PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the ministry) reconsideration decision dated September 24, 2018 which found that the appellant did not meet three of the five statutory requirements of Section 2 of the *Employment and Assistance for Persons with Disabilities Act* for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement and that his impairment is likely to continue for at least two years. However, the ministry was not satisfied the evidence establishes that:

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

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 before the ministry at the time of the reconsideration decision included the appellant's Persons With Disabilities (PWD) Application comprised of the appellant's information and self-report dated April 5, 2018, a medical report (MR) dated April 16, 2018 completed by a General Practitioner (GP) who had known the appellant for 4 months and had met with him 2 to 10 times in the past year, and an assessor report (AR) dated May 22, 2018 completed by a Registered Nurse (RN) who had known the appellant 8 months.

The evidence also included the following documents:

1) First page of a 2-page letter dated February 8, 2009 from a hospital in another province;
2) Letter dated April 16, 2013from a physician specializing in Hepatology in another province;
3) Outpatient Report from another province dated February 4, 2014; and,
4) Request for Reconsideration dated September 10, 2018 with attached revised MR and a Medical Report from another province dated November 18, 2011.

Diagnoses

In the MR, the GP diagnosed the appellant with chronic pancreatitis, with an onset in June of 2008. The GP did not diagnose a medical condition within the mental disorders category in the diagnoses section of the MR. When asked in the AR to describe the mental or physical impairments that impact the appellant's ability to manage daily living activities (DLA), the RN wrote: "chronic abdominal pain- flare-ups 2 to 3 times per week where he can't get out of bed, lasting 6 hours- unpredictable, osteoarthritis- hands, knees and right hip, both shoulders, restricts movement and causes pain- reactional depression due to lifestyle changes and limited time."

Physical Impairment

In the MR, the GP reported:

- With respect to the appellant's health history, the appellant has "chronic abdominal pain secondary to pancreatitis" and the appellant "states excacerbative (sic) exacerbation 1 to 2 times per week and unable to get out of bed."
- The appellant does not require an aid for his impairment.
- In terms of functional skills, the appellant can walk 2 to 4 blocks unaided on a flat surface, climb 2 to 5 steps unaided, lift 2 to 7 kg. (5 to 15 lbs.) and has no limitation with remaining seated. The GP added that the appellant "states can't walk for long distance due to chronic lower back and leg pain" and he is "easily fatigued." The GP also wrote that the appellant "states very weak upper body strength and can lift maximum of 10 lbs." and he "uses cane or ski poles to mobilize."
- The appellant is not restricted with mobility inside the home and is continuously restricted with mobility outside the home. There was no comment provided by the GP regarding the degree of restriction.
- For additional comments, the GP added: "intermittent unpredictable severe abdominal pain secondary to chronic pancreatitis. Multiple hospitalizations. Multiple modalities attempted to manage pain with vary (sic) degrees of success. Above condition leads to weight loss, fatigue and pain making him incapacitated during flare ups."

In the revised MR, the GP reported:

- The appellant is also diagnosed with liver cirrhosis, with no date of onset provided.
- The appellant is continuously restricted with mobility outside the home and the degree of restriction is moderate.

In the AR, the RN indicated:

- In the AR, the appellant is assessed as independent with standing. The appellant is independent and takes significantly longer than typical with climbing stairs. The appellant requires periodic assistance, uses an assistive device, and takes significantly longer than typical for walking indoors and walking outdoors. The appellant requires periodic assistance and takes significantly longer than typical with lifting and carrying and holding. The RN wrote that the appellant "Occasionally has to use a walking stick or cane, also has to hold onto wife when mobilizing at home due to muscle weakness and risk to fall, this occurs about 4 times per week. Always has to have support when walking outside- states he can only walk comfortably for a block- has numbness and tingling in feet from diabetic neuropathy- can only walk 10 steps before he has to rest, always uses handrails- if handrail not available, needs assistance/support from another person."
- For additional comments, the RN added that the appellant can only stand for 10 minutes unsupported and then needs to sit due to back and knee pain. For lifting 10 lbs., the appellant's shoulders hurt, and this also increases abdominal pain. He can only carry it for 30 feet- anything heavier, or needs to be carried farther, he gets help- needs help several times a week.
- In the section of the AR relating to assistance provided, the RN identified a cane and bathing aids (note: "bath bars to prevent him from falling") are assistive devices routinely used by the appellant, and wrote that he also uses hearing aids.

The Medical Report from another province dated November 18, 2011 indicated that:

- The appellant had been diagnosed with a primary medical condition of chronic pain associated with chronic pancreatititis with an onset in 2006, secondary medical condition of insulin dependent diabetes poorly controlled with an onset of 2007, and a tertiary medical condition of labile hypertension with an onset in 2006.
- It was unknown how far the appellant could walk unaided, how many stairs he could climb unaided, what his limitations were with lifting, or how long he could remain seated, the degree of impairment was indicated as severe. The comment indicated that the appellant "is frequently incapacitated by pain and fatigue. He has had several emergency room visits due to this. He is unable to do extended periods of physical activity."
- Additional comments indicated that the appellant became severely ill in 2008 and has been unable to maintain any type of meaningful work. The appellant is not gainfully employable and will never be into the future.

