

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the “ministry”) reconsideration decision of November 14, 2018, which found that the appellant did not meet two of five statutory requirements of section 2 of the *Employment and Assistance for Persons With Disabilities Act* (“EAPWDA”) for designation as a person with disabilities (“PWD”). The ministry found that the appellant met the age requirement, that in the opinion of a medical practitioner the appellant’s impairment is likely to continue for at least two years, and that the appellant has a severe impairment. However, the ministry was not satisfied that:

- 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 those restrictions, the appellant requires the significant help or supervision of another person, an assistive device, or the services of an assistance animal.

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 information before the ministry at the time of reconsideration included the following:

- The appellant's PWD application form consisting of the appellant's self-report form dated July 31, 2018; a medical report ("MR") completed by a general practitioner (the "physician") on July 26, 2018; and an assessor's report ("AR") also completed by the physician on July 26, 2018. The physician indicated that he based his reports on an office interview with the appellant.
- The ministry's Denial Decision Summary dated October 11, 2018.
- A Request for Reconsideration form dated November 6, 2018, including a statement from the appellant addressed "To Whom It May Concern" (the "Nov. 6 Self-Report"). The appellant also attached two pages from the AR which had been revised by the physician;
- A copy of the appellant's temporary driver's licence issued July 24, 2018.
- Progress notes from a medical clinic from January 2018 to June 2018.
- A "services certificate" from an insurance company signed by the physician and indicating that the appellant has a diagnosis of major depression.
- A letter to the appellant from a work-related insurance claim company, dated May 18, 2017, confirming the appellant had incurred a psychological condition as a consequence of the permanent chronic back pain accepted on her claim.
- A letter to the appellant from the work-related insurance claim company, dated August 22, 2018, indicating her chronic low back pain is considered permanent effective March 9, 2018.
- Three pages of forms showing the appellant's absences from work and noting reasons for absences.

In her notice of appeal, dated November 15, 2018, the appellant stated that she disagreed with the ministry's decision concerning DLA, noting the ministry "is expecting more answers than just the answers asked on the forms." The appellant attached a written statement dated November 19, 2018, attaching Section 2 E of the MR completed and signed by the physician ("Section 2 E") (this section had not been completed by the physician in the original application as doing so was unnecessary if he completed the AR). In Section 2 E the physician states the appellant is continuously restricted in personal care, meal preparation, daily shopping, mobility outside the home, and use of transportation; periodically restricted in basic housework and mobility inside the home; and not restricted in management of finances. With respect to the periodic restrictions, the physician writes "condition waxes and wanes." The physician also indicates a restriction to social functioning, writing "Mood + pain causes emotional + physical fatigue and socially withdraw", but he does not indicate if the social restriction is continuous or periodic. The physician does not provide any further comments on the degree of restrictions such as the frequency or duration of periodic restrictions, the degree of her continuous impairments, or any assistance provided. The appellant noted the physician did not answer the question concerning assistance, so she answered it. She explained that she uses a cane to walk any distances, and uses a cart when shopping as the cart provides her with the stability that she needs. She also relies on her 19 year-old daughter to help her lift items such as grocery bags and laundry, cook meals that are not pre-packaged, drive (as it is less painful for the appellant to be in a car when she can shift position), and do vacuuming and clean the bathroom because the appellant cannot lean over. She states that if her daughter is not available to help her then these jobs do not get done.

At the hearing, the appellant described that she has several disabilities, mental and physical, originating in a work accident in 2013. With respect to the reasonableness of the ministry's decision, she said the ministry seemed to ignore her submissions, only relying on what her doctor said, and that the ministry did not acknowledge that she uses a cane. She submitted that it is not reasonable that the ministry could find that her DLA were not affected from all the disabilities she suffers. Her adult daughter moved out of the home because of changes to the appellant's personality due to her disabilities, saying that she is too sensitive, gets angry too easily and depends

