

**Part C – Decision Under Appeal**

The decision under appeal is the Ministry of Social Development and Poverty Reduction’s (“ministry”) Reconsideration Decision dated February 23, 2024, in which the ministry found the appellant was not eligible for designation as a Person with Disabilities (“PWD”) under section 2 of the *Employment and Assistance for Persons with Disabilities Act* (“Act”). The ministry found that the appellant met the age requirement and the requirement for the impairment to continue for at least two years (“duration”), but was not satisfied that:

- The appellant has a severe mental or physical impairment.
- The severe impairment, in the opinion of a prescribed professional, directly and significantly restricts the ability to perform daily living activities 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 daily living activities.

The ministry found that the appellant is not one of the prescribed classes of persons eligible for PWD designation on the alternative grounds set out in section 2.1 of the *Employment and Assistance for Persons with Disabilities Regulation* (“Regulation”). As there was no information or argument on this point, the panel considers it not to be at issue in this appeal.

**Part D – Relevant Legislation**

The ministry based the reconsideration decision on the following legislation:

*Employment and Assistance for Persons with Disabilities Act* - section 2

*Employment and Assistance for Persons with Disabilities Regulation* - sections 2 and 2.1

The panel also relied on:

*Employment and Assistance Act* - section 22(4)

*The full text is available in the Schedule after the decision.*

**Part E – Summary of Facts****Evidence Before the Ministry at Reconsideration**

The information the ministry had at the reconsideration included:

1. A Decision Record that said the PWD application was submitted on December 8, 2023, and denied by the ministry on January 16, 2024. The Denial Summary explained the criteria that were not met.

On February 8, 2024, the appellant submitted a Request for Reconsideration with a typed statement. On February 23, 2024, the ministry completed its review and found that the requirements for severe impairment, restrictions to daily living activities, and the need for help were still not met.

2. The PWD application with three parts:

The Applicant Information (“self-report”) dated December 9, 2021, with hand-written notes from the appellant.

A Medical Report dated October 21, 2023, signed by a neurologist who has known the appellant for 3 years, and saw him 2-10 times in the past 12 months, and

An Assessor Report dated April 18, 2022, completed by an occupational therapist who has known the appellant for 1.5 years and saw him 2-10 times in the past 12 months. They based the assessment on an office interview with the appellant.

*Summary of relevant evidence from the application*

**Diagnoses**

In Section B of the Medical Report, the neurologist said that the appellant has post-traumatic migraine [*illegible*], onset 2018. In Section C – Health History, the neurologist noted “improved headache” (occurring 2 days per week) with treatment that includes medication and Botox injections.

***Functional skills***

Self-report

The appellant listed symptoms including issues with his eyes, dizziness, headaches in his temples; tightness in his Achilles, hip, and chest, and vertigo during exercise. The appellant said that he is unable to do any heavy lifting, and he has difficulty attending school or work.

Medical Report

In Section E - Functional Skills, the appellant is able to walk 4+ blocks unaided on a flat surface and climb 5+ steps unaided. The appellant has no limitations with lifting or remaining seated. The neurologist checked "no" when asked if the appellant has difficulties with communication.

When asked if there are any significant deficits with cognitive and emotional function, the neurologist checked "yes," there are deficits with attention or sustained concentration (comment, "limited attention related to ongoing headaches plus pharmacotherapy").

No deficits were reported for the other 11 functions listed in the Medical Report:

- consciousness,
- executive,
- language,
- memory,
- perceptual psychomotor,
- psychotic symptoms,
- emotional disturbance,
- motivation,
- impulse control,
- motor activity; and
- other.

Assessor Report

In Section B-1, the occupational therapist said that post-concussion symptoms cause difficulty with cognitive functioning including attention and memory. The appellant experiences fatigue and is slower at processing information.

The occupational therapist described ongoing physical symptoms (neck, shoulders, back, hip, and legs - especially the left leg) affecting the appellant's activity tolerance and endurance.

The appellant's ability to communicate was rated "good" for speaking and hearing, and "satisfactory" for writing and reading (comment, "able to read but difficult with sustained reading").

In Section B-3 - Mobility and Physical Ability, the occupational therapist checked restrictions for one area: the appellant takes significantly longer than typical with lifting (comment, "difficulty with repetitive lifting due to pain").

