

## **PART C – DECISION UNDER APPEAL**

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Poverty Reduction (the ministry) dated 12 June 2018 that denied the appellant designation as a Person with Disabilities (PWD).

The ministry determined that the appellant did not meet all of the required criteria for PWD designation set out in section 2 of the *Employment and Assistance for Persons with Disabilities Act*, section 2. Specifically, the ministry determined that the information provided did not establish that the appellant has a severe mental or physical impairment that in the opinion of a prescribed professional

- (i) directly and significantly restricts his ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and,
- (ii) as a result of those restrictions, he requires help to perform those activities.

The ministry determined that the appellant satisfied the other 2 criteria: he has reached 18 years of age and his impairment in the opinion of a medical practitioner is likely to continue for at least 2 years.

## **PART D – RELEVANT LEGISLATION**

*Employment and Assistance for Persons with Disabilities Act* (EAPWDA) – section 2

*Employment and Assistance for Persons with Disabilities Regulation* (EAPWDR) – sections 2 and 2.1.

## **PART E – SUMMARY OF FACTS**

With the consent of the Appellant, his Advocate and an Advocate Observer attended the hearing.

### **A. Evidence Before the Ministry at Reconsideration**

The evidence before the ministry at reconsideration consisted of the following:

#### **1. The Appellant's PWD Application Dated February 26, 2018**

The Application contained:

- A Medical Report (MR) dated February 27, 2018, completed by a neurologist who has seen the appellant 2-10 times in the past 12 months and known the appellant for eight months.
- An Assessor Report (AR) dated March 1, 2018, completed by the appellant's family physician (GP) who has known the Appellant for approximately six months and has seen the Appellant once in the past 12 months
- A Self Report (SR) dated February, 2018, signed by the appellant, in which the Appellant says
  - he has experienced random grand mall seizures for the past 14 months
  - living with the seizures is slowly starting to affect his anxiety, depression, fear and life in general
  - the frequency of his seizures is that sometimes he will go a week and have none and sometimes will experience three or four in one week
  - he never has any warning signs of his seizures coming on and they tend to last for different times, every time; the longest one has been greater than 10 minutes and during it he destroyed most things in his room, and had no perception of who his father was
  - no matter how long a seizure lasts he wakes up with a completely disrupted memory and feels like he has run in 10 mile marathon, got hit by a truck, and always has a few gashes from thrashing around
  - there are many different ways that the seizures have affected his life; his depression and anxiety have become his worst enemy and they are simply difficult to deal with
  - having the unknown feeling of never knowing when he is going to get seizures is one of the things that is hardest to deal with – never knowing whether today is going to consist of hospital visits is very scary
  - four days after a seizure even the little things like getting dressed, making food, and getting out of bed become very hard to deal with, and his everyday life has taken on a new meaning for himself and the people around him

#### **2. Medical Report (MR) dated February 27, 2018**

*MR - Diagnoses*

In the MR, the neurologist, who reported that the Appellant had been his patient for eight months and had seen the Appellant between two and 10 times in the past 12 months, specified the following diagnoses as related to the appellant's impairment as:

- Epilepsy - specifically focal secondarily generalized tonic-clonic seizures, with an onset date of May 2017, which the neurologist says have been a major problem over the last year. He reported that the Appellant is on three anticonvulsant drugs, which have as at the date of the MR controlled the Appellant's epilepsy for three months; the Appellant is on a dose of 1200 mg/day of an anti-epileptic medication
- The neurologist indicates the severity of the Appellant's condition as saying the seizures were frequent in the first six months but are now controlled and have been for the last three months because of the dose of his seizure medication. He reports that the condition is for life, and carries a stigma, which for the Appellant has an impact on his cognitive function and restricts him in terms of driving and not working in a setting that might pose a threat to his safety should he experience a seizure. The neurologist says that these pose limitations to employment.

#### *MR - Degree and Course of Impairment*

In the MR, the neurologist says that the Appellant's impairment is likely to continue for two years or more.

#### *MR - Functional Skills*

The neurologist reported that the Appellant can walk unaided on a flat surface for four or more blocks, can climb five or more steps, has no limitations in lifting or remaining seated, has no difficulties with with communication, but has significant deficits with cognitive and emotional functioning, specifically with memory, emotional disturbance and attention or sustained concentration. The neurologist explains these deficits with cognitive and emotional function as "*mild*" and as partly related to the Appellant's medication and partly to his adjustment to his disease.

