PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction's ("ministry") reconsideration decision dated July 19, 2018, in which the ministry found that the appellant is not eligible for designation as a Person with Disabilities ("PWD") under section 2 of the *Employment and Assistance for Persons with Disabilities Act* ("EAPWDA"). The ministry found that the appellant meets the age and duration requirements but was not satisfied that:

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

PART D – RELEVANT LEGISLATION

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

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

PART E – SUMMARY OF FACTS

The evidence and documentation before the minister at the reconsideration consisted of [*panel note: in same order as in the ministry's Record of decision*]:

1. Information from the ministry's record indicating the PWD application was received on November 22, 2018 [*sic* - 2017] and denied on May 29, 2018. The appellant submitted a Request for Reconsideration ("RFR") on July 16, 2018 [extension of time had been granted by the ministry]. The ministry reviewed the RFR on July 19, 2018.

Upon reviewing section 2-E (page 11) of the Medical Report ("MR"), the adjudicator found that this page was not completed by the General Practitioner whose signature appears on the form ("Dr. L."). Dr. L. wrote: "N.B. notes in black were completed by patient." The adjudicator contacted Dr. L. to seek clarification and to determine which notes were written by the appellant as opposed to the physician. On April 19, 2018, the ministry received an alternate version of the PWD application ("PWD App. 2") with the MR completed by Dr. L. The ministry notes that the reports are identical except section 2-E is completed in App. 2 and the appellant's comments are removed. The ministry relies on the MR in PWD App. 2 in determining eligibility for PWD designation.

2. The RFR, signed by the appellant on June 20, 2018, requesting an extension of time to provide further forms.

3. The appellant's PWD application comprised of:

- a self-report ("SR") dated August 18, 2017;
- a MR dated October 17, 2017, signed by Dr. L. who indicates she had seen the appellant zero times in the past 12 months [comment, "previous family physician, Dr.___ left practice"];
- an Assessor Report ("AR") dated November 10, 2017, completed by a Registered Nurse ("RN") whose only meeting with the appellant was for the assessment. The RN based the assessment on an office interview with the appellant;
- Statements in the *Comments* section of the AR, written and signed by Dr. L.

Summary of relevant evidence from the application:

Diagnoses

In the MR, Dr. L. indicates the following conditions: left sciatic nerve palsy, multiple severe lower limb fractures and bilateral pneumothoraces [onset July 1996]. Under *Additional Comments*, Dr. L. notes that the appellant reports a mood disorder pre-existent to severe trauma sustained in July 1996, in an accident involving a 90-foot fall.

Functional skills

In the SR, the appellant states that his multiple injuries did not heal completely. Everyday life is a challenge for him due to fatigue, stiffness, and soreness throughout the day. The appellant describes being slowed down by pain and fatigue, and needing a lot of breaks and recovery for daily activities. The appellant reports that back pain [from a plate in his back] as well as leg, ankle, and hip pain slow him down. The appellant describes nerve pain in his toes due to his ankle being "higher and fused". The appellant reports that the orthotic lift in his shoe sometimes causes circulation problems. The appellant reports that he has struggled with depression throughout much of his life, with it worsening after the accident.

The information in the MR indicates the appellant can walk 2 to 4 blocks unaided on a flat surface; climb 5 or more steps unaided; lift 5 - 15 pounds [comment, "average"], The box for 15 to 35 pounds is crossed out. The appellant can remain seated for 1 -2 hours [comment, "lay down after that"]. The appellant has no difficulties with communication but shows significant deficits with cognitive and emotional function in the areas of *Language* [*expression* is underlined], *Memory* [underlined], *Emotional disturbance*, *Motivation*, and *Motor activity*.

In the MR, under *Additional Comments*, Dr. L. states that the appellant "presents with noticeable ambulatory and motoric impairments...shows marked atrophy of left lower limb." Dr. L. indicates the appellant had difficulties in past employment [keeping up with the work and following schedules]. The appellant's difficulties are in part due to mental fatigue and physical impairment.

In the AR [sections completed by the RN], the appellant's *Ability to Communicate* is rated as good in all areas [speaking, reading, writing, and hearing]. For the 6 activities listed in *Mobility and Physical Ability*, the appellant uses an assistive device for *Walking Indoors*, *Walking Outdoors*, *Climbing Stairs*, *Lifting*, and *Carrying and holding*. The appellant is independent with *Standing*. With the use of an assistive device, the appellant is independent with *Lifting*, and with *Carrying and holding* [comment: "impaired by weakness in lower limbs"].

Regarding impacts to *Cognitive and Emotional Functioning*, the RN indicates the appellant's mental impairment restricts or impacts his functioning as follows:
• No impact for 9 out of 13 areas: *Bodily functions*, *Consciousness*, *Impulse control*, *Insight and judgment*, *Executive*, *Motor activity*, *Language*, *Psychotic symptoms*, and *Other neuro-psychological problems.* No information is provided for *Other emotional or mental problems*;
• Minimal impact: [no areas are checked];
• Moderate impact for 4 areas: *Emotion*, *Attention/concentration*, *Memory*, and Motivation;
• Major impact: [no areas are checked];
• Under *Comments*, Dr. L. states that she is aware of the appellant's mood disorder [depression] and history of fatigue but "cannot make a statement to the degree of his impairment of concentration, motivation (possible anhedonia), memory function and degree of depression. Dr. L. adds, "I trust these functions are affected at this point in time." Dr. L. indicates the appellant's physical impairment impairs his ability to perform physical tasks.

DLA

In the SR, the appellant reports restrictions with meals due to his additional stiffness and soreness in the morning [comment: "need help with making breakfast"]. The appellant states that his wife cooks all of the meals and does all of the cleaning and most of the errands and shopping. The appellant reports that doing anything that requires him to be on his feet for very much time "is too much physically to handle." The appellant reports that many days are overwhelming as he tries to determine what he can and cannot do physically. If he tries to do too much, he needs to rest more the next day because of fatigue.

In the MR, Dr. L. indicates the appellant has not been prescribed any medications or treatments that interfere with his ability to perform DLA.

In the AR, the RN states that the appellant's left nerve palsy/weakness in lower limbs, and his mental fatigue/mood disorder impact his ability to manage DLA. The RN provides the following information for specific DLA:
• The appellant uses an assistive device for 5 of the 8 activities listed for *Personal Care*: Dressing and Grooming ["assistance of chair"], Bathing ["with bench in shower"], and Transfers - in/out of bed and on/off chair ["assistance of cane"]. The appellant is independent with Toileting, Feeding self, and Regulating diet.
• The appellant requires continuous assistance with both of the areas listed for *Basic Housekeeping*: Laundry and Basic Housekeeping [comment: "wife does all"].
• The appellant is independent with 3 of the 5 areas listed for *Shopping*: Reading prices and labels, Making appropriate choices, and Paying for purchases. The appellant requires continuous assistance with Going to and from stores ["always with wife"] and Carrying purchases home ["wife takes heavy items"]. Under *Additional comments*, the RN states that the appellant has an increased risk for falls due to his fused ankle and chronic sore back. The RN comments: "noted to be independent with some activities, however, very delayed in process, with great assistance from wife and mobility aids."
• The appellant requires continuous assistance with all of the activities indicated for *Meals*: Meal planning, Food preparation, Cooking [comment: "wife does all"], and Safe storage of food ["wife does majority"]. The appellant requires periodic assistance and takes significantly longer than typical with Food preparation and Cooking [comments: "depends: due to pain needs help in lifting, cooking"].
• The appellant is independent with all areas of *Pay Rent and Bills*: Banking, Budgeting, and Pay rent and bills [comment: "on line"]; and with all areas of *Medications*: Filling/refilling prescriptions, Taking as directed, and Safe handling and storage.
• The appellant uses an assistive device for all areas of *Transportation*: Getting in and out of a vehicle [comment: "with cane"], Using public transit [comment: "with cane, but uses own vehicle most of the time"], and Using transit schedules/arranging transportation [comment: "with cane"].
• The appellant is independent with 4 of the 5 areas listed for *Social Functioning*: Appropriate social decisions

[comment: "extra cautious after incident"]; Able to develop and maintain relationships; Interacts appropriately with others; and Able to deal appropriately with unexpected demands. The appellant requires periodic support/supervision with Able to secure assistance from others [comment: "wife is only support"]. The RN indicates the appellant has good functioning with his immediate social network and marginal functioning with his extended social networks [comment: "is at baseline prior to incident"]. The RN does not describe any support/supervision that is required to maintain the appellant in the community. The section for *Additional Comments* [*including identification of any safety issues*] is not completed.

