

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the ministry) reconsideration decision dated July 26, 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.

The ministry also found that the appellant is not one of the prescribed classes of persons who may be eligible for PWD designation on the alternative grounds set out in Section 2.1 of the EAPWDR and the appellant did not appeal the decision on this basis.

## 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 appellant's Persons With Disabilities (PWD) Application comprised of the appellant's information and self-report dated January 27, 2017, a medical report (MR) and an assessor report (AR) both dated April 9, 2017 and completed by a general practitioner (GP) who has known the appellant for more than 20 years and has seen him 2 to 10 times in the last year.

The evidence also included the following documents:

- 1) Letter dated June 26, 2017 from the GP ("the Letter"); and,
- 2) Request for Reconsideration dated July 6, 2017.

### ***Diagnoses***

In the MR, the GP diagnosed the appellant with chronic low back pain with an onset in September 2007, traumatic brain injury also with an onset in September 2007, migraine, and heroin addiction, on methadone maintenance program. Asked to describe the mental or physical impairments that impact the appellant's ability to manage daily living activities (DLA), the GP wrote: "chronic low back pain and traumatic brain injury cause issues with prolonged standing, lifting, carrying, and learning new things."

### ***Physical Impairment***

In the MR and AR, the GP reported:

- With respect to the hearing history, the chronic back pain occurred in a work injury and he was left with chronic low back pain. The migraines he has "had since a teen and, when occur, limit his ability to do anything due to pain until resolves."
- The appellant does not require any prostheses or aids for his impairment.
- In terms of functional skills, the appellant can walk 4 or more blocks unaided, climb 5 or more steps unaided, lift 2 to 7 kg. (5 to 15 lbs.) and it is unknown how long the appellant can remain seated.
- The appellant is assessed as being independent with most aspects of his mobility and physical ability, specifically: walking indoors and walking outdoors, climbing stairs and standing. He requires continuous assistance from another person with lifting, and carrying and holding and the GP noted the appellant "finds carrying and lifting very painful so usually gets help with this task."
- In the section of the AR relating to assistance provided, none of the listed assistive devices are indicated as applicable and the appellant does not have an assistance animal.

In the Letter, the GP added:

- The appellant suffers from migraine 12 to 15 days per month. There is no real pattern to the migraine as to when it occurs during the day, and it can last anywhere from a few hours to the entire day.
- He was seen by a migraine specialist for management several years ago, with multiple medication trials for prophylaxis but was not successful in finding anything that worked.
- For lifting and carrying things, the appellant can lift 15 lbs. once or twice but he cannot do that repetitively. He can only empty the lawn mower bag, weighing about 10 to 15 lbs. a few times and then he notes severe back pain. He will stop and finish the lawn later in the day or the next day.

In his self-report, the appellant wrote:

- He is in pain at night almost 90% of the time. He gets severe pain in his head, eyes, and teeth.
- He is awaiting a CT Scan of his head.
- His back will feel great for weeks and then he will lift something and it is useless again.
- He has suffered severe migraines for the majority of his life, which he has learnt to live with, and he is thankful for the medication.

In his Request for Reconsideration, the appellant wrote:

- He does not know when he will get his headaches but when he does get them, which is about half of the month, every month, they are terrible and he is useless for the day.
- He can lift 15 lbs. but when he does it for 2 to 4 times, his back is so sore that he has to lie down.
- He has two hernias in his stomach caused by not eating properly. His kidneys and liver are not good, and he has some internal bleeding.

### ***Mental Impairment***

In the MR and AR, the GP reported:

- With respect to the health history, a traumatic brain injury occurred in a work-related injury in 2007 and he “has continued to have symptoms of nausea, occasional light-headedness and some difficulties with learning new material.” For his heroine addition, he has been on methadone for replacement and takes a daily dose.
- The appellant has no difficulties with communication.
- The appellant has significant deficits with cognitive and emotional function in the areas of executive and memory and the GP wrote “has issues with memory and learning new things from head injury in 2007.”
- The GP indicated that the appellant has a good ability to communicate in all areas, specifically with speaking, reading, writing and hearing.
- With respect to daily impacts to the appellant’s cognitive and emotional functioning, the GP assessed the appellant with major impacts in executive and memory. There are moderate impacts to cognitive and emotional functioning in the areas of emotion, impulse control, and attention/concentration, and a minimal impact to motivation. The GP commented that “due to head injury, has some issues with attention (easily distractible) and memory leading to difficulty with learning new things or problem solving/calculations- he can do but with significant challenges. This causes issues [with] his levels of anxiety and impulse control to increase, causing more issues. Both lead to lack of motivation.”
- For social functioning, the appellant requires periodic support/ supervision with making appropriate social decisions (note: “sometimes has issues with impulsive decisions”), and is independent with 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 left this section incomplete.