on her daughter too much. However, she explained that her daughter is now living with her again and does most of the cooking and cleaning. Her daughter cleans the tub and toilet in the bathroom but the appellant can manage the counter and sink. Her daughter does the vacuuming and anything else involving bending over. When her daughter doesn't cook, the appellant eats mostly prepared meals so she doesn't have to lean over the counter. When the daughter doesn't clean, things don't get done. The appellant does drive, but is limited to about a ½ hour at a time, as she needs to move around so her back does not hurt. Also, her high anxiety makes her want to stay close to home. She said her ability to do daily activities depends on the activity and her stress level. Until a few weeks ago she was trying to work but she is now on medical leave as she had a panic attack. Her typical day consists of getting up, having coffee, sitting on the couch, and trying to do a little bit at a time. For example, she only does small loads of laundry. She needs help with things like putting up the Christmas decorations. The appellant clarified that she can walk without a cane within the house, where she knows she has places to sit or lean if she needs to. She can make it out of her condo building to her car without using her cane, but if she goes for a walk outdoors where there are no places to rest she brings the cane or avoids going out. She also clarified that she can walk up/down stairs, but there is a danger of her tripping so she uses the hand railing. Shopping is sometimes a challenge due to anxiety (she described how she has sometimes had to stop shopping and return home due to anxiety), but she can do it if she can use a cart and distribute her purchases over several bags so she can lift them. She limits herself to a few items at a time to keep the load lighter.

At the hearing, the ministry explained that while the appellant has a severe disability, the evidence did not show that she meets all the criteria for PWD designation. In response to questions from the appellant, the ministry representative explained that, in assessing an application, the ministry relies on what is written. The ministry submitted that the written evidence states the appellant can do many things by herself and the doctor did not answer questions in the MR and AR that would help to assess the significance of the appellant's impairments on restrictions to DLA. The ministry affirmed the importance of the medical opinion (over the appellant's self reports) to the ministry's decision. In response to a question from the panel concerning how a severe impairment that leaves a person unable to walk more than 1-2 blocks, sit less than 1 hour and not walk stairs could not have a significant impact on DLA, the ministry said the frequency and duration of need or support speaks to degree of restriction to DLA. In response to another question, with respect to social functioning, the ministry said social functioning might have to be "very disrupted" in order to be a significant restriction to DLA.

As per section 22(4) of the *Employment and Assistance Act*, the panel admitted the appellant's written statement dated November 19, 2018 and Section 2 E of the MR that was submitted with the notice of appeal, as well as the appellant's oral evidence as being information in support of information that was in the appellant's PWD application before the ministry at reconsideration. As the physician has already answered similar questions on the AR, Section 2 E provides additional responses, and the appellant's oral evidence provides further details of information in her original self report.

The panel assessed the evidence that was before the ministry at reconsideration as follows:

Diagnoses

In the MR the physician diagnosed the appellant with degenerative disc disease, major depression, general anxiety disorder, fibromyalgia, sleep apnea, and non-alcoholic steatohepatitis. Her conditions are "indefinite" and "progressive." He writes that the medical conditions are systemic; cause fatigue, cognitive effects and musculoskeletal effects; and are affecting DLA. He also notes that the appellant uses a cane when walking.

Physical Impairment

In the MR the physician states the appellant can walk 1 to 2 blocks unaided, cannot climb any stairs unaided, can lift 5 to 15 lbs, and remain seated less than 1 hour. In the AR the physician indicated that the appellant is independent in walking indoors but takes twice as long, uses an assistive device when walking outdoors, uses handrails for walking up stairs, she is unable to stand for extended lengths of time, and needs periodic assistance with lifting, carrying and holding as her maximum is 5 kg. In the revised pages of the AR submitted at reconsideration, the physician provides the following additional comments: "She has a permanent partial disability according to [worker's insurance company]. She has been restricted by inability to sit, stand extensively, no low level bending, no walking > 14 minutes without walking aid or rest break."

In her self report, the appellant describes how she is restricted in standing, sitting, and lifting and "cannot walk very far without either having somewhere to sit down or using a cane for support"; she has poor balance and trips over small obstacles. Her fibromyalgia gives her pain.