The occupational therapist checked "independent" for the other 5 functions listed in the Assessor Report:

- walking indoors,
- walking outdoors,
- climbing stairs (comment, "uses handrails"),
- standing; and
- carrying and holding (comment, "able but with pain aggravation if heavy").

In section B-4, Cognitive and Emotional Functioning, the assessor is asked about the impact of a mental impairment on various functions. For the 14 areas listed, the occupational therapist check marked the following impacts:

- "moderate impact" for 7 areas: bodily functions, attention/concentration, memory, motivation, motor activity, language, and other emotional or mental functions.
- "minimal impact" for 3 areas: consciousness, emotion, and executive.

The occupational therapist indicated no "major impacts," and checked "no impact" for 4 functions:

- impulse control,
- insight and judgment,
- psychotic symptoms; and
- other neuro-psychological problems.

### ***Daily living activities***

The neurologist provided the following information:

#### Medical Report

In Section C-3, the neurologist checked "yes" the appellant has been prescribed medications or treatments that interfere with the ability to perform daily living activities. The appellant's medications "can slow cognition and be sedating."

In Section F, the neurologist checked “no” when asked if the impairment directly restricts the person’s ability to perform daily living activities.

Assessor Report

In Section B-1, the occupational therapist said that ongoing headaches, intermittent dizziness, and ongoing physical symptoms impact the appellant’s ability to manage daily living activities.

In Section C, the occupational therapist indicated the following restrictions for 3 of the 8 daily living activities listed in the Assessor Report. The appellant requires periodic assistance from another person with:

- **Basic Housekeeping - housework** (comment, “due to physical pain symptoms and post-concussion symptoms, requiring assistance from family with basic housekeeping at times”). The appellant was assessed as “independent” with laundry.
- **Shopping - making appropriate choices** (comment, “requires reminders at times due to forgetfulness”). The appellant was “independent” with 4 other areas of shopping:
  - going to and from stores,
  - reading prices and labels.
  - paying for purchases; and
  - carrying purchases home (comment, “as long as it is not overly heavy”).

The occupational therapist provided additional comments for the above daily living activities. The appellant is “unable to engage in an activity for prolonged periods due to increased pain and fatigue.” The appellant “experiences low mood which affects his motivation to engage in activities.”

The appellant requires periodic assistance with:

- **Meals - meal planning, food preparation, and cooking** (comment, “due to fatigue/headaches, assist by family”). The appellant is “independent” with safe storage of food.

The occupational therapist indicated that the appellant is “independent” for all areas of 5 daily living activities listed in the Assessor Report:

- **Personal Care:** the appellant is independent with dressing, grooming, bathing, toileting, feeding self, regulating diet, and transfers – bed and chair.
- **Pay Rent and Bills:** the appellant is independent with banking, budgeting, and paying rent and bills.

- Medications: the appellant is independent with filling/refilling prescriptions, taking as directed, and safe handling and storage (comment, “uses cell phone reminders” for taking as directed”).
- Transportation: the appellant is independent with getting in and out of a vehicle. The appellant “drives independently” but reports “difficulty with following Google maps especially with going new places at times.”
- Social functioning: the appellant is independent with appropriate social decisions, developing/maintaining relationships, interacting appropriately, dealing with unexpected demands, and securing assistance from others. The occupational therapist checked “marginal functioning” for both immediate and extended social networks (comments, “relationships affected due to [the appellant’s] fatigue, mood, and post-concussion symptoms, decreased interactions, little interaction with neighbourhood/acquaintances”). The spaces for comments on any safety issues or help required to maintain the appellant in the community were left blank.

At the end of the Assessor Report, the occupational therapist provided Additional Comments regarding the impact of the impairment on daily living activities:

- Ongoing pain and post-concussion symptoms affect the appellant’s stamina and ability to engage in activities of daily living, such as chores, courses, and social activities.
- The appellant requires frequent breaks during activities due to increased headaches, fatigues, and dizziness with sustained attention. For example, the appellant needs a “quick break” after approximately 30 minutes of conversing with others or reading. Without taking a break, the appellant “finds it harder to maintain attention/process further information.”
- The appellant requires “a longer time to process information” and he implements cognitive strategies to assist with memory difficulties.
- The appellant’s mood also affects his motivation to engage in activities. For example, “on days that he experiences low mood, thus decreased motivation, he has difficulty adhering to his set schedule. The appellant must plan ahead of time to manage his symptoms and fatigue.
- Due to cognitive difficulties, fatigue, and pain, the appellant is only able to take one course at a time and requires “longer time to complete and retain information.”

