

APPEAL NUMBER:

### **PART C – DECISION UNDER APPEAL**

The decision under appeal is the Ministry of Social Development and Poverty Reduction's ("ministry") reconsideration decision dated May 21, 2019, in which the ministry found that 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* ("EAPWDA"). The ministry found that the appellant meets the age and duration requirements, but was not satisfied that:

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

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

### **PART D – RELEVANT LEGISLATION**

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

*Employment and Assistance for Persons with Disabilities Regulation* - EAPWDR - section 2

**PART E – SUMMARY OF FACTS**

The evidence and documentation before the minister at the reconsideration consisted of:

1. Information from the ministry's record of decision indicating that the PWD application was received by the ministry on March 27, 2019 and denied on April 11, 2019. On May 10, 2019, the appellant submitted a Request for Reconsideration ("RFR") and on May 21, 2019, the ministry completed the review of the RFR.

2. An RFR, signed by the appellant on May 6, 2019 with attached submission in which the appellant provides argument for the reconsideration and describes her medical conditions and restrictions as follows:

- She has multiple ailments including chronic back, neck, shoulder and arm pain; deafness in her right ear; vision problems; drug and alcohol addictions; and depression and anxiety.
- Back pain impacts her mobility when walking, and when she tries to raise her arm it will "freeze up" causing extreme pain.
- She has to sit in a straight, hard back chair as a soft chair causes increased back pain and restricts her from sitting up straight.
- When transferring items, she is limited to using her right arm. She is unable to carry items that weigh more than 5-10 lbs. with her left arm without suffering increased pain.
- She struggles with anxiety and impulse control and needs a repetitive daily routine; otherwise she becomes withdrawn, agitated and confused, and "shuts down."
- She struggles to concentrate and her memory is very poor. She relies on assistance from family as she has difficulty following through on anything and is unable to retain information. The appellant states that she would not shower, put on clean clothes, or eat without reminders.
- She relies on her family to prepare and cook meals and is unable to perform those tasks without supervision "as I forget what I am doing and walk away."
- It is a struggle to attend to housework as bending and twisting increases her back pain and she needs to take frequent breaks which in turn cause her to lose focus.
- As well as being deaf in her right ear, she has "floaties" in her eyes that cause vision issues.
- Because of her addictions, she cannot responsibly manage finances and will spend her money impulsively.
- A psychiatrist has diagnosed her with Fetal Alcohol Syndrome ("FAS") with limited intellectual functioning; Borderline Personality Disorder; and Multiple illicit substance abuse, and the report is attached to her PWD application  
[Panel note: There is no psychiatric report with the application or Record of decision].

3. The ministry's *Decision Summary* with attached letter dated April 11, 2019, indicating the appellant does not meet all of the criteria for PWD designation.

4. The appellant's PWD application comprised of:

- the applicant information (self-report - "SR") dated December 7, 2018;
- a Medical report ("MR") dated March 4, 2019, completed by a General Practitioner ("GP") who has seen the appellant 11 or more times in the past 12 months; and
- an Assessor Report ("AR") dated November 9, 2018, completed by a Registered Nurse ("RN") who indicates she had never seen the appellant prior to the assessment. The RN based the assessment on an office interview with the appellant.

*Summary of relevant evidence from the application:**Diagnoses*

In the MR, the appellant is diagnosed with alcohol abuse, substance use disorder, Post-Traumatic Stress Disorder ("PTSD") and anxiety. Under *Health History*, the GP provides the following information for each condition:

- PTSD: "feels very tense, flashbacks of traumatic events, scared people might hurt her";
- Anxiety: "episodes of panic, many people cause anxiety";
- Alcohol abuse: "stable now, done counselling, did Alcoholics Anonymous ("AA")"; and
- Substance abuse: "not using now, gave her energy, gave her courage, improved confidence."

*Functional skills*Self-report

The appellant reports that she "feels lopsided" when walking due to chronic pain and she has to stop frequently to rest. She reports that her left arm will freeze momentarily when she uses it in a raised position and "this is extremely painful." The appellant states that she normally uses her right arm to carry items and is unable to lift or carry more than 5-10 lbs. with her left arm without increased pain. The appellant states that she is unable to sit on a soft chair without pain and she is unable to stand up straight.