Mental Impairment

In the MR the physician notes there are no difficulties with communication, but then says the cause of difficulties is cognitive. He also notes significant deficits with cognitive and emotional function in the areas of consciousness, executive, memory, emotional disturbance, motivation, and attention or sustained concentration.

In the AR the physician reported that the appellant's handwriting has deteriorated but otherwise her ability to communicate is good. With respect to cognitive and emotional functioning, the physician reports no impact to consciousness, insight and judgement, language, psychotic symptoms, other neuropsychological problems and other emotional or mental problems. He reports minimal impact to impulse control, executive, and motor activity, and moderate impact to motivation. He reports a major impact to bodily functions (underlining sleep disturbance), emotion, attention/concentration, and memory.

In her self report, the appellant says her depression makes her isolate herself; she struggles to motivate herself; making decisions can be difficult; and she has had thoughts of suicide. Her anxiety makes her feel nauseous, dizzy and gives her blurry vision and chest pain. Her sleep apnea contributes to not sleeping well and makes her anxiety and depression worse.

DLA

In the AR the physician reports that the appellant takes significantly longer with dressing, grooming, bathing, and toileting but does not state how much longer than typical. He states that she is independent in feeding, regulating diet, and transfers in/out of bed or chair. He states that she takes significantly longer to do laundry and basic housekeeping (that she does smaller loads or paces herself) but again does not state how much longer it takes her. The physician states the appellant is independent in shopping but needs continuous assistance to carry purchases home. He also reports that the appellant is independent in meal planning, food storage, using transit schedules and all aspects of paying rent and bills and medications. He reports that it takes the appellant significantly longer than typical to prepare and cook food, noting that she has difficulty leaning over counter, but not stating how much longer it takes her. He also notes that it takes her significantly longer than typical getting in/out of a vehicle or using public transit), but again does not say how much longer it takes her. He says she cannot walk to the bus stop.

In the AR, the physician states that the appellant is independent in all areas of social functioning, but "must isolate herself due to anxiety" and the physician describes her as having marginal functioning in her immediate and extended social networks. In a revised page of the PWD application submitted with the appellant's

reconsideration request, the physician changed some of his answers from "independent" to "periodic support/supervision". Specifically, for "appropriate social decisions" and "able to develop and maintain relationships" the physician writes, "she is undergoing counselling". A document prepared by the physician for a disability insurer and dated April 13, 2017 notes that the appellant was seeing a counsellor; medical records submitted with the revised page note counselling "continues" on February 28, 2018 and counselling is noted again on June 20 and 28, 2018, but otherwise there is no indication of the frequency and duration of that support or supervision. With respect to "able to deal appropriately with unexpected demands" he writes, "she struggles when her routine suddenly changes" but does not describe the support required or frequency and duration of that support. In the letter she submitted along with the revised pages, the appellant stated that the changes were made following a meeting with her doctor to discuss her disabilities. The "approaches and information" section of the pages is unchanged from "office interview with the applicant. The physician does not indicate any new or further assessments (e.g., home assessments) undertaken prior to completing these revised pages.

In her self report, the appellant describes her overall quality of life as very poor. She states that her personal care is difficult and takes longer; and she cannot prepare meals anymore as standing in one spot and bending over the kitchen counter for any length of time increases her back pain. In her Nov. 6 self report, the appellant disagreed with the physician's statement in the PWD application that she is independent in regulating her diet and meal planning, stating that she can't cook meals so she buys ready-to-eat prepared foods. She said everyday is a struggle for her.

Help

In the MR the physician does not answer the question concerning help required, but he notes the appellant requires a cane when walking and a cart when shopping.

In the AR the physician described that the appellant receives assistance from family and uses a cane for walking. He does not describe what assistance is required from family, nor does he answer the question with respect to help or supervision needed for social functioning.

In her self report, the appellant states that when all of her symptoms are happening at the same time, she goes to her family for help to make decisions. She says that she cannot walk far without her cane.