Need for help

• In the SR, the appellant indicates his wife helps him with DLA by doing a lot of the household tasks. The appellant has had custom made orthotics, lifts, and braces over the years but they have not helped him enough due to his ankle being at a higher angle and fused. The appellant reports that his shoe lifts also cause his foot to lean outwards, resulting in circulation problems.
• In the MR, Dr. L. indicates the appellant requires a high shoe orthotic [left foot, 2.5 inch]; "sometimes ankle brace - custom plastic mold with leg strap". The appellant walks with a cane for support.
• In the AR, the RN states that the appellant's wife is the only person who helps him with DLA ["does everything together with wife"]. The RN check marks cane, braces, and bathing aid ["chair"] as assistive devices the appellant routinely uses [comments: "left leg brace - longer walks; always using cane"]. The RN indicates the appellant needs a grab rail for toileting. The RN check marks *No*, the appellant does not have an assistance animal.

4. A hospital *Transfer Summary* dictated by a Medical Doctor on May 8, 1996. The report indicates the appellant suffered a 90-foot fall that resulted in "severe and multiple injuries" including left leg, ankle, and spinal fractures for which he had surgery. The report states that it was difficult to obtain a thorough neurological examination due to the severity of the appellant's injuries. A subsequent neurological examination revealed left-sided nerve palsy.

5. The appellant's second PWD application comprised of:

- an SR dated August 18, 2017 [identical to the original SR];
- a MR ('second MR") dated October 17, 2017 and signed by Dr. L., with additions/changes as well as comments initialed by Dr. L.; and
- an AR dated November 10, 2017 and completed by the RN [identical to the original AR].

Summary of additional or amended evidence from the second MR:

- Under *Health History* [section B], the comment that indicated some sections were completed by the appellant is deleted.
- The information on assistive devices [item 4 of section B] is initialed by Dr. L.
- Under *Functional Skills* (section D), items 3 and 4 [limitations in lifting, and the length of time the appellant can remain seated] are left blank.
- Under *Functional Skills*, a comment [with Dr. L.'s signature] is added to item 6 indicating significant deficits with cognitive and emotional function: "patient is affected by easy fatigability from physical and emotional strain."
- Under *Additional Functional Skills Comments*, there is information written on a sticky note regarding the appellant's ability to lift and remain seated: "lifting limits on average 5-15 pounds, variable on better days to 15-35 pounds. Seating average 1-3 hours - variable on levels of pain."
- Section *E - Daily Living Activities* is now completed. Dr. L. checks that the appellant's impairment directly restricts his ability to perform DLA. She indicates that the appellant is independent with 7 out of the 10 DLA listed on the form: *Personal self-care*, *Meal preparation*, *Basic housework*, *Mobility inside the home*, *Mobility outside the home*, *Use of transportation*, and *Management of finances*.
- Dr. L. indicates the appellant is periodically restricted with *Daily shopping*, and *Social functioning* [comments: "Shopping: depends on degree of soreness. Fluctuating"; and *Social functioning*: "can become stressed and overwhelmed."];
- Dr. L. adds her signature to *Additional Comments* - section F of the MR.

6. A letter dated February 27, 2018 from a ministry adjudicator, indicating the PWD application was returned to the appellant as it was incomplete. The ministry notes that much of the information in the MR is self-reported and has not been confirmed by a physician or a nurse practitioner. The ministry notes that page 11 was left blank. The ministry explains that it requires the MR to be completed in its entirety by a physician. The letter includes the appellant's hand-written notation: "corrections have been completed inside forms."

7. The ministry's *Denial Decision Summary* with attached letter, dated May 29, 2018.

8. A letter from a General Practitioner ("Dr. K.") dated July 16, 2018, confirming the extent of the appellant's injuries which include a fused left ankle [with shortened length], curled toes, atrophied left leg and hip muscles, and fused vertebrae and metal plate in the middle of the appellant's back. Dr. K. describes ankle and nerve pain and circulation problems in the toes, exacerbated by bearing extra weight. Dr. K. states that a weak left hip causes additional aches and pains and the appellant's back condition impairs lifting and leads to more back pain. Dr. K. reports that the appellant has struggled with depression throughout his life. The appellant practices meditation to treat his depression and physical pain. Dr. K. notes that the appellant has a leg brace which supports the ankle from leaning outwards toward the left side.

9. A 7-page hand-written submission from the appellant [dated July 2018] in which he states his argument for the reconsideration and reiterates his restrictions due to pain and mobility limitations in his ankle, foot, and back. The appellant provides the following additional information regarding the application process and his functional restrictions:

- The doctor that filled out the original PWD forms [Dr. L.] was a replacement for his original doctor who left the practice. Dr. L. was in transition, short on time [rushed the appellant through appointments] and was always late to return the forms. The appellant reports that he has a new doctor [Dr. K.].
- The appellant states that he suffered from depression before and after his accident. He currently has Post-traumatic Stress Disorder ("PTSD") from multiple emotional traumas including the accident itself. He cannot withstand very much stress.
- The appellant states that he walks with a cane for support at all times and his right ankle is also sore from bearing extra weight on the right side, especially when walking, or standing to make meals, do dishes, clean house or do personal care activities. The appellant reports that his ankle and nerve pain is significant enough to impair daily walking. Even when sitting, he has sharp pains in his left foot because of the extra pressure it bears. The appellant states that the plate in his back causes re-strain on lifting and his ankle brace causes blistering if he walks with it for too long.
- The appellant describes an "average day" in which he loses sleep and requires 45 minutes to an hour to "unwind my body from aches and pains to finally sleep." The appellant then needs to sleep until 11:00 or 11:30 AM and when he gets up he feels surges of pain and needs his wife to support him to the bathroom. The appellant's wife serves him breakfast in bed and it takes about 3 to 4 hours on average before his body starts to feel a little better. The appellant states that he lays down to rest throughout the day; he over-exerts himself very easily; and walking a very short distance can cause issues.

10. A letter from Dr. L. dated September 27, 2018, requesting an extension of time for completion of the PWD forms. Dr. L. has taken over the practice of the appellant's previous physician and needs time to review the patient's chart/records.

11. A letter from the ministry adjudicator, dated July 17, 2017, and addressed to Dr. L. and the RN who completed the AR. The adjudicator states that page 11 of the PWD application is not complete, and there is information written on the form by the client. The adjudicator asks Dr. L. to initial if she agrees with the information. The adjudicator notes that in the AR [pages 17 and 19] there is information crossed out and re-written and it is unclear who provided the information. The adjudicator asks Dr. L. to confirm if the physician or assessor provided the information.