#### *MR – Daily Living Activities*

In reply to the question "*Does the impairment directly restricted the person's ability to perform Daily Living Activities?*" The neurologist answered "*No*".

### **3. Assessor Report (AR) dated March 1, 2018**

The Prescribed Professional completing the AR was the Appellant's family physician. The services the family physician provided are a referral to the neurologist and treatment for the Appellant's injuries sustained from his seizures. In the Section A - Living Environment he reported that the Appellant lived with family.

#### *Section B 1 - Mental or Physical Impairment*

The family physician answered "*nil*" in response to the question "*What are the applicant's mental or physical impairments that impact his/her ability to manage Daily Living Activities? (brief summary)*"

#### *Section B 2 - Ability to Communicate*

The physician reported that the appellant's level of ability in all 4 tasks, namely speaking, reading, writing and hearing was "*good*".

#### *Section B 3 - Mobility and Physical Ability*

The physician reported that the Appellant was "*Independent*" in all 6 listed tasks, specifically walking indoors, walking outdoors, climbing stairs, standing, lifting and carrying and holding.

#### *Section B 4 - Cognitive and Emotional Functioning*

The physician indicated that the appellant experienced "*No Impact*" in the 8 of the 14 listed tasks and experienced "*Minimal impact*" in the remaining 8 listed tasks, commenting that the Appellant has focal secondarily generalized seizures currently under control for the last three months on carbamazepine at a dose of 1200 mg per day which affects his concentration and memory function to a mild but definite degree and impacts on his employment status.

#### *Section C - Daily Living Activities*

There are 8 listed Daily Living Activities (DLA), each containing a number of tasks. The family physician indicated that

- (a) In the DLA "Personal Care", 8 listed tasks, the Appellant required periodic assistance from another person in 6 of them, required continuous assistance in 1 and indicated nothing for the 8<sup>th</sup>.
- (b) In the DLA "Basic Housekeeping" the physician indicated that periodic assistance from another person was required for both tasks.
- (c) In the DLA "Shopping" the physician indicated that the Appellant was independent in 2 of the 5 listed tasks and required periodic assistance from another person in the remaining 3.

- (d) In the DLA "Meals" the physician indicated that the Appellant required periodic assistance from another person in all 4 listed tasks.
- (e) In the DLA "Pay Rent and Bills" the physician indicated that the Appellant required assistance in 2 of the 3 listed tasks and required continuous assistance from another person in the remaining task.
- (f) In the DLA "Medications" the physician indicated that the Appellant required periodic assistance from another person in all 3 listed tasks.
- (g) In the DLA "Transportation" the physician indicated that the Appellant required periodic assistance from another person in all 3 listed tasks.

In none of those 7 DLAs did the physician indicate the periodicity of assistance required or what sort of periodic assistance was required, nor did he indicate what sort of continuous assistance was required.

- (h) In the DLA "Social Functioning", which is to be answered only if the Appellant has an identified mental impairment, the physician indicated that the Appellant required periodic support/supervision in 5 of the 6 listed tasks, and made no comment in the sixth, which is specified as "Other". Under this DLA, the physician indicated that the Appellant had marginal functioning with respect to his relationship with both his immediate and extended social networks. The physician described the help the Appellant required to support or supervise him as "*ongoing parental support*".

#### *Section D - Assistance Provided for Applicant*

The physician indicated that the Appellant received assistance from family, did not have an Assistance Animal and made no comment as to what sort of assistance would be necessary in the event of no help being available and made no comment as to whether or not the Appellant was provided assistance with the use of an Assistive Device.

#### *Section E - Additional Information*

The physician provided no additional information.

#### *Section F - Approaches and Informational Sources*

The physician indicated that the source of information was an office interview with the appellant.

#### **4. A letter from the ministry dated April 30, 2018**

The ministry wrote to the Appellant denying his request for designation as a Person with Disabilities, enclosing the Decision Summary dated April 30, 2018.

#### **5. Request for Reconsideration Dated May 31, 2018**

The Appellant's Request for Reconsideration gave as the reason for the Request that the Appellant believe's his epilepsy is severe mental impairment and his physical impairment is also severe. The Request included a written statement prepared by an advocate and confirmed by the Appellant describing how his disability affects his life and his ability to take care of himself, specifically in the DLA s of Personal Care, Meal Preparation, Shopping, Basic Housecleaning, Managing Finances, Public Transportation and Social Functioning.