In his self-report, the appellant wrote:

- He is depressed a lot due to the fact that he feels lousy so much.
- His memory is terrible. For example, he will put an important paper or letter away and not remember where it is.
- He rarely goes out. He is living like he is in prison with no bars, which is frustrating. He does not have a social life.
- He does not feel good about himself. He just stays home and watches television and sleeps.

### **Daily Living Activities (DLA)**

In the MR and the AR, the GP reported:

- The appellant has not been prescribed any medication and/or treatment that interfere with his ability to perform DLA.
- The appellant is independent with walking indoors and walking outdoors.
- The appellant is independent with all tasks of most of the listed DLA, specifically he is independent with the personal care DLA, the basic housekeeping DLA (note: “does have increased pain with [laundry/basic housekeeping] but does manage on own”), the medications DLA, and the transportation DLA.
- For the shopping DLA, the appellant is independent with going to and from stores, reading prices and labels, making appropriate choices, and paying for purchases and requires periodic assistance from another person with carrying purchases home. The GP noted that the appellant “requires help with groceries, especially heavy bags.”
- For additional comments, the GP wrote: “while can manage most tasks, does require some help with carrying groceries. If does on own, has severe exacerbation of pain in back. Laundry has to be done in small loads to manage due to back pain.”
- Regarding the meals DLA, the appellant takes significantly longer than typical with meal planning (note: “due to effects of HI [head injury] this means he is generally eating prepared meals that are not necessarily healthy”).
- With respect to the pay rent and bills DLA, the appellant is independent and also takes significantly longer than typical with all tasks, specifically banking, budgeting and pay rent and bills. The GP commented that “due to effects of head injury requires lots of time to due (sic) budgeting.”

### **Need for Help**

With respect to the assistance provided by other people, the GP reported in the AR that the appellant receives help from his family. 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 stamped received July 28, 2017, the appellant expressed his disagreement with the ministry’s reconsideration decision and wrote that the headaches do cause severe limitation doing anything. As the doctor’s note stated, half of a month and all at different times, never knowing when. His back is useless and he cannot remember anything. He is waiting to hear back from an advocate for help.

Prior to the hearing, the appellant provided a Questionnaire dated August 20, 2017 (“the Questionnaire”) in which the GP responded to questions, including:

- When the impact of the appellant’s medical conditions on his daily life is considered, the appellant has a severe physical or mental impairment or both as: “with the previous head injury and residual symptoms, has issues with planning and organization, such as forgetting to pay bills so unless he is reminded he pays late. Due to his back pain, takes much longer to do any more physical chores, such as vacuuming/emptying and loading dishwasher, etc.”;
- It takes the appellant significantly longer than normal to perform DLA as a direct result of his physical and mental limitations as: “emptying dishwasher 2 to 3 times longer than average, typically has to do laundry in many small loads to allow for carrying/folding load in a washer and dryer. Cannot read books due to head injury- can never remember what he read in articles and papers are difficult.”
- The appellant needs to take frequent rest breaks during the day. He “states takes 5 to 6

breaks per task, such as mowing lawn, cleaning house, etc. This is because of exacerbations of back pain. Walking dog only goes a few blocks before needs to rest.”

- The appellant’s level of activity is significantly reduced due to his impairment as “back pain causes significant reduction in activity.”
- The appellant is significantly restricted in performing DLA by one or more of his medical conditions “every day.”
- The appellant’s impairment significantly restricts his ability to perform a range of DLA on a continuous basis, or periodically for extended periods, as he has difficulty: “reading paper; doing dishes and laundry; managing yard and house cleaning.”
- Regarding significant help with DLA, either by taking much longer than typical to complete routine tasks, needing other people for ongoing help, or needing to use an assistive device, the GP wrote: “most tasks take significantly longer for him to do and anything that requires organization or planning often requires help from his brothers.”