The appellant states that she struggles with anxiety and impulse control and is constantly fidgeting. The appellant states that if something interferes with her daily routine, she "shuts down and withdraws" and becomes "overly agitated, confused, and disorientated." The appellant states that she feels uptight and tense all the time and she also struggles with concentration and memory issues and relies on family for reminders. The appellant states that she has difficulty following through with plans and is unable to retain information.

The appellant indicates that she has difficulty with her vision (she explains that she has "floaties" that affect her ability to see clearly). The appellant states that she struggles with her alcohol addiction and "drinks to excess" if there is alcohol available. The appellant reports that she uses marijuana daily and other drugs when available. The appellant states that she suffers from a lack of confidence and often feels embarrassed and paranoid.

Medical Report

Under section D, *Functional Skills*, the GP indicates the appellant can walk 4 or more blocks unaided on a flat surface and climb 5 or more steps unaided. The appellant has no limitations with lifting and no limitation with remaining seated.

The GP reports that the appellant has difficulties with communication (no comments are provided). The appellant has significant deficits with cognitive and emotional function in the areas of *Language, Emotional disturbance, Motivation, and Impulse control* (comments: "feels depressed most of the time. Impulse control better now, language - poor speech quality"). Under *Additional Comments*, the GP states that the appellant experienced early childhood trauma, has never had a job, and her speech is "slightly slurred - difficult to understand. Deaf in right ear."

Assessor Report

Under section B-2, *Ability to Communicate*, the RN assesses the appellant's ability in all areas of communication as *Good (Speaking)* and *Satisfactory (Reading, Writing, and Hearing)*: comment, "deaf in right ear". The RN states that the appellant has "'floaties' in her left eye - affects vision - has been ongoing this year - can't afford to see optometrist to get it checked out."

Under section B-3, *Mobility and Physical Ability*, the RN marks the appellant as independent with the 6 listed skills: *Walking indoors, Walking Outdoors, Climbing stairs, Standing, Lifting, and Carrying/holding*. The RN comments that the appellant is "unable to stand still due to anxiety" and "client states that due to neck pain has more difficulty lifting with her left arm."

For section B-4, *Cognitive and Emotional Functioning*, the RN completed the checklist, indicating that a mental impairment or brain injury restricts or impacts the appellant's functioning as follows:

- *Other emotional or mental problems*: **no impact**;
- *Bodily functions, Insight and judgment, Motivation, Motor activity, Language, Psychotic symptoms, and Other neuro-psychological problems*: **minimal impact**;
- *Impulse control, Attention/concentration, Executive, and Memory*: **moderate impact**; and
- *Consciousness, and Emotion*: **major impact**.

Under *Additional comments* (recorded in section C), the RN reports that the appellant has difficulty sleeping, "states that she can only sleep for 3-4 hours, wakes up with nausea - can [illegible] - states usually feels rested when she wakes up."

The RN further comments: *client states that she has a [illegible] daily if anything interferes with her [illegible] she can't cope - gets confused, disoriented, has to withdraw - tries to calm herself down - occurs at least once or twice a day, causes agitation, further worsens anxiety, everything makes her anxious when she is anxious.*

#### Daily Living Activities

##### Self-report

The appellant states that she relies on daily reminders from family to shower and to put on clean clothes and she also needs reminders for appointments and reminders to eat. The appellant reports that a family member usually does her laundry and although the appellant can do laundry, she states that "I don't sort it, and I usually overload the machine."

The appellant reports that her family does the shopping "because of my inability to concentrate and I usually forget items." The appellant states that she cooks "but only with support and supervision as I forget what I'm doing and walk away." The appellant states that she tries to help with housework but bending increases her back pain and she takes frequent rest breaks. The appellant states that family assists her with budgeting as she "spends impulsively."

##### Medical Report

The GP indicates *No*, the appellant has not been prescribed medications or treatments that interfere with her ability to perform DLA.

The GP checks *Unknown* when asked if the impairment restricts the person's ability to perform DLA. Regarding specific DLA listed on the form, the GP checks that there are no restrictions with 9 of the 10 DLA: *Personal self-care, Meal preparation, Management of medications, Basic housework, Daily shopping, Mobility inside and outside the home, Use of transportation, and Management of finances.*

The GP checks that there are restrictions with *Social functioning*. When asked to explain, the GP comments, "poor speech, interacting with people is difficult for her." No additional comments are provided regarding the degree of restriction.