### ***Need for Help***

#### Medical Report

In Section C-4, the neurologist checked “no” when asked if the applicant requires any prostheses or aids for the impairment.

### Assessor Report

The occupational therapist checked that the appellant lives with family members who help him with daily living activities. No check marks were provided for Assistive Devices. The occupational therapist commented, "using cell phone reminders to assist with managing memory difficulties and reminders to take breaks due to ongoing fatigue/limited stamina."

The occupational therapist checked "no" the appellant does not have an assistance animal. They indicated that the appellant received occupational therapy from July 2020 – October 2021 to assist him with managing pain and post-concussion symptoms. The appellant was taught cognitive strategies to help him make plans and a study schedule for his course. The appellant was on an extended medical absence from school following a motor vehicle accident.

### **Request for Reconsideration**

In his typed submission for the reconsideration, the appellant said that he struggles with both mental and physical functioning and is impaired in his everyday living.

### **Additional evidence provided after the Reconsideration**

The appellant filed a Notice of Appeal, received by the Tribunal on February, 27, 2024. The appellant included a typed statement which the panel accepts as argument for the appeal. The Tribunal granted several adjournments prior to scheduling the hearing so that the appellant could submit additional medical information. The appellant submitted the following documents:

1. A vestibular physiotherapy report from a neuro-physiotherapist dated February 30, 2020. The report contains the following background information:
  - The appellant was first seen at the concussion clinic in 2019 following multiple concussions and head trauma dating back to his youth. He recovered relatively well (but not completely) until the most recent concussions: four between 2015 and 2019 which resulted from sports injuries, motor vehicle accidents and a violent incident in which the appellant was a victim.
  - In 2019, the appellant complained of whiplash injuries, dizziness, headaches, a spinning sensation, blood rushing in his head, sensitivity to light and sound, memory and concentration issues, sleep disturbance, issues with visual perception, and left ankle pain. At that time the symptoms were persistent throughout the day.
  - Oculomotor and movement assessments indicated both central and peripheral involvement with the eyes moving out of sync, gaze stability issues, and visual disturbances, with dizziness and headaches reproduced during the tests. The

appellant's "physical exertion abilities" were "significantly lowered following the concussion injuries." The appellant was provided with various education and exercise strategies to manage and treat his symptoms. The appellant was advised to walk and follow a light gym program.

- Retesting in January 2020 showed "immense improvement" in the appellant's vestibular rehabilitation. His eye movements were no longer jerky, and he was able to walk both forwards and backwards. However, the appellant continued to experience headaches and dizziness "throughout the day." The appellant's concussion symptoms were found to be aggravated by concentration, lights, sound, and physical exertion which he cannot avoid on a daily basis. The appellant was advised to continue with his vestibular rehabilitation at a lower intensity, with the goal of habituating to the dizziness he experiences.

**2.** A neurology clinic final report, dated March 17, 2015, describing a mild traumatic brain injury in 2014 with ongoing post-concussive symptoms which may take up to 2 years to resolve.

**3.** Eight letters from the neurologist (the same neurologist that filled out the Medical Report for the PWD application). The letters are addressed to the appellant's family doctor and are dated from September 3, 2020, to June 21, 2022 (based on the dates the appellant was seen at the clinic). The letters describe the progress the appellant made with treatment for post-traumatic migraine headaches and vertigo.

- The appellant received vestibular therapy, occupational therapy, and physical therapy for his symptoms as well as medication for ongoing headaches and sleep issues. The appellant was also given Botox injections. The appellant continued to experience "daily headaches" from 2019-2021, associated with dizziness, poor attention, limits on exertion, and difficulty performing regular activities.
- By June 2022, the headaches had improved to 1-2 times a week. In 2022, the appellant had ongoing difficulties with remembering numbers and he had difficulty concentrating due to fatigue. The appellant continued to take medications and receive Botox injections.
- In several of the letters, the neurologist noted that the appellant arrived either too early for his appointment (up to a week early) or he was 15 minutes late for the appointment. The neurologist said that the appellant had never arrived on time and "needs to come on time for appointments or I will not continue with his management."