In the letter dated April 16, 2013, a physician specializing in Hepatology in another province indicated:

- The appellant's past medical history is significant for hypertension, hyperlipidemia, diabetes and pancreatic insufficiency.
- The appellant stated that he was feeling better, although he still has significant abdominal pain and continues to take narcotics for his abdominal pain.

In the Outpatient Report from another province dated February 4, 2014 the diagnoses of chronic abdominal pain, secondary to gallstone pancreatitis with neuropathic component, fatty liver/cirrhosis, and abdominal wall pain were confirmed.

In his self-report, the appellant wrote:

- His disability includes chronic pancreatitis, liver cirrhosis, severe osteoarthritis (OA) in his hands, shoulders, hips, and knees, diabetic neuropathy, peripheral (feet), recurring kidney stones, and loss of hearing in his left ear.
- He suffers from chronic abdominal pain from chronic pancreatitis and liver cirrhosis and 1 to 2 times a week the pain is so severe he is unable to get out of bed.
- Occasionally he has to go to the hospital for fluid replacement and intravenous medication. He has suffered severe weight loss.
- He suffers from chronic pain, weakness and stiffness in his hands, shoulders, hips and knees from OA.
- He suffers from tingling numbness in his feet, from the balls of his feet up into his toes.
- All of his disabilities affect his mobility. He has fallen several times due to pain and weakness in his knees and they have given out. He frequently holds on to another person for support when mobilizing inside and outside the home due to loss of balance. He uses walking sticks when walking outside on his own. He is incapable of walking more than 2 blocks due to pain and weakness.
- He requires assistance when using stairs.
- He is unable to lift more than 10 lbs. due to abdominal pain.
- He has hand rails in the shower for support.

Mental Impairment

In the MR, the GP reported:

- There are no difficulties with communication.
- There is a significant deficit with cognitive and emotional function in the area of emotional disturbance, described by the GP as “low mood secondary to chronic pain.”
- There is no indication of a restriction in the area of social functioning.

In the revised MR, the GP reported:

- There was no addition of a medical condition within the mental disorders category in the diagnoses section of the MR.
- The appellant is restricted in his social functioning, and the GP wrote that the “patient states limited due to pain.” There was no indication whether the restriction to social functioning is continuous or periodic.

In the AR, the RN reported:

- The appellant has a good or satisfactory ability to communicate in all areas, specifically speaking, reading, writing and hearing. The RN wrote that the appellant “can only hold onto a pen for about 5 minutes due to muscle cramping and pain- arthritic fingers- unable to use phone or keyboard for any more than 5 minutes as well for same reason- has some hearing loss- exposure to loud noises for 18 years- has had hearing tested- recommended aids.”
- With respect to daily impacts to the appellant’s cognitive and emotional functioning, the GP indicated that there are major impacts to the areas of consciousness (especially drowsy, confusion), emotion (especially anxiety, depression), attention/concentration, executive, memory, and motivation with moderate impacts in bodily functions (particularly eating problems, sleep disturbance), and minimal impacts in language and other neuropsychological problems.

- For additional comments, the RN added that the appellant's "appetite is poor- no interest in eating- weight loss of over 200 lbs. in past 9 years- eating leads to increased abdominal pain." The appellant "only sleeps 2 hours at a time- wakes for 2 to 3 hours before he can resettle but will sleep for another 2 hours- maximum sleep 5 to 6 hours per night- states falling asleep is difficult due to abdominal pain- states that he is always tired- no energy and naps at least once and often twice a day.
- The RN also added that for confusion, the appellant has "difficulty finding words to express self in conversation- knows what he wants to say but can't verbalize- gets angry and frustrated- states that he thinks he has cognitive deficits due to chronic prescribed opioids for over 10 years."
- Regarding "reactional depression," the RN wrote that the appellant is "tired of being ill and in pain all the time- used to be [active exerciser]- can't participate in sports- walking-hiking- working used to be [in the transportation field] – states that the depression causes him to want to stay inside- procrastinates- no interest in anything- wife will encourage him." Regarding the anxiety, the RN wrote that the appellant has "stress daily- gets worked up over situations that he can't control- causes vomiting- has anxiety daily."
- Regarding attention/concentration, the RN wrote that "short term memory poor- can't recall what he has done the day before- forgets where he puts things- can only focus for maybe 30 minutes- conversation is difficult- wife gives him written instruction to complete a task- needs notes all the time- thinks that long-term opiod use has affected cognitive function- current medications also affect memory." Also the appellant is "unable to read to learn- has to have repetitive visual learning but states 'no point to that.'"
- For motivation, the RN wrote that this is "poor due to chronic pain- decreased range of motion- from arthritic reactional depression- 'no get up and go'- difficulty moving fingers- wife makes a list of chores for him to do daily but he will only work at it for 10 to 15 minutes- often doesn't get out of bed due to abdominal pain."
- Regarding language, the appellant "can't always find words to express self." The RN also referred to "learning disabilities" and wrote that the appellant has "dyslexia- left handed things have always been a bit more difficult and he has to work harder. States he is getting more and more frustrated with self and situations- states getting more verbally aggressive- won't put self in dangerous situation."
- The appellant is independent with areas of social functioning, specifically with making appropriate social decisions, interacting appropriately with others, and securing assistance from others. The appellant requires periodic support/supervision with developing and maintaining relationships (note: "limited social activity- has not made friends since moving to [his community]- has no interest- is an introvert") and with dealing appropriately with unexpected demands (note: "creates anxiety- increases abdominal pain- has difficulty making changes due to unpredictable lethargy and fatigue").
- The appellant has good functioning in his immediate social network (note: his family/children are in the area) and marginal functioning in his extended social networks (note: "rarely goes out socially- has daily pain- increased anxiety").
- Asked to describe the support/supervision required to help maintain the appellant in the community, the RN left this section incomplete.

