

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated June 9, 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 2 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 Act (EAA), Section 34

Employment and Assistance for Persons with Disabilities Act (EAPWDA), Section 2(2); Section 35

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

A. The Persons with Disabilities (PWD) application dated January 31, 2017

In the Applicant Information Section, the appellant

- said his disability effects [sic] his life and ability to take care of himself, makes day-to-day living complicated, and he requires help with many simple tasks he said he can do some tasks only in certain areas and under certain conditions and can sometimes do them only if he does nothing else
- says he has most problems with making and cleaning up after meals so family members give him assistance to complete these tasks. When he does them it makes the whole world spin and he has to lie down to recover, taking several hours to days to recover from preparing meals and cleaning up. The more he does these tasks the worse and more intense his symptoms become, such that he will often not eat if someone does not prepare meals for him. He has more difficulty doing dishes in the dishwasher than in the sink as bending and reaching causes more problems
- has problems with day-to-day shopping, because standing in line if there are more than three people makes him unstable and want to fall over; thus he shops as quickly as possible. He plans his grocery buying trips even before he enters the store so as to spend as little time as possible in the store. He says being around many small objects is worse than being around fewer large items on the shelf and worsens his condition so he avoids staying in such areas for long.
- says he has problems carrying purchases due to a pinched Molnar nerve in his elbows so he often switches hands and carrying and moves quickly so as to carry things for a shorter period of time, and pushing a shopping cart causes problems with his arms so he uses a basket but in doing so he cannot use trekking poles, causing him to shop more quickly or have assistance from someone else, which is what he often chooses to do
- says walking and travel causes him problems and with the more movement that occurs around him, the worse his symptoms become. He has problems walking in areas where the ocean can be seen because he becomes unstable looking at moving water as that can trigger his symptoms. He avoids stopping and speaking to people is much as possible and often has to sit down or he will fall over. He uses trekking poles to aid in balance and they have prevented him falling. It was recommended he use a cane but the pinched ulnar nerve makes the weight of a cane too much and trekking poles are much lighter. It is very difficult for him to take ferries as it takes him weeks to recover from a simple trip to physician off the island where he lives. He has difficulties with things moving around him and being unable to lie down and recover so he avoids the ferry as much is possible. If someone gives him a ride off-island the average recovery time is 1 ½ weeks and if he travels by himself it is 2 or more weeks. He spends much of his recovery lying down and resting.
- says his chronic pain and injury symptoms are managed by frequent trips to the physiotherapy, the chiropractor, and working with an athletic therapist, without which he is unable to do anything at all
- he has attempted to sign up for Medical Assistance in Dying (MAID), but as his condition is not terminal he does not qualify; he would like to commit suicide but someone would have to find his body, causing trauma to that person so it is not an option. If he had a choice he would pick MAID over designation as a person with disabilities
- his disability has prevented him from working in any capacity, left him financially destroyed as he spends more money than he has on the treatments; he gets 48 physiotherapy treatments every 3 weeks, athletic therapist treatments 57 times and chiropractic treatments 25 times every three weeks and massage therapy once a month

B. The Persons with Disabilities Designation Denial Decision Summary dated April 12, 2017

The adjudicator reports that the appellant

- is 18 years of age or more and that his impairment is likely to continue for 2 or more years,
- has been diagnosed with post-concussion vestibulopathy and chronic musculoskeletal / myofascial pain syndrome
- the Summary reviews the medical consultations whether or not the appellant requires assistance with mobility or physical ability from the medical viewpoint, whether or not the appellant's impairment directly and significantly restrict his daily living activities and concludes that they do not, and that the appellant does not require help with DLA.

C. A Medical Report (MR) Completed by the Appellant's General Practitioner dated February 21, 2017, in which the GP reported he had seen the appellant for 3 visits in total over the 3 months the appellant has been his patient, and, despite the instruction in Section E Daily Living Activities (DLA), that if the physician is completing the assessor report, he is not to complete this Section E, he did complete it, and reported with respect to the Appellant's DLA that

- the appellant experiences periodic restrictions in the 2 of the 9 physical DLA of Meal Preparation, and Use of Transportation. The physician comments that the periodic restriction is that the appellant is more affected when his surroundings are moving and in low light, but does not describe the periodicity or frequency. The physician says that for doing the dishes, cleaning and meal preparation, assistance is provided to by his parents.
- the appellant experiences continuous restrictions in the 3 of the 9 physical DLA of Basic Housework, Daily Shopping and Mobility Outside. The physician does not comment further about the nature of the continuous restriction except to say that the degree of restriction is significant in certain situations such as being in crowds, around the ocean, and in low light
- the appellant is not restricted in the 4 of the 9 physical DLA of Personal Self-care, Management of Medications, Mobility Inside the Home and Management of Finances, and that
- in the 1 DLA having to do with Social Functioning, the appellant is continuously restricted, but then says that the restrictions are only in certain situations such as in crowds.