#### **B. Evidence at Appeal**

In order to preserve anonymity the evidence of the witnesses is summarized, with specific dates or other indicators that might lead to identification of the Appellant not given. However, the evidence given has been considered by the panel in its entirety.

#### **Appellant's Mother**

The appellant's mother gave evidence of her experience with her sons epilepsy and said that the affects on him were "huge". She said that her sons first seizure occurred in the fall of 2017, saying that she heard a loud noise, "*a really loud bang*", and thought a bike her son had been working on had fallen; she

went upstairs and found him with symptoms of an epileptic seizure, called 911, and since then her son has had at least 10 Grande Mal seizures and numerous small ones. When there is a Grande Mal seizure, often her son will bleed, with blood on the floor and walls, bruise, chew up his tongue, and exhibit other symptoms. She said that following seizures her son is often angry, has disoriented thinking such as believing he was going to work, does not remember his seizures, and is afraid to go to sleep. Often following a seizure he has difficulty walking for a period of time.

She gave evidence of a number of seizures before June 4, 2018, the date the Appellant's request for reconsideration was submitted. She also gave evidence of seizures following June 4, 2018. In the MR dated February 27, 2018 the neurologist has said that the Appellant seizures had been controlled for three months by that date; in the AR the family physician said the same. She said that her son had been treated in the Emergency Room using only an IV and Tylenol to treat her son; that following a seizure he can sleep for lengthy periods of time, up to 3 ½ days, and that he has had seizures pretty much every month following June 4, 2018. She said that although her son had been seizure free or about three months up to the date of the MR at the end of February 2018 and the AR dated March 1, 2018, he has had numerous seizures since then, and has been attended by ambulances, fire trucks and the police. She said that the family had hoped that the medication was working, and it had been up until late April 2018, but since then he has had a number of seizures both before and after the date that her son submitted his request for reconsideration, June 4, 2018.

### **Panel Decision on Admissibility**

In his self-report submitted as part of his Reconsideration Application, the Appellant spoke of his seizures, and it is clear from his self-report that his seizures were occurring after the date of the MR and AR, and were occurring up to the time the Appellant submitted his Reconsideration Request on June 4, 2018. The issue is whether or not the evidence of the Appellant's mother as to the reappearance of the seizures following the evidence given by the physicians in the MR and AR, specifically February 27, 2018 and March 1, 2018 is admissible.

The ministry objected to the mother's evidence being admitted.

The panel finds that the evidence of the Appellant's mother insofar as it refers to seizures and the effect upon her son up to the date the appellant submitted his Reconsideration Request on June 4, 2018 is in support of the Appellant's evidence provided in his self-report, which was before the Minister at reconsideration. That evidence is admissible pursuant to section 22(4)(b) *Employment and Assistance Act*. The evidence of her son's seizures and the effects on him after the date the Appellant submitted his Request for Reconsideration, June 4, 2018, is not admissible because it is not in support of information or records that were before the minister at the time of reconsideration, pursuant to section 22(4)(b) *Employment and Assistance Act*.

### **Appellant's Father**

The Appellant's father said that his son is not stable, and there is a danger when his son is violent during his seizures because he is strong and his physical strength is uncontrollable. He gave examples of his son picking up a chair, swinging it around in damaging things. He said that his son, following a major seizure is bruised, bloodied and does not even recognize his father. He said his son argues with the paramedics. The medications he has been on have changed him. He said 15 months ago he was living with a healthy normal 25-year-old and that now he has a 26-year-old living at home who is very much changed. He also said that the neurologist has given his son the option of brain surgery, which took the whole family by surprise. The neurologist asked how many seizures the Appellant would have to experience before he would consider brain surgery, a question which the father said is not something that could be easily answered and certainly not on the spot.

The Appellant's father said that he had raised 3 children, and while all children give their parents grief at times, he has now has fear of the unknown, and it seems the unknown is never going to change.

He said he has to help his son with DLAs, while trying to make sure that a topic of his son needing such help does not become a topic of discussion. He said that certain things cause fear, such as his son being home alone and that he may try cooking something, and might burn the house down. He said that he feels that he and his wife have to be there most of the time to ensure his son's safety and that in a seizure his son does not cause something catastrophic to happen. He said that his son has a fear of the unknown future and an example is that his son doesn't want to go to bed because he feels he might never get up. He said that the neurologist is "a great guy" but throws out questions that can't be answered in a few seconds; the example he gave was asking how many seizures the Appellant must experience before he will consider surgery and he said that it is difficult to answer such questions as the family has no experience in such a situation and has insufficient information upon which to make a decision.

