

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the ministry) reconsideration decision dated August 17, 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 her 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 ministry did not attend the hearing. After confirming that the ministry was notified, the hearing proceeded under Section 86(b) of the Employment and Assistance Regulation.

The evidence before the ministry at the time of the reconsideration decision included the Persons With Disabilities (PWD) Application comprised of the appellant's information dated January 29, 2017, a typed self-report dated July 21, 2017, a medical report (MR) dated March 1, 2017 completed by a general practitioner (GP) who has known the appellant since September 2016 and has seen her 2 to 10 times in the last year, and an assessor report (AR) completed by a physical therapist (PT) who has known the appellant since April 2016 and has seen her 11 or more times in the past 12 months.

The evidence also included the following documents:

- 1) Curriculum Vitae dated September 2015 for physician specializing in otolaryngology;
- 2) Photographs of appellant's vehicle at the accident scene and at the auto wreckers;
- 3) Letter dated December 16, 2015 from a physician specializing in neurology;
- 4) Letter dated February 25, 2016 from the appellant's motor vehicle accident (MVA) lawyer referring to a binder of medical information provided to the otolaryngology specialist physician for her review;
- 5) Report dated March 18, 2016 from a neuro-physiologist;
- 6) Letter dated July 15, 2016 from a physician specializing in otolaryngology;
- 7) Letter from the PT dated February 6, 2017;
- 8) Fax sheet dated May 15, 2017 from the PT; and,
- 9) Request for Reconsideration dated August 4, 2017 with attached letter dated July 25, 2017 from the appellant's MVA lawyer.

Diagnoses

In the MR, the GP diagnosed the appellant with chronic pain syndrome and vestibular dysfunction, both with an onset in April 2015. Asked to describe the mental or physical impairments that impact the appellant's ability to manage daily living activities (DLA), the PT wrote: "post concussion syndrome- dizziness, headache (vestibular concussion also involved)."

Physical Impairment

In the MR, the GP reported:

- With respect to the health history, "Since MVA in April 2015, [the appellant] has suffered from chronic back pain, headaches, vertigo, nausea, shoulder pain and back pain. Symptoms can be exacerbated easily with her every day activities." The GP wrote that as a result of her symptoms, the appellant cannot pursue studies full-time and she is unable to work while taking classes.
- The appellant does not require any prostheses or aids for her impairment.
- In terms of functional skills, the appellant can walk 2 to 4 blocks unaided on a flat surface, with the note that the appellant "often gets dizzy after walking 3 blocks and therefore needs to sit down", climb 5 or more steps unaided, lift 7 to 16 kg (15 to 35 lbs.), and no limitation to remaining seated.
- The appellant is not restricted with her mobility inside the home and she is periodically restricted with her mobility outside the home. The GP did not comment regarding the degree of restriction.

In the AR, the PT indicated:

- The appellant is assessed as independent with all aspects of her mobility and physical ability, specifically with walking indoors, walking outdoors, climbing stairs, standing, lifting and carrying and holding.

- In the section of the AR relating to assistance provided, the PT identified a rolling back pack as an assistive device being used by the appellant to help her compensate for her impairment. For equipment required but not currently being used, the PT wrote that an “ergonomic assessment would be beneficial- some screen modification for concussion symptoms would be helpful as well.”
- The appellant does not have an assistance animal.

In the letter dated February 6, 2017 and the Fax sheet dated May 15, 2017 the PT reported:

- She has been treating the appellant since April 2016 for injuries related to her MVA.
- Her primary symptoms are neck pain, headache and dizziness, which all increase related to increased physical and mental activity.
- There have been several challenges with her rehab due to her protracted symptoms of dizziness and imbalance.
- Due to the nature of her injury, her symptoms cannot be controlled easily.
- Her symptom onset can be predicted to a certain extent, but often her symptoms come on quickly during exercise sessions and overtake her so she must sit down for several minutes.
- All of this leads the PT to recommend that the appellant requires ongoing kinesiology for supervision during exercise and it is unrealistic to have in a community exercise facility without support and with risk of injury due to her dizziness and imbalance.