The physician reported that the appellant could

- walk 4 or more blocks unaided, but this ability deteriorates when movement and light surrounds the appellant
- climb 5 or more steps unaided,
- lift between 7 and 16 kilograms, and
- remain seated for 1 to 2 hours,
- communicate with no difficulties
- live with no significant deficits with cognitive and emotional function

In answer to the query "*Does the impairment directly restrict the person's ability to perform Daily Living Activities?*" The physician answered "Yes", but made no comment as to the severity of the restrictions. The physician says to refer to the specialist consultations as they outline the appellant's history and medical well.

D. Otolaryngologist's Report dated September 3, 2014

Following the first of two car crashes the appellant was investigated for vertigo, which began a week after the crash, with each episode lasting seconds to minutes. The specialist noted that the appellant had trigger points in various muscles, but no nystagmus. Various tests failed to evoke any problems and the specialist suspected that it was either post-traumatic/concussive vestibulopathy or cervicogenic vertigo and recommended vestibular rehabilitation and a neurological referral for

parasthesia/neurological deficits and post-traumatic/concussive dizziness. The specialist said it was difficult to ascertain the etiology of the dizziness.

E. Neurologist's Report Dated March 16, 2015

The neurologist reported that when first evaluated the appellant had left ulnar neuropathy and musculoskeletal/myofascial symptoms, which the appellant told the neurologist had started to improve after the first motor vehicle crash up until the second one. The neurologist reported that the appellant had a positive Tinel's Sign bilaterally at the elbows and negative bilaterally at the wrists. There were no objective sensory deficits, no scapular winging and the appellant's rhomboids were full-strength. The neurologist reviewed an earlier cervical spine CT scan and noted that it was unremarkable without any significant degenerative changes or neuroforaminal stenosis. The neurologist said that given the normal examination and unremarkable CT cervical spine scan further neuroimaging would not be of value and encouraged the appellant to enrolment a regular low-weight-bearing exercise program.

F. Physiatrist's Report Dated June 12, 2015

This is scientist reported the appellant's symptoms and treatments as the appellant related them to him, and stated that on examining the appellant, he found well-maintained cervical thoracic and lumbar curves with well-maintained ranges of motion; the appellant's gate was normal, had no tenderness over the spinous processes in the cervical thoracic and lumbar regions with no tenderness or tightness in the muscles of the upper back and shoulder. The physiatrist did not find musculoskeletal concerns needing treatment and told the appellant that further imaging of the neck would not be useful. He urged the appellant to continue with day-to-day activities, relaxation techniques, breathing exercises, yoga and other enjoyable leisure activities.

G. Otolaryngologist's Report Dated November 19, 2015

The otolaryngologist reported the appellant to be improving quite well with vestibular therapy, that spinning vertigo is no longer present but there is still intermittent imbalance. The otolaryngologist told the appellant that he likely has a vestibular dysfunction.

H. Neurologist's Report Dated July 29, 2016

The neurologist reported that the appellant, following the two motor vehicle accidents, has:

- no overt pain manifestations, a full range of motion of the spine, with tenderness over the upper trapezius bilaterally and over the cervical neuroforaman, normal cranial nerves, normal fundoscopic examination, normal cerebellar function and gate, no pronator drift, response of tingling in the left fifth finger on pinprick, and normal reactions to other tests
- very mild left ulnar nerve dysfunction leaving the appellant with no disability and not requiring further investigation or treatment
- chronic musculoskeletal pain involving the base of the skull, upper thoracic area and lumbosacral area, with a poor prognosis for recovery, but which does not require further investigation, and an MRI which showed minimal changes and no significant pathology to explain the symptoms
- post-traumatic headaches that do not fit the criteria for migraine, and for which no investigation is warranted
- an opinion that the appellant is fixated on his cervical spine, with little in the way of pathology to explain all of the appellant's symptoms,
- that there is no evidence of spinal pathology to explain symptoms the appellant complains of below his neck when he cannot move, and that these complaints are of unclear etiology, but the neurologist doubts the appellant's symptoms are due to cataplexy, epilepsy isohemin. There is no evidence of any spinal pathology to explain the symptoms and the neurologist has no further investigations to offer, advising the appellant should simply avoid activities that