PART F – REASONS FOR PANEL DECISION

The issue on this appeal is whether the ministry's decision to deny the appellant 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. In particular, was the ministry reasonable in determining that in the opinion of a prescribed professional the appellant's impairments do not directly and significantly restrict her from performing DLA either continuously or periodically for extended periods, and that as a result of those restrictions the appellant does not require help to perform DLA?

The relevant legislation is as follows:

EAPWDA:

2 (1) In this section:

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

"daily living activity" has the prescribed meaning;

"prescribed professional" has the prescribed meaning.

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

(a) in the opinion of a medical 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.

EAPWDR section 2(1):

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.

Majority Reasons of Panel Members

In the reconsideration decision, the ministry was satisfied that the information provided establishes both a severe physical impairment and a severe mental impairment. Determining a severe physical or mental impairment requires weighing the evidence provided against the nature of the impairment and its reported functional skill limitations. In both the MR and AR sections of the PWD application, the ministry defines impairment" as "a loss or abnormality of psychological, anatomical or physiological structure or functioning causing a restriction in the ability to function independently, effectively, appropriately or for a reasonable duration." The panel adopts the ministry's definition of impairment. To assess the severity of an impairment, the ministry must consider the nature of the impairment and the extent of its impact on daily functioning.

Restrictions in the Ability to Perform Daily Living Activities

Section 2(2)(b)(i) of the EAPWDA requires that the minister be satisfied that in the opinion of a prescribed professional, a severe mental or physical impairment directly and significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods. While other evidence may be considered for clarification or support, the ministry's determination as to whether or not it is satisfied that the legislative criteria are met is dependent upon the evidence from prescribed professionals. The term "directly" means that there must be a causal link between the severe impairment and the restriction. The direct restriction must also be significant. Finally, there is a component related to time or duration – the direct and significant restriction may be either continuous or periodic. If periodic, it must be for extended periods. Inherently, any analysis of periodicity must also include consideration of how frequently the activity is restricted. All other things being equal, a restriction that only arises once a year is less likely to be significant than one that occurs several times a week.

Accordingly, in circumstances where the evidence indicates that a restriction arises periodically, it is appropriate for the ministry to require evidence of the duration and frequency of the restriction in order to be "satisfied" that this legislative criterion is met.

DLA are defined in section 2(1) of the EAPWDR, and are listed in the MR and AR forms, with the opportunity for the prescribed professional to check marked boxes and provide additional narrative. DLA, as defined in the legislation, do not include the ability to work.

In its reconsideration decision, the ministry stated that, in determining that the appellant has a severe physical impairment, it relied upon the evidence in the MR and the AR. The ministry accepted the opinion of the physician that the appellant's symptoms cause fatigue, cognitive and musculoskeletal effects. The ministry accepted that the appellant requires the use of a cane when walking, that she can walk between 1-2 blocks unaided, climb no stairs, lift between 5-15 lbs. unaided and remain seated for less than 1 hour. The ministry also accepted that the appellant takes 2 times longer to walk indoors, that she requires a cane when walking outdoors and a handrail when climbing stairs. The ministry noted that the appellant requires continuous assistance when standing and periodic assistance with lifting, carrying and holding, as the appellant is limited to lifting a maximum of 5 kilograms.

In determining that the appellant has a severe mental impairment, the ministry stated that it had relied upon the evidence in the MR and the AR. The ministry accepted the physician's opinion that the appellant has significant deficits with cognitive and emotional function in the areas of consciousness, executive, memory, emotional disturbance, motivation and attention or sustained concentration. The ministry accepted that the appellant has difficulties with communication due to cognitive issues and that, while she has good abilities in most communication areas, including speaking, reading and hearing, she has poor abilities in writing.

The specific functional impairments noted by the Ministry in support of its determination that the Appellant has a severe physical impairment and a severe mental impairment are components of the DLA defined in s.2 of the EAPWDR, which the Ministry acknowledged at the hearing. The Ministry maintained that the appellant's physical and mental impairments, while significant enough to support the decision that the impairments are severe, were not severe enough to support a decision that the impairments were significant restrictions on the appellant's DLA. The ministry also concluded that where, in the physician's opinion, the severe impairments resulted in the appellant taking significantly longer to perform DLA, the lack of details of the additional time taken meant that the ministry was not able to determine if that additional time was actually significant, as the physician had stated. In sections 4 and 5 of the reconsideration decision, where the ministry reaches these conclusions, and in considering whether the appellant requires the help of an assistive device, the ministry does not mention the appellant's undisputed need to use a cane.

