ministry also considered that the RN indicated the appellant is independent with walking indoors and walking outdoors. The RN noted that the appellant also takes significantly longer than typical with walking outdoors and “can only walk about 4 blocks outside- back pain and feet cramp. Needs to rest about 3 to 5 minutes, then can go again.” In his self-report, the appellant wrote that when he walks outdoors, he needs to frequently stop for rest breaks. This information is consistent with that of the GP that the appellant can walk 2 to 4 blocks unaided. The RN indicated that the appellant takes significantly longer with climbing stairs, and noted: “states he can only go up 5 to 6 steps then needs to rest back, and hips hurt him- waits a few minutes before he can continue; can only complete about 15 steps- has to use handrails.” In his self-report, the appellant wrote that stairs are a struggle due to

increased pain and he needs to stop and rest. Again, this information is consistent with that of the GP that the appellant can climb 5 or more steps unaided.

The RN indicated that the appellant is independent with standing and the RN noted: “can only stand about 10 minutes- “get weak”- back and feet hurt him.” The RN indicated that the appellant requires periodic assistance from another person with lifting and continuous assistance with carrying and holding, and he can “only lift about 8 to 10 lbs.- unable to carry weight.” The appellant wrote in his self-report that he is unable to lift or carry items weighing more than 10 lbs. due to back pain and pressure, clarifying that the continuous assistance with carrying and holding is for weights in excess of 10 lbs. The advocate argued that the appellant is a tall and large person so lifting 10 lbs. is more of a restriction for him than for someone who is smaller of stature. The advocate stated that the appellant used to be an extremely active person and very strong and now he has difficulty standing for any length of time. However, the assessment of mobility and physical ability provides a snap shot of current abilities, not a relative change from previous abilities, within a fixed scale that would allow a person to accomplish simple daily tasks. The appellant wrote in his self report that the only relief he gets from the constant lower back pain is to keep moving. The appellant wrote that he cannot sit for more than 15 minutes because of increasing pain and stiffness. At the hearing, the appellant stated that if he has been sitting for more than an hour, he gets flare-ups of pain and has to move and he often wakes in the night and has to get up and wander to allow the pain to let up.

At the hearing, the advocate pointed out that the GP added comments to the MR that the appellant is “not a surgical candidate at this point for either his neck or back. Diabetic neuropathy in feet not really expected to improve.” The advocate provided information that high blood sugar can injure nerve fibers throughout the body, but diabetic neuropathy most often damages nerves in the legs and feet, resulting in pain and numbness, and it is “a common serious complication of diabetes.” In the additional information to the AR, the RN wrote that the appellant has had diabetes for 10 years and “now has numbness and cramping in hands and feet periodically- affect ability to hold onto things- stand- walk” and he “...has difficulty with headaches daily- ability to move neck side to side- lift and carry- sit for any length of time- this is getting progressively more painful and impairs his ability to do things independently.” While the appellant’s conditions may have progressed since the time that the MR and the AR were completed, there was no additional information from a medical professional provided on the appeal.

Given the GP’s report in the MR of a moderate level of functional skills and the RN’s report of independent physical functioning within that range, with no revised assessment provided on the appeal, as well as the GP’s emphasis on the appellant’s inability to work, the panel finds that the ministry reasonably determined that there is not sufficient evidence to establish that the appellant has a severe physical impairment under Section 2(2) of the EAPWDA.

Severe Mental Impairment

In the reconsideration decision, the ministry was not satisfied that the information provided was sufficient evidence of a severe mental impairment. The ministry noted that the GP did not diagnosis a mental condition or head injury in the MR. The ministry noted that the GP reported significant deficits with cognitive and emotional functioning in the areas of consciousness, executive, motivation, memory, and attention or sustained concentration, but did not provide any description of what is causing these deficits or how they impact the appellant’s daily functioning. The ministry considered that the RN indicated in the AR that all areas of cognitive and emotional functioning have a moderate, minimal, or no impact on the appellant’s daily functioning and that the appellant “has no mental illness.”

The panel finds that the ministry reasonably concluded that there was a lack of evidence of a severe mental impairment in part due to the assessment of independence in the “social functioning” DLA that are specific to mental impairment. Regarding the ‘decision making’ DLA, the RN reported in the AR that the appellant independently manages all decision-making components of DLA, with the exception of meal planning and safe storage of food as part of the meals DLA, with an assessment that the appellant requires periodic assistance from another person as he “states that he and roommate share cooking, works short periods due to back pain- feet cramping; also has difficulty using utensils- knives.” The RN indicated in the AR that the appellant is independently able to make appropriate social decisions.