##### Assessor Report

When asked to describe which impairments impact the applicant's ability to manage DLA, the RN writes, "chronic back and neck pain - affects mobility, history of alcohol and drug abuse, uses daily if available, anxiety and depression (on medication), unable to sit/stand still."

In section C of the AR, the RN indicates the appellant is independent with 5 of the 8 listed DLA:

- *Personal care*: The appellant is independent in all areas except *Grooming* for which she requires periodic assistance from another person, [comment: "(family) will remind her to shower and put on clean clothes"].
- *Basic housekeeping*: The appellant is independent in all areas.

- *Shopping*: The appellant is independent in all areas except *Going to and from stores* [comment: "states that (family) does shopping, 'I'm not into it'"].
- *Medications*: The appellant is independent in all areas.
- *Transportation*: The appellant is independent in all areas [comments: "client does not have a driver's license, takes the bus only when she has to - gets increased anxiety taking the bus, usually sits at the back, tries to walk everywhere"].

The RN indicates that the 3 remaining DLA are restricted:

- *Meals*: The appellant requires continuous assistance from another person with 3 of the 4 listed areas: *Meal planning*, *Food preparation*, and *Cooking* [comments: "states that (family) does all the cooking - states that she has just started making her own tea - quit cooking as felt what (illegible) she tried upset others"].
- *Pay Rent and Bills*: The appellant is independent with *Banking* and requires periodic assistance with *Budgeting* and continuous assistance with *Pay rent and bills* [comments: "Rent is taken off her cheque and paid directly - can't trust herself to pay bills. Needs help with budgeting. Does not have a bank account"].
- *Social Functioning*: The appellant is independent with 2 of the 5 areas listed: *Able to deal appropriately with unexpected demands*, and *Able to secure assistance from others*. The appellant requires periodic support/supervision from another person with the remaining 3 areas: *Appropriate social decisions* [comment: "relies on (family)"]; *Able to develop and maintain relationships* [comment, "uses social media"]; and *Interacts appropriately with others* [comment: "client does not appear to have good insight into her cognitive disabilities"].
- The RN indicates the appellant has good functioning with her immediate social network and marginal functioning with her extended social networks [comment: "not involved with community - isolates self a lot, often with music"]. The RN left the space blank when asked to describe any support/supervision that is required to help maintain the person in the community. The RN did not fill in *Additional Comments* including identification of any safety issues.
- Under *Additional Information* (and its effect on DLA), the RN states that the appellant has had neck and back pain for over a year and has severe anxiety and depression from the abuse she suffered in the past including domestic abuse in relationships. The RN states that the appellant now isolates herself and has poor self-esteem and difficulty trusting people. The appellant has used alcohol and drugs to try and cope but is now mostly just using marijuana. The appellant has: *ongoing hearing and vision problems, agitation is chronic and often annoys other people. This increases the client's paranoia and worsens self-esteem, client needs (family) to help with reminding her to attend to personal care - provides meals for her, assists her with financial management. States that living with (family) makes her the most comfortable and allows her to maintain Activities of Daily Living ("ADL")*.

#### *Need for help*

In the SR, the appellant reports that she needs help with most household tasks. In the MR, the GP check marks *No*, the appellant does not require any prostheses or aids for her impairment. In the AR, the RN indicates the appellant lives with family and they provide assistance with DLA. Section D - *Assistance Provided for Applicant* was left blank.

When asked what equipment or devices the applicant requires but does not currently use, the RN states, "needs to have hearing and eyes tested." The RN check marks that the appellant does not have an assistance animal.

5. A hospital discharge record dated March 7, 2018 (discharge date); admission date was March 4, 2018. The record includes a *Discharge Summary*, and *Inpatient Consult Note* completed by the appellant's GP. The following information is reported:

- The appellant presented with delusions and the diagnosis was possible drug-induced psychosis, as well as FAS with limited intellectual functioning, Borderline Personality Disorder, and multiple illicit substance abuse. The GP reports that the appellant has an extensive history of substance abuse and tested positive for drugs at admission.
- The appellant was not clinically depressed, overly psychotic, or suicidal and it appeared that her intellectual limitations were contributing to her symptoms.