At the hearing, the appellant stated that:

- He had wanted his brother and an advocate to attend the hearing, but they were not available. His brother had to work. He is aware of the ability to request an adjournment, but wished to represent himself and proceed with the hearing.
- An advocate prepared the Questionnaire for his doctor to fill out.
- For dressing, he has trouble pulling shirts on because of his back pain.
- He does not do much cooking and ends up eating greasy fast food. He had a Cat scan of his stomach and he has two hernias.
- He has a tough time most mornings getting out of bed. He has to take pain medication.
- He usually sleeps about 12 hours a day.
- He needs help with groceries.
- For banking, he always forgets to pay bills and one of his brothers has to remind him.
- One of his brothers has a car he can borrow once in a while and he has not used public transit for years. He has trouble getting in and out of a vehicle so it takes him longer.
- He does not like to ask people for stuff so he tries to do things himself. He gets frustrated lots.
- He used to be active, going to the gym and going out, but now he just stays at home and watches television. When he walks the dog, he has to stop lots along the way. At least they both get some exercise.
- He often “wrecks” the laundry by putting all the colours together. His brothers will give him clothes they are not using. He has two brothers who live relatively close to him.
- His memory is “terrible” and he often misplaces things he has put away.
- Sometimes he stutters when he talks.
- He had a serious work injury and was receiving compensation through Work Safe BC and he went back to work after the accident for about 4 months.
- He also received employment insurance for a while.
- He has had migraines since he was a teen and he now gets them about 3 to 5 times a week, or about 12 to 15 times a month. If he does not take the medication, he will start throwing up. He only takes the medication when a headache starts.
- He has seen a neurologist about his migraines and they found a medication that seems to help. The migraines usually last 1 to 4 hours.
- He is not receiving treatment for depression. He does not go out when he is invited.
- He discovered that he needs major surgery for his nose.
- He is still waiting to be scheduled for a scan of his head.
- He is not able to work because his memory and his back are useless. He currently has the status with the ministry as a Person with Persistent Multiple Barriers (PPMB) to employment.

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

***Admissibility of Additional Information***

The panel considered the information in the Questionnaire and the appellant's oral testimony 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*.

## 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 chronic low back pain with an onset in September 2007 and migraine, and noted that the GP commented the chronic back pain occurred in a work injury and he has had migraines "...since a teen and, when occur, limit his ability to do anything due to pain until resolves." Although the appellant wrote in his

Request for Reconsideration that he has two hernias in his stomach caused by not eating properly, his kidneys and liver are not good, and he has some internal bleeding, these conditions and any specific resulting impacts to functioning were not diagnosed by the GP. The ministry was not satisfied that the combination of the appellant's functional skills and 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.

The ministry considered the impacts of the appellant's diagnosed medical condition on his daily functioning, beginning with the assessments provided in the MR and in the AR. The ministry considered that the GP assessed the appellant's functional skills as being able to walk 4 or more blocks unaided, climb 5 or more steps unaided, lift 5 to 15 lbs. and it is unknown how long the appellant can remain seated. The ministry considered that the GP reported that the appellant does not require any aids or prostheses for his impairment. The ministry considered the GP's assessment of independence with his mobility (walking indoors and outdoors, climbing stairs and standing) and the requirement for continuous assistance from another person with lifting, and carrying and holding. The ministry also considered that the GP commented in the MR that the appellant "usually gets help with this task" and, in the Letter, that the appellant can lift 15 lbs. once or twice but he cannot do that repetitively. The GP provided an example that the appellant can only empty a lawn mower bag, weighing about 10 to 15 lbs. a few times and then he has severe back pain, will stop and finish the lawn later in the day or the next day.

The appellant wrote in his Request for Reconsideration that he can lift 15 lbs. but when he does it for 2 to 4 times, his back is so sore that he has to lie down. In his self-report, the appellant wrote that his back will feel "great for weeks" and then he will lift something and it is "useless" again. In the Questionnaire, the GP agreed that the appellant needs to take frequent rest breaks during the day as he "states [he] takes 5 to 6 breaks per task, such as mowing lawn, cleaning house, etc. This is because of exacerbations of back pain. Walking dog only goes a few blocks before [he] needs to rest." The GP agreed in the Questionnaire that when the impact of the appellant's medical conditions on his daily life is considered, the appellant has a severe physical or mental impairment or both as: "...due to his back pain, takes much longer to do any more physical chores, such as vacuuming/emptying and loading dishwasher, etc." and the appellant's level of activity is significantly reduced as "back pain causes significant reduction in activity." The panel finds that the ministry reasonably considered that the appellant performs his mobility and physical ability within the high/independent to moderate range of functional skill limitations, respectively, although it takes him longer due to rest breaks.