Additional information

The panel accepts the appellant's *Notice of Appeal* [with hand-written statement] as argument. Prior to the hearing, the appellant filed two packages of documents with the Tribunal.

The first package, dated September 26, 2018, consists of the following document:

1. A 12-page Occupational Therapy assessment dated September 26, 2018. An Occupational Therapist ("OT") conducted a cognitive assessment based on referrals from a psychiatrist and from Dr. K. [the appellant's new General Practitioner]. The OT states that the appellant was previously on disability assistance in another province.

The assessment summarizes the appellant's background, indicating that his difficulties originate from an accident in 1996 involving a 90-foot fall. The OT describes the appellant's subsequent physical disability including his struggles with fatigue. The OT confirms that the appellant walks with a cane at all times and that his ankle brace causes skin problems with prolonged use.

The OT indicates the appellant likely suffered a head injury in his fall/accident. The appellant reported a concussion or cranial injury but could not recount the details and did not have any reports or imaging results. The OT notes the appellant's cognitive difficulty in explaining his PWD application to date. The OT states that she agrees with Dr. K.'s re-assessment of the appellant's cognitive and emotional function, indicating moderate to severe impacts in the areas of bodily, emotional, and social functions. The OT agrees with Dr. K.'s observation that the appellant likely had "reduced cognitive comprehension" of the questions in the AR and underestimated the severity/impact of his impairment.

The OT describes the following cognitive deficits, observed by both the OT and the intake nurse at the assessment:

- slow monotone speech, verbal perseveration, and poverty of thought;
- slow processing speed and difficulty with word-finding and completing own sentences;
- poor/vague historian, tangential and off-topic responses;
- confusion [the appellant mistook the nurse for the psychiatrist despite explanation];
- difficulty answering questions [written and verbal] without prompts. It took the appellant over an hour to complete one page of a questionnaire; and
- reduced working memory within the same conversation [the appellant repeated himself and forgot where he wrote or stored information to compensate for his memory deficit].

The OT summarizes findings from various cognitive assessment tools/standardized tests that she used to assess the appellant's mental functions. The OT explains that the test results indicate the appellant's cognitive functioning is impacted below the norms in the following areas:

- memory: the appellant had problems with immediate recall and delayed recall; he showed a "moderate-to-severely reduced" working memory for instructions;
- executive function: the appellant's score was in the "borderline cognitive range" indicating difficulties with organization and planning [delayed and inconsistent ability to detect and correct his own errors and follow rules and constraints]. The appellant's inductive reasoning skills worsened as the volume of tasks increased. The appellant required a high degree of repetition and clarification of instructions for problem-solving tasks and exhibited prolonged processing, rehearsal, and planning attempts before he could proceed with the task.
- financial ability: the appellant could identify coins and bills but had difficulty with calculating/identifying change. The appellant required extra processing time to interpret a sample credit card bill [he eventually found 83% of the targets while verbalizing confusion 50% of the time]. The appellant indicated he does not use credit cards. The appellant was able to discriminate between different types of financial records, and fill out a sample cheque correctly [with extra time].

The OT assessment summarizes "collateral information" garnered from the appellant's spouse ("the spouse") who corroborates the appellant's cognitive difficulties in the areas of memory, focus/concentration, reasoning, insight/judgment, reduced processing speed [thinking and speech], and reduced organizational skills [the appellant requires "extensive extra time"]. The spouse has known the appellant for 6 years and reports that family members indicate the appellant's cognition changed after his accident.

The spouse describes the appellant's need for assistance with various DLA as a result of his cognitive impairment:

Shopping and Meals: The spouse reports the appellant is unable to meal plan and create shopping lists. She grocery shops alone because the appellant has difficulty finding items: "takes him the whole store visit" to find one item, during which time she obtains all of the remaining groceries. After finding one item, the appellant is too tired or in too much pain to find a second item, and the increased fatigue and pain prevents him from engaging in other DLA later in the day. The appellant is unable to carry a full bag of groceries without increased pain/fatigue so the spouse does the lifting and carrying. The appellant also has difficulty with comparison shopping: "gets lost in the scanning and printed details for too long and often chooses an unhealthy or more expensive option because his attention is focused on a specific idiosyncratic detail." The spouse believes that without her guidance, the appellant would not eat wholesome meals or effectively track his diet. The spouse reports that the appellant can obtain ready to eat foods from the kitchen but due to his physical pain and fatigue, he cannot tolerate standing in one place for 20 minutes to chop food or cook.

Transportation: The spouse indicates that although the appellant does not take the bus, he would need extra time and focus to interpret a bus schedule due to his reduced concentration and memory. The spouse described deficits in the appellant's ability to read and write: he "glosses over pages and forgets content of what he has read". The appellant can "lose his train of thought/go off on tangents" when writing something. The spouse indicates that while the appellant is a cautious, non-aggressive driver, she does most of the driving or "backseat drives" because the appellant has "near misses" while driving. The appellant admitted that his spouse "prevented small accidents numerous times" by alerting him to hazards. The spouse attributes the appellant's difficulties with driving to reduced concentration, thinking speed and reaction time, plus fatigue and/or pain.

Social Functioning: The spouse reports that the appellant has no close friends. The couple has a few "loose neighbourhood/store acquaintances" only. The spouse indicates the appellant is kind and respectful but others lose patience with him "due to his verbal repetition and extra time it takes to express himself." The spouse reports that the appellant has difficulty detecting and responding to social cues. As the appellant's level of stress increases, his cognitive and physical performance slows down further. When faced with personal stressors, the appellant tends to "close up and incubate for awhile."

Housekeeping: The spouse reports that the appellant can perform short light tasks such as picking up clothes or wiping up a counter spill, "but not standard house cleaning such as cleaning floors, the bathroom, washing or emptying a full load of dishes, or stooping/loading/grabbing full loads of laundry without undue physical suffering that carries over into the subsequent day(s) and renders the client temporarily confined to bed."

The spouse indicates the appellant is largely independent with the remaining DLA:

Medications: The appellant prefers to avoid prescription medications but is able to safely store and take Advil for pain relief "and would likely be independent with prescription medications."

Paying bills and banking: The spouse indicates the appellant requires extra time to cognitively track financial matters and most of their bills are on the auto-payment system for ease. The appellant is able to consistently remember his PIN number and he prefers to use debit when paying for purchases as this is easier for him than counting out change. The spouse reports that the appellant monitors his bank accounts on line and exercises frugality and judgment with financial decisions, except at stores where he does not always exercise budgeting skills.

Personal care: The spouse reports that the appellant toilets and washes himself independently, but he chooses to bathe rather than shower due to pain and fatigue with standing.

Regarding functional skills, the spouse reports the appellant's motivation to be moderately impacted by his post-injury challenges but any abnormal thought processes ("he can go down spiritual or philosophical tracks") have a minimal impact on his function as they tend to avoid those conversations. From a physical standpoint, the spouse reports that the appellant takes several hours to get out of bed in the morning due to severe morning stiffness, fatigue, and nerve/joint pain. The appellant suffers from poor sleep due to pain. The spouse reports that when the appellant walks, he must either use a cane or hold onto furniture or her arm.

The OT provides her overall impression: the appellant scored within normal to borderline cognitive functioning on the formal screening tests, depending on the function that was being assessed. On more complex executive tasks, the appellant demonstrates "moderate to severe" deficits in concentration, working memory, short-term memory, and processing speed, but basic attention was sufficient. The appellant's impairments "moderately to severely impair" his executive problem-solving; in particular, organizing errands, going shopping, and planning meals, especially as the volume of data increases.