**4.** A letter from a family doctor dated May 10, 2021, referring the appellant to the neurologist for headache (migraine). The family doctor said that the appellant was also being treated for depression. The appellant's medical history included a moderate



concussion, migraine headaches, and one episode of major depression.

### **New Assessor Report, July 2024**

5. In addition to the medical reports and letters summarized above, the appellant provided an Assessor Report dated July 15, 2024, completed by the appellant's new occupational therapist. The report said that the appellant saw the previous occupational therapist from July 2020 to October 2021. The new occupational therapist indicated meeting the appellant one time to complete the updated Assessor Report through an office interview.

The new Assessor Report contains the following information:

#### ***Functional skills*** (new Assessor Report)

- The appellant has a good ability to communicate through speaking and hearing. His ability to read and write are satisfactory (comment, "able to read and write, however, his ability decreased due to his injury in the past 2 years").
- The appellant is "independent" with walking indoors, walking outdoors, climbing stairs (comment, "uses handrails"), standing, and carrying/holding (comment, "experiences aggravated pain with heavy lifting"). The appellant takes significantly longer with lifting (comment, "difficulty lifting more than 20 pounds").

Regarding a mental impairment, the new Assessor Report indicates the following impacts:

- "moderate impact" for 6 areas: emotion, attention/concentration, memory, motivation, motor activity, and language.
- "minimal impact" for 3 areas: bodily functions, consciousness, and executive.

The occupational therapist indicated no "major impacts," and checked "no impact" for 4 functions:

- impulse control,
- insight and judgment,
- psychotic symptoms; and
- other neuro-psychological problems.

No check mark was provided for other emotional or mental problems. The occupational therapist said that the appellant completed a cognitive test which showed decreased scores for language and memory.

In the section for Additional Information at the end of the Assessor Report, the occupational therapist said that the appellant “continues to experience pain symptoms and post-concussion symptoms...that affect his cognitive ability and his endurance.” His test scores indicate “difficulty in word finding, and delayed recall.” The appellant had difficulty sitting for the assessment and had to re-position himself frequently.

***Daily living activities*** (new Assessor Report)

The occupational therapist indicated the following restrictions for 4 of the 8 daily living activities listed in the report. The appellant requires periodic assistance from another person with:

- **Basic Housekeeping - housework** (comment, “requires assistance due to pain”). The appellant was assessed as “independent” with laundry.
- **Shopping - making appropriate choices** (comment, “requires assistance for making list for groceries”). The appellant was independent with 4 other areas of shopping:
  - going to and from stores,
  - reading prices and labels.
  - paying for purchases; and
  - carrying purchases home (comment, “unable to carry heavy bags”).

The occupational therapist provided additional comments for the above daily living activities: the appellant “requires minimal assistance for housekeeping and carrying groceries.” The appellant “also experiences low mood and anxiety.”

The appellant requires periodic assistance with:

- **Meals - meal planning, food preparation, and cooking** (comment, “requires assistance from family”). The appellant is independent with safe storage of food.
- **Medications - filling/refilling prescriptions** (comment, “occasionally assisted by his family member”). The appellant is independent with taking medication as directed, and safe handling/storage.

The occupational therapist indicated that the appellant is “independent” for all areas of 4 daily living activities listed in the Assessor Report:

- **Personal Care:** the appellant is independent with dressing, grooming, bathing, toileting, feeding self, regulating diet, and transfers - bed and chair.
- **Pay Rent and Bills:** the appellant is independent with banking, budgeting, and paying rent and bills.

- Transportation: the appellant is independent with getting in and out of a vehicle. The appellant “is able to drive, however, he cannot drive more than 30 minutes due to his pain.”
- Social functioning: the appellant is independent with appropriate social decisions, developing/maintaining relationships, interacting appropriately, dealing with unexpected demands, and securing assistance from others. The occupational therapist checked “marginal functioning” for both immediate and extended social networks (comments, “mood affects his communication with his family members...does not socialize due to the pain and post concussion symptoms”). The spaces for comments on any safety issues or help required to maintain the appellant in the community were left blank.