In his self-report, the appellant wrote:

- He suffers from depression and anxiety.
- He does not socialize and has few friends.
- His memory and concentration are poor.
- He has difficulty focusing. His wife provides written instructions to assist him in
- Completing tasks.
- Periodically he feels confused and he forgets or is unable to recall words when in conversation.

Daily Living Activities (DLA)

In the MR, the GP reported:

- The appellant has not been prescribed any medications and/or treatments that interfere with his ability to perform DLA.
- The appellant is not restricted with mobility inside the home and is continuously restricted with mobility outside the home.
- The appellant is not restricted in the remaining list DLA, specifically: personal self care, meal preparation, management of medications, basic housework, daily shopping, use of transportation, and management of finances.
- When asked to describe the assistance that the appellant requires with DLA, the GP left this section incomplete.

In the revised MR, the GP reported:

- The appellant is periodically restricted with the DLA of basic housework and the DLA of daily shopping. Regarding an explanation of "periodic," the GP wrote that "wife assists when patient unable."
- The degree of restriction is described by the GP as "moderate."
- When asked to describe the assistance that the appellant requires with DLA, the GP added that the appellant "has assistance from wife and use of cane or ski poles to mobilize."

In the AR, the RN reported:

- The appellant requires periodic assistance and also uses an assistive device and takes significantly longer than typical with walking indoors and walking outdoors. The RN explained that the appellant "occasionally has to use a walking stick or cane, also has to hold onto wife when mobilizing at home due to muscle weakness and risk to fall, this occurs about 4 times per week. Always has to have support when walking outside- states he can walk comfortably for a block- has numbness and tingling in feet from diabetic neuropathy."
- The appellant is independent with all tasks of several of the listed DLA, specifically: the personal care DLA (dressing, grooming, toileting, feeding self, regulating diet, transfers in/out of bed, and transfers on/off chair), the pay rent and bills DLA (including banking and budgeting), and the medications DLA (filling/refilling prescriptions, taking as directed, and safe handling and storage). The RN wrote that the appellant "does all [banking, budgeting, pay rent and bills] online but only for 5 to 10 minutes at a time" and he "has medication in daily dispenser so he remembers to take them."
- For the basic housekeeping DLA, the appellant requires periodic assistance and takes significantly longer than typical with the tasks of laundry and basic housekeeping. The RN explained that the appellant "needs help with chores that require lifting- often unable

to do chores for more than 10 minutes- unable to do anything that requires bending due to increased abdominal pain with distortion and back. Wife does all outdoor chores- vacuuming- washing floors, walls, etc., client will do laundry and dishes."

- For the shopping DLA, the appellant is independent with the tasks of reading prices and labels, making appropriate choices, and paying for purchases. Regarding the tasks of going to and from stores and carrying purchases home, the appellant requires periodic assistance from another person. The RN explained that the appellant "usually goes shopping with wife or she does it. He has to lean on the shopping cart, can only stay in the store for about 30 minutes- needs help to pack groceries, etc. Home- states used to love shopping now it is most of a chore although he does like to 'get out'."
- Regarding the meals DLA, the appellant is independent with the tasks of meal planning and safe storage of food and requires periodic assistance from another person with the tasks of food preparation and cooking. The RN wrote that the appellant's "wife will help with food preparation or make his meals for him. Unable to stand to prepare foods- sits down after 5 minutes- difficulty cutting and peeling vegetables due to arthritic pain in hands. Unable to take pots/pans out of oven or lift heavy pots on stove."
- The appellant requires periodic assistance from another person and takes significantly longer than typical with the task of getting in and out of a vehicle as part of the transportation DLA. The other tasks (using public transit and using transit schedules and arranging transportation) are not assessed. The RN wrote: "takes him a while to get out of a car- up to a couple of minutes- states if he has been on a drive for more than one hour he needs help to get out due to hip pain."

Need for Help

- In the MR, the GP indicated that the appellant does not require an aid for his impairment. This response was not amended in the revised MR; however, the GP added the comment when asked to describe the assistance that the appellant requires with DLA that the appellant "has assistance from wife and use cane or ski poles to mobilize."
- In the AR, the RN reported that the appellant's family and friends help with his DLA. The RN commented "wife will arrange for friends (hers) to come over and help him out."
- In the section of the AR relating to assistance provided, the RN identified a cane and bathing aids (note: "bath bars to prevent him from falling") as assistive devices routinely used by the appellant to help compensate for his impairment. The RN added that the appellant also uses "hearing aids."

Additional information

In his Notice of Appeal dated October 5, 2018, the appellant expressed his disagreement with the ministry's reconsideration decision and wrote that he is disabled and prior to moving to B.C. he received benefits for severely handicapped people in another province for the past 7 years.