Upon being asked what are the Appellant's requirements for assistance between seizures, the Appellant's father said that if it's a Grande Mal seizure, then when his son comes home from hospital he curls up in a ball for up to 36 hours at a time, and when he "comes out of it", he is scrambled at best, and has no memory of his seizure. He said that during the periods of time between seizures, his son is depressed, has anxiety, fear and restlessness. Much of the time he recovers in about 24 hours at which time he gets back to normal.

The Appellant's father said that as both he and his wife work, they cannot ensure that at least one of them is home all the time, but by coincidence one has been at home for many, but not all, of his sons seizures, but it would be desirable to have someone home with his son at all times as it would relieve the stress of not knowing whether his son would have a seizure while alone or would do something catastrophic. He said however that his son would not like feeling he has to have a person to supervise him at all times.

### **The Appellant**

The Appellant agreed with his parents. He was asked to describe his relationship with a neurologist and said that without the neurologist he would not be on proper medication; he said the Emergency Room physician gave him medications that the neurologist said were inappropriate. The neurologist has tried various medication regimes and has been amazing.

The ministry asked the Appellant when was the last time he worked. The appellant said it was just over a year ago when he was doing hotel maintenance but was let go. He said he has had "side jobs" in maintenance "here and there but nothing that lasted".

The Appellant said that he is now living at home but had previously lived in Vancouver; the onset of epilepsy was about four months after he moved back home.

### **C. Submissions At Appeal**

#### **1. Notice of Appeal dated June 25, 2018**

In his Notice of Appeal the appellant says that his seizures, various medications, dosage type and side effects affect every moment of his daily life and if not for his parents he would have no place to live or food to eat. He says he cannot engage in employment at this time due to his seizures not being controlled.

**2. Appellant's Submissions** The Appellant's Advocate submitted a two page written submission; he pointed out that an applicant must meet five criteria in order to receive a Persons with Disability (PWD) designation, and outlined what those were, as well as other submissions. Although the submissions are not repeated here, the panel has considered them all.

The submission contained no new evidence and went to argument.

### **3. Ministry Submissions**

The ministry stood by and relied on the Reconsideration decision.

When asked if the ministry considers epilepsy to be a physical or mental impairment, the ministry was unable to provide a definitive opinion. When questioned further about how the ministry assessed the issue it said it has only what is presented in the application to go on. When asked if people with epilepsy are classified as Persons with Disabilities, the ministry said that some are and some are not, and that it has no list of medical conditions that determine automatic PWD designation. It all depends on the impact of the medical condition on daily functioning.

The ministry said that the severity of impairment is a determination by the minister, is not dependent upon the Appellant's self-report, and whether or not an impairment directly and significantly restricts DLAs is to be decided by the minister upon the opinion of a prescribed professional.

## PART F – REASONS FOR PANEL DECISION

The issue in this appeal is whether the ministry decision that determined that the appellant did not meet three of the five statutory requirements of Section 2 of the EAPWDA for designation as a person with disabilities (PWD) is reasonably supported by the evidence or is a reasonable application of the legislation in the circumstances of the appellant.

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Poverty Reduction (the ministry) dated 12 June 2018 that denied the appellant designation as a Person with Disabilities (PWD).

Specifically, the ministry determined that the appellant did not meet all 5 of the required criteria for PWD designation set out in section 2 of the *Employment and Assistance for Persons with Disabilities Act*, section 2. The ministry determined that the information provided did not establish that the appellant has a severe mental or physical impairment that in the opinion of a prescribed professional

- (i) directly and significantly restricts his ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and,
- (ii) as a result of those restrictions, he requires help to perform those activities.

The ministry determined that the appellant satisfied the other 2 criteria: he has reached 18 years of age and his impairment in the opinion of a medical practitioner is likely to continue for at least 2 years.

### Applicable Legislation

#### Employment and Assistance for Persons with Disabilities Act

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).

#### Employment and Assistance for Persons with Disabilities Regulation

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.