### ***Need for Help*** (new Assessor Report)

The occupational therapist checked that the appellant lives with family members who help him with daily living activities. In the section for assistance using assistive devices, the occupational therapist checked “other” (comment, “grab bars”). The occupational therapist commented, “uses cell phone for managing appointments and takes frequent rest breaks.” The occupational therapist checked “no,” the appellant does not have an assistance animal.

### *Admissibility – additional medical information and new Assessor Report*

The ministry had no objections to admitting the documents as evidence. The panel finds that the documents provide detailed background information on physical and mental impairments, and updated information on daily living activities and the need for help. The panel admits all the documents under section 22(4) of the *Employment and Assistance Act* as evidence that is reasonably required for a full and fair disclosure of all matters related to the decision under appeal.

### ***Testimony at the hearing***

#### *Appellant*

The appellant summarized his self-report and added the following details:

- He was the victim of two assaults followed by back-to-back car accidents in the last couple of years.
- He has pain in his Achilles, hip, and spine, with sharp pains in his chest and lower back and eye pain as well. He suffers from headaches and confusion as well as

anxiety and depression. The impairment leaves him “unable to work or attend school normally.”

- He has tried to find solutions through an occupational therapist and kinesiologist. He has collected a lot of doctor’s notes over a long period of time.
- In response to questions, the appellant said he had a lawyer to help with the PWD process, but the lawyer passed away and a second lawyer retired. When asked what the lawyer did for him, the appellant said that they helped him understand the ministry’s decision.
- In response to further questions, the appellant said that he depends on his family “for cooking and to do basic things for [him].” He occasionally goes to the store, but he rarely makes food. The appellant explained that he stayed in bed yesterday because he had a headache all day and needed help from his family. When asked how often he gets headaches, the appellant said “2-3 times per week...Sometimes they get better, then in 3-4 weeks they get worse.” When the headaches are severe, he “has to lie in a dark room” because sunlight bothers him.
- He is still getting Botox injections, but he has an appointment next week to see if he should continue with these (if they are helping his symptoms).
- For recreation, he goes to a kinesiologist and “kicks a soccer ball around, plays 21, and goes for little walks.” His attention span is poor because he cannot sit for long periods to focus on course work. He needs to keep changing positions when sitting, due to lower back spasms.
- When asked why he arrived too early or late for appointments with the neurologist, the appellant explained that he got confused regarding the time.
- When asked if he could live on his own and do his own cooking/cleaning/shopping, the appellant said, “not sure.”
- When asked if he disagrees with anything in the new Assessor Report (July 2024), the appellant said that he agrees with the report.

#### *Admissibility - oral submissions*

The panel finds that the appellant’s statements add further detail about his medical history, symptoms, and current functioning. The panel finds the testimony admissible under section 22(4) of the *Employment and Assistance Act* as evidence that is reasonably required for a full and fair disclosure of all matters related to the decision under appeal.

#### *Ministry*

At the hearing the ministry summarized the reconsideration decision and commented on the additional evidence. The ministry said that it would not change the reconsideration decision based on the new evidence because the medical reports and letters are not

recent, and the new Assessor Report contains information similar to the original Medical and Assessor Reports. The panel accepts the ministry's statements as argument for the appeal. The panel will consider the arguments of both parties in Part F - Reasons.

**Part F – Reasons for Panel Decision**

The issue on appeal is whether the Reconsideration Decision that said the appellant is not eligible for PWD designation was reasonably supported by the evidence or was a reasonable application of the legislation in the circumstances of the appellant. The panel's role is to determine whether the ministry was reasonable in finding that the following eligibility criteria in section 2 of the Act were not met:

- the appellant has a severe mental or physical impairment.
- the severe impairment, in the opinion of a prescribed professional, directly and significantly restricts the ability to perform daily living activities 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 daily living activities.

**Analysis***PWD designation - generally*

The legislation provides the Minister with the discretion to designate someone as a Person with Disabilities if all the requirements are met. In the ministry's view, PWD designation is for persons who have significant difficulty performing regular self-care activities including social interaction and making decisions about personal activities, where a severe impairment is shown.