In the report dated March 18, 2016, the neuro-physiologist wrote that the appellant’s story of nausea, subtle imbalance and newly developed visual vestibular mismatch are suggestive of an otolithic abnormality.

In the letter dated July 15, 2016, the physician specializing in otolaryngology wrote:

- The appellant’s balance system has been injured.
- She recommends patients with visual vestibular mismatch to continue to be as active as they can and engage in vestibular rehabilitation exercises.
- Patients with episodes of dizziness or imbalance are at risk and she recommends that she avoid activities that can put her in hazard if she experiences an episode causing her to fall. She should avoid being at height, on a ladder or scaffolding. From the recreational point of view, she should avoid activities that put her at risk for falling, such as ice skating.
- The appellant experiences tinnitus subsequent to the accident. It is not bothersome to her and she manages to ignore it.

In her self-report, the appellant wrote that on particularly bad days (once every few months), she will experience a “drop attack,” which means she cannot walk and will spend her day in bed crawling to the bathroom and kitchen when she has to go to the bathroom or needs to eat.

In her Request for Reconsideration, the appellant’s lawyer wrote:

- The appellant was seriously injured in a MVA in April 2015. The collision was significant, causing her vehicle to roll over, as demonstrated by the damage to her vehicle in the photographs.
- The appellant sustained a number of injuries in the MVA, including musculoskeletal or cervicogenic headaches associated with neck pain due to blunt trauma to her head and neck, visual vestibular mismatch or dizziness and imbalance, and post-concussive symptoms.

Mental Impairment

In the MR, the GP reported:

- With respect to the health history, the GP wrote that the appellant's "ability to concentrate during school and other activities has been impacted by her symptoms."
- The appellant has no difficulties with communication.
- The appellant has significant deficits with her cognitive and emotional function in the areas of memory and attention or sustained concentration.
- There are no restrictions to the appellant's social functioning.

In the AR, the PT reported:

- The appellant has a good ability to communicate in speaking, writing, and hearing, and a satisfactory ability with reading. The PT wrote that the appellant is "limited by condition (has to be paced)."
- With respect to the section relating to daily impacts to the appellant's cognitive and emotional functioning, the PT assessed a major impact to attention/concentration. There are moderate impacts in the areas of executive and memory. Minimal impacts are assessed for bodily functions, emotion, and motivation. There are no impacts in the areas of consciousness, impulse control, insight and judgment, motor activity, language, psychotic symptoms, or other emotional or mental problems. For comments, the PT added: "symptoms are episodic and related to pacing and overloading. When she is participating in school or work-related activities she has a limit to how much she can do before getting significant increase in symptoms. This fluctuation of symptoms limits her ability to complete tasks in a timely manner."
- Regarding the appellant's social functioning, the appellant is independent in all aspects, specifically with 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 with her immediate social network and marginal functioning with her extended social network. The PT wrote that "social functioning limited due to the need to avoid extra activity and her need to focus on schooling as primary focus of energy/attention."

In her self-report, the appellant wrote regarding her social functioning that:

- She asks the same questions repeatedly, bothering people.
- She cannot participate in physically demanding outings.
- She cries when people ask about the accident.
- There are limits on where she can go for social functions because she does not know how dizzy she will be or how far she can drive or when she will feel "gross" and want to go home.

In her Request for Reconsideration, the appellant's lawyer wrote that the appellant sustained injuries in the MVA that include post-concussive symptoms such as sleep impairment, decreased motivation, focus and concentration, and deregulation of her emotions with crying at unexpected moments or events.

Daily Living Activities (DLA)

In the MR, the GP reported:

- With respect to the health history, the GP wrote that as a result of her symptoms, the appellant cannot pursue studies full-time and she is unable to work while taking classes. The GP wrote that the appellant "requires her family's support to buy groceries, cook and clean her home. Her symptoms have also made it difficult for her to sit through her [school] courses, and she requires multiple breaks during examinations and assessments."