The OT finds that the appellant's reasoning, insight, and judgment "were only partial", and are compounded by his memory deficits. In terms of his social functioning, the OT states that although the appellant makes efforts to be methodical and thorough, he experiences "extreme inefficiencies that at times may be beyond reasonable accommodation, e.g....in many social environments." The OT notes that the appellant has lost social connections and supports as a result of his impairment. The OT notes that the appellant's ability to drive safely is also a concern and she recommends an Enhanced Road Evaluation.

The OT provides her professional opinion in the language of the PWD application. Regarding the functional skills and DLA set out in the MR and AR, the OT finds that the appellant has impairments as follows:

Functional skills

Communication: impaired due to "post-traumatic cognitive impairments"; and impaired due to the appellant's problems with memory [working memory and short term memory], processing speed, executive function, and insight.

- *Ability to communicate*: Speaking and Reading are poor due to cognition; Writing is satisfactory/poor due to cognition; and Hearing is satisfactory [comment: "not formally tested"].

Mobility and Physical ability: impaired due to chronic pain, neurological left leg weakness and leg length discrepancy, fused ankle;

- *Walking indoors*: needs periodic assistance and uses an assistive device [cane];
- *Walking outdoors*: needs periodic assistance and uses an assistive device [cane and leg brace];
- *Climbing stairs*: needs periodic assistance and uses an assistive device [cane and rail];
- *Standing*: needs periodic assistance and uses an assistive device [cane, counter, furniture];
- *Lifting*: needs periodic assistance and uses an assistive device [cane, cart]; [comment: "weight/height dependent"];
- *Carrying and holding*: needs periodic assistance and uses an assistive device [cane, bag, pack]; [comment: "weight/height dependent"].

Cognitive function: impacted in the areas of executive function, language, memory, and sustained concentration. The OT notes social isolation and indicates she will defer to the psychiatrist's opinion regarding any thought disorder or impacts on emotion and motivation. The OT assesses the impacts listed in the AR as follows:

- *Bodily impact*: moderate impact on sleep, toileting;
- *Consciousness*: no impact
- *Emotion*: [comment: "defer to Psychiatry"];
- *Impulse control*: minimal impact [comment: "some trouble with assessment session, re-directable"];
- *Insight and judgment*: moderate impact
- *Attention/Concentration*: major impact
- *Executive*: major impact
- *Memory*: major impact
- *Motivation*: [comment: "defer to Psychiatry"];

- *Motor activity*: [comment: "defer to Psychiatry to distinguish any mental health contributions from physical contributions];
- *Language*: moderate impact;
- *Psychotic symptoms*: [comment: "defer to Psychiatry"];
- *Other emotional problems*: [comment: "defer to Psychiatry"].

DLA

The OT reports that the appellant is continuously restricted with the following DLA:

Personal Self-Care, continuously restricted by pain/weakness/fatigue [comment: "must go slow, skip on worse days"]:

- *Dressing*: uses an assistive device and takes significantly longer [comment: "chair to sit for majority"];
- *Grooming*: uses an assistive device [comment: "must use chair and sit"];
- *Bathing*: uses an assistive device and takes significantly longer [comment: "grab bars and shower chair recommended"];
- *Toileting*: uses an assistive device plus countertop for stability [comment: "grab bar or safety frame recommended"];
- *Feeding self*: independent;
- *Regulating diet*: needs continuous assistance [comment: "cognitively from wife for healthy meal planning"];
- *Transfers (bed)*: uses an assistive device [comment: "cane, other hand on bed, or bedside table];
- *Transfers (chair)*: uses an assistive device - cane and armrest;

Meal preparation, continuously restricted by cognition [memory, speed, executive], and pain, weakness, fatigue;

- *Meal planning*: needs continuous assistance [comment: "wife - cognitively"];
- *Food preparation*: needs continuous assistance [comment: "wife (physically and cognitively) - unless pre-prepared/no prep. required"];
- *Cooking*: needs continuous assistance [comment: "wife - physically and cognitively"];
- *Safe storage*: needs periodic assistance [comment: "wife - cognitively tracking and disposing"].

Basic Housework, continuously restricted by pain/weakness/fatigue [comment: "cannot do most, without being rendered non-functional (in bed) for day(s) afterward"];

- *Laundry*: needs continuous assistance from partner [comment: "full loads too much weight to stoop, carry, lift, twist with"];
- *Basic housekeeping*: needs continuous assistance due to pain, weakness, fatigue.

Daily shopping, continuously restricted by cognition [memory, speed, executive], and pain/weakness/fatigue;

- *Going to and from stores*: needs continuous assistance, uses an assistive device [comment: "with wife"];
- *Reading prices and labels*: needs continuous assistance from his wife [comments: "will miss details, perseverate on one detail, trouble with good decision-making from what he reads. Trouble scanning majority, stuck on one."];
- *Making appropriate choices* [*shopping*]: needs continuous assistance [comment: "wife must re-direct him in store re: planning and purchase choices"];
- *Paying for purchases*: independent;
- *Carrying purchases home*: needs continuous assistance and uses an assistive device [comment: "wife carries, unless one small object only - with cane"].

Mobility inside home, continuously limited by pain/weakness [comments: "takes hours to de-stiffen before can get out of bed in AM... Must use cane or hold furniture/partner, reduced mobility amount over course of day"];

Mobility outside home, continuously restricted by pain/weakness/fatigue [comment: "to overdo, results in bedridden days"];

Use of transportation, continuously restricted cognitively, due to processing speed, reaction time, concentration, working memory [comments: "must have spouse in car 'backseat driving' to prevent accidents. Recommend Enhanced Road Assessment through Road Safety BC"];

- *Vehicle transfers*: requires periodic assistance from his wife and uses an assistive device [cane];
- *Using public transit*: [comment: "not using - assistive device - cane"];
- *Using transit schedules*: [comment: "not using - possible periodic assistance cognitively"].

The OT reports that the appellant is periodically restricted with the following DLA:

Management of finances: periodically restricted by cognitive impairment [comment: "depends on complexity of financial task - assist complex"];

- *Banking*: independent [on-line];
- *Budgeting*: needs periodic assistance from his wife [comment: "client monitors on-line, but poorer choices at store/in execution"];
- *Pay rent and bills*: needs periodic assistance [comment: "in form of auto-payment set up to compensate for memory/executive, and intermittent check-in from partner"];

The OT reports that the appellant is independent with the following DLA:

Medications:

- *Filling prescriptions*: [comment: "unable to comment"];
- *Medications as prescribed*: independent;
- *Medication handling and storage*: independent.

Social functioning DLA

The OT does not specifically comment on the DLA of Social Functioning as it is described in the MR. The OT provides comments for each area of social functioning listed in the AR:

- Social decisions: [comment: "independent"];
- Develop and maintain relationships: needs periodic support from his wife;
- Interacts appropriately: needs continuous support from the other party [comment: "trouble adjusting conversation to subtle cues, requires overt re-direction"];
- Deal with unexpected demands: needs periodic support and extra time;
- Secure assistance from others: needs periodic support [comment: "impacted by insight at times, rest of time seeks out help"];
- Mental function impact on immediate social network: "Good";
- Mental function impact on extended social networks: "Marginal".

Help to perform DLA

The OT reports that "current ADL help comes from spouse only." The appellant's assistive devices include a cane, leg brace, and orthotic. A shower chair, grab bars in the shower and by the toilet, and a car assist handle are recommended.