Prior to the hearing, the appellant provided the following additional documents:

1) Current Medication List prepared on October 12, 2018 and showing water pills, insulin, pain medication including for nerve pain, heartburn medication, inflammation medication, an antidepressant, and high blood pressure medication;
2) Letter dated October 22, 2018 in which a physician who is a specialist in internal medicine wrote:
    - The appellant has a history of advanced chronic liver disease (liver cirrhosis), diabetes mellitus, chronic pancreatitis and hypertension.
    - The appellant was recently admitted to hospital with gastrointestinal bleeding and

he required to have scopes to his stomach.
    - The appellant developed ascites and that was dealt with by abdominal paracentesis.
    - These conditions will make it very difficult for the appellant to do jobs requiring physical efforts. He will need to have some time to recover from his gastrointestinal bleeding and he would not be able to do any job; and,
3) Summary Points from the court decision in *Hudson v. Employment and Assistance Appeal Tribunal (EAAT)*, 2009 BCSC 1461.

At the hearing, the appellant's advocate stated:

- This appeal is being advanced not because the medical evidence is compelling, since they had poor success with the GP, but because the appellant has suffered an injustice.
- The appellant moved to B.C. to be close to his family for support as a result of his disability.
- The appellant has liver cirrhosis, diabetic neuropathy, and chronic pancreatitis. The liver has an impact on the level of body glucose which is related to diabetes. With a damaged pancreas, the appellant's body is unable to properly process the enzymes.
- The appellant's medical conditions were first diagnosed in 2008 and have been ongoing since then. The letter dated February 8, 2009 from a hospital in another province sets out his medical history.
- The appellant's disability has affected his mobility. His severe abdominal pain is unpredictable and he occasionally has to go to the hospital. The appellant is unable to attend to his DLA when he is incapacitated. The appellant's wife helps him periodically.
- The appellant is unable to stand/sit for long due to abdominal pain.
- The GP was not supportive, did not know how to complete the MR, and adamantly refused to change some of her responses. They will point out some of the inconsistencies.
- At first, the GP would only include the diagnoses of chronic pancreatitis. When the appellant returned to the GP, he requested that all of his medical diagnoses be included, especially since his medical history shows that the appellant is diabetic and insulin dependent. The GP agreed to add the diagnosis of liver cirrhosis but none of the appellant's other conditions, including recurring kidney stones, even though the appellant had major surgery in the summer due to an obstruction from a kidney stone. The GP also did not add OA or the depression/anxiety.
- The GP added that the appellant experiences exacerbations to his abdominal pain, but included that the "patient states" this to be the case.
- The GP had initially assessed the functional skills as being "unknown" and later agreed to add an assessment of functioning and some additional comments after being requested to do so. Doctors often say they 'do not know' as they seldom have an opportunity to observe the patient perform these activities and they must rely on information from the patient.
- At first, the GP reported that the appellant was not restricted in any of the listed DLA. She was willing to change the assessment regarding the appellant's mobility outside the home as continuously restricted.
- The GP added comments to the MR that confirmed that the appellant is incapacitated during flare-ups. The RN provided copious notes about the appellant's restrictions and wrote that these flare-ups occur 2 to 3 times per week where the appellant cannot get out of bed, and these last 6 hours and are unpredictable.
- The GP agreed to change the assessment of DLA and indicated that the DLA of basic housework and daily shopping are periodically restricted. For the degree of restriction, the GP indicated this was "moderate."

- In the reconsideration decision, the ministry found that the frequency, duration or nature of the flare-ups were not reported as the GP wrote that the "patient states," and this is indicative of a self-report by the appellant rather than the medical opinion of the GP.
- In making the decision, the ministry has applied additional criteria regarding the frequency and duration of exacerbations that is not in the legislation. Section 2 of the EAPWDA prescribes no requirement for calculation of the frequency of occurrence and, therefore, the ministry has added criteria that are not in the legislation. The ministry has engaged in illegal fettering of the ministry discretion.
- As a result of the nature of the symptoms, it is reasonable that the medical professionals would not be able to calculate the exact frequency or duration. For example, the doctor does not go out and walk a block with the patient or watch his functioning.
- With stomach pain, the doctor has to believe that it is so severe that the appellant cannot get out of bed when he says this is the case.
- The GP wrote in the additional comments that the severe abdominal pain is "intermittent" and "unpredictable" but also that there have been "multiple" hospitalizations and modalities attempted to manage his pain.
- If the appellant is "incapacitated" during flare-ups, it is safe to say that he cannot do any DLA.
- The appellant was recently hospitalized as a result of bloody bowel movements and the October 22, 2018 letter confirms the diagnoses.
- The appellant has suffered an injustice through the response by the GP and the system.