- The appellant has not been prescribed any medication and/or treatments that interfere with her ability to perform DLA.
- The appellant is not restricted with the management of medications DLA, mobility inside the home, the use of transportation DLA, the management of finances DLA, and social functioning.
- The appellant is periodically restricted with the personal self care DLA, the meal preparation DLA, and mobility outside the home. Regarding the periodic restrictions, the GP wrote that the appellant “has difficulty with showering due to her vestibular symptoms. Her family does her grocery shopping and cooking for her. She can do light housework but is unable to do any vacuuming or heavy lifting.”
- The appellant is continuously restricted with the basic housework DLA and the daily shopping DLA.
- The GP did not comment regarding the degree of restriction.
- Asked to describe the nature and extent of assistance required with DLA, the GP wrote: “help from her family to do shopping, cooking, and heavy housework.”

In the AR, the PT reported:

- In the AR, the appellant is independent with walking indoors and with walking outdoors.
- The appellant is independent and does not require assistance with all of the tasks for several DLA, specifically: the personal care DLA, the shopping DLA, the pay rent and bills DLA, the medications DLA, and the transportation DLA.
- For the basic housekeeping DLA, the appellant requires periodic assistance from another person with both housekeeping and laundry and the PT commented: “occasional assistance if symptoms are increased (one person assist).”
- Regarding the meals DLA, the appellant is independent with the tasks of meal planning, food preparation, and safe storage of food, and requires periodic assistance from another person with the task of cooking. The PT wrote: “one person assist occasional.”
- For additional information, the PT commented that the appellant “has challenges with activity progression and general exercise due to her symptoms increasing, which limits further functioning throughout the week. This will likely be an ongoing problem as her recovery has been limited and the education/career she is pursuing requires significant mental focus, time commitment, and problem-solving ability.”

In the letter dated February 6, 2017, the PT reported:

- Significant pacing and modification of activity is required for the appellant to function well enough to complete her daily tasks such as schooling, activities of daily living, and house work.
- Supervised exercise with a kinesiologist was key to management of her symptoms during exercise and modification of exercises as required.
- It is a difficult balance for patients like the appellant to be able to fit everything in a day without overloading and “crashing” so that she cannot be productive in the following days.

In her self-report, the appellant wrote that:

- For personal hygiene, heat is a trigger for vestibular symptoms so she showers a maximum of twice per week. She cannot deal with hairstyling on a daily basis and trying to braid or straighten her hair puts a strain on her back and her arms get tired really quickly. She can dress herself but has difficulty with certain clothing.
- For cleaning and maintaining the house, she has not felt good enough to do the laundry in the last few months. She is not strong enough to lift the vacuum. Making the bed sets off her vestibular symptoms. She cannot clean anything over 5 feet high. She cannot be outside the in sun for yard maintenance and she cannot lift a weed whacker.

- Although she has the cognitive ability to manage money, she is facing financial difficulty.
- She does not drive outside of the city limits because of dizziness.
- Her family prepares meals 3 to 5 nights a week. If they do not, she mostly eats snack foods in place of a meal or, when she cooks, she spends a maximum of 45 minutes of hands-on time.
- For shopping, she can tolerate looking up and down the aisles, which is a trigger, for about 30 minutes and then she starts feeling symptoms.

Need for Help

The PT reported in the AR that help required for DLA is provided by family and “her current living situation allows family to help at certain times with home-related activities.” The PT identified a rolling back pack as an assistive devices being used by the appellant. She does not have an assistance animal.

Additional information

In her Notice of Appeal dated August 22, 2017, the appellant expressed her disagreement with the ministry’s reconsideration decision. The appellant’s lawyer wrote in an attached letter that the appellant suffered severe injuries in a MVA that have produced chronic back pain, headaches, impaired cognition, vertigo, and nausea. These chronic impairments have impaired her function and abilities. The assessor has failed to appreciate the degree of the appellant’s impairment as it relates to her DLA, her education and her interaction with others. The assessor erred in failing to review the submissions made by the appellant in her self-report.