trigger the symptoms

- the neurologist recommends reassurance, states there is no indication for further investigations of the musculoskeletal or nervous system due to the already comprehensive investigation, that there is no indication for any specific pharmacologic therapy, and that the appellant is not eligible for Health Authority Pain Clinics since the appellant has ongoing litigation and pending ICBC claim.

I. An Assessor's Report (AR) dated February 21, 2017 and completed by the same the physician who completed the MR.

In Section A of the AR "*Living Environment*"

- *Section A(1)* - The physician reported that the appellant lives with his parents

In Section B of the AR "*Mental or Physical Impairment*" the physician reported as follows:

- *Section B(1) - Mental or Physical Impairment Impacting DLA* - the physician reported that his mental or physical impairments that impact his ability to manage DLA are troubles with balance, holding things, general movement, dizziness, a proneness to falling and headaches
- *Section B (2) - Ability to Communicate* - the appellant's ability is "Good" in all 4 listed tasks
- *Section B(3) - Mobility and Physical Ability* - the appellant is independent in 1 of the 6 listed tasks (walking indoors) that he uses an assistive device in the 2 of those tasks (walking outdoors, climbing stairs) and that the assistive devices are trekking poles and hand railings, and that in the remaining 3 tasks (standing, lifting, carrying and holding), the appellant takes significantly longer than typical, commenting that the appellant has trouble with standing still, lifting and holding,
- *Section B (4) - Cognitive and Emotional Functioning* - the physician crossed this section out, not making any report on difficulties with Cognitive and Emotional Functioning.

In Section C of the AR "*Daily Living Activities*" the physician assessor reports that with the DLA of

- Personal Care, where there are 8 listed tasks, the appellant is independent in 6, and takes significantly longer than typical in 2, having his meals prepared for "feeding self" and periodic assistance for "that transfers in/out his bed"
- Basic Housekeeping, where there are 2 listed tasks, the appellant requires periodic assistance with both, provided by his parents, but does not describe the periodicity
- Shopping, where there are 5 listed tasks, the appellant is independent in 3, requires periodic assistance in 1, such assistance being described as his parents shopping for him but the assessor does not describe the periodicity. The appellant takes significantly longer in 1 of the tasks; the assessor explains the degree and duration of support required as "takes longer" without describing how much longer or how often
- Meals, where there are 4 listed tasks, the appellant is independent in 2, requires periodic assistance in the 1 described as the appellant being unable to prepare his own meals at times and needs assistance from his parents, and requires continuous assistance in the remaining 1 task, with an explanation that his mother prepares his meals as he is unable
- Pay Rent and Bills, where there are 3 listed tasks, the appellant is independent in all 3
- Medications, where there are 3 listed tasks, the appellant is independent in all 3
- Transportation, where there are 3 listed tasks, the appellant is independent in 1, and takes significantly longer in the 2, explained as sometimes taking longer getting in and out of a vehicle and avoiding the use of public transit
- Social Functioning, which is only to be completed if the appellant has an identified mental

impairment, at the physician, although stating in the MR that the appellant has no significant deficits with cognitive and emotional function goes on to complete this section where there are where there are 6 listed tasks, stating that the appellant is independent in 4, that he requires periodic support/supervision in 1, with the explanation that the appellant avoids gatherings of people due to vertigo, and does not score the 6th. The physician assessor says that the appellant is independent with the task of “able to secure assistance from others” and explains that the degree and duration of assistance is “when available”. The physician says that the appellant’s mental impairment causes him to function marginally with his immediate social network but allows him “good functioning” with his extended social network.

- Dealing with the use of Assistive Devices, the physician says the appellant uses trekking poles to compensate for his impairment, using them for balance, that no more equipment or devices are needed, and that the appellant does not have the use of an assistance animal.
- By way of additional information, the assessor says that the appellant is significantly affected when his symptoms are bad and specifies this to be his vertigo balance problems and chronic pain; the assessor says this affects him daily, with his living and activity and he is unable to function independently and requires periodic assistance.