### **Conditions Necessary for Designation as a Person with Disabilities**

Under section 2 EAPWDA there are 5 conditions that a person must satisfy in order to be designated as a Person with Disabilities. Those are:

- (a) Age - the applicant must be 18 years of age or older
- (b) Severe Mental or Physical Impairment – the applicant's condition must be either a severe mental or severe physical impairment
- (c) Duration – the applicant's impairment must be, in the opinion of a physician or nurse practitioner, likely to continue for at least 2 years
- (d) In the opinion of a prescribed professional (one of six professionals set out in section 2(2) EAPWDA the impairment directly and significantly restricts the applicant's ability to perform DLA's either continuously or periodically for extended periods, and
- (e) As a result of those restrictions the applicant requires help to perform DLA's.

### **Conditions Necessary**

- (i) Examining each of the five conditions in turn, condition (a) Age and (c) Duration were not in dispute.
- (ii) *Condition (b) - Severe Mental or Physical Impairment*  
*Physical Impairment*

*Appellant*

The Advocate argued that that the Appellant felt he did meet the criteria and pointed out that both the family physician and the neurologist emphasized the effect of the Appellant's impairment on his employability which indicated that neither physician fully understood the criteria required for the PWD designation. He argued that it was highly unlikely that if someone fully understood the eligibility requirements, that person would include comments related to employability as the PWD application

stated that employment is not a relevant factor. He also argued that a misunderstanding of the assessment criteria explains why the family physician would state that the impact of the Appellant's ability to manage daily living activities because of mental or physical impairments were "Nil" and then go on to indicate that the appellant required assistance with all but two DLA's. The Advocate argued that the physicians' misunderstanding or their not being aware of the criteria necessary for PWD designation should not result in a denial of that designation for the Appellant.

The Advocate says that he and the Appellant do not believe that the omission of describing the frequency or duration of the support that the Appellant requires for all areas of social functioning should serve as the basis for a denial of PWD designation, and asks the tribunal to consider the fairness of such a practice in making the decision.

The Appellant asks the tribunal take into consideration the fact that the neurologist had only known the Appellant for eight months and had seen him between two and 10 times and that the family physician had limited interaction with the appellant in the 12 months preceding the PWD application. The Advocate argued that with such limited contact with the Appellant it is unlikely that either physician could fully appreciate the extent to which the Appellant's Grande Mal seizures directly and significantly restrict his DLA's and he says that despite the limited insight of both physicians that both acknowledged in some way that the Appellant's impairment was severe; he says that the neurologist explicitly stated that the Appellant's epilepsy had been a "*major problem*" and that the family physician indicated that the Appellant required some form of assistance for every type of daily living except two and that is indicative of a severe impairment. Therefore the Appellant meets the criteria for PWD designation and also supports the conclusion that the appellant's severe impairment directly and significantly restricts DLAs, if not continuously, then at least periodically for extended periods

#### *Ministry*

The ministry relied upon the Reconsideration decision. At Reconsideration the ministry found that the Appellant had neither a severe mental nor severe physical impairment. In doing so, the ministry relied upon the neurologist's opinion in the MR and the family physician's opinion in the AR, that the Appellant's seizures, which had been frequent over the first six months, had been controlled for three months. The ministry argued that the fact that the appellant had not had a seizure in three months as at the time of the MR and the AR indicated that the Appellant's epilepsy, while it might be serious, did not constitute a severe physical impairment. The ministry pointed out that the lack of the Appellant having any limitations on his functional skills, and that the neurologist did not indicate any restrictions to the ability to perform DLA, also indicated that there was no severe physical impairment.

The ministry, at Reconsideration, noted that that the neurologist authoring the MR reported that the only danger posed was that the Appellant's epilepsy and his medication might impose a threat to safety in the event of a seizure and also posed a limitation to employment.

The ministry argued that the appellant did not show evidence of a severe mental or physical impairment and in reading the MR and AR the medical evidence was that the Appellant's seizures were now controlled. The ministry also pointed out that employability was not a criterion for PWD designation. The ministry pointed out that in the MR under section E - Daily Living activities, the physician reported that the Appellant's impairment did not directly restrict the appellant's ability to perform DLAs, and that in the AR the family physician reported that the Appellant's Ability to Communicate and Mobility and Physical Ability was "Good" and "Independent" respectively in all tasks despite any impairment. The ministry further argued that the effect of impairments on the Appellant's DLAs, where the family physician indicated that the Appellant required periodic assistance from another person in many of the tasks for each of the seven DLA's, the physician provided no information as to the periodicity of the assistance required or what sort of assistance was required. The ministry also noted that when the family physician indicated that the Appellant required continuous assistance from another person in 2 tasks of the 7 DLAs, the physician gave no indication of what sort of assistance was required.