Some requirements must have an opinion from a professional, so it is reasonable to place significant weight on those opinions. The ministry found that two of the five requirements were met because the appellant is at least 18 years of age; and a doctor has said that the impairment is likely to continue for at least two years.

The application form includes a self-report, so it is appropriate to place significant weight on evidence from the appellant unless there is a legitimate reason not to do so. The panel reviewed the reasonableness of the ministry's determinations and exercise of discretion.

*Severe impairment*

"Severe" and "impairment" are not defined in the legislation. The ministry considers the extent of any impact on daily functioning as shown by limitations with or restrictions on physical abilities and/or mental functions. The panel finds that an assessment of severity based on physical and mental functioning including any restrictions, is a reasonable

interpretation of the legislation. A medical practitioner's description of a condition as "severe" is not determinative on its own. The ministry must make this determination considering the relevant evidence and legal principles.

### *Restrictions to Daily living activities*

A prescribed professional must provide an opinion that the applicant's impairment restricts the ability to perform daily living activities. The BC Supreme Court decision in *Hudson v. Employment and Assistance Appeal Tribunal* [2009 BCSC 1461] determined that at least two daily living activities must be restricted in a way that meets the requirements of the Act, and **not all activities need to be restricted.**

The restrictions to daily living activities must be significant and caused by the impairment. "Significant" means that not being able to do daily activities (without a lot of help or support) will have a large impact on the person's life.

The restrictions also must be continuous or periodic. Continuous means the activity is generally restricted all the time. A periodic restriction must be for extended periods, meaning frequent or for longer periods of time. For example, the activity is restricted most days of the week, or for the whole day on the days that the person cannot do the activity without help or support. To determine if a periodic restriction is for extended periods, it is reasonable to look for information on how often the restriction occurs and the nature and frequency of the help that is required.

The requirements for restrictions to daily living activities are set out in subsection 2(2)(b)(i) of the Act. Specific activities are listed in section 2(1) of the Regulation. The Medical Report and Assessor Report also list activities, and though they do not match the daily living activities in the Regulation exactly, they generally cover the same activities.

The Medical Report and Assessor Report give the professional the opportunity to provide additional details on the applicant's restrictions. **The inability to work and financial need are not covered by section 2 of the Act and are only relevant to the extent they impact daily living activities.**

### *Help Required*

A prescribed professional must provide an opinion that the person needs help to perform the restricted daily living activities. This requirement is set out in subsection 2(2)(b)(ii) of the Act. Under subsection 3 of the Act, "help" means needing an assistive device, the significant help or supervision of another person, or an assistance animal to perform daily

living activities. An assistance device, defined in section 2(1) of the Act, is something designed to let the person perform restricted daily living activities.

## **Arguments**

### *Severe impairment - Appellant's position*

The appellant's position is that his impairments are severe because he provided multiple doctor's reports that show the severity of his injury and the impact on his day-to-day life. The appellant said that he did not understand why the ministry denied his application a second time.

### *Severe impairment - Ministry's position*

The ministry's position is that the appellant's physical and mental impairments are not severe because there was not enough detail from the neurologist and the occupational therapist in the Medical and Assessor Reports. The ministry said there was no information to explain the restriction on lifting in reported in the Assessor Report such as how much weight causes the appellant pain. The ministry argued that there was inconsistent information between the Medical and Assessor Reports that was not explained because in the Medical Report the appellant had no limitations with lifting and no physical restrictions.

The ministry acknowledged that the appellant experiences some limitations to his cognitive and emotional functioning but argued that his mental impairment is not severe because no major impacts were reported in the Assessor Report and his ability to communicate was rated as good or satisfactory. The ministry also said that a severe mental impairment was not shown because the appellant was assessed as independent with personal care, finances, and social functioning.

### **Panel's Decision - severe impairment**

The panel finds that the ministry decision was reasonable based on the evidence at the reconsideration as well as the additional doctor's reports/letters and the new Assessor Report. The appellant suffered multiple concussions and continues to have migraine headaches and dizzy spells. However, the neurologist and both occupational therapists said that the condition has improved over time and the appellant's headaches have decreased in frequency and now occur 2 times per week.