At the hearing, the appellant stated:

- He has a build-up of fluids in his abdomen as a result of problems with his liver. About once a month he has to go in to have this drained. This time, something, "like a pimple", "exploded" in his stomach and he was frightened when it caused bleeding.
- He had to have four transfusions after that.
- His conditions are getting worse.
- There is also stress because his wife only makes $1,400 per month and he has no income. He is concerned about not being able to pay the bills. The doctor has said that stress is not good for his conditions.
- He experiences flare-ups about 1 to 2 times a week but it could be more and it could be less as it is unpredictable. The pain is controlled somewhat by medication.
- He feels depressed sometimes when he considers what people might think when he has to go to the hospital for pain medications, including hydromorphone. He has been trying to keep the pain under control by doing everything that the doctors recommend.
- While his wife is working he might throw a load of laundry on but he really does a minimal amount. He would like to be able to do more but he cannot.
- He was flabbergasted by the way the doctor treated him. The doctor in the other province diagnosed OA but would not document things in writing.

The ministry relied on the reconsideration decision, as summarized at the hearing. At the hearing, the ministry clarified that although the RN provided information in the AR about the appellant's experience of flare-ups, this information was not consistent with that of the GP or the appellant and more information was required.

Admissibility of Additional Information

The ministry did not object to the admissibility of the additional documents, specifically the medication list and letter dated October 22, 2018. The panel reviewed the documents and determined that the information supports information before the ministry at reconsideration as relating to medical conditions diagnosed or referred to in the PWD application, including the Reconsideration documents. The panel also admitted the oral testimony on the appellant's behalf as being in support of, and tending to corroborate, the impact from medical conditions referred to in the PWD application which was before the ministry at reconsideration. Therefore, the panel admitted this additional information in accordance with Section 22(4)(b) of the *Employment and Assistance Act.*

The Summary Points from the court decision in *Hudson v. EAAT*, as well as the argument in the Request for Reconsideration based on the *Interpretation Act*, were considered as part of the advocate's arguments on the appellant's behalf and will be addressed in Part F- Reasons for Panel Decision, below.

PART F – REASONS FOR PANEL DECISION

The issue on appeal is whether the ministry's reconsideration decision, which found that the appellant is not eligible for designation as a PWD, was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. The ministry found that the evidence does not establish that the appellant has a severe mental or physical impairment and also does not establish that his DLA are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods. Also, as a result of those restrictions, it could not be determined that the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

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

Persons with disabilities

2 (1) In this section:

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

"daily living activity" has the prescribed meaning;

"prescribed professional" has the prescribed meaning.

(2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act if the minister is satisfied that the person is in a prescribed class of persons or that the person has a severe mental or physical impairment that

(a) in the opinion of a medical practitioner or nurse practitioner is likely to continue for at least 2 years, and

(b) in the opinion of a prescribed professional

(i) directly and significantly restricts the person's ability to perform daily living activities either

(A) continuously, or

(B) periodically for extended periods, and

(ii) as a result of those restrictions, the person requires help to perform those activities.

(3) For the purposes of subsection (2),

(a) a person who has a severe mental impairment includes a person with a mental disorder, and

(b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires

(i) an assistive device,

(ii) the significant help or supervision of another person, or

(iii) the services of an assistance animal.

(4) The minister may rescind a designation under subsection (2).

The EAPWDR provides as follows:

Definitions for Act

2 (1) For the purposes of the Act and this regulation, **"daily living activities"** ,

(a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following activities:

(i) prepare own meals;

(ii) manage personal finances;

(iii) shop for personal needs;

(iv) use public or personal transportation facilities;

(v) perform housework to maintain the person's place of residence in acceptable sanitary condition;

(vi) move about indoors and outdoors;

(vii) perform personal hygiene and self care;

(viii) manage personal medication, and

(b) in relation to a person who has a severe mental impairment, includes the following activities:

(i) make decisions about personal activities, care or finances;

(ii) relate to, communicate or interact with others effectively.

(2) For the purposes of the Act, "**prescribed professional**" means a person who is

(a) authorized under an enactment to practise the profession of

(i) medical practitioner,

(ii) registered psychologist,

(iii) registered nurse or registered psychiatric nurse,

(iv) occupational therapist,

(v) physical therapist,

(vi) social worker,

(vii) chiropractor, or

(viii) nurse practitioner, or

(b) acting in the course of the person's employment as a school psychologist by

(i) an authority, as that term is defined in section 1 (1) of the Independent School Act, or

(ii) a board or a francophone education authority, as those terms are defined in section 1 (1) of the School Act,

if qualifications in psychology are a condition of such employment.

Part 1.1 — Persons with Disabilities

Alternative grounds for designation under section 2 of Act

2.1 The following classes of persons are prescribed for the purposes of section 2 (2) [persons with disabilities] of the Act:

(a) a person who is enrolled in Plan P (Palliative Care) under the Drug Plans Regulation, B.C. Reg. 73/2015;

(b) a person who has at any time been determined to be eligible to be the subject of payments made through the Ministry of Children and Family Development's At Home Program;

(c) a person who has at any time been determined by Community Living British Columbia to be eligible to receive community living support under the Community Living Authority Act;

(d) a person whose family has at any time been determined by Community Living British Columbia to be eligible to receive community living support under the Community Living Authority Act to assist that family in caring for the person;

(e) a person who is considered to be disabled under section 42 (2) of the Canada Pension Plan (Canada).