Section 2 of the EAPWDA does not require that a *majority* of DLA must be directly and significantly restricted in order for the ministry to find a significant impairment of the ability to perform DLA, but rather that 2 or more DLA be directly and significantly restricted (*Hudson v. British Columbia (Employment and Assistance Appeal Tribunal)*, 2009 BCSC 1461).

So long as the opinion of the prescribed professional meets the criteria in s.2 of the EAPWDA, the evidence of the applicant/appellant may also be taken into account in a determination of the severity of the impairment and the nature and extent of the help required. Where, for example, the appellant's evidence is contradicted by the physician's report, or raises medical conditions that are not identified in the physician's report, it may be reasonable to place little weight on that evidence. However, where an appellant's statement is descriptive of medical conditions and symptoms set out by a prescribed professional in the MR and AR, and that statement

provides information about the severity of an appellant's condition and the severity of the restrictions on her ability to perform DLA, it is not reasonable for the ministry to place little weight on that evidence only because the details are not repeated in the physician's report. That determination has been held by the court to be "patently unreasonable" (*Hudson v. British Columbia (Employment and Assistance Appeal Tribunal)*, *supra*).

In the MR, including the section dated November 20, 2018 and submitted as new evidence at the hearing, and in the AR, the physician has identified 5 DLA in which the appellant's ability to perform the DLA is directly restricted continuously. Using the DLA descriptions in s.2(1)(a) of the EAPWDR, those are: prepare own meals; shop for personal needs; use public or personal transportation facilities; move about indoors and outdoors; and perform personal hygiene and self care. The physician has identified 4 DLA in which the appellant's ability to perform the DLA is directly restricted periodically. Those are: perform housework to maintain the person's place of residence in acceptable sanitary condition and move about indoors and outdoors. (This last DLA appears twice in this analysis because, in the MR, the physician has stated that the appellant's ability to move about indoors is restricted periodically and her ability to move about outdoors is restricted continuously.)

With respect to the DLA in EAPWDR s.2 (1) (b) (i) make decisions about personal activities, care or finances and (ii) relate to, communicate or interact with others effectively, the physician's evidence is that the appellant has significant deficits in cognitive and emotional functioning. He states that the appellant's mental impairment has a major impact on bodily functions, specifically sleep disturbance, emotion, attention/concentration and memory, and a moderate impact on motivation. He states that, with her immediate social network, she has "marginal functioning", defined as "little significant participation/communication; relationships often minimal and fluctuate in quality". With her extended social networks he also states that the appellant has "marginal functioning", defined as "little more than minimal acts to fulfill basic needs". He states that she "must isolate herself due to anxiety".

In the additional page of the MR dated November 20, 2018, the physician has stated that, with respect to social functioning, the appellant's condition "waxes and wanes" and, in combination with her physical pain, causes her to be both emotionally and physically fatigued and socially withdrawn. In the MR he indicates that she has to isolate herself due to anxiety. In the amended page of the MR dealing with social functioning, the physician indicates that the appellant needs periodic support and supervision to make appropriate social decisions and developing and maintaining relationships, and to deal appropriately with unexpected demands. The physician indicates that the support/supervision takes the form of counselling, as well as the previously noted isolation to deal with anxiety.

On appeal, the appellant described a panic attack at work that resulted in her stopping her part time work, and says that sometimes when she goes out, her anxiety can be very high and result in her leaving a store and returning home. While it is clear that depression and anxiety affect her pain level and sometimes affect her ability to function outside the home, as noted above, it is reasonable for the ministry to require evidence of duration and frequency of episodic anxiety and panic attacks. There is no evidence either from the physician or the appellant to show how often these episodes occur.