Regarding the DLA of ‘relating effectively’, the GP reported that the appellant is periodically restricted in social functioning, described as “avoids going out to social gatherings if pain too much,” which relates to the appellant’s physical impairment rather than to a mental impairment per se. The RN indicated in the AR that the appellant is independently able to develop and maintain relationships and interact appropriately with others and he has good functioning in both his immediate and his extended social networks. The RN indicated that the appellant has a satisfactory ability to communicate with speaking, reading and writing, with no assessment of hearing although the appellant “states he has some hearing loss.” In his self-report, the appellant did not refer to impacts to his mental functioning and focused on his physical functioning.

Given the lack of evidence of significant impacts to the appellant’s cognitive, emotional and social functioning, the panel finds that the ministry reasonably determined that a severe mental impairment was not established under Section 2(2) of the EAPWDA.

Restrictions in the ability to perform DLA

In the reconsideration decision, the ministry was not satisfied that the appellant has a severe physical or mental impairment that, in the opinion of the prescribed professional, directly and significantly restricts DLA either continuously or periodically for extended periods of time.

The advocate argued at the hearing that the court decision in *Hudson v. Employment and Assistance Appeal Tribunal, 2009 BCSC 1461* established that the appellant is only required to show direct and significant restrictions on at least two DLA. According to the legislation, Section 2(2)(b) of the EAPWDA, the ministry must assess direct and significant restrictions to DLA in consideration of the opinion of a prescribed professional, in this case the appellant’s GP and the RN. This does not mean that the other evidence is not factored in as required to provide clarification of the professional evidence, but the legislative language makes it clear that a prescribed professional’s evidence is fundamental to the ministry’s determination as to whether it is “satisfied.” Therefore, the prescribed professional completing the assessments has the opportunity to indicate which, if any, DLA are significantly restricted by the appellant’s impairments either continuously or periodically for extended periods.

In the reconsideration decision, the ministry reviewed the information provided in the MR and noted that the GP indicated that the appellant has not been prescribed any medications or treatments that interfere with his ability to perform DLA. The ministry wrote that the GP indicated in the MR that the appellant is periodically restricted with personal self care, basic housework, and mobility inside and outside the home, and noted “especially during period of increased pain flare-ups.” The ministry noted that the GP described the degree of restriction as “mild to moderate.” The ministry considered that although the GP indicated that the appellant is restricted from completing daily shopping, the GP does not indicate if the restriction is periodic or continuous. The ministry considered that as no information was provided to describe the nature of the appellant’s restrictions or how often he

experiences flare-ups or how long they last, the ministry was not able to establish that the restrictions are periodic for extended periods of time.

At the hearing, the advocate argued that the ministry overstepped its authority in creating additional criteria for PWD designation that are not set out in the legislation because the EAPWDA prescribes no requirement for medical professionals to provide a calculation regarding the occurrence of an individual's symptoms and resulting needs for supports. Adding these requirements has the effect of denying a benefit to eligible applicants, is unauthorized by the legislation, and amounts to an illegal fettering of the ministry's discretion to determine if an individual meets the legislated criteria. The advocate also argued that given the nature of most mental and physical health conditions, the resulting symptoms cannot be quantified or generalized to have a measured, expected rate of occurrence, and it is reasonable that medical professionals would not provide such measurement.

Section 2(2) of the EAPWDA requires that a severe impairment directly and significantly restricts the appellant's ability to perform the prescribed DLA either continuously or periodically for extended periods. The direct and significant restriction may be either continuous or periodic. If the restriction is periodic, it must be for an extended time. Inherently, any analysis of periodicity must also include consideration of the frequency. All other things being equal, a restriction that only arises once a year is less likely to be significant than one which occurs several times a week. Accordingly, in circumstances where the evidence indicates that a restriction arises periodically, it is appropriate for the ministry to require evidence of the duration and frequency of the restriction in order to be "satisfied" that this legislative criterion is met.