The ministry considered that the GP wrote in the MR that the appellant has had migraines "...since a teen and, when occur, limit his ability to do anything due to pain until resolves." The ministry also considered the Letter and noted that the GP wrote that the appellant suffers from migraine 12 to 15 days per month and "there is no real pattern to the migraine as to when it occurs during the day. The migraine can last anywhere from a few hours to the entire day." The GP also wrote that the appellant was seen by a migraine specialist for management several years ago, with multiple medication trials but was not successful in finding anything that worked for prophylaxis. However, the appellant wrote in his self-report that he has learnt to live with severe migraines, which he has suffered with for the majority of his life, and that he is thankful for the medication.

At the hearing, the appellant clarified that he currently gets migraines about 3 to 5 times a week, or about 12 to 15 times a month. If he does not take the medication, he will start throwing up. The appellant stated that the neurologist found a medication that helps alleviate the migraine once it starts and he just takes the medication on an 'as needed' basis. The appellant stated that the migraine usually lasts 1 to 4 hours. Given an opportunity in the Questionnaire to provide further information, the GP referenced the impacts to the appellant's physical functioning due to his back pain and head injury, and did not refer to the appellant's migraines.

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.

Given the GP's assessment of independence with his mobility as well as physical ability in the moderate range, as well as the inconsistent evidence of the duration of the migraines, the impact of which is ameliorated by medication, 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 diagnosed the appellant with traumatic brain injury, which occurred in a work-related injury in 2007 and he "has continued to have symptoms of nausea, occasional light-headedness and some difficulties with learning new material," and heroin addiction, for which he is on methadone maintenance program. While the appellant wrote in his self-report that he is depressed a lot due to the fact that he feels lousy so much, he does not feel good about himself and just stays home and watches television and sleeps, the appellant acknowledged at the hearing that his GP has not diagnosed depression and he stated that is not currently receiving treatment for depression.

In considering the impacts of the appellant's medical condition on his daily functioning, the ministry noted that the GP reported that the appellant has significant deficits to cognitive and emotional functioning in the areas of executive and memory and the GP wrote "has issues with memory and learning new things from head injury in 2007." In the AR, the GP confirmed that the appellant has major impacts to his daily cognitive and emotional functioning in the areas of executive and memory. There are moderate impacts to cognitive and emotional functioning in the areas of emotion, impulse control, and attention/concentration, and a minimal impact to motivation. The GP commented that "due to head injury, has some issues with attention (easily distractible) and memory leading to difficulty with learning new things or problem solving/calculations- he can do but with significant challenges. This causes issues [with] his levels of anxiety and impulse control to increase, causing more issues. Both lead to lack of motivation." The appellant stated at the hearing that he is still waiting to be scheduled for a scan of his head to discover the extent of the injury, and no further report was provided on the appeal.

Given an opportunity to provide further information in the Questionnaire, the GP agreed that, when the impact of the appellant's medical conditions on his daily life is considered, the appellant has a severe physical or mental impairment or both as: "...with the previous head injury and residual symptoms, has issues with planning and organization, such as forgetting to pay bills so unless he is reminded he pays late." At the hearing, the appellant stated that his memory is "terrible" and he often misplaces things he has put away. The GP also wrote in the Questionnaire that: "most tasks take

significantly longer for him to do and anything that requires organization or planning often requires help from his brothers.” The panel finds that there is a lack of detail provided by the GP in the Questionnaire as to how much longer it takes the appellant with tasks, or how often the appellant requires assistance and with which specific organization and planning tasks of DLA.

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 GP 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). While the appellant is assessed as taking significantly longer than typical with meal planning and the tasks of the pay rent and bills DLA, the GP commented “due to effects of head injury, this means he is generally eating prepared meals that are not necessarily healthy” and “requires lots of time to due (sic) budgeting,” without indicating how much longer than typical it takes the appellant to perform these tasks. The GP reported in the AR that the appellant requires periodic support/supervision with making appropriate social decisions and commented that he “sometimes has issues with impulsive decisions,” with no further information provided regarding how often the appellant requires support or supervision.

Regarding the DLA of ‘relating effectively’, the GP reported in the MR that the appellant is independent with developing and maintaining relationships and with interacting appropriately with others. In his self report, the appellant wrote that he rarely goes out, that he is living like he is in prison with no bars, which is frustrating, and he does not have a social life. The GP reported in the AR that the appellant has good functioning in both his immediate and his extended social networks. While the appellant stated at the hearing that he sometimes stutters when he speaks, the GP reported in the MR that the appellant has no difficulties with communication and, in the AR, that he has a good ability to communicate in all areas, specifically with speaking, reading, writing and hearing. In the Questionnaire, the GP indicated that the appellant “...cannot read books due to head injury- can never remember what he read in articles and papers are difficult,” and does not provide an explanation for the discrepancy in the assessment in the AR of a good ability to read.