2. The second package submitted on appeal, dated October 5, 2018, consists of the following documents:

• a 3-page hand-written submission from the appellant which the panel accepts as argument on appeal;
• a 2-page self-assessment questionnaire [partially illegible] regarding the appellant's mental health symptoms;
• a fax from Dr. K. to the ministry dated September 18, 2018, stating that the appellant has been referred to an OT and to Mental Health for an assessment of his functional limitations; and
• a psychiatric consult report signed by a psychiatrist on September 28, 2018. The appellant reports long-standing depression that worsened in the aftermath of his 1996 accident. The appellant also describes PTSD symptoms, noting that he does not handle stress well and his depression worsens with physical pain and stress. The appellant reports communicating with animals "in their own code" and having paranormal experiences including "special messages directed to him" when watching television or listening to the radio. Socially, the appellant reports that he

always felt like the "odd one out", and his relationship with his wife [married in 2013] is "better now".

The psychiatrist reports "some psychomotor slowing" on a mental status exam, with speech that is not pressured, affect that is constricted, and a thought process that is quite circumstantial. The psychiatrist states that the appellant "does not clearly demonstrate frank delusional thought content" but there is "oddness" to some of his beliefs and the possibility of ideas of reference. The psychiatrist finds the appellant to have appropriate insight and judgment regarding his difficulties "although higher levels of insight and judgment may be limited or impaired as suggested by the recent OT report" which should be referred to for details on the appellant's cognitive functioning.

The psychiatrist concludes that the appellant presents with signs and symptoms of Major Depressive Disorder and possibly unspecified trauma and stress-related disorder with likely "major emotional impact, mild to moderate impairment of/ impact on motivation and motor activity, mild impairment with respect to possible psychotic symptoms, and no significant impairment with respect to impulse control."

3. A letter to the ministry from Dr. K. dated August 17, 2018. Dr. K. describes the appellant's physical injuries, noting that the appellant's left leg, foot, and back disabilities are "significant severe physical injuries that do restrict mobility of walking and lifting." The appellant needs to walk with a cane to help stabilize and support the imbalances in his bones. The appellant "should not do prolonged lifting of much weight because of the pain and pressure on the plate in the back, hip, and leg misalignment." The appellant can lift 5 to 15 pounds depending on pain levels, but less than 5 pounds at a time is recommended to keep pain levels lower.

Dr. K. states that the appellant is limited in the amount of time he can stand and sit. Nerve and joint pain develop quickly; the appellant has to lie down to control the pain. Sitting for too long causes back and hip pain. If the appellant overdoes his activities, he feels pain and nausea. The appellant needs his wife to help him "do daily elongated walking and tasks that normally take (him) much longer than average." The appellant takes "much longer" to complete daily tasks including personal or home care. The appellant therefore needs "continuous help" from his wife throughout the day.

Dr. K. examined the original AR and explains that the appellant did not fully understand the examples for each of the functions that are listed. Dr. K. states that bodily functions "should be moderate to major impact on his leg, sleep disturbance and bathroom problems, etc." Dr. K. indicates that Emotion [depression, for example] "should be moderate to major" impact, and psychotic symptoms "can vary from minimal to moderate on less common, major, affiliated to PTSD symptoms." Dr. K. indicates that the duration of periodic restrictions to social functioning is "moderate to major, depending on what he is going through, PTSD symptoms through to depression can be a real hindrance to social functioning."

Admissibility of OT assessment

The ministry objects to admitting the assessment into evidence. The ministry argues that the OT was not involved in the appellant's (three) PWD applications up to that point and states that the assessment contains a lot of new information that is not in support of the information the ministry had at the reconsideration. The appellant argues that the assessment does not cover any new injuries and is simply a more thorough and complete examination of his impairments.

The panel finds that the OT assessment is in support of the information and records that were before the ministry at the reconsideration. The OT assessment covers the same medical conditions as set out in the PWD application: injuries sustained in a 90-foot fall as well as fatigue and depression and an "identified mental impairment" that impacts the DLA of *Social Functioning*. While the OT provides more thorough and detailed assessments that do not always corroborate or substantiate the findings in the MR and AR, the OT assesses functional skills and abilities that are identical to the ones listed in the original reports. For example, the ability to communicate, as well as specific areas of cognitive and emotional function [executive tasks, memory, etc.], were assessed in the original PWD application and reconsideration submissions.

Dr. L. does not specifically refer the appellant for an OT assessment of his functioning, but she leaves open the possibility of further assessment: in the MR, Dr. L. accepts that the appellant's functions in areas such as concentration, motivation, memory, and degree of depression are affected but indicates she is unable to make a

statement on the degree of his impairment in those areas. The OT assessment provides information on the degree of impairment. The panel admits the assessment under section 22(4) of the *Employment and Assistance Act* ("EAA") as evidence in support of the information and records that were before the minister when the decision being appealed was made.

Admissibility of additional reports

The ministry did not object to the other additional documents. The panel finds that the psychiatric consult, self-assessment questionnaire, and the fax/letter from Dr. K. are in support of the information and records that were before the ministry at the reconsideration. While these reports provide a different or more detailed assessment of the appellant's functions, they address the same medical conditions/impairments as the original PWD application. Dr. K. provides an explanation for the discrepancies in the findings and indicates that the new assessments [including the assessment by the OT] are intended to provide clearer, more thorough assessments in support of the PWD application. The panel admits the psychiatric consult, self-assessment questionnaire, and the fax/letter from Dr. K. under section 22(4) of the EAA as evidence in support of the information and records that were before the minister when the decision being appealed was made.

Oral testimony

At the hearing, both parties presented their arguments and did not introduce any new evidence. The panel accepts all of the oral submissions as argument in support of the submissions that were before the minister when the decision under appeal was made.

PART F – REASONS FOR PANEL DECISION

The issue on appeal is whether the ministry's decision to deny the appellant PWD designation is reasonably supported by the evidence or a reasonable application of the legislation in the circumstances of the appellant. Was the ministry reasonable in finding that the following criteria in section 2 of the EAPWDA were not met?

- the appellant has a severe mental or physical impairment;
- the appellant's impairment, in the opinion of a prescribed professional, directly and significantly restricts his ability to perform DLA either continuously or periodically for extended periods; and
- as a result of restrictions caused by the impairment, the appellant requires an assistive device, the significant help or supervision of another person, or the services of an assistance animal to perform DLA.

The ministry based its reconsideration decision on the following legislation:

EAPWDA

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).

EAPWDR

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.

Analysis

Severe mental or physical impairment

To be eligible for the PWD designation, the legislation requires several criteria to be met including the minister being satisfied that the applicant has a severe mental or physical impairment. "Severe" is not defined in the legislation but the diagnosis of a severe medical condition does not in itself establish a severe impairment of mental or physical functioning. To assess the severity of the impairment, the ministry must consider the extent of any impact on daily functioning as evidenced by limitations/restrictions in mental or physical functions, DLA, and whether significant help is required to manage DLA. At the reconsideration, the ministry was not satisfied that the information provided establishes a severe impairment of mental or physical functioning as required under section 2(2) of the EAPWDA.

Mental impairment

The ministry found that the appellant does not have a severe mental impairment. The ministry bases its conclusion on the inconsistencies in the information between the MR [PWD App. 2] and the AR. The ministry argues that inconsistent information makes it difficult to develop a clear and coherent picture of the degree of impairment. The ministry notes that there is no information in the MR and AR on the frequency or duration of periodic restrictions/periodic support required with social functioning. While Dr. L. indicates the appellant has difficulties in employment situations, the ministry argues that an applicant's employability or ability to work is not taken into consideration in determining eligibility for PWD designation. The panel notes that employability/vocational restrictions are not included in the legislative criteria under section 2 of the EAPWDA.