The ministry wrote that the RN indicated in the AR that the appellant takes significantly longer than typical while transferring in and out of bed, completing basic housekeeping, preparing food, cooking, and getting in and out of a vehicle and the ministry reasonably considered the narrative provided by the RN with respect to these tasks of DLA. The comments by the RN included: "slow to get out of bed due to back pain and stiffness," "can do lighter chores- often having to plan to do only a few things then rest- especially with chores that require bending," "states that he and roommate share cooking- works short periods due to back pain- feet cramping; also has difficulty using utensils- knives, peelers as hands cramp. Needs to stop- rest then he will continue after 10 to 15 minutes," and "states that he is unable to sit for more than one hour in a vehicle; gets back pain- stiffness has to use "hand pulls." The panel finds that the ministry reasonably determined that the RN did not describe how much longer it takes the appellant to perform the identified tasks to establish that it takes significantly longer than typical to complete them. In his self report, the appellant wrote that it is a struggle for him to get up off a chair and out of bed due to extreme pain and stiffness; however, the appellant did not describe how much longer it takes him.

The ministry wrote that the RN indicated in the AR that the appellant requires periodic assistance from another person to complete the tasks of laundry, basic housekeeping, going to and from stores, carrying purchases home, meal planning, food preparation, cooking, and safe storage of food, with the comments: "able to do laundry most of time- sometimes restricted due to pain- can do lighter chores- often having to plan to do only a few things then rest" and "needs help to carry heavier items- usually goes with roommate who will help him reach for items on higher/lower shelves and carry heavier (more than 10 lbs.) items." In his self-report, the appellant wrote that he lives with two roommates and they share the daily chores and shopping. At the hearing, the appellant stated that his roommate will help him when she is around, but he manages to do things on his own when she is not there. When asked to clarify how often he experiences flare-ups of pain, the appellant stated that if he has been sitting for more than an hour, he gets flare-ups of pain and has to move, and he also gets them at night and has to get up and walk around to allow the pain to subside. The panel finds that while the appellant described daily pain flare-ups after sitting more than an hour, and mostly at

night, the ministry reasonably concluded that the prescribed professionals did not describe how often the appellant requires assistance or for how long he requires it to allow the ministry to be satisfied that the periodic assistance is required for extended periods of time.

In the MR, the GP reported that the appellant is not restricted with the meal preparation DLA, the management of medications DLA, the use of transportation DLA, and the management of finances DLA. The RN indicated that the appellant is independent with all of the tasks of the personal care DLA (taking longer with the task of transfers in/out of bed), pay rent and bills DLA, the medications DLA, and the transportation DLA (taking longer with the task of getting in and out of a vehicle). Although the advocate argued at the hearing that the GP and the RN confirm restrictions to the same DLA, the GP reported that there are no restrictions with the meal preparation DLA.

The GP also concluded in the health history of the MR that the appellant is unlikely to find gainful employment due to his physical abilities/ inabilities and, as previously discussed, employability is not one of the criteria for PWD designation. In the additional information to the AR, the RN wrote that the appellant “now has numbness and cramping in hands and feet periodically- affect ability to hold onto things- stand- walk” and he “...has difficulty with headaches daily- ability to move neck side to side- lift and carry- sit for any length of time- this is getting progressively more painful and impairs his ability to do things independently.” As previously discussed, while the appellant’s conditions may have progressed since the time that the MR and the AR were completed, there was no additional information from a medical professional provided on the appeal.

Given the GP’s report of the degree of restrictions to some DLA as “mild to moderate,” the lack of a description by the GP or the RN of how much longer it takes the appellant with some tasks of DLA or how often he experiences exacerbations in his condition that necessitate periodic assistance, the panel finds that the ministry reasonably determined that the evidence is insufficient to show that the appellant’s overall ability to perform his DLA is significantly restricted either continuously or periodically for extended periods, pursuant to Section 2(2)(b)(i) of the EAPWDA.

Help to perform DLA

In the reconsideration decision, the ministry held that, as it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required. Section 2(2)(b)(ii) of the EAPWDA requires that, as a result of being directly and significantly restricted in the ability to perform DLA either continuously or periodically for extended periods, a person must also require help to perform those activities. That is, the establishment of direct and significant restrictions under section 2(2)(b)(i) is a precondition of meeting the need for help criterion. Help is defined in subsection (3) as the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform a DLA.

While the RN indicated that the appellant receives help from family and friends, and the GP reported that the appellant’s roommate helps with cleaning and moving heavy objects, as the ministry reasonably determined that direct and significant restrictions in the appellant’s ability to perform DLA have not been established, the panel finds that the ministry also reasonably concluded that, under section 2(2)(b)(ii) of the EAPWDA, it cannot be determined that the appellant requires help to perform DLA.

Conclusion

The panel finds that the ministry’s reconsideration decision, which determined that the appellant was not eligible for PWD designation pursuant to Section 2(2) of the EAPWDA, was reasonably supported by the evidence. The panel therefore confirms the ministry’s decision. The appellant’s appeal, therefore, is not successful.