Further, the ministry argued that in the DLA of Social Functioning where the physician indicated that the Appellant required Periodic Support/Supervision in five of the six listed tasks there was no information

given as to what sort of support was required nor as to the periodicity of it. In that when the family physician said that ongoing parental support was the help required, and that support from family was required, the physician did not say what type of ongoing parental support was required.

The ministry pointed out that no information about the Appellant's condition was provided to the Reconsideration Officer between the dates of the MR and AR (February 27 and March 1, 2018) and of the application for reconsideration (June 4, 2018) or the date of the Reconsideration Decision (June 12, 2018) and so there was no medical information as to the fact that the appellant's seizures continued after the dates of the MR and AR.

#### *Panel Finding*

The determination of severity of impairment is at the discretion of the minister, taking into account all of the evidence. However, the legislation is clear that the minister must rely primarily on the evidence from the medical practitioners. It is therefore reasonable for the ministry to expect that these medical professionals provide a clear and up-to-date picture of the Appellant's medical condition and its impact on daily functioning, as evidenced by the functional skill limitations and restrictions in the ability to perform DLA. The panel finds that it was reasonable for the ministry to determine that the information provided does not establish that the Appellant has a severe physical impairment, because the evidence of a medical practitioner available to the Reconsideration Officer was that the Appellant's epilepsy was and had been under control for 3 months. There was no clear picture from the MR and AR on how the Appellant's epilepsy restricts his physical functioning except for the relatively brief periods when the Appellant is having a seizure. While the Appellant gave, in his self-report, evidence that he continued to experience seizures, section 2(2) EAPWDA makes it clear that whether or not the appellant has or does not have a severe physical impairment must be in the opinion of a medical practitioner (or nurse practitioner). It follows that the opinion of the Appellant as to whether or not he has a severe physical impairment is not determinative of whether he is or is not suffering from a severe physical impairment.

#### *Mental Impairment*

The ministry, at Reconsideration, considered that the Appellant did not have a severe mental impairment because the neurologist, in giving his opinion in the MR, said that while there were significant deficits to 3 areas of the Appellant's cognitive and emotional functioning, they were mild, and that these deficits are partly related to medication and partly to the Appellant's adjustment to his epilepsy. The neurologist did not note any difficulty with the remaining 8 specific areas of cognitive and emotional functioning.

The ministry, at Reconsideration, also relied upon the opinion of the family physician who indicated that the Appellant had no mental or physical impairments which impacted his ability to manage his DLA's, had good ability with all listed areas of communication, and in the areas dealing with Cognitive and Emotional Functioning that the Appellant experienced no impact in 8 of the listed functions and only minimal impact in the remaining 6.

#### *Panel Finding*

The panel finds that it was reasonable for the ministry to determine that the information provided does not establish that the appellant has a severe mental impairment, because the neurologist found only mild deficits in the Appellant's cognitive and emotional functioning and then only in 3 of 11 listed areas, and the family physician did not note any major or moderate impacts on the Appellant's mental health on his daily functioning.

While the Appellant in his self-report spoke of the challenges of self neglect, depression, fatigue as a result of anxiety and depression, lack of motivation, as well as other challenges, these challenges were not confirmed by either the neurologist or the family physician as is required by section 2 (2) EAPWDA.

(iii) *Condition (d) - Direct and significant restrictions in the ability to perform DLA*

The legislation specifies that the minister must assess direct and significant restrictions in the ability to perform DLA upon the opinion of a prescribed professional. This does not mean that other evidence should not be considered, but it is clear that a prescribed professional's evidence is fundamental. At issue in this assessment is the degree of restriction in the appellant's ability to perform the DLA listed in section 2(1)(a) and (b) of the EAPWDR applicable to a person with a severe mental or physical impairment.