At the hearing, the appellant provided a report dated October 21, 2015 by the neurologist. The report included information that:

- He has been requested to provide his medical opinion regarding the medical condition of the appellant and its relationship to injuries she sustained in the MVA of April 2015, within his field of expertise of neurology.
- The appellant states that the headaches are intermittent in nature and associated with jaw pain and ongoing back pain.
- The appellant attended massage therapy and physiotherapy and she has been exercising since the accident and these therapies have been helping her pain.
- The appellant also suffered with dizziness and true vertigo following the accident. She stated that the symptoms have improved but have not resolved.
- The appellant stated that she felt sad for the first two months after the accident but she has not felt depressed.
- She has decreased ability to do things around the house because of pain present since the accident.
- The appellant stated that her memory has been normal since the accident.
- The appellant probably suffered soft tissue and musculoskeletal injuries to her head, neck and back area, and her wrist.
- It is probable that the appellant suffered injury to the inner ear vestibular system and it is possible that her complaints of dizziness and vertigo were also due to the injury of the cervical paraspinal muscles also sustained in the accident.
- The abnormal test result was indicative of a dysfunction of the inner ear vestibular system.
- It is unlikely that the appellant suffered a mild traumatic brain injury or concussion at the time of the MVA. The appellant has not described symptoms of post traumatic brain injury syndrome and she reported no cognitive problems following the accident. The clinical records of the family physician also do not document any cognitive problems present following the accident.
- The appellant’s main reason for ongoing complete disability following the accident is pain and discomfort present as a result of soft tissue and musculoskeletal injuries.

- The appellant has suffered with musculoskeletal or cervicogenic headaches associated with neck pain and due to blunt trauma of her head and facial area, and ongoing dizziness and vertigo. These symptoms have improved 3 ½ months following the accident and he anticipates she will have further improvement.
- Patients improve up to approximately 2 years following these types of physical injuries.

At the hearing, the appellant's lawyer stated:

- The vehicle that hit the appellant's vehicle in the MVA had run through a red light.
- The appellant's vehicle rolled over several times, spun in the intersection, and landed in a field, as show in the photograph.
- The appellant has suffered with fatigue, dizziness, nausea and headaches since the accident, and he sent her to a specialist for investigation.
- The appellant experiences dizziness to the point that she will throw up.
- Prior to the MVA, the appellant was healthy, social, and working to make extra money for her schooling.
- The neurologist has prepared the report dated October 21, 2015 and sets out his opinion.
- As the appellant's dizziness and nausea continued after the accident, he referred her to the otolaryngology specialist physician, who stated that the appellant is restricted in her options for employment.
- The appellant attends a post-secondary institution but is restricted in the number of courses she can take. She sometimes vomits when moving from class to class because of dizziness.
- The appellant has had regular physiotherapy treatments, and the PT provided an update by way of the February 6, 2017 letter and subsequent fax sheet. They have been trying to bring the appellant back to the best that she can be. It has been 2 ½ years since the date of the accident and the appellant has reached a plateau.
- The appellant has shown signs of Post Traumatic Stress Disorder (PTSD) and has been assessed by counseling. She has ongoing anxiety and symptoms.
- The appellant is 2 years behind in her education and her parents help her to keep going.
- The appellant is significantly disabled from her day-to-day activities. She cannot work part-time.
- She is not in a wheelchair but this has been a large impact to a young person. They are looking for fair compensation for an injury that has long-term effects on her life.
- He has known the appellant for a long time prior to the MVA and he has observed that she has changed. She reacts emotionally in various situations.
- There is some research that shows that Botox injections may be helpful to relieve symptoms of headache and dizziness/nausea. These treatments are expensive.

At the hearing, the appellant stated:

- She has lost educational opportunities because of her limitations.
- When she referred to the "drop attack" in her self-report, she meant that the room starts to spin like when a person has too much to drink. There is no way she could drive. These are really bad days when she could not care for herself. They happen about once per month.
- The other days, it feels a bit like being hung-over.
- She has used colored (yellow) sheets in front of the computer screen to avoid trigger of her symptoms.
- If she has a headache or nausea and dizziness, sometimes an ice pack on her head will help.
- She has taken pain medication but they have side effects too.
- She takes [over-the-counter medication used to treat motion sickness and nausea] frequently.
- Flying in an airplane is hard. She finds that it "uses up" her energy for the day.