- The appellant was given medications in the hospital and prescriptions at discharge and was encouraged to connect with community supports. The GP states that a psychiatric follow-up appointment will be arranged if necessary.
- The GP notes that the appellant has a noticeable speech impediment "which is characterized by being slurred and nasal in production." The GP noted previous episodes of self-harming and states that the appellant has no previous psychiatric history. The appellant acknowledged regular drug use and denied any sustained biological symptoms of depression or auditory hallucinations.

**6. Hand-written clinical notes from the RN dated November 7, 2018, describing the appellant's conditions and symptoms:**

- *Anxiety*: The appellant gets physically agitated, cannot think clearly, and isolates herself.
- *Depression*: The appellant has suffered abuse and states that she has always had difficulty with relationships. The appellant has experienced loss and family dysfunction and "socially isolates, feels sad a lot, states that medication helps her."
- *Impulse control*: The appellant has a history of alcohol and drug abuse. She will drink excessively if alcohol is available and she uses marijuana daily (and hard drugs when available). The appellant tries to only use marijuana, she states that it helps her eat, sleep, and "chill out."
- *Suicidal ideation*: The appellant used to cut herself but has not done so for more than a year and does not feel suicidal at present.
- *Attention, memory, and executive function*: The appellant is easily distracted and states that she can't remember the last two months of her life as she "blacked out." The appellant states that her memory is inconsistent and she usually asks family to assist her with anything that involves planning/organizing. The appellant describes having to learn something repetitively before it "clicks in."
- *Motivation*: The appellant states that she can stay motivated as long as she has music to listen to, and she relies on family to wake her up and get her going each day.
- *Motor activity*: The appellant is agitated, her hands are always moving; she fidgets and has difficulty standing/sitting still. The appellant states that her fidgeting often aggravates other people and that will make her upset.
- *Language*: The appellant "gets tongue-tied" and "speaks gibberish." She has a speech impediment and cannot make the sounds of certain letters. The appellant had a hearing and speech teacher when she was in school.
- *Psychotic symptoms (hallucinations and delusions)*: The appellant states that she hears voices daily which are hard for her to ignore, and sees shapes that are not in pictures. She attributes the hallucinations to "birthmarks that make her see things." The appellant states that she often sees lights flickering (even when they are not).

*Additional information*

With the consent of both parties, the appeal proceeded as a written hearing pursuant to section 22(3)(b) of the *Employment and Assistance Act* ("EAA"). Subsequent to the reconsideration decision neither party filed any new evidence requiring an admissibility determination in accordance with section 22(4) of the EAA. The appellant filed a *Notice of Appeal* with a brief type-written statement that the panel accepts as argument. In an email to the Tribunal, the ministry states that the reconsideration summary is the ministry's submission on appeal.

**PART F – REASONS FOR PANEL DECISION**

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

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

The ministry based the reconsideration decision on the following legislation:

**EAPWDA**

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

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

"**daily living activity**" has the prescribed meaning;

"**prescribed professional**" has the prescribed meaning.

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

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

(b) in the opinion of a prescribed professional

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

(A) continuously, or

(B) periodically for extended periods, and

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

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

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

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

(i) an assistive device,

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

(iii) the services of an assistance animal.

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

**EAPWDR****Definitions for Act**

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

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

(i) prepare own meals;

(ii) manage personal finances;

(iii) shop for personal needs;

(iv) use public or personal transportation facilities;

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

(vi) move about indoors and outdoors;

(vii) perform personal hygiene and self-care;

(viii) manage personal medication, and

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

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

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

**Analysis***Severe mental or physical impairment*

To be eligible for the PWD designation, the legislation requires several criteria to be met including the minister being satisfied that the applicant has a severe mental or physical impairment. "Severe" is not defined in the legislation but the diagnosis of a serious medical condition does not in itself establish a severe impairment of mental or physical functioning.

*Mental impairment*

To assess the severity of a mental impairment, the ministry must consider the extent of any impact on daily functioning as evidenced by limitations/restrictions with mental functions; restrictions with DLA requiring mental/social functioning; and whether significant help is required to manage DLA.