As noted by the ministry, there are inconsistencies between the MR and AR regarding impacts to the appellant's cognitive and emotional functioning. As well, there are inconsistencies in the information within each report. In the MR, Dr. L. indicates significant deficits with cognitive and emotional functioning in the areas of language, emotional disturbance, motivation, and motor activity, but in the AR, the RN assesses a moderate impact for emotion and motivation, and no impact for motor activity. No major impacts are reported for any of the functions listed in the AR. The RN indicates the appellant's mental impairment has no impact on most areas of cognitive and emotional functioning.

In the AR, the appellant's ability to communicate is rated as *Good* in all areas: In the MR, Dr. L. also reports no difficulties with communication. At the same time, Dr. L. checks that the appellant has significant deficits with cognitive and emotional functioning in the area of language [expression]. No explanation is provided for this discrepancy in the information.

In the MR, the appellant is periodically restricted with social functioning but there is no information on the frequency and duration of the restriction. Where a function is periodically restricted, the legislation requires evidence to establish that the restriction is for extended periods of time. Dr. L. writes that the appellant becomes "stressed and overwhelmed" but does not state how often that occurs. In the AR, on the other hand, the appellant is independent with most areas of social functioning, with the exception of *securing assistance from others* for which he requires periodic support. As the ministry noted, there is no information on the frequency/duration of the support the appellant requires. Based on the original PWD medical reports and submissions for the reconsideration, the panel finds that the ministry reasonably concluded there is insufficient evidence of a severe mental impairment under section 2(2) of the EAPWDA.

Additional evidence and panel's decision - mental impairment

The panel admitted the assessment reports from the OT and psychiatrist as well as the letter from Dr. K. which also provides updated assessments on the severity of the appellant's impairments. The appellant, the OT, and Dr. K. offer the following explanations for the discrepancies between the original PWD reports and the new assessments. In his hand-written submissions, the appellant explains that Dr. L. was new [replacing his original doctor], in transition, and pressed for time. The appellant argues that the panel should give the new assessments of his impairments greater weight.

The OT indicates that she, and the intake nurse, and Dr. K. directly observed the appellant's "reduced cognitive comprehension" with the assessments. The appellant had difficulties communicating [slow speech, poverty of thought, difficulty word-finding and answering questions]. The appellant presented with confusion, disorganization, a slow processing speed, and a reduced working memory for details [it took him an hour to complete one page of a questionnaire; he required frequent repetition of questions, and he could not remember where he wrote or stored information to compensate for his memory deficit].

The assessment tests and tools show memory performance below the norms [especially a moderate to severely reduced working memory]. The tests show a "borderline cognitive range" for executive functions, and the assessments indicate a poor ability to communicate ["Speaking and Reading due to cognition"]. The appellant's ability to write is "satisfactory to poor" due to cognition as well. The collateral evidence from the spouse, which the OT accepts, provides specific examples of the appellant's cognitive impairment, in DLA tasks such as shopping for items in stores, planning meals, and using transportation. The OT concludes that the appellant's cognitive impairment has major impacts in the areas of Attention/Concentration, Executive, and Memory and a moderate impact for Language.

The appellant's cognitive impairment also impacts his social and emotional functioning. The appellant has a good relationship with his wife [the appellant reports that was not always the case] but all of the assessments indicate that she is his only significant relationship. The appellant has no friends because people lose patience with his verbal repetitions and the extra time it takes him to express himself. The psychiatrist reports that the appellant has "odd beliefs" that impact his communication and social functioning. While the psychiatrist reports mild to moderate impacts of depression/ PTSD symptoms on motivation, motor activity, and possible psychotic symptoms, and no impact on impulse control, a major impact on emotion is reported. The psychiatrist notes that the appellant's presentation is consistent with Major Depressive Disorder. The psychiatrist accepts the cognitive findings in the OT assessment, noting that higher levels of insight and judgment may be limited.

Dr. K. agrees that the impact of the appellant's depression on his emotional functioning should be re-rated as "moderate to major" but Dr. K., who sees the appellant on a more frequent basis as his new General Practitioner, reports a moderate to major impact for psychotic symptoms. Dr. K. states that the impact of PTSD symptoms can vary from minimal to major depending on what stressors the appellant is facing. Dr. K. provides information on the duration of periodic restrictions to social functioning, describing the duration as "moderate to major". Dr. K. notes that PTSD symptoms through to depression can be a "real hindrance" to social functioning.

In the original medical reports, Dr. L. indicates significant deficits with language [expression], memory and emotional disturbance. These assessments corroborate the findings in the new reports. While other functions [Executive, for example] are not impacted in the MR and AR, or are assessed with conflicting information between or within the reports [Ability to communicate, Emotion, and Social Functioning], the panel gives more weight to the OT assessment and the other new reports because they are more detailed and comprehensive than the original PWD reports. The OT assessment, in particular, is very thorough, and employs a variety of assessment techniques including direct observation, cognitive tools and tests, and collateral information from the spouse, intake nurse, and Dr. K.

The evidence in the MR and AR, on the other hand, is from prescribed professionals who met the appellant for the first time; were reportedly in a rush to complete the forms; and did not provide consistent information on functional impacts. In addition to being more detailed and thorough, the new reports contain plausible explanations for the discrepancies between the original and new assessments. Dr. K. indicates that due to a cognitive impairment, the appellant was likely confused about the items in the AR and underestimated the severity of impacts on his cognitive and emotional functions.

In light of all of the admissible evidence, the panel finds that the ministry's determination that the appellant does not have a severe mental impairment is unreasonable. While some of the OT's findings indicate a moderate level of impairment, the assessment reaches the severe range of impairment in most areas of cognitive functioning [communication, executive functioning, and memory in particular] with an associated severe impact on social functioning [the appellant has no friends].

Moderate to major impacts are also reported for emotional functioning due to the appellant's depression and PTSD symptoms. The psychiatrist reports a major impact on emotion. In the original PWD application, Dr. L. indicates significant deficits with cognitive and emotional function due to emotional disturbance. Based on this analysis of the information in its entirety, the panel finds that the ministry's determination of no *severe mental impairment* under section 2(2) of the EAPWDA is not reasonably supported by the evidence.

Physical impairment

The ministry found that the appellant does not have a severe physical impairment. The ministry bases its conclusion on the assessments of functional skills in the MR [PWD APP. 2] and the AR. The ministry argues that the ability to walk 2 to 4 blocks unaided, and climb 5 or more steps unaided [as noted in the MR] is not indicative of a severe impairment of physical functioning.

The ministry argues the information in the MR for lifting and remaining seated [sticky note included with the report] was provided by the appellant rather than Dr. L. In any event, the ministry argues that the ability to lift 5 to 15 pounds and remain seated for 1 to 3 hours does not establish a severe impairment of physical functioning.

The ministry notes the contradiction between being able to walk and climb steps unaided and the information in the MR that indicates the appellant has noticeable ambulatory impairments and uses a cane and an orthotic to walk. The ministry argues that restrictions to employment, as noted in the MR, are not considered in determining eligibility for PWD designation. As with a mental impairment, employability/vocational restrictions are not included in the legislative criteria under section 2 of the EAPWDA.