The ministry did not attend the hearing and relied on the reconsideration decision.

Admissibility of Additional Information

The panel considered the information in the letter from the neurologist and the oral testimony on behalf of the appellant, for the most part, 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 additional information in accordance with Section 22(4)(b) of the *Employment and Assistance Act*.

The panel did not admit the information from the appellant's lawyer that the appellant has symptoms of, and has been assessed through counseling for, PTSD as this was not included in the PWD application or the Request for Reconsideration and was not before the ministry at reconsideration.

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 PWD designation, 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 her DLA are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods. Also, it could not be determined that, as a result of those restrictions, the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

The criteria for being designated as a PWD are set out in Section 2 of the EAPWDA as follows:

Persons with disabilities

2 (1) In this section:

"assistive device" means a device designed to enable a person to perform a daily living activity that, because of a severe mental or physical impairment, the person is unable to perform;

"daily living activity" has the prescribed meaning;

"prescribed professional" has the prescribed meaning.

(2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act if the minister is satisfied that the person 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 appellant was diagnosed by the GP with chronic pain syndrome and vestibular dysfunction, and that the GP commented that since MVA in April 2015, the appellant has suffered from chronic back pain, headaches, vertigo, nausea, shoulder pain and back pain. The GP wrote that as a result of her symptoms, the appellant cannot pursue studies full-time and she is unable to work while taking classes and the ministry reasonably considered that employability, or an ability to attend school, is not a criterion in section 2(2) of the EAPWDA nor is it listed among the prescribed daily living activities in section 2 of the EAPWDR.

Asked to describe the mental or physical impairments that impact the appellant's ability to manage DLA, the PT wrote in the AR that: "post concussion syndrome- dizziness, headache (vestibular concussion also involved)." In the report dated March 18, 2016, the neuro-physiologist wrote that the appellant's story of nausea, subtle imbalance and newly developed visual vestibular mismatch are suggestive of an otolithic abnormality. The appellant's lawyer stated at the hearing that they have been trying to bring the appellant back to the best that she can be. It has been 2 ½ years since the date of the accident and the appellant has reached a plateau.

A diagnosis of a serious medical condition or conditions does not in itself determine PWD eligibility or establish a severe impairment. An "impairment" is a loss or abnormality of psychological, anatomical, or physiological structure or functioning causing a restriction in the ability to function independently, effectively, appropriately, or for a reasonable duration. 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.

The ministry considered the impacts of the appellant's diagnosed medical conditions on her daily functioning, beginning with the assessments provided in the MR and the AR. The ministry wrote that the GP reported in the MR that the appellant is able to walk 2 to 4 blocks unaided on a flat surface, with the note that the appellant "often gets dizzy after walking 3 blocks and therefore needs to sit down", climb 5 or more steps unaided, lift 15 to 35 lbs., and there is no limitation with remaining seated. The ministry considered that although the PT wrote that the appellant "has challenges with activity progression and general exercise due to her symptoms increasing, which limits further functioning throughout the week," the PT reported that the appellant is independent with all listed areas of mobility and physical ability. The PT reported that the appellant is independent and does not require assistance from another person or the use of an assistive device with walking indoors and outdoors, climbing stairs, standing, lifting and carrying and holding.

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.

In her self-report, the appellant wrote that on particularly bad days (once every few months), she will experience a "drop attack," when she cannot walk and will spend her day in bed crawling to the bathroom and kitchen when she has to go to the bathroom or needs to eat. At the hearing, the appellant clarified that the "drop attack" for her is when the room starts to spin like when a person has too much to drink. These are really bad days when she could not care for herself, and she stated that these bad days happen about once per month. In the MR, the GP reported that the appellant is not restricted with her mobility inside the home and she is periodically restricted with her mobility outside

the home. The GP did not comment regarding the degree of restriction. The GP commented in the MR that the appellant's symptoms of chronic back pain, headaches, vertigo, nausea, shoulder pain and back pain "can be exacerbated easily with her every day activities;" however, there was no further information from the GP or the PT establishing a reduction in the appellant's independent physical functioning during these exacerbations of her symptoms.