Given the lack of evidence of significant impacts to the two DLA specific to a person with a mental impairment, and the lack of detail in the Questionnaire regarding the impacts to specific tasks of DLA, how much longer they take the appellant, or how often he requires assistance from his brothers, 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.

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. 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 AR and noted that the GP assessed the appellant as independent with all tasks of DLA, with the exception of a requirement for periodic assistance from another person with carrying purchases home when shopping. The GP commented that the appellant needs help especially with “heavy bags” and that “if does on own has severe exacerbation of pain in back,” the GP assessed the appellant as able to lift up to 15 lbs., and there is no explanation or description by the GP of how often the appellant requires assistance with heavier bags. The ministry also considered that the appellant is assessed by the GP as taking significantly longer than typical with the tasks of meal planning and all of the tasks of the pay rent and bills DLA (banking, budgeting and pay rent and bills). The GP added comments that, due to the effects of the appellant’s head injury, he is “...generally eating prepared meals that are not necessarily healthy” and he “requires lots of time to due (sic) budgeting,” and the ministry noted that the GP does not describe how much longer than typical it takes the appellant to manage these tasks to allow the ministry to determine the significance of the restriction.

The ministry also considered that the GP wrote, in the Letter, that the appellant suffers from migraine 12 to 15 days per month and that “there is no real pattern to the migraine as to when it occurs during the day” and it can last “anywhere from a few hours to the entire day.” In his Notice of Appeal, the appellant wrote that his migraine headaches do cause severe limitation with “doing anything.” The appellant wrote that, as the doctor’s note stated, the migraines last half of a month and all at different times, “with him never knowing when.” At the hearing, the appellant stated that he gets migraines about 3 to 5 times a week, about 12 to 15 times a month, and that he takes medication when a headache starts. The appellant stated that his migraines usually last 1 to 4 hours. Given an opportunity to provide further information regarding the frequency and duration of the appellant’s experience of migraine, the GP did not address his migraines in the Questionnaire.

The appellant also stated at the hearing that he is not able to work because his memory and his back are “useless.” The panel notes that employability is not a consideration for eligibility for PWD designation as employability is not a criteria in section 2(2) of the EAPWDA nor is it listed among the prescribed daily living activities in section 2 of the EAPWDR.

In the AR, the GP had assessed the appellant as independent with the tasks of the housekeeping DLA, independently doing his laundry and his basic housekeeping, and the GP commented that the appellant “does have increased pain with these but does manage on own.” The GP agreed in the Questionnaire that it takes the appellant significantly longer than normal to perform DLA as “emptying dishwasher 2 to 3 times longer than average, typically has to do laundry in many small loads to allow for carrying/folding load in a washer and dryer.” While the GP clarified that one aspect of housekeeping, emptying the dishwasher, takes 2 to 3 times longer than average, there is no indication of how much longer the other aspects of housekeeping take the appellant or a suggestion that he does not continue to manage on his own.

The GP agreed in the Questionnaire that the appellant’s impairment significantly restricts his ability to perform a range of DLA on a continuous basis, or periodically for extended periods, as he has difficulty: “reading paper; doing dishes and laundry; managing yard and house cleaning.” The GP agreed that the appellant needs to take frequent rest breaks during the day and the appellant “states takes 5 to 6 breaks per task, such as mowing lawn, cleaning house, etc.,” that this is “because of exacerbations of back pain” and that this occurs “every day.” The panel finds that while the appellant experiences difficulty with some tasks of the housekeeping DLA and takes rest breaks throughout the

day, there is insufficient detail provided in the Questionnaire to establish that the appellant takes significantly longer than typical and that the restriction to this DLA is significant.

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.

As previously discussed with respect to the severity of the mental impairment, considering the two "social functioning" DLA that are specific to mental impairment – 'decision making' and 'relate effectively,' the panel found the ministry was reasonable to conclude that there was insufficient evidence that the appellant is significantly restricted with either.

Given the GP's report of independence with performing DLA, a lack of a description of the frequency or duration of the periodic assistance required with one task, or how much longer than typical he takes with others, and the lack of evidence of significant restrictions to those DLA specific to a severe mental impairment, 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 GP indicated in the AR that the appellant receives help from his family, and wrote in the Questionnaire that "anything that requires organization or planning often requires help from his brothers," 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.