Severe Physical Impairment

In the reconsideration decision, the ministry was not satisfied that the information provided establishes a severe physical impairment. The ministry acknowledged that the GP diagnosed the appellant with chronic pancreatitis and liver cirrhosis. While the RN wrote that the appellant also has osteoarthritis that restricts movement and causes pain, the ministry reasonably considered that the GP did not establish this diagnosis. The appellant's advocate explained at the hearing that the GP was adamant not to add the additional diagnoses, including recurring kidney stones. In his self-report, the appellant wrote that he also has severe OA, diabetic neuropathy, recurring kidney stones, and loss of hearing in his left ear. Although the Medical Report from another province dated November 18, 2011 confirmed a diagnosis of insulin dependent diabetes poorly controlled with an onset of 2007, and a tertiary medical condition of labile hypertension with an onset in 2006, as these diagnoses were not included in the MR, the relative "impairment" resulting from these conditions was not assessed by the GP and the ministry reasonably determined that the report, being 7 years old, does not provide insight into the appellant's current degree of functioning.

An "impairment" is a medical condition that results in restrictions to a person's ability to function independently or effectively or for a reasonable duration. The ministry reasonably concluded that a diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a severe impairment. The panel finds that the ministry reasonably required sufficient evidence to determine the nature of the impairment and the extent of its impact on daily functioning in order to assess the severity of the impairment.

The ministry reasonably considered the impacts of the appellant's diagnosed medical conditions on his daily functioning, beginning with the assessments provided in the MR and the AR. The ministry considered the GP's comments that the appellant has "chronic abdominal pain secondary to pancreatitis" and the "patient states excacerbative (sic) exacerbation 1 to 2 times per week and unable to get out of bed." The ministry reasonably considered that the use of the

term “patient states” suggests that the statement is based on the appellant’s self-report rather than the medical assessment of the GP. As the advocate argued at the hearing, doctors must rely on the self-report of the patient for stomach pain; however, it is reasonable to conclude that the intentional use of the term “patient states” by the GP indicates an unwillingness to endorse the appellant’s evidence regarding frequency of exacerbations. For additional comments, the GP added the appellant’s severe abdominal pain secondary to chronic pancreatitis is “intermittent” and “unpredictable.” The GP indicated that the exacerbations of his chronic pancreatitis...leads to weight loss, fatigue and pain making him incapacitated during flare ups,” without further explanation by the GP of how often and how long these periods continue.

In his self report, the appellant wrote that he suffers from chronic abdominal pain from chronic pancreatitis and liver cirrhosis and 1 to 2 times a week the pain is so severe he is unable to get out of bed. At the hearing, the appellant explained that he experiences flare-ups about 1 to 2 times a week but it could be more and it could be less; that this pain is unpredictable. The appellant stated that the pain is controlled somewhat by medication. In terms of frequency of the exacerbations, the RN wrote in the AR: “chronic abdominal pain- flare-ups 2 to 3 times per week where he can’t get out of bed, lasting 6 hours- unpredictable, osteoarthritis- hands, knees and right hip, both shoulders, restricts movement and causes pain” and the ministry reasonably placed less weight on the evidence of the RN as the evidence included an assessment of the impacts from OA, which medical condition had not been diagnosed by the GP.

The ministry also reviewed the GP’s assessment in the MR of the appellant’s functional skills and considered that the appellant is able to walk 2 to 4 blocks unaided on a flat surface, climb 2 to 5 steps unaided, lift 5 to 15 lbs. and he has no limitation remaining seated. While the GP added the comment that the appellant uses a cane or ski poles to mobilize, the GP did not amend the assessment to indicate that the appellant requires an aid for his impairment. In the revised MR, the GP indicated that the appellant is continuously restricted with mobility outside the home and the degree of restriction is “moderate.”

The advocate argued that the ministry has applied additional criteria regarding the frequency and duration of exacerbations that is not in Section 2 of the EAPWDA and is engaging in illegal fettering of the ministry discretion. However, the panel finds that the ministry reasonably determined that the appellant’s physical functioning as described by the GP is in the moderate range and in order to be satisfied that the impairment is “severe,” the ministry reasonably considered that the evidence of the length of periods of time for which the appellant’s functioning is reduced, and in which areas functioning is impacted, must be compelling. The advocate argued at the hearing that the appellant suffered an injustice as a result of the GP’s response and from the system and that the EAPWD legislation must be interpreted with a benevolent purpose in mind, according to the binding court decision in Hudson v. EAAT.

For the ministry to be “satisfied,” the panel considers it reasonable for the ministry to expect that the information provided by the medical practitioner and prescribed professional presents a comprehensive overview of the nature and extent of the impacts of the medical conditions on daily functioning, including by providing the explanations, descriptions or examples in the spaces provided in the MR and in the AR forms.

In the AR, the appellant is assessed by the RN as independent with standing, independent and takes significantly longer with climbing stairs, and requires periodic assistance, uses an assistive device, and takes significantly longer for walking indoors and walking outdoors. The RN wrote that the appellant can only stand for 10 minutes unsupported and then needs to sit due to back and knee pain, although back and knee pain do not clearly relate to the conditions diagnosed by the GP. The RN wrote that the appellant "occasionally" has to use a walking stick or cane, also wrote that the appellant "always" has to have support when walking outside and he can "only walk comfortably for a block." The ministry pointed out that the evidence from the RN is not clear as the GP reported that the appellant can walk 2 to 4 blocks unaided and this assessment was not amended by the GP when given an opportunity to do so in the revised MR.