J. An Article from the Vestibular Disorders Association undated but received February 21, 2017.

K. A Letter from the Appellant’s Mother “To whom it may concern” undated but received December 21, 2017, in which she advises that the appellant has difficulty with everyday things, including cooking because of standing and reaching, although the appellant does cook some meals, has difficulty unloading the dishwasher because having to stretch and then reach and has trouble doing his laundry and vacuuming the floor because of pain. She says holding and carrying things for more than a couple of minutes is difficult.

L. A Letter from the Appellant’s Family Physician Dated May 24, 2017

The family physician refers to the Disabilities Designation Denial Decision Summary and corrects what the physician sees as misimpressions with that Summary. The panel points out that although the Summary was before the reconsideration officer, it is not the Summary that is being appealed, but rather the Reconsideration Decision.

**Information Provided on Appeal
Appellant’s Additional Evidence**

Written Evidence

The appellant submitted 3 documents as additional evidence; a 5 page printout from the ministry entitled “Persons with Persistent Multiple Barriers” (PPMB), a 5 page Medical Services Plan (MSP) a printout covering several years and a 5 page compilation of receipts for various services.

The appellant argued that the PPMB printout should be admissible because it advised individuals that under certain circumstances they may also require assistance with Daily Living Activities and should be informed of the option to apply for designation as a Persons With Disabilities. The appellant agreed that this document and the various options were not before the Minister at reconsideration.

The appellant argued that the MSP printout should be admissible because it showed the cost of the various treatments and examinations that the government has spent upon him in the period set out in that MSP printout. The appellant agreed that this document and the discussion of expenses paid by the government was not before the minister at reconsideration.

The appellant argued that the receipts, for things such as drugs, ferry travel, quasi-medical care and psychological counselling should be admitted because they showed some of the expenses that the

appellant has paid personally and for what items or services. He said that he could ill-afford these things. The appellant agreed that this document and the discussion of expense to him were not before the minister at reconsideration.

Ministry Position on Additional Written Evidence

The ministry was not opposed to admission of the appellant's additional written evidence.

Panel Finding on Additional Written Evidence

The panel finds that the Appellant's additional written evidence, specifically the 3 written documents, is not in support of the information and records that were before the minister when the reconsideration decision being appealed was made and therefore does not admit that additional evidence pursuant to section 22(4) *Employment and Assistance Act (EAA)*.

Ministry's Additional Evidence

The ministry did not submit additional evidence.

PART F – Reasons for Panel Decision

Issue on Appeal

The issue on appeal is whether the Ministry of Social Development and Social Innovation's (the ministry) reconsideration decision dated June 9, 2017, to deny the Appellant designation as a PWD was reasonably supported by the evidence or was a reasonable application of the applicable enactment, namely section 2(2) *EAPWDA* and sections 2 *EAPWDR*, in the circumstances of the appellant. The Ministry of Social Development and Social Innovation (the ministry) reconsideration decision found that the appellant did not meet 3 of the 5 statutory requirements of Section 2 of the *Employment and Assistance for Persons with Disabilities Act* 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 2 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

Relevant Legislation

Employment and Assistance Act

Delegation of minister's powers and duties

- 34** (1) Subject to the regulations, the minister may delegate to any person or category of persons any or all of the minister's powers, duties or functions under this Act except
- (a) the power to prescribe forms,
 - (b) the power to appoint members to the tribunal, and
 - (c) the power to enter into an agreement under section 30 (2) or (2.1), unless section 30 (2.2) applies in relation to the agreement.
- (2) A delegation of the powers, duties or functions of the minister must be in writing and may include any limits or conditions the minister considers advisable.

Employment and Assistance for Persons with Disabilities Act (EAPWDA)

Delegation of minister's powers and duties

- 25** (1) Subject to the regulations, the minister may delegate to any person or category of persons any or all of the minister's powers, duties or functions under this Act except
- (a) the power to prescribe forms, and
 - (b) the power to enter into an agreement under section 21 (2) or (2.1), unless section 21 (2.2) applies in relation to the agreement.
- (2) A delegation of the powers, duties or functions of the minister must be in writing and may include any limits or conditions the minister considers advisable.

Employment and Assistance for Persons with Disabilities Act (EAPWDA)

(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.

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR).

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 *EAPWDA* and section 2 *EAPWDR* is that in order to be designated as a Person With Disabilities (PWD), 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 restricts his ability to perform Daily Living Activities either continuously or periodically for extended periods, and as a result he requires help to perform them.