In s. 2(1) of the EAPWDR, DLA specifically relating to a person with a severe mental impairment are: making decisions about personal activities, care or finances; and relating to, communicating or interacting with others effectively. The description of "marginal functioning", above, indicates a significant restriction in relating to, communicating or interacting with others. It is not reasonable for the ministry to take the position that only the most extreme impact on social functioning can be considered "significant".

The appellant states that she is unable to vacuum the house and to clean the tub and toilet of her residence

because back pain prevents her from bending. She says that if a family member cannot do these things for her, the jobs do not get done. The physician has confirmed her back pain and limitations with bending, standing and lifting. A home that is never vacuumed and never sees the tub and toilet cleaned is not being maintained in an "acceptable sanitary condition". It is not reasonable to suggest that these restrictions are not significant.

The appellant states that she cannot prepare meals. She says that all she can do is take a pre-packaged meal out of a box and put it in the microwave because she cannot stand at the counter for an extended time and she cannot lean over the counter, because of the physical impairments that the ministry has determined are severe. These limitations are the same or similar to the functional limitations that prevent her from doing the significant aspects of housework noted above, which are confirmed by the physician. While the appellant is able to 'prepare a meal' in the sense of re-heating prepared food in a microwave, she is not able to prepare the meal itself. It is not reasonable to find that is not a significant restriction.

It appears that the ministry did not take into account the appellant's evidence in her self-report because it was not also contained in the physician's report. In its reconsideration decision the ministry stated that the degree of restriction described by the appellant in her self-report was not reported by the physician and had not been outlined in her revised application. Since then the appellant has submitted further evidence from the physician and from herself, about the extent of the impairment of DLA and the help and assistive devices she needs. While the appellant's own evidence of the severity and the extent of the restrictions in her DLA is not all repeated in the physician's report, her evidence of the severity and significance of the restrictions, and the help she needs from assistive devices and others, is consistent with and descriptive of the impairments and restrictions about which the physician has provided his opinion. It is not reasonable to disregard the appellant's evidence for the reasons stated by the ministry. Further, in making its reconsideration decision, the ministry did not have the benefit of the additional evidence admitted at the hearing, which provided significant information about the severity and extent of the restrictions in DLA.

Therefore the majority of the panel finds that the ministry's determination that the appellant's severe physical and mental impairments do not directly and significantly restrict her ability to perform DLA either continuously or periodically for extended periods is not reasonably supported by the evidence.

Help to Perform Daily Living Activities:

Section 2(2)(b)(ii) of the EAPWDA requires that, as a result of direct and significant restrictions in the ability to perform DLA, a person requires help to perform those activities. Help is defined in subsection (3) as the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform DLA.

The physician identifies that the appellant receives the help required for DLA from family. He also identifies that she uses a cane to compensate for her impairment.

Although the physician does not describe details of the assistance provided by family members, that is not a legislative requirement where the rest of the evidence meets the statutory criteria in s.2(2) of the EAPWDA. In this case, the appellant has provided additional evidence in her written statement of November 18, 2018, and in the additional page of the MR provided by the physician regarding restrictions in DLA. The appellant has stated that she cannot vacuum her residence or clean the tub and toilet in the bathroom, and that she cannot prepare her own meals if it involves anything more than putting a pre-packaged meal in the microwave, because she cannot stand and lean over a kitchen counter. The appellant relies on family, usually her daughter, to do the housework that she is unable to do. If her daughter does not do the cleaning, or the meal preparation, "it does

not get done”.

She needs a cane to walk any more than a minimal distance outdoors. The physician confirmed that she needs to use a cart when she shops, because of her limitations in the amount of weight she can lift. The cart also takes the place of a cane to steady her when she is shopping – it is not possible to use both the cane and a shopping cart at the same time and she cannot use a cane and carry a shopping basket. If her car was not available to her, the physician says that the appellant would not be able to walk to the bus stop. She needs to use a handrail when she walks up stairs.