The ministry noted that the neurologist in the MR indicated that the Appellant required no assistance in performing DLA and that the family physician, while indicating that the Appellant required periodic assistance in 6 of eight listed tasks under the DLA Personal Care and requires continuous assistance in 1, required periodic assistance in both listed tasks of the DLA Basic housekeeping, required periodic assistance in three of the five listed tasks in the DLA Shopping, required periodic assistance in all 4 listed tasks in the DLA Meals, required periodic assistance in 2 of the listed tasks of Pay Rent and Bills and required continuous assistance in the 1 remaining task, required periodic assistance in the 3 listed tasks of the DLA Medications and required periodic assistance in the 3 listed tasks of DLA Transportation, as well as requiring periodic assistance in 5 listed areas of the DLA Social Functioning, the only indication of what sort of assistance was required was that the Appellant required ongoing parental support in his Social Functioning; no indication was ever given by the family physician in the AR as to how often, that is what was the periodicity, of the assistance required, or what sort of assistance was required.

The legislation 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. 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, significant help or supervision of another person, or the services of an assistance animal in order to perform a DLA.

The ministry was not satisfied that the appellant has a severe impairment that, in the opinion of a prescribed professional, directly and significantly restricts his ability to perform DLA continuously or periodically for extended periods. In reaching this conclusion, the ministry noted that the neurologist in completing the MR noted that the Appellant can walk 4+ blocks unaided on a flat surface, can climb 5+ steps unaided, has no limitations in lifting and has no limitations in remaining seated, as well as no difficulties with communication. The ministry also noted that in response to the question "*Does the impairment directly restrict the person's ability to perform Daily Living Activities?*" the neurologist replied "No". The ministry noted that the family physician in the AR, in answer to the question "*What are the applicant's mental or physical impairments that impact his/her ability to manage Daily Living Activities?*" answered "Nil" and went on to give her opinion that the Appellant was independent with all listed areas of mobility and physical ability, and that with Cognitive and Emotional Functioning, the family physician found no impact in 8 and only minimal impact in 6 of the listed areas.

There was no indication of the periodicity of the assistance required in either the MR or the AR when either the neurologist or the family physician has noted that there is periodic assistance required, and neither physician has explained the nature of the restrictions in ability to perform DLA.

The panel finds that, in relation to the areas where some periodic assistance is assessed, neither the specialist or the GP has provided sufficient information in relation to the nature, degree and duration of the assistance required by the appellant to establish that there are significant restrictions for extended periods in the appellant's ability to perform DLA. The panel notes that this information is not consistent with the level of restriction reported by the appellant and his parents at the hearing.

The panel finds that it was reasonable for the ministry to determine that the information provided at reconsideration does not establish that in the opinion of a prescribed professional the appellant

experiences direct and significant restrictions in his ability to perform DLA.

*(iv) Condition (e) - Help to Perform DLA*

The ministry found at Reconsideration that as it was not established that DLAs are significantly restricted, it cannot be determined that significant help is required.

The panel notes that the information provided at the hearing indicates that the appellant receives assistance from his parents on a daily basis. However, while the information provided demonstrates that the appellant does receive assistance from other people the panel has concluded that the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established. As such, the panel finds that the ministry reasonably concluded that under section 2(2)(b)(ii) of the EAPWDA it cannot be determined that the appellant requires help to perform DLA.

The panel also notes that the appellant, the neurologist and the family physician mentioned the Appellant's inability to work. However, the panel notes that neither employability nor vocational ability are criteria for PWD designation nor are they DLAs set out in the regulation.

Given the limitations in the information before the ministry, the panel concludes that the ministry's determination that this criterion has not been met is reasonably supported by the evidence.

The panel finds that it was reasonable for the ministry to determine that the information provided did not establish that the Appellant required help to perform DLAs.

**Conclusion**

Having reviewed and considered all of the evidence and relevant legislation, the panel finds that the ministry's reconsideration decision was reasonably supported by the evidence and was a reasonable application of the applicable enactment in the appellant's circumstances.

The panel confirms the ministry's decision and the Appellant is not successful in his appeal.

**PART G – ORDER**

THE PANEL DECISION IS: (Check one)

 UNANIMOUS BY MAJORITY

THE PANEL

 CONFIRMS THE MINISTRY DECISION RESCINDS THE MINISTRY DECISION

If the ministry decision is rescinded, is the panel decision referred back to the Minister for a decision as to amount?  Yes  No

**LEGISLATIVE AUTHORITY FOR THE DECISION:***Employment and Assistance Act*Section 24(1)(a)  or Section 24(1)(b) 

and

Section 24(2)(a)  or Section 24(2)(b) **PART H – SIGNATURES**

PRINT NAME

Donald (Dan) McLeod

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2018/July/17

PRINT NAME

Carl Gorham

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2018/July/17

PRINT NAME

Richard Roberts

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2018/July/17