Parties' Positions at Appeal

Jurisdiction – Delegation of Minister's Powers, Duties or Functions

Appellant's Position

The appellant argued that the reconsideration decision cannot stand because it was made by a ministry employee, and neither an employee nor the ministry itself can make such decisions because the legislation, the *Employment and Assistance Act (EAA)* and the *Employment and Assistance for Persons with Disabilities Act (EAPWDA)*, both require the Minister personally to make decisions. The appellant argued that specifically under section 2 (2) of the *EAPWDA* it is only the Minister personally who may designate a person as a Person with Disabilities. The appellant argued that this should also apply to the original decision to deny him PWD designation.

Ministry Position

The ministry stated, in answer to a direct question, that the individuals making the decisions and in particular the reconsideration officer who made the reconsideration decision under appeal, dated June 9, 2017, had been delegated the minister's powers, duties and functions to make such decisions under both sections 34 *EAA* and 25 *EAPWDA*.

The ministry argued that the decisions made were thus properly made because the individuals making the decisions had been delegated the Minister's powers, duties and functions.

Panel Finding

The panel finds that an objection to a reconsideration decision based on a claimed lack of authority to make that decision may be considered whether or not it was specifically addressed in the reconsideration decision, because it does not involve a question of admissibility of evidence, but rather because it is an objection to the foundation of the reconsideration decision itself.

The panel finds that the objection to the original decision, although it was part of the evidence before the reconsideration officer, and hence was information and records before the minister when the decision being appealed was made, cannot be entertained because the appeal is from the reconsideration decision, not the original decision.

The panel finds, based on the ministry's assertion that the reconsideration officer was exercising authority delegated under either section 34 *EAA* and/or section 25 *EAPWDA*, that the reconsideration officer was properly exercising delegated powers, and had the authority to make the reconsideration decision.

Analysis

Section 2(2) *EAPWDA*

Age and Duration and Severe Impairment Requirement

Section 2(2) *EAPWDA* 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, and that the Appellant, in the opinion of a physician that while the appellant has limitations in physical functioning that are likely to continue for at least 2 years, they are not severe, and that the appellant has no severe mental impairment.

Thus the requirements of section 2(2) of the *EAPWDA* as to age and duration had been met.

Severe Physical Impairment

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

The legislative requirement respecting DLA set out in section 2(2)(b) of the EAPWDA is that the minister be satisfied that as a result of a severe physical or mental impairment a person is, in the opinion of a prescribed professional, directly and significantly restricted in the ability to perform DLA either continuously or periodically for extended periods. Consequently, while other evidence - such as that of (a witness and of the) appellant - may be considered for clarification or support, but the ministry's determination as to whether or not it is satisfied is dependent upon the evidence from prescribed professionals. DLA are defined in section 2(1) of the *EAPWDR* and are listed in both the PR and the AR sections of the PWD application with the opportunity for the prescribed professional to check marked boxes and provide additional narrative.

While there was evidence from the appellant and the neurologist in the report of July 29, 2016 to the effect that while the appellant was working after his first motor vehicle accident, he did not continue working and has not worked since, DLA, as defined in the legislation, do not include the ability to work.

In this case, the prescribed professional who has provided information respecting the appellant's ability to perform DLA is the family physician for both the MR and the AR.

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.

To assess the severity of an impairment, the ministry must consider both the nature of the impairment and the extent of its impact on daily functioning as evidenced by functional skill limitations and the degree to which the ability to perform DLA is restricted. In making its determination the ministry must consider all the relevant evidence, including that of the appellant. However, the legislation is clear that the fundamental basis for the analysis is the evidence from a prescribed professional – in this case, the family physician.

Appellant's Position

The appellant's position was that he was severely physically impaired. He repeated that he avoids public transport such as the skytrain, because he becomes dizzy and vertiginous, that he is unable to prepare meals and that his mother prepares them for him, that when he returns home from the appeal hearing it will take him a week to a week and a half to recover. He argued that the reconsideration decision cannot stand because it is for the doctor to decide severity of the physical condition, not the ministry. He argued that there are further errors in the reconsideration decision because it is not for the ministry to decide whether a DLA restriction is periodic or continuous, but rather for the doctor to decide. He points out that in the original decision his GP is misquoted, and that the doctor said that he would be very guarded about any long term "impairment" whereas the original decision used the term "improvement".