The ministry argues that the information in the AR also does not establish a severe physical impairment. The appellant presents with left nerve palsy and weakness in his lower limb and uses an assistive device with walking indoors, walking outdoors, and climbing stairs. At the same time, the RN reports the appellant is independent with lifting, and with carrying/holding [while using assistive devices] and the appellant is independent with standing. The ministry notes there is no description in the AR of the assistive devices used for lifting and carrying; how much weight the appellant can lift is not described; and the RN does not explain the discrepancy between the MR and AR for walking ad climbing stairs ["unaided" versus use of assistive devices].

Based on the original PWD medical reports and submissions for the reconsideration, the panel finds that the ministry reasonably concluded there is insufficient evidence of a severe physical impairment. The appellant's ability to walk 2 to 4 blocks and climb 5 or more steps, etc. are on the moderate to high ends of the rating scales. The panel finds that the ministry's determination of no *severe physical impairment* under section 2(2) of the EAPWDA is reasonably supported by the evidence.

Additional evidence and panel's decision - physical impairment

As with a mental impairment, the appellant, the OT, and Dr. K. offer explanations for the discrepancies in the assessments of physical functions between the original PWD reports and the new assessments. The appellant maintains that the original assessments were rushed. In addition, he reports being confused about the questions on functional skills. For example, when asked how many blocks he could walk unaided, the appellant explains that he did not understand that "aided" includes an assistive device [his cane] as well as help from another person. The OT notes that the AR indicates no impact for many areas of functioning despite the appellant's detailed self-reports describing his functional limitations. The appellant argues that the panel should give the new assessments of his impairments greater weight.

The OT indicates that the appellant uses a cane at all times. He also uses a leg brace when walking outdoors. The appellant is therefore unable to walk or climb stairs "unaided" as stated in the MR. With the collateral information from the spouse, the OT initially concludes that the appellant needs continuous assistance with mobility inside and outside the home. The spouse indicates that due to severe morning stiffness, fatigue, and nerve/joint pain, it takes the appellant several hours to get out of bed and he suffers poor sleep due to pain. The spouse indicates the appellant can do DLA involving short/.light activities only.

Later on in the assessment, the OT indicates the appellant needs periodic assistance with all of the physical functions listed in the PWD forms: Walking indoors, Walking outdoors, Climbing stairs, Standing, Lifting, and Carrying/holding, The appellant relies on a cane for all of these functions and also holds onto the counter or other structures. The OT notes that the appellant's: ability to lift is weight/height dependent. There is no explanation for the discrepancy in the OT's assessments within her report [continuous assistance with walking versus periodic assistance with walking and all physical functional skills].

The OT does not indicate how far the appellant can walk or how much weight he can lift. In the original assessments, the appellant is able to walk 2 to 4 blocks, climb 5 or more steps, lift 5 to 15 pounds, and remain seated for 1 to 3 hours. The OT confirms that the appellant uses an assistive device for all of these activities. The OT assessment indicates the appellant needs a day or more of recovery time if he overdoes his activities. The assessment does not describe how much activity or which activities result in the appellant "overdoing it."

Dr. K. indicates the appellant is restricted with walking and lifting due to his severe physical injuries. Dr. K. reports that the appellant's left leg, foot, and back problems cause "significant movement limitations" and "restrictions to duration of lifting." The appellant needs a cane to walk and while he can lift 5 to 15 pounds depending on his pain levels, he "should not do prolonged lifting of much weight." To keep pain levels from increasing, Dr. K. recommends lifting of less than 5 pounds.

Dr. K. reports that the appellant is limited in the amount of time he can be on his feet or remain seated ["nerve and joint pain occurs in a short enough time and requires him to lay down"]. Tasks involving "elongated walking" take the appellant "much longer than average." Sitting "too long" causes back and hip pain. The appellant takes "much longer" to complete daily tasks and requires continuous help from his wife throughout the day. Dr. K. reports that the appellant suffers pain if he overdoes his activities. The new assessment by Dr. K. does not indicate the length of time the appellant can stand or sit, what distance he can walk, how many stairs he can climb; how much longer it takes the appellant to walk places; or how much activity he can withstand before he experiences pain and needs to lie down.

Considering all of the admissible evidence, there are still inconsistencies within the new assessments as well as a lack of information on distance, weight, and duration for specified functional skills. The panel finds that the ministry reasonably concluded that the information provided does not establish a severe physical impairment. The panel finds that the ministry's determination of no severe physical impairment under section 2(2) of the EAPWDA is reasonably supported by the evidence.

Restrictions in the ability to perform DLA

Subsection 2(2)(b)(i) of the EAPWDA requires the ministry to be satisfied that, in the opinion of a prescribed professional, a severe impairment directly and significantly restricts a person's ability to perform DLA either continuously, or periodically for extended periods. In this case, the prescribed professionals are Dr. L. who filled out the MR, the RN who completed the AR., and Dr. K. who provided information for the reconsideration. The term "directly" means there must be a causal link between the severe impairment and the restriction to DLA. The direct restriction must also be significant.

Finally, there is a component related to time or duration: the direct and significant restriction may be either continuous or periodic. If periodic, the restriction must be for extended periods. Inherently, an analysis of periodic restrictions must also include how frequently the activity is restricted. All other things being equal, a restriction that arises once a year is less likely to be significant than one that 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 on the duration and frequency of the restriction in order to be satisfied that this criterion is met.

DLA are defined in section 2(1) of the EAPWDR and are also listed in the MR, with additional details in the AR. Therefore, a medical practitioner completing these forms has the opportunity to indicate which, if any, DLA are significantly restricted by the appellant's impairments either continuously or periodically for extended periods and to provide additional narrative. DLA, as defined in the legislation, does not include the ability to work.

The ministry argues there is not enough evidence from the prescribed professionals to confirm that DLA are significantly restricted either continuously, or periodically for extended periods. In the MR, the appellant is independent with most DLA. Dr. L. indicates the appellant is periodically restricted with *Shopping* but does not describe the degree of the restriction, other than "fluctuating". Dr. K. does not state what help is required. Dr. L. indicates the appellant has not been prescribed any medications or treatments that interfere with his ability to perform DLA.

In the AR, the RN notes the appellant is at an increased risk for falls due to his fused ankle but is independent, though "very delayed", with some activities. DLA require "great assistance" from his wife and his mobility aids. As noted by the ministry, the RN does not describe how long it takes the appellant to perform his DLA.

The appellant is described as independent with some areas of *Personal Care* but uses an assistive device [cane or chair] for most of the listed activities. The appellant is independent with most areas of *Shopping*, all areas of *Pay rent and bills*, and *Medications*, and most areas of *Social Functioning*. The appellant uses an assistive device [cane] for all areas of *Transportation*. The appellant requires continuous assistance with both areas of *Basic Housekeeping* [his wife does the laundry and housekeeping], two areas of *Shopping* [his wife always shops with him, and carries heavier items] and all areas of *Meals* [his wife does all/majority of listed activities]. The appellant requires periodic assistance with one area of *Social Functioning* [his wife is his only support in securing assistance from others].

The AR indicates the appellant is continuously restricted with all activities for two DLA [*Basic housekeeping and Meals*], and with two shopping activities, and uses an assistive device for many physical activities. The ministry notes that the restrictions in the AR are inconsistent with the information in the MR where Dr. L. indicates no restrictions with *Personal Care*, *Basic Housekeeping*, *Meals*, and *Transportation*. Dr. L. indicates the appellant needs only periodic assistance with *Daily Shopping*. In light of the inconsistencies in the information, which are not explained by the prescribed professionals, the panel finds that the ministry reasonably determined there is not enough information in the original PWD application to establish that DLA are significantly restricted as required by the legislation. Based on the original assessments by prescribed professionals, the panel finds that the ministry reasonably determined the criteria in section 2(2)(b)(i) of the EAPWDA are not met.