The RN indicated that the appellant "also has to hold onto wife when mobilizing at home due to muscle weakness and risk to fall, this occurs about 4 times per week," and the ministry reasonably considered that it is not clear whether this relates to periods of flare-ups of abdominal pain, or to a medical condition not diagnosed by the MR, as previously discussed. The evidence is also inconsistent with that of the GP, who reported in the revised MR that the appellant is not restricted with his mobility inside the home. The panel finds that the ministry also reasonably considered that handrails on the stairs do not fall within the definition of an "assistive device" which, in Section 2(1) of the EAPWDA is defined to mean "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."

The RN assessed the appellant as requiring periodic assistance and taking significantly longer than typical with lifting and carrying and holding. While the RN indicated that the appellant's "shoulders hurt" and there is an increase to his abdominal pain, the RN indicated that he can lift up to 10 lbs and he would need help for "anything heavier, or needs to be carried farther [than 30 feet]." The ministry reasonably considered that lifting up to 10 lbs. is in the moderate range of functional skills, allowing for the lifting of a range of items to meet his daily requirements.

Given the GP's assessment of independent functional skills in the moderate range, with an absence of information to clarify the degree of reduction in functioning and how often and for how long the periods of exacerbations occur from those medical conditions diagnosed by the GP, the panel finds that the ministry reasonably determined that there is not sufficient evidence to establish that the appellant has a severe physical impairment under Section 2(2) of the EAPWDA.

Severe Mental Impairment

In the reconsideration decision, the ministry was not satisfied that the information provided was sufficient evidence of a severe mental impairment. At the hearing, the advocate argued that the prescription for anti-depressants, as set out in the October 12, 2018 Medication List, demonstrates that the appellant has a mental health condition for which he is being treated. The ministry wrote that the GP did not diagnose a mental health condition in the MR, and reasonably considered that, therefore, the GP did not confirm that the "impairment" from this condition is likely to continue for two years, as required by Section 2(2)(a) of the EAPWDA.

The ministry went on to consider that the GP reported that the appellant has one significant deficit with cognitive and emotional functioning in the area of emotional disturbance, described by the GP as "low mood secondary to chronic pain." The ministry considered that the RN reported major impacts in several areas of cognitive and emotional functioning and pointed out that none of these areas, with the exception of emotional disturbance, were identified by the GP as areas of significant deficit.

In his self-report, the appellant wrote that he suffers from depression and anxiety, he does not socialize and has few friends, his memory and concentration are poor, has difficulty focusing, and, periodically, he feels confused and he forgets or is unable to recall words when in conversation. At the hearing, the appellant stated that there is also stress because he and his wife have limited income and he is concerned about not being able to pay the bills.

Considering the two "social functioning" DLA, as set out in Section 2(1)(b) of the EAPWDR, that are specific to mental impairment – make decisions about personal activities, care or finances (decision making), and relate to, communicate or interact with others effectively (relate effectively), the panel finds that the ministry reasonably concluded that there is insufficient evidence to establish that the appellant is significantly restricted in either. Regarding the 'decision making' DLA, the RN reported in the AR that the appellant independently manages all of the decision-making components of DLA, specifically: personal care (regulating diet), shopping (making appropriate choices and paying for purchases), meals (meal planning and safe storage of food), pay rent and bills (including budgeting), and medications (taking as directed and safe handling and storage). For the transportation DLA, there was no assessment of the appellant's ability to use transit schedules and arrange transportation. The RN also assessed the appellant as independent with making appropriate social decisions.

Regarding the DLA of 'relating effectively,' the ministry considered that the GP reported in the revised MR that the appellant's social functioning is restricted, with no indication of whether this is continuous or periodic, and the explanation by the GP is that the "patient states limited due to pain," makes it difficult for the ministry to conclude that this is part of the GP's assessment and not the appellant's self report. In the AR, the RN indicated that the appellant is independent with interacting appropriately with others and requires periodic support/supervision with developing and maintaining relationships. The RN noted that the appellant has limited social activities and has not made friends since moving to B.C., and the ministry reasonably considered that the RN does not provide further information to allow the ministry to determine that the support/supervision required for developing and maintaining relationships is required for extended periods of time. The GP reported that the appellant has no difficulties with communication, and the RN indicated that he has good or satisfactory functioning in all areas of communication.

Given the insufficient evidence of significant impacts to the appellant's cognitive, emotional, or social functioning, the panel finds that the ministry reasonably determined that a severe mental impairment was not established under Section 2(2) of the EAPWDA.

Restrictions in the ability to perform DLA

In the reconsideration decision, the ministry was not satisfied that the appellant has a severe physical or mental impairment that, in the opinion of the prescribed professional, directly and significantly restricts DLA either continuously or periodically for extended periods of time.

According to the legislation, Section 2(2)(b) of the EAPWDA, the ministry must assess direct and significant restrictions to DLA in consideration of the opinion of a prescribed professional, in this case the appellant's GP and the RN. This does not mean that the other evidence is not factored in as required to provide clarification of the professional evidence, but the legislative language makes it clear that a prescribed professional's evidence is fundamental to the ministry's determination as to whether it is "satisfied." The panel notes that both the MR and the AR forms direct the person completing those forms to explain in more detail the nature of any continuous restrictions and/or the nature, frequency and duration of any periodic restrictions to an applicant's ability to perform DLA. Therefore, the prescribed professional completing the assessments has the opportunity to indicate which, if any, DLA are significantly restricted by the appellant's impairments either continuously or periodically for extended periods.