The ministry took the position that a cart is not an “assistive device” as defined in the EAPWDA. The cart is designed to enable a person to carry items. The appellant, because of a severe physical impairment, is unable to carry items, either within or outside the store. Therefore, it would seem that a cart can meet the definition in the statute, being “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.” In any event, there is no question that a cane is an assistive device, and appellant does need a cane, whenever she leaves her house.

With respect to her severe mental impairments of depression and anxiety, the appellant has been receiving counselling since some time before April 2017. Counselling is, by its nature, periodic support. The appellant’s severe mental impairments interact with her severe physical impairments to increase her physical pain and thus her restrictions in DLA. Her impaired level of social function resulted in her daughter, who is her primary help in DLA that the appellant cannot perform, moving out of the house for several months.

Having found that the appellant’s severe physical and mental impairments directly and significantly restrict her ability to perform more than 2 DLA either continuously or periodically for extended periods, and that she receives help from family members to do the things she is unable to do, the majority of the panel finds that the ministry’s decision that it cannot be determined that significant help is required from other persons or an assistive device is not reasonably supported by the evidence.

In the reconsideration decision, the ministry stated that because it had not been established that DLA are significantly restricted, it cannot be determined that significant help is required from other persons or a device. The majority of the panel finds that the determination that DLA are not significantly restricted is not reasonably supported by the evidence, it follows that the decision that the need for significant help or an assistive aid cannot be determined, is also not reasonably supported by the evidence and is not a reasonable application of the applicable enactment.

Conclusion

The majority of the panel finds that the ministry’s reconsideration decision, which determined that the appellant was not eligible for PWD designation, is not reasonably supported by the evidence and is not a reasonable application of the applicable enactment, and therefore the decision is rescinded. The appellant is successful in the appeal.

Dissenting Reasons of Panel Chair

Significant Restrictions to DLA

The appellant’s position is that the evidence she has provided from her physician and through her self reports proves that her DLA are “markedly restricted.” She points to new evidence from the physician indicating

continuous restriction in personal self care, meal preparation, daily shopping, mobility outside the home and use of transportation.

The ministry's position is that the evidence from the physician does not establish that in the opinion of a prescribed professional the appellant's impairments directly and significantly affect the appellant's ability to perform DLR. The ministry points to the AR where the physician reports the appellant is independent in several DLA; and says that while the AR notes continuous assistance is needed for carrying purchases home from shopping, the physician provides no information to understand the duration or degree of other restrictions or the assistance the appellant requires, nor the additional time required to complete other tasks on her own. The ministry acknowledges the appellant has severe impairments but says the evidence does not show a significant restriction to the ability to perform DLA.

Decision of Panel Chair

For a PWD designation, it is not enough to show a severe impairment. The legislation requires that the ministry be satisfied that, in the opinion of a prescribed professional, a severe impairment, directly and significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods. The word "directly" indicates that there must be a causal link between the severe impairment and the restriction. In circumstances where the evidence indicates that DLA are directly restricted, it is appropriate for the ministry to require evidence as to whether the restriction is continuous or periodic and – if periodic – of how frequently the restriction arises and how long it lasts. This information can help in determining whether an applicant's ability is restricted "significantly." The legislation (s. 2(2)(b) of the EAPWDA) refers to "daily living activities" (as defined in s. 2(1) of the EAPWDR) *collectively*. While the plural "daily living activities" "dictates that there must be evidence from a prescribed professional indicating a direct and significant restriction on *at least two* daily living activities" (*Hudson, supra* at para. 43; emphasis added), a significant restriction in one (or more) of the listed activities of DLA may not always lead to the conclusion that an applicant's ability to perform DLA as a whole is significantly restricted. The minister needs to be satisfied on a reasonable assessment of the evidence before it—including evidence on all the various activities of DLA—that, in the opinion of a prescribed professional, the ability of the appellant to perform DLA is significantly restricted. In making that assessment, it is appropriate for the ministry to give more weight to the evidence of the prescribed professional than to the self reports of the appellant, as the legislation indicates the minister must be satisfied concerning the professional's opinion.