Given the assessment by the GP in the MR of physical functioning in the moderate range of functional skills limitations and the assessment by the PT of complete independence with her mobility and physical ability, 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 considered that the GP wrote in the MR that the appellant's "ability to concentrate during school and other activities has been impacted by her symptoms," and that the GP reported the appellant has significant deficits with her cognitive and emotional function in the areas of memory and attention or sustained concentration. In the letter dated October 21, 2015, the neurologist wrote that it is unlikely that the appellant suffered a mild traumatic brain injury or concussion at the time of the MVA. The neurologist wrote that the appellant did not described symptoms of post traumatic brain injury syndrome and she reported no cognitive problems following the accident. The neurologist also noted that the clinical records of the family physician also do not document any cognitive problems present following the accident. The neurologist wrote that the appellant stated that her memory has been normal since the accident.

The ministry considered that the PT reported one major impact to the appellant's daily cognitive and emotional functioning in the area of attention/concentration, moderate impacts to executive and memory, and minimal or no impact to the remaining 11 areas of functioning. The appellant's lawyer wrote in the Request for Reconsideration that the appellant sustained injuries in the MVA that include post-concussive symptoms such as sleep impairment, decreased motivation, focus and concentration, and deregulation of her emotions with crying at unexpected moments or events. The appellant wrote in her self-report, that she bothers people by asking the same questions repeatedly and she cries when people ask about the accident. However, the PT assessed a minimal impact to the area of bodily functions (e.g. sleep disturbance, etc.), minimal impact to motivation, as well as minimal impact in the area of emotion. The ministry considered that the PT's comments- "symptoms are episodic and related to pacing and overloading," "when she is participating in school or work-related activities she has a limit to how much she can do before getting significant increase in symptoms" and "this fluctuation of symptoms limits her ability to complete tasks in a timely manner-" do not describe the frequency or range of severity in fluctuations in symptoms. As previously discussed, the ministry reasonably considered that employability, or an ability to attend school, is not a criterion in section 2(2) of the EAPWDA nor is it listed among the prescribed daily living activities in section 2 of the EAPWDR.

Considering the two "social functioning" DLA that are specific to mental impairment – make decisions about personal activities, care or finances (decision making), and relate to, communicate or interact with others effectively (relate effectively), the panel finds that the ministry reasonably concluded that there is insufficient evidence to establish that the appellant is significantly restricted in either.

Regarding the 'decision making' DLA, the PT reported in the AR that the appellant independently manages all of the decision-making components of DLA, specifically: personal care (regulating diet), shopping (making appropriate choices and paying for purchases) meals (meal planning and safe storage of food), pay rent and bills (including budgeting), medications (taking as directed and safe

handling and storage), and transportation (using transit schedules and arranging transportation). The PT reported that the appellant is also independent with making appropriate social decisions, requiring no support or supervision from another person.

Regarding the DLA of 'relating effectively', the GP reported in the MR that the appellant is not restricted with her social functioning and the PT reported in the AR that the appellant is independent with developing and maintaining relationships and with interacting appropriately with others. The PT reported that the appellant has good functioning in her immediate social network and marginal functioning in her extended social network. The PT again focused on the impact as a result of the appellant attending school and wrote that "social functioning limited due to the need to avoid extra activity and her need to focus on schooling as primary focus of energy/attention." In her self-report, the appellant wrote regarding her social functioning that she cannot participate in physically demanding outings and there are limits on where she can go for social functions because she does not know how dizzy she will be, or how far she can drive, or when she will feel "gross" and want to go home. The GP reported in the MR that the appellant has no difficulties with communication and the PT indicated in the AR that she has a good ability to communicate in speaking, writing, and hearing, and a satisfactory ability with reading that "has to be paced."

Given the lack of evidence of significant impacts to the appellant's cognitive and emotional functioning or to the two social functioning DLA that are specific to a mental impairment, 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.