The ministry reasonably determined that this level of frequency does not meet the threshold for a severe impairment because the appellant is able to function adequately most days when he does not have headaches. The appellant acknowledged that his headaches have become less frequent, but he still has body pain and needs to lie in a dark room when the headaches and dizziness occur. However, the evidence does not show a severe physical impairment because the appellant is independent with all his physical functions and does not require an assistive device (other than handrails) when walking or climbing stairs.

Despite experiencing pain when lifting heavy objects, the appellant is able to manage lighter loads and has no limitations with lifting according to the neurologist. Furthermore, the most recent Assessor Report said that the appellant could lift 20 pounds. The appellant frequently needs to change positions when sitting but is able to remain seated without an assistive device.

The appellant provided further information about his physical capabilities. The report from the neuro-physiotherapist said that vestibular rehabilitation included walking and exercise. The appellant was encouraged to participate in physical activity and recreation at a less intense level. The appellant said that he currently “kicks a soccer ball and goes for little walks.” The panel finds that the evidence in its entirety does not show a severe physical impairment because the appellant performs his physical functions independently and engages in regular physical activity despite pain, muscle spasms, and dizzy spells.

Regarding a mental impairment, the ministry’s decision is reasonable based on the following evidence:

- Despite “significant” deficits for attention/concentration as indicated in the Medical Report and self-reports, neither of the Assessor Reports indicate a “major” impact for attention. The most recent Assessor Report described a decreased ability to read due to new injuries in the past 2 years, as well as difficulties with word finding, memory (delayed recall) and reduced endurance. However, the impact for memory and language was “moderate,” with a “minimal impact” for executive function. Overall, the evidence indicates a moderate rather than severe impairment for attention, and communication (reading).
- The appellant confirmed his difficulties with remembering appointment times and focusing in course work (he can only take one class at a time) but there was no information on any follow-up assessment to corroborate the extent of his difficulties or explore depression/other mental health condition as a possible factor.
- The neurologist mentioned depression in the earlier letters, and the referral from the family doctor in 2021 indicated an episode of “major depression.” The most recent Assessor Report described the appellant’s low mood and reduced motivation

due to anxiety and depression, but the impact for motivation was “moderate.” The record contains no mental health or psychiatric report to explain the extent of the appellant’s cognitive and emotional difficulties. The most recent medical evidence indicates a moderate rather than severe mental impairment. Therefore, the requirement under the Act for a severe impairment has not been met.

#### *Restrictions to daily living activities - Appellant’s position*

The appellant’s position is that his daily living activities are significantly and continuously restricted because he is “still dealing with problems on a daily basis” which make it difficult to function.

#### *Restrictions to daily living activities - Ministry’s position*

The ministry’s position is that there was not enough evidence from the neurologist and occupational therapist about restrictions to daily living activities. The ministry argued that it is unclear why the appellant needs periodic help with some activities listed in the Assessor Report when the neurologist checked “no restrictions” in the Medical Report. The ministry also said that there was no information in either the original or most recent Assessor Report on how frequently the appellant needs help with activities that are periodically restricted.

#### **Panel’s Decision - daily living activities**

The panel finds that the ministry reasonably determined that daily living activities are not significantly restricted continuously, or periodically for extended periods by a severe impairment as required by the Act. The ministry’s decision was reasonable because:

- In the Medical Report, the neurologist checked that daily living activities are not restricted, despite sedation and slowed cognition from medication side effects, and despite “significant” deficits for attention/concentration.
- In the original Assessor Report, the occupational therapist did not confirm that periodic restrictions are for extended periods as required by the Act. The occupational therapist said that the appellant requires help with housework “at times” and reminders “at times” to make appropriate shopping choices. The appellant also needs “periodic assistance” with cooking/meals due to headaches. The occupational therapist did not say that the appellant needs help most days of the week or detail any extended period in which the appellant is unable to manage his daily life.
- The neurologist said that headaches have decreased to two days per week with treatment. It follows that the appellant would be able to manage daily activities

independently most days of the week when his symptoms are less.

- The appellant was assessed as “independent” with all areas of social functioning, despite not socializing due to low mood. The Assessor Report indicates the appellant is able to engage in short conversations despite his difficulties with attention and focus. (“needs a quick break after approximately 30 minutes of conversing with others”).