*Arguments - mental impairment*

In her submission on appeal, the appellant argues that the ministry did not give sufficient consideration to her mental state. In her RFR submission, the appellant submits that she struggles with anxiety, impulse control, and cognitive and speech deficits. The appellant argues that the information from the GP and the RN confirms a severe impairment that significantly restricts DLA. The appellant argues that a psychiatric assessment confirms the impacts of FAS, Borderline Personality Disorder, and substance abuse on her ability to function.

The ministry argues that the information provided in the PWD reports and RFR confirms a moderate as opposed to a severe impairment of mental functioning. The ministry notes inconsistencies between the MR and AR, arguing that the GP identifies significant deficits in areas of cognitive and emotional functioning which the RN assesses as "minimal or no impact". The ministry submits that the RN also assesses moderate and major impacts in areas where the GP does not indicate any cognitive or emotional deficits.

The ministry argues that the assessment by the RN is not supported by the GP's information and that less weight should be given to the RN's assessment because the RN only met with the appellant once (for the purpose of completing the AR) and based her assessment on the appellant's self-reports rather than an independent evaluation of function. The ministry argues that the hospital records should also be given less weight because there is no evidence to indicate that the reported symptoms have continued to the present day. With regard to social functioning, the ministry argues there is insufficient information in the MR and AR to confirm a severe mental impairment given the level of social functioning described in those reports.

*Evidence for mental impairment*

The hospital records provided for the reconsideration appear to illustrate the most severe degree of mental impairment. The appellant is diagnosed with possible psychosis (likely drug-induced), FAS, and Borderline Personality Disorder and was certified under mental health legislation based on her "odd statements", positive drug tests, and the concerns of her family. Even with these diagnoses, the appellant's GP (who authored the hospital reports) qualifies the impact of the conditions on the appellant's emotional functioning by ruling out any classic form of psychosis as well as depression and suicidal ideation.

In terms of the appellant's cognitive functioning, the hospital reports describe the appellant's noticeable speech impediment, and difficulty conceptualizing her experience in words due to "limited intellectual functioning." The appellant's impulsivity, reduced insight, and poor coping skills, consistent with Borderline Personality Disorder, are also noted. The appellant's past childhood trauma is indicated as contributing to her substance abuse which was in an active phase at the time of the hospital admission.

While the hospital reports cover a short period of time (March 2018), the panel gives some weight to the information on cognitive and emotional functioning because a speech impediment, reduced intellectual functioning due to FAS, and reduced insight and coping skills due to Borderline Personality Disorder are inherently longstanding rather than acute conditions. The panel finds that the ministry reasonably determined the reports lack detail regarding the

impacts of these conditions on the appellant's current functioning as no follow up psychiatric report is provided. The GP recommended a psychiatric follow-up and the appellant states that she had a psychiatric assessment and provided the report with her PWD application. However, as noted earlier, there is no psychiatric report in the record.

Regarding the AR, the panel notes that the RN completed the assessment on November 7, 2018, approximately 8 months after the appellant's hospital admission. It is unclear whether the RN reviewed the hospital reports when filling out the AR (and preparing her clinical notes). In the AR, the RN check marks that she based the assessment solely on an office interview with the appellant. The ministry states that the AR (and clinical notes) are problematic because they are based on a one time interview with the appellant; contain frequent references to the appellant's self-reported symptoms rather than the RN's own assessment; and the information in the assessments is not consistent with the more recent information in the MR.

The panel finds the evidence in the AR (and clinical notes) to be of some value because these assessments contain a detailed narrative by the RN, and are actually a mixture of the RN's own impressions as well as reporting what the appellant states. The shortcoming with the RN's assessment is not so much that it is based on the appellant's self-report but rather that the information is dated compared to the GP's recent evidence in the MR.

The panel notes that the GP completed the MR in March 2019, 4 months after the assessment by the RN. The panel finds that the ministry reasonably gave the GP's information the greatest weight when stating that the MR "is a more accurate reflection" of the appellant's current mental functioning. Consistent with the hospital records, the AR indicates active substance abuse (when alcohol and drugs are readily available) but in the MR, the appellant's substance use disorder appears to be in remission as the GP states that her alcohol addiction is "stable now" since the appellant participated in counselling and AA. With regard to the appellant's drug addiction, the GP states that the appellant is "not using now" and described her as having more energy and improved confidence as a result.