The ministry wrote in the reconsideration decision that the GP reported in the MR that the appellant has not been prescribed any medication and/or treatments that interfere with his ability to perform DLA. With respect to the 'move about indoors and outdoors' DLA, as previously discussed, the GP reported that the appellant is not restricted with mobility inside the home and is continuously restricted with mobility outside the home to a moderate degree and he is capable of walking 2 to 4 blocks unaided, or without the use of an assistive device or the assistance of another person. The ministry considered the GP's further assessment in the revised MR that the appellant is periodically restricted to a moderate degree with the basic housekeeping DLA and the shopping DLA; however, the comments "wife assists when patient unable" and the appellant "has assistance from wife and use of cane or ski poles" does not provide sufficient information for the ministry to determine that this assistance is required for extended periods of time.

The ministry also reviewed the RN's assessment in the AR that the appellant is independent with all of the tasks of several of the listed DLA, specifically: the personal care DLA, the pay rent and bills DLA, and the medications DLA. The ministry reasonably considered that while the RN indicated the need for periodic assistance with some tasks of the meals DLA and the transportation DLA, the GP reported no restrictions in performing these DLA. Further, the RN's comments relating to the need for periodic assistance with the tasks of food preparation and cooking, specifically "difficulty cutting and peeling vegetables due to arthritic pain in hands," and the comments relating to the need for periodic assistance with the task of getting in and out of a vehicle, specifically "states if he has been on a drive for more than an hour he needs help to get out due to hip pain," relate a medical condition not diagnosed by the GP.

The RN indicated that the appellant requires periodic assistance from another person with the tasks of laundry and basic housekeeping, going to and from stores and carrying purchases

home when shopping, and the ministry reasonably considered that the comments "needs help with chores that require lifting" and "unable to do anything that requires bending" do not provide sufficient information o determine that the assistance with these tasks is required for extended periods of time, as required by Section 2(2)(b)(i)(B) of the EAPWDA.

The additional information provided in the letter dated October 22, 2018 from a physician who is a specialist in internal medicine confirmed the appellant's history of advanced chronic liver disease (liver cirrhosis), diabetes mellitus, chronic pancreatitis and hypertension and his recent admission to hospital due to ascites, dealt with by abdominal paracentesis. In terms of functioning, the physician did not address the appellant's ability to perform DLA and concluded that the appellant's medical conditions will make it very difficult for him to do jobs requiring physical efforts and that he would not be able to do any job until he has some time to recover from his gastrointestinal bleeding. As for the appellant's ability to work, the panel notes that employability is not a criterion in section 2(2) of the EAPWDA nor is it listed among the prescribed daily living activities in section 2 of the EAPWDR.

As previously discussed, the panel finds that the ministry reasonably concluded that there was insufficient evidence to establish that the appellant is significantly restricted in either of the two "social functioning" DLA specific to a mental impairment, as set out in Section 2(1)(b) of the EAPWDR.

Given the GP's assessment of the appellant's independence in performing most tasks of DLA, inconsistencies between the information from the GP and from the RN, and a lack of detail regarding the frequency of duration of periodic assistance required with some tasks, the panel finds that the ministry reasonably determined that the evidence is insufficient to show that the appellant's overall ability to perform his DLA is significantly restricted either continuously or periodically for extended periods, pursuant to Section 2(2)(b)(i) of the EAPWDA.

Help to perform DLA

In the reconsideration decision, the ministry held that, as it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required. Section 2(2)(b)(ii) of the EAPWDA requires that, as a result of being directly and significantly restricted in the ability to perform DLA either continuously or periodically for extended periods, a person must also require help to perform those activities. That is, the establishment of direct and significant restrictions under section 2(2)(b)(i) is a precondition of meeting the need for help criterion. Help is defined in subsection (3) as the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform a DLA.

The GP indicated in the MR and the revised MR that the appellant does not require an aid for his impairment and the added the comment that the appellant "has assistance from wife and use cane or ski poles to mobilize." In the AR, the RN reported that the appellant's family and friends help with his DLA and his "wife will arrange for friends (hers) to come over and help him out." The RN identified a cane and bathing aids, as well as hearing aids, as assistive devices used by the appellant to help compensate for his impairment.

As the panel found that the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established, the panel also finds that the ministry reasonably concluded that, under section 2(2)(b)(ii) of the EAPWDA, it cannot be determined that the appellant requires help to perform DLA.

Conclusion

The panel finds that the ministry's reconsideration decision, which determined that the appellant was not eligible for PWD designation pursuant to Section 2(2) of the EAPWDA, was reasonably supported by the evidence. The panel therefore confirms the ministry's decision. The appellant's appeal, therefore, is not successful.

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	
	DATE (YEAR/MONTH/DAY): 2018-08-14

PRINT NAME: Anil Aggarwal	
	DATE (YEAR/MONTH/DAY): 2018-08-14
PRINT NAME: Rob Nijjar	
SIGNATURE OF MEMBER	DATE (YEAR/MONTH/DAY): 2018-08-14