Additional evidence and panel's decision - Restrictions to DLA

The appellant again notes that the original assessors were pressed for time and he did not understand the questions on the forms. At the hearing, the appellant added that Dr. L. had never filled out a PWD application before and when going over the DLA on the form, she asked "leading questions" such as "you can do that, can't you?" The appellant argues that the assessments by the OT, the psychiatrist, and Dr. K. should be given more weight than the original PWD reports.

The OT re-rates most DLA as continuously restricted and indicates the appellant requires continuous assistance to perform the activity. Due to his mental impairment, DLA listed in the MR and AR [*Meal preparation*, *Daily shopping*, and *Use of transportation*] are directly and significantly restricted on a continuous basis. The appellant's deficits with memory, and executive function as well as his slow processing speed and delayed reaction time impact his ability to perform these DLA. The spouse provided collateral information about the appellant's restrictions with meal preparation [he can make pre-prepared meals only; he cannot meal plan without continuous assistance]. She also describes the appellant's restrictions with shopping [inordinate amount of time locate one item from the shopping list]; and use of transportation [the appellant needs the spouse to "backseat drive" to alert him to hazards and she therefore does most of the driving].

In the OT assessment, *Meal preparation* and *Shopping* are also continuously restricted by the appellant's physical impairments [due to pain, weakness, and fatigue]. *Personal care*, *Basic housework*, and *Mobility* inside and outside the home are continuously restricted by his physical limitations. The appellant relies on an assistive device for all physical DLA.

The OT reports that the appellant is periodically restricted in the management of finances, depending on the complexity of the task. To compensate for deficits with memory and handling currency, the appellant's bills are set up with automatic payments and he uses his debit card for purchases. The appellant is able to budget with his on-

line account but executes poorer choices in stores due to his cognitive impairment. The appellant is independent with managing medications but does not use prescription medicine.

The new evidence establishes that *Social Functioning* is also directly and significantly restricted by the appellant's cognitive and emotional impairments. According to the OT, the appellant is independent with social decisions and needs only periodic support in developing and maintaining relationships, but the appellant does not interact appropriately with others without continuous support from the other party. The collateral information from the spouse, which the OT accepts, indicates significant deficits with social functioning. The appellant has no friends due to his cognitive impairment. The appellant has difficulty reading social cues and he tends to isolate himself. All of the evidence indicates that the appellant's only significant relationship and source of support is his wife.

Dr. K. indicates that PTSD symptoms through to depression can be a "real hindrance" to social functioning and the periodic restrictions to social functioning [as reported in the MR] should be characterized as "moderate to major." The psychiatrist does not delve into the appellant's social functioning but indicates that the appellant always felt like "the odd one out' and the appellant's "odd beliefs" [communicating with animals "in their own code" and often seeing spirits] impact his communication and social functioning.

In the original PWD medical reports, Dr. L. assesses *Social Functioning* as periodically restricted. She does not describe how often the restriction occurs. The AR indicates the appellant is independent with most areas of *Social Functioning* but his wife is his only support and he has marginal functioning with his extended social networks.

The panel gives more weight to the OT assessment and the other new information for the following reasons: the new reports provide a more thorough assessment of DLA. The OT assessment in particular is detailed and comprehensive. The OT employs a variety of assessment techniques including direct observation, cognitive tools and tests, and collateral information from the spouse, intake nurse, and Dr. K. The evidence in the MR and AR, on the other hand, is from prescribed professionals who met the appellant once; were reportedly in a rush to complete the forms; and did not provide consistent information on restrictions to DLA.

In light of all of the admissible evidence, the panel finds that the ministry's determination that the appellant's DLA are not significantly restricted due to a severe impairment is unreasonable. The BC Supreme Court decision in *Hudson* v. *British Columbia Employment and Assistance Appeal Tribunal* [2009 BCSC 1461] states that there must be evidence from a prescribed professional indicating a direct and significant restriction on at least two DLA. Not all DLA need to be affected by the severe impairment.

The additional evidence from prescribed professionals indicates the appellant's severe impairment of cognitive and emotional functioning directly and significantly restricts the DLA of *Meals*, *Shopping*, and *Transportation* {continuously]. The new evidence also indicates significant and continuous restrictions with *Social Functioning* in the area of *relate to, communicate or interact with others effectively*.as set out in set out in section 2(1)(b) of the EAPWDR. While *Pay Rent and Bills*, and *Medications* are not significantly restricted, the appellant relies on accommodations for financial transactions [automatic bill payments, for example] and the evidence indicates that the only medication he takes is Advil for pain. Based on this analysis of the information in its entirety, the panel finds that the ministry's determination of no significant restrictions to DLA under section 2(2)(b)(i) of the EAPWDA is not reasonably supported by the evidence.

Help to perform DLA

Section 2(2)(b)(ii) of the EAPWDA requires that, *as a result of direct and significant restrictions in the ability to perform DLA*, a person requires help to perform those activities. 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 DLA.

The MR and AR indicate the appellant uses a number of aids to assist him with DLA, including a cane, leg brace, high shoe orthotic and bathing aids ["chair"]. The RN indicates the appellant needs grab bars for toileting. Both reports indicate the appellant's wife provides assistance with DLA.

The ministry's position is that because it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required. Under the legislation, confirmation of direct and significant restrictions to DLA is a precondition for needing help to perform DLA. As the panel found that the ministry reasonably determined that significant restrictions to DLA were not established by the information provided in the original medical reports, the panel also finds that the ministry reasonably concluded that the criteria for help under section 2(2)(b)(ii) of the EAPWDA are not met.

Additional evidence and panel's decision - Need for help

The OT indicates that due to the appellant's severe mental impairment, he needs continuous assistance from his spouse with *Meals*, *Shopping*, and *Transportation*, and with specific areas of *Social Functioning.* The evidence from the OT and other prescribed professionals indicates that these DLA are significantly restricted.

The spouse does the meal planning, cooking, and shopping due to the appellant's cognitive inefficiencies. The appellant needs continuous support with interacting appropriately with others as his memory problems and lengthy verbal explanations and repetition, go beyond reasonable accommodation by others. The OT reports that the appellant uses an assistive device for all physical DLA.

As noted earlier, the panel gives more weight to the OT's assessments, finding the evidence in her report to be more sufficient and more reliable. The OT provides a comprehensive assessment of the appellant's restrictions and need for help, with corroboration from various sources. By contrast, the record indicates that the MR and AR are based on rushed, one-time assessments by Dr. L. and the RN. In any event, all of the professionals indicate that the appellant requires help from his wife and from assistive devices to perform the majority of DLA.

The panel found that the ministry's decision on DLA is unreasonable based on the totality of evidence. Accordingly, the panel finds that the evidence, considered in its entirety, makes the ministry's determination on help unreasonable. The evidence indicates that the criteria for significant help under section 2(2)(b)(ii) of the EAPWDA are met.

Conclusion

The panel finds that the ministry's reconsideration decision, which determined the appellant was not eligible for PWD designation, is not reasonably supported by the evidence. The panel rescinds the decision. The appellant is successful on 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	
Margaret Koren	
SIGNATURE OF CHAIR	DATE (YEAR/MONTH/DAY) 2018-10-10

PRINT NAME	
Stephanie Korour	
SIGNATURE OF MEMBER	DATE (YEAR/MONTH/DAY) 2018-10-10
PRINT NAME	
Susan Mackey	
SIGNATURE OF MEMBER	DATE (YEAR/MONTH/DAY) 2018-10-10