In the MR, the GP does not indicate any significant deficits with most areas of cognitive and emotional functioning and comments that the appellant's impulse control is "better now", although she feels depressed "most of the time" as well as socially anxious ("many people cause anxiety"). Despite physical symptoms of anxiety ("constant fidgeting" as described by the appellant and the RN), the GP does not check mark significant deficits with *Motor activity* and he provides no comments about the appellant's restlessness and "constant fidgeting."

The GP does not indicate any deficits with *Executive function, Memory, or Attention/concentration* despite the appellant's FAS "with limited intellectual functioning" as described in the hospital records and reported by the appellant. In particular, the GP does not indicate deficits with memory despite the appellant's self-reported problems with remembering things (she reports needing frequent reminders from her family) and the learning issues described in the RN's narrative; i.e., problems with retaining information.

Both the RN's assessments and the MR describe the appellant's speech impediment. Despite some inconsistencies between the AR and the RN's clinical notes (good/satisfactory communication versus "getting tongue tied", "speaking gibberish", and not being able to make certain sounds), the GP's impression in the MR is that the appellant does have difficulties with communication and she is difficult to understand due to her poor speech quality.

The appellant's communication problems in turn, impact her social functioning ("interacting with people is difficult for her" - MR) but the GP does not provide any further detail about the appellant's social deficits; in particular, he does not describe any supports/supervision the appellant requires with social interactions. The RN's assessments provide conflicting information on social functioning: the narrative describes longstanding difficulties with relationships while the tick boxes in the AR indicate the appellant needs periodic support/supervision only with most areas of social functioning and has good functioning with her family.

#### *Panel's decision - mental impairment*

Considering the information in its entirety, the panel finds that the ministry reasonably determined the evidence provided demonstrates a moderate rather than severe impairment of physical functioning. Despite the appellant's assertion that a severe mental impairment was confirmed by her medical practitioners' reports, the most recent

report, from her GP (MR) suggests that the appellant's emotional functioning has improved since 2018. Despite feeling depressed, tense and socially anxious, the GP reports that the appellant's addictions are stabilized, giving her "more courage and improved confidence" to cope with life's demands. There is insufficient detail in the MR to confirm a severe impairment of cognitive functioning despite the appellant's significant deficits with language and her intellectual impairment as described by the RN and in the hospital reports. The panel therefore finds that the ministry reasonably concluded a severe physical impairment under section 2(2) of the EAPWDA was not established on the evidence.

### ***Physical impairment***

To assess whether the applicant has a severe physical impairment, the ministry considers the degree of restrictions to physical functioning, restrictions to DLA involving movement, and whether the applicant requires significant help or any assistive devices to manage DLA.

#### *Arguments - physical impairment*

The appellant submits that she has a hearing impairment (deaf in one ear) and vision problems ("floaties") as well as chronic back, neck, shoulder, and arm pain. The appellant argues that walking is difficult due to radiating pain and she has to stop frequently to rest. The appellant submits that sitting in a soft chair and lifting and carrying items over 5-10 lbs. is also "extremely painful." The appellant argues that the information from the RN confirms that chronic neck and back pain affects her mobility.

The ministry argues that the information provided in the PWD application and RFR does not establish a severe physical impairment because in the most recent medical report (MR), the GP has not diagnosed the appellant with chronic pain and in section D of the MR, he also rates all of the appellant's physical functions on the least restricted end of the rating scale. The ministry argues that more weight should be given to the GP's information in the MR than to the appellant's reports of pain because under the legislation, a medical condition such as chronic pain must be *confirmed by a medical practitioner*.

#### *Evidence for physical impairment*

The evidence in the MR is that the appellant is able to walk 5 or more blocks and climb 5 or more steps unaided, indicating the least degree of restriction on the rating scale. In addition, the GP indicates the appellant has no limitations with lifting or remaining seated. The GP does not diagnose any chronic pain condition or note any vision problem but he does state that the appellant is deaf in her right ear.

The GP does not explain if/ how the appellant's speech impediment is connected to her hearing impairment. The GP also does not indicate that the appellant requires a hearing aid or any prostheses/aids for a physical impairment. The RN also mentions the appellant's hearing impairment in the AR but the impact on the appellant's function is not described. Rather, the RN indicates that the appellant's hearing loss still needs to be assessed as does her vision problem (the appellant requires hearing and eye tests).