The appellant went on to point out various diagnoses or conditions referred to by his physicians and argued that the supported a conclusion that he was severely physically impaired.

Ministry's Position

The ministry relied on the reconsideration decision. In that decision it was stated that the appellant did not require any aids or prosthesis. It was also stated that according to the family physician's

opinion set out in the MR and the AR, the appellant was able to perform the functional skills set out, albeit taking longer to perform some. It was also stated that while the appellant has continuous or periodic restrictions with some DLA. Reading the MR together with the AR indicates that the assistance required is because the appellant takes significantly longer than typical to manage some tasks, not that the appellant was unable to perform those DLA without assistance. The ministry further stated that, quoting the family physician, the appellant's inability to carry out many DLA is subjectively significantly affected, and that the appellant experiences some limitations managing physical functioning, but that no medical practitioner or nurse practitioner has given an opinion that the appellant's physical functioning is impaired to a severe degree. The reconsideration decision pointed out that the appellant's inability to prepare his own meals occurs, according to the family physician, "at times" and at those times he was in need of parental assistance. The Reconsideration officer pointed out that no additional information was provided to explain the degree, frequency or duration during which the appellant required assistance, but rather in those at DLA where assistance was needed, the difficulty was that it took the appellant "longer sometimes" but that the physician did not indicate how much longer, or the periodicity when the assistance is required.

Panel Finding

The panel finds that the appellant's functional skills, as set out in both the MR and the PR, are indicative of an individual whose impairment, while it may directly restrict the appellant's ability to perform DLA and are more indicative of a moderate level of impairment causing the appellant to perform DLA more slowly, than they are of a severe impairment restricting the appellant from performing one or other DLA entirely.

The panel finds that the ministry's decision at reconsideration that the appellant does not have a severe physical impairment was reasonably supported by the evidence and was a reasonable application of the applicable enactment in the circumstances of the appellant.

Severe Mental Impairment

At reconsideration the ministry found that the appellant did not have a severe mental impairment.

Appellant's Position

The appellant's position was that he had anxiety and depression. He did not argue that he was severely mentally impaired.

Ministry's Position

The ministry relied on the reconsideration decision. The ministry argued that the GP reported that the appellant not to have any significant deficits with cognitive and emotional functioning, strikes a line through section B subsection 4 "*Cognitive and Emotional Functioning*", that the appellant has no difficulties with communication and that although the appellant says he tried to apply for Medical Assistance in Dying, no information was provided by the GP as to the appellant's mental status. Therefore the ministry was not satisfied that the appellant has a severe mental impairment.

Panel Finding

The panel notes that in the MR the GP reported that the appellant's diagnoses were post-concussion vestibulopathy and chronic MSK (musculoskeletal) myofascial pain syndrome. The GP did not diagnose any mental impairment and answered "No" to the query "*Are there any significant deficits with cognitive and emotional function?*". The GP crossed off the entire section B4 "*Cognitive and Emotional Functioning*". The GP also reported that the appellant had marginal functioning in his immediate social network but good functioning with extended social networks.

The panel finds that the ministry's decision at reconsideration that the appellant does not have a severe mental impairment was reasonably supported by the evidence and was a reasonable application of the applicable enactment in the circumstances of the appellant.

Section 2(2)(b)(i) & (ii) EAPWDA

Direct and Significant Restriction in the Ability to Perform Daily Living Activities

Section 2(2)(b)(i) 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.

Section 2(2)(b)(ii) EAPWDA requires that a prescribed professional provide an opinion that as a result of the direct and significant restrictions of the Appellant's ability to perform Daily Living Activities, the Appellant requires help to perform those activities.

Appellant's Position

The appellant's position was that he sometimes can and sometimes cannot carry purchases home and cannot ride a bus because there is too much light and movement and it "overcomes the brain". He said that he can do the dishes, which consists of using the dishwasher, but it is difficult for him, due to the bending required. He argued that his mother prepares his meals. He argued that when the GP said that he was periodically restricted in meal preparation, the GP was incorrect and should have marked "continuous". He said that the GP had made a further mistake in marking that the restriction on daily shopping is "continuous" when it should have been "periodic" and that the GP made a further mistake in marking that he has a restriction with the use of transportation; he said that the restriction on his use of transportation is "periodic" not continuous because he can take private transportation, but not take public transportation.

Ministry's Position

The ministry relied on the reconsideration decision.