In the original AR, the physician states the appellant is independent in most DLA, (including all areas of social functioning), though for some DLA it takes the appellant significantly longer than typical. The physician does not explain how much longer than typical. The only DLA for which the physician notes continuous assistance is in carrying purchases home, but he provides no further information about the degree of restriction or the help required. (The appellant herself described that she can carry purchases so long as the weight of bags is manageable.) Both the AR and the revised pages of the PWD Application submitted at reconsideration indicate that the appellant has marginal social functioning with her immediate and extended social networks. "Marginal functioning" is the middle option provided between "good functioning" and "very disrupted functioning", indicating that there is some restriction in this area, but whether marginal functioning is a significant restriction to DLA depends on the case. Accordingly, comments and explanation from the prescribed professional can provide critical insight as to how significant the restriction is for a particular applicant. Here, while the revised pages note the appellant needs some periodic support or supervision (counselling), the physician does not indicate the degree or duration of the support needed. The new evidence from the physician on appeal (Section 2E of the MR) indicates continuous or periodic restrictions in all areas of DLA except management of medications and finances (for social functioning the new evidence does not say whether the restriction is periodic or continuous). However, the physician provides no comments to help explain the restrictions; this is especially problematic considering his

original evidence in the AR is that the tasks under most of these areas are completed by the appellant independently, though some take her longer than typical. He does not explain the reason for his change in opinion. While the appellant described in her written submission on appeal that she had the physician fill out this form because the reconsideration decision indicated this information could be useful, the physician does not give evidence about the reason for his change in opinion. For example, he provides no indication that his revised opinion is the result of further assessments (e.g., home assessment) or further consideration or consultation about the appellant's condition. Given the now conflicting evidence between Section 2E of the MR and the original AR and the lack of any explanation from the physician for the apparent change in the physician's opinion, it is difficult to assess the physician's opinion about the appellant's restrictions concerning DLA. And again, even on the new evidence, for periodic restrictions, it is not clear how often and for how long she is restricted and may require help. All the physician writes is that her condition waxes and wanes.

Overall, the evidence from the physician shows that the appellant faces some restrictions in DLA as a result of her severe impairment. Indeed, it would be unusual for someone with a severe mental or physical impairment not to experience some restrictions in DLA. Nevertheless, the ministry must be satisfied that that in the opinion of the prescribed professional, the appellant's severe impairment *directly and significantly* restricts her ability to perform DLA. Here, the evidence shows the appellant being independent in most listed components of DLA. Where she needs help, the lack of detail around the frequency and duration of that help, and conflicting evidence make it difficult to conclude that she is, in the opinion of a prescribed professional, *significantly* restricted in her ability to perform DLA. Therefore, it was reasonable for the ministry to conclude there is not enough evidence to show that the appellant has a severe impairment that in the opinion of a prescribed professional *significantly* restricts her ability to perform DLA continuously or periodically for extended periods.

Help with DLA

The appellant's position is that without help, her DLA do not get done, and that she requires a cane for walking any distance.

The ministry's position is that since it has not been established that the appellant's DLA are significantly restricted, it cannot be determined that significant help is required from other persons.

Decision of Panel Chair

Both the appellant and the physician note that the appellant uses a cane for walking outside the home. On appeal, the appellant said she uses the cane for walking distances outside the home where she has no place to rest or lean if needed. Regardless, a finding that a severe impairment directly and significantly restricts a person's ability to manage her DLA either continuously or periodically for an extended period is a precondition to a person requiring "help" as defined by section 2(3)(b) of the EAPWDA. For the reasons provided above, the evidence falls short of satisfying that precondition.

Accordingly, I find that the ministry reasonably concluded it could not be determined on the evidence that the appellant requires help with DLA as defined by section 2(3)(b) of the EAPWDA.

Conclusion

Having reviewed and considered all of the evidence and the relevant legislation, and for the reasons provided above, the Panel chair finds that the ministry's decision finding the appellant ineligible for PWD designation is reasonably supported by the evidence. I would confirm the ministry's decision.

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

Kathy Grant

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2018/12/17

PRINT NAME

Susan Ferguson

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2018/12/17

PRINT NAME

Carmelle Dieleman

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2018/12/17