Section 2(2)(b) of the EAPWDA requires that a prescribed professional provide an opinion that an applicant's severe impairment directly and significantly restricts her ability to perform DLA, either continuously or periodically for extended periods. In this case, the GP and the PT are the prescribed professionals. DLA are defined in Section 2(1) of the EAPWDR and are also listed in the MR and, with additional details, in the AR. Therefore, a prescribed professional completing these forms has the opportunity to indicate which, if any, DLA are significantly restricted by the appellant's impairment continuously or periodically for extended periods.

In the reconsideration decision, the ministry reviewed the information provided in the MR and wrote that the GP indicated that the appellant has not been prescribed medication/treatment that interferes with her ability to perform DLA. The ministry wrote that due to inconsistencies between the information provided by the GP and the PT, it is difficult to develop a clear and coherent picture of the degree of her impairment and the impacts to her ability to perform DLA and the assistance she requires as a result. The ministry considered that the GP reported that the appellant is restricted continuously with basic housework and daily shopping. In her self-report, the appellant wrote that she has not felt good enough to do the laundry in the last few months, she is not strong enough to lift the vacuum, making the bed sets off her vestibular symptoms, and she cannot clean anything over 5 feet high. The appellant wrote that, when shopping, she can tolerate looking up and down the aisles, which is a trigger, for about 30 minutes and then she starts feeling symptoms. The PT indicated in the AR that the appellant requires periodic assistance with the basic housekeeping DLA and she is independent with performing all of the 5 tasks of the shopping DLA.

The ministry considered that, in the MR, the GP reported that the appellant is periodically restricted with the personal self care DLA, the meal preparation DLA and mobility outside the home, but did not establish the frequency of periodic restrictions. The ministry considered that the GP wrote that the appellant “has difficulty with showering due to her vestibular symptoms,” that “her family does her grocery shopping and cooking for her,” and “she can do light housework but is unable to do any vacuuming or heavy lifting,” and noted that the GP reported the appellant can lift 15 to 35 lbs. In her self-report, the appellant wrote that heat is a trigger for her vestibular symptoms so she showers a maximum of twice per week, she cannot deal with hairstyling on a daily basis, which puts a strain on her back and her arms, and she can dress herself but has difficulty with certain clothing. The appellant wrote that her family prepares meals 3 to 5 nights a week and, if they do not, she mostly eats snack foods in place of a meal or, when she cooks, she spends a maximum of 45 minutes of hands-on time. However, the PT reported that the appellant is independent in performing all tasks of the personal care DLA, including dressing, grooming and bathing, she is independent with the move about indoors and outdoors DLA, and she is independent with 3 of the 4 tasks of the meals DLA. The ministry considered that the comments by the PT regarding the need for periodic assistance with basic housekeeping, and with the task of cooking both refer to “occasional” assistance “if symptoms are increased” and do not establish the need for periodic assistance for extended periods of time.

In the AR, the PT commented that the appellant “has challenges with activity progression and general exercise due to her symptoms increasing, which limits further functioning throughout the week” and “this will likely be an ongoing problem as her recovery has been limited and the education/career she is pursuing requires significant mental focus, time commitment, and problem-solving ability.” In the letter dated February 6, 2017, the PT reported that significant pacing and modification of activity is required for the appellant to function well enough to complete her daily tasks such as schooling, activities of daily living, and house work. The PT wrote that supervised exercise with a kinesiologist was key to management of the appellant’s symptoms during exercise and modification of exercises as required. In the MR, the GP wrote that the appellant’s “symptoms have also made it difficult for her to sit through her [school] courses, and she requires multiple breaks during examinations and assessments.” At the hearing, the appellant’s lawyer stated that the appellant attends a post-secondary institution but is restricted in the number of courses she can take, she is 2 years behind in her education and her parents help her to keep going, and she can no longer work part-time. At the hearing, the appellant stated that she has lost educational opportunities because of her limitations.

Given the inconsistencies between the GP’s report of restrictions to some DLA and the report of the PT of independence with DLA, with some tasks requiring “occasional” assistance, and the emphasis on impacts to the appellant’s ability to work or attend school, the panel finds that the ministry reasonably determined that the evidence is insufficient to show that the appellant’s overall ability to perform her 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 PT reported that the appellant receives help from family, she uses a rolling back pack, and an “ergonomic assessment would be beneficial,” 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.