The ministry argued that because the GP had indicated that the appellant could walk four or more blocks unaided (but that disability deteriorated with light and movement in the appellant's vicinity) could climb five or more steps unaided, lift 7 to 16 kg and remain seated for one or two hours, and only had to use his trekking poles went on uneven ground, and that the appellant took significantly longer to perform the tasks of standing, lifting, carrying and holding, but provided no information as to how much longer. The ministry was unable to determine if there was any significant restriction and said simply because there are some limitations does not mean that these limitations are severely restricting. The ministry also reviewed the neurologist's, physiatrist's and otolaryngologist's reports and took those into account when determining if the appellant was significantly restricted in any DLA.

The ministry argued that in assessing the appellant's abilities, there is no medical evidence as to how much longer it takes the appellant to perform various physical activities; just the doctor's comment "*takes longer*" and "*takes longer sometimes*". How much longer and how often is meant by "*sometimes*" is not explained by any physician, and therefore it cannot be determined that the appellant requires help.

The ministry concluded that as no prescribed professional indicated any specific restrictions with DLA due to any physical or mental impairment, except for it taking the appellant significantly longer to get in and out of a vehicle or use public transit. No prescribed professional gave an opinion that it was impossible or even that the appellant was significantly restricted in the use of transportation.

The ministry argued that the medical evidence was that the appellant was independently able to manage all other DLA .

The ministry concluded that the appellant had not established any significant restriction in his ability to perform DLA.

Panel Finding

The panel notes that the GP in fact marked the restriction on use of transportation as “periodic” in the MR and that in the AR noted that it takes the appellant significantly longer getting in and out of a vehicle and using public transit.

The panel notes that the determination of whether or not there is a direct and significant restriction of the Appellant’s ability to perform Daily Living Activities is to be determined by the opinion of a medical practitioner (or nurse practitioner) and that while the opinion of the appellant or of another person is of assistance, the determination is that of a medical practitioner or nurse practitioner. While the appellant said that he could not take public transit the physician reported only that it took the appellant “longer sometimes” to get in and out of the vehicle and that he avoids public transit. Avoidance is not indicative of impossibility or significant restriction.

The panel notes that the GP, in neither the MR nor the AR, indicated that there was any severe restriction, that the various specialist reports found only minor changes in his spine, that his brain CT scan was normal, that his ranges of movement were not restricted, that there were no objective sensory deficits to confirm nerve damage, and that until he ceased his vestibular therapy he was making good progress, and that no physician found that the appellant was severely restricted in the performance of any DLA.

The panel finds that no prescribed professional determined that the appellant has a severe physical or mental impairment which directly and significantly restricts the appellant’s ability to perform DLA either continuously or periodically for extended periods was reasonably supported by the evidence and was a reasonable application of the applicable enactment in the circumstances of the appellant.

Section 2(2)(b)(ii) EAPWDA

Requirement for Help to Perform DLA

Section 2 (2) (b) (ii) requires that if a person’s ability to perform DLA is restricted, continuously or periodically for extended periods, then to qualify for PWD designation, the person must require help to perform DLA as a result of those restrictions. The term “Help” is defined in subsection 3 as a requirement for the use of 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 was that he requires help of another person. The appellant said that he needed help cooking meals and that his mother cooked all of his meals for him. The GP said in the AR that he requires continuous assistance in preparing food and explained that his mother prepares his meals as he is unable, and that he requires periodic assistance with cooking but did not explain further. He said that he can’t get on a bus, and that although the AR indicates he needs periodic assistance with the 2 tasks of the DLA “Basic Housekeeping”, and that his parents assist, he said he can do these 2 tasks, but it is difficult because it causes him pain. Although the GP reports in the AR that he requires periodic assistance with 1 task (going to and from stores) and that his parents will shop for him, the appellant’s evidence was that he can go to and from stores and what he needs assistance with is carrying his purchases. The appellant said that he can carry purchases but not heavy ones.

Ministry Position

The ministry's position is that because it has not been established that DLA are significantly restricted, it cannot be determined that help is required.

Panel Decision

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

Conclusion

Having reviewed and considered all of the evidence and relevant legislation, the panel finds that the ministry's reconsideration decision, which determined that the appellant was not eligible for PWD designation under section 2 of the *EAPWDA*, was reasonably supported by the evidence and was a reasonable application of the applicable enactment in the appellant's circumstances.

The appellant is not successful in his appeal.