In the AR, the RN's comments about the appellant's chronic pain are usually qualified as being based on what the appellant told her but in section E - *Additional Information*, the RN states that the appellant has had "bad neck and back pain for over a year." Even so, chronic pain is not mentioned at all in the RN's clinical notes, and in the AR, the RN rates all of the appellant's physical functions as independent: *Walking indoors/outdoors*, *Climbing stairs*, *Standing* (despite being unable to stand still due to anxiety), *Lifting*, and *Carrying and holding* (despite the appellant reporting difficulty with raising her left arm).

#### *Panel's decision - physical impairment*

Considering the information in its entirety, the panel finds that the ministry reasonably determined the information provided does not confirm a severe impairment of physical functioning. Despite the appellant's reports of chronic pain and vision problems, the GP does not diagnose a chronic pain or eye condition and the appellant is independent with all of the physical functions listed in the MR and AR forms.

Furthermore, there is very little detail about the impact of the appellant's hearing impairment and she requires both hearing and eye tests to identify the nature of these problems. The panel therefore finds that the ministry reasonably concluded a severe physical impairment under section 2(2) of the EAPWDA was not established on the evidence.

### ***Restrictions in the ability to perform daily living activities***

Subsection 2(2)(b)(i) of the EAPWDA requires the ministry to be satisfied that, in the opinion of a prescribed professional, a severe impairment directly and significantly restricts a person's ability to perform DLA either continuously, or periodically for extended periods. In this case, the prescribed professionals are the GP and the RN who filled out the PWD medical reports.

The term "directly" means there must be a causal link between the severe impairment and the restrictions to DLA. A direct restriction must also be significant. Finally, there is a component related to time or duration: the direct and significant restriction may be either continuous or periodic. If periodic, the restriction must be for extended periods of time.

Inherently, an analysis of periodic restrictions must also include how frequently the activity is restricted. All other things being equal, a restriction that arises once a month is less likely to be significant than one that occurs several times a week. Accordingly, in circumstances where the evidence indicates that a restriction arises periodically, it is appropriate for the ministry to require evidence on the duration and frequency of the restriction in order to be satisfied that the 'periodic' component is met.

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

### ***Arguments - DLA***

The appellant argues that she would not do her personal care tasks without reminders from family and she is also unable to prepare and cook meals without supervision due to her memory and concentration problems. The appellant submits that she struggles to do housework due to back pain and she cannot responsibly manage her finances due to being an addict who spends money impulsively.

The appellant argues that the information from the RN confirms that she needs continuous or periodic support to perform DLA. Regarding the frequency and duration of periodic support, the appellant explains that a description of the nature/degree/duration of support is not a legislated requirement and medical professionals "are not required to provide a calculation regarding the occurrence of an individual's symptoms and resulting need for supports." The appellant argues that given the nature of most mental and physical health conditions, the resulting symptoms "cannot be quantified or generalized to have a measured, expected rate of occurrence."

The ministry argues there is not enough evidence from the GP and RN to confirm that DLA are significantly restricted because of discrepancies between the assessments of the two medical professionals. The ministry argues that more weight should be given to the GP's assessment of DLA because he has seen the appellant numerous times whereas the RN has only met the appellant once. The ministry acknowledges that the legislation does not specifically require the frequency and the duration of limitations to be explained but argues that the minister finds such information valuable in determining whether restrictions are significant.

### ***Evidence from prescribed professionals***

In the MR, the GP confirms that the appellant has not been prescribed any medications that interfere with her ability to perform DLA. In the MR, section E, the GP indicates that it is *unknown* if the appellant's impairment restricts DLA, and at the same time, the GP indicates that none of the listed DLA are restricted except for *Social functioning*, due to the appellant's speech impediment. The GP does not provide any information regarding the degree of the

restriction to social functioning and the panel notes that a single check mark, on its own, is insufficient to confirm that the appellant's social functioning meets the legislated requirement of being significantly restricted either continuously or periodically for extended periods.