The panel has considered the additional medical information and new Assessor Report but finds that the reconsideration decision continues to be reasonable based on the evidence. The additional medical reports state that symptoms “were present throughout the day” in 2020-2021, with daily headaches associated with dizziness, poor attention, and limits on exertion which led to “difficulty performing regular activities.” However, the appellant has received rehabilitation and treatment for several years and his headaches have decreased in frequency to approximately 2 days per week.

The most recent Assessor Report (July 2024) indicates a need for only periodic assistance with daily living activities. The appellant’s new occupational therapist did not confirm that periodic restrictions are for extended periods as required by the Act because they wrote that the appellant “requires minimal assistance for housekeeping and carrying groceries” and can manage his medication refills with “occasional assistance” from a family member. The appellant is also able to drive long enough to do an errand (up to 30 minutes despite pain as reported in the new Assessor Report).

The recent Assessor Report confirms continued independence with social functioning despite the appellant not socializing due to pain and post-concussion symptoms. The recent report indicates the appellant is independent with making decisions about personal care, activities, or finances. The additional evidence from the neurologist, neuro-physiotherapist, and the appellant’s new occupational therapist does not confirm restrictions to daily living activities as required by the Act.

#### *Help with daily living activities – Appellant’s position*

The appellant’s position is that he needs help from his family because his symptoms make it difficult to cook, clean, and shop for himself. The appellant said that he has tried to get help from multiple doctors and is still trying to find a solution so that he can finish his course and get a job after that.

*Help with daily living activities - Ministry's position*

The ministry's position is that it could not be determined that significant help is required as it had not been established that daily living activities were significantly restricted.

**Panel's decision - help with daily living activities**

The panel finds that the ministry reasonably determined that the requirement for help was not met. The panel acknowledges that the appellant receives help from his family, and the new occupational therapist said that the appellant has "grab bars" as an assistive device. The appellant has also received long term rehabilitation therapy from several professionals.

However, significant restrictions to daily living activities are a precondition for needing help, and the evidence from the occupational therapists and other professionals did not show that daily living activities are significantly restricted continuously or periodically for extended periods by a severe impairment. The panel therefore finds that the requirement for help was not met under section 2(2)(b) of the Act.

**Conclusion**

The panel finds that the Reconsideration Decision is reasonably supported by the evidence. The appellant does not meet all 5 requirements for PWD designation under the Act because the submissions do not establish that:

- The appellant has a severe mental or physical impairment.
- A severe impairment significantly restricts daily living activities as confirmed by prescribed professionals.
- The appellant requires significant help from other people or an assistive device to manage his daily living activities.

The appellant meets 2 of the requirements for PWD designation (age, and duration) but the Act says that the criteria for severe impairment, daily living activities and help must also be met. The appellant has described longstanding difficulties and the panel is sympathetic to his situation, but the panel is bound by the legislation and does not have discretion to make an exception to the requirements under the Act.

The panel confirms the Reconsideration Decision. The appellant is not successful in his appeal.

## **Schedule - Relevant Legislation**

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

**2 (1)** In this section:

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

"daily living activity" has the prescribed meaning;

"prescribed professional" has the prescribed meaning.

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

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

**(b)** in the opinion of a prescribed professional

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

**(A)** continuously, or

**(B)** periodically for extended periods, and

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

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

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

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

**(i)** an assistive device,

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

**(iii)** the services of an assistance animal.

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

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

#### **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,

<b>Part G – Order</b>	
The panel decision is: (Check one) <input checked="" type="checkbox"/> Unanimous <input type="checkbox"/> By Majority	
The Panel <input checked="" type="checkbox"/> Confirms the Ministry Decision <input type="checkbox"/> 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 <input type="checkbox"/> No <input type="checkbox"/>	
<b>Legislative Authority for the Decision:</b>	
<i>Employment and Assistance Act</i>	
Section 24(1)(a) <input checked="" type="checkbox"/> or Section 24(1)(b) <input type="checkbox"/>	
Section 24(2)(a) <input checked="" type="checkbox"/> or Section 24(2)(b) <input type="checkbox"/>	

<b>Part H – Signatures</b>	
Print Name Margaret Koren	
	Date (Year/Month/Day) 2024/07/31

Print Name Susanne Dahlin	
Signature of Member	Date (Year/Month/Day) 2024/07/29

Print Name Edward Wong	
Signature of Member	Date (Year/Month/Day) 2024/07/31