Even though the RN only met with the appellant once, there are more comments on restrictions to DLA in the AR than in the MR. But even with the RN's explanatory remarks, the DLA listed in the AR are assessed as "independent" for the most part. Restrictions are indicated for three DLA:

- *Meals*: The appellant requires continuous assistance with most areas and "quit cooking" when she felt that what she tried to make upset others.
- *Pay Rent and Bills*: The appellant requires periodic assistance with budgeting (reason not stated) and continuous assistance with *Pay Rent and Bills* (because she "doesn't trust herself to pay bills").
- *Social Functioning*: The appellant requires periodic assistance only with most areas of social functioning.

As noted by the ministry, the GP assesses the appellant as independent with *Meal preparation* and *Management of finances* in the MR, and the only consistent assessment between the MR and AR is that *Social Functioning* is marked as restricted in both reports. In the MR, the GP does not indicate how often the restriction occurs (to confirm the legislative criteria of continuous versus periodic). In the AR, the RN indicates periodic restrictions with *Social Functioning* but does not provide any frequency/duration information to confirm that a periodic restriction is for extended periods as required by the legislation.

#### *Panel's decision - restrictions to Daily Living Activities*

Considering all of the information from the GP and RN, the panel finds that the ministry reasonably determined there is insufficient information from prescribed professionals to establish that DLA are significantly restricted either continuously or periodically for extended periods as required by the legislation. There is no explanation from the GP for the discrepancies between his assessment of DLA and the RN's assessment in an earlier report. While the GPs evidence indicates that the appellant's substance abuse disorder is in remission, there are no comments or narrative to explain any corresponding improvement in her ability to manage DLA except that she has more energy and confidence now that she is not using drugs.

Further, it is unclear why the GP would mark DLA such as *Personal self-care* and *Management of Finances* as independent when the appellant is depressed and has intellectual limitations due to FAS. The appellant states that she cannot manage many DLA without frequent reminders from family but in the MR, the GP does not indicate that the appellant has any significant deficits with memory or other cognitive functions despite her "limited intellectual functioning."

Given that there is insufficient information on current restrictions to DLA and given that the appellant is not diagnosed with a physical impairment (chronic pain or otherwise) or with significant deficits in most areas of cognitive functioning, the panel finds that it was reasonable for the ministry to conclude that the information from prescribed professionals does not establish that DLA are significantly restricted either continuously or periodically for extended periods. Based on the information from prescribed professionals, the panel finds that the ministry reasonably determined the criteria in subsection 2(2)(b)(i) of the EAPWDA were not met.

#### *Help to perform daily living activities*

The appellant argues that she cannot manage DLA without daily reminders and help from family. The ministry's position is that because it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required. The ministry notes that the medical professionals do not indicate the appellant needs any assistive devices for her impairment.

Subsection 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.

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The information in the MR and AR indicates the appellant's family assists her with most DLA. The appellant does not currently use an assistive device or an assistance animal to perform DLA although her hearing and vision still need to be assessed.

*Panel's decision - help with Daily Living Activities*

Under the legislation, confirmation of direct and significant restrictions to DLA is a precondition for needing help to perform DLA. As the panel found that the ministry reasonably determined that significant restrictions to DLA were not established by the information provided, the panel also finds that the ministry reasonably concluded that the criteria for help under subsection 2(2)(b)(ii) of the EAPWDA are not met.

*Conclusion*

The panel finds that the ministry's reconsideration decision that found the appellant ineligible for PWD designation was reasonably supported by the evidence. The legislation requires all of the criteria to be met. Based on the functional skills and DLA assessments by prescribed professionals, and considering the evidence in its entirety, the panel finds that the ministry's reconsideration is reasonable as only two of the legislative requirements were met. The panel confirms the ministry's decision. The appellant is not successful on appeal.

**PART G – ORDER**

THE PANEL DECISION IS: (Check one)       UNANIMOUS       BY MAJORITY

THE PANEL       CONFIRMS THE MINISTRY DECISION       RESCINDS THE MINISTRY DECISION

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

**LEGISLATIVE AUTHORITY FOR THE DECISION:**

*Employment and Assistance Act*

Section 24(1)(a)  or Section 24(1)(b)

and

Section 24(2)(a)  or Section 24(2)(b)

**PART H – SIGNATURES**

PRINT NAME

Margaret Koren

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2019/08/29

PRINT NAME

Perry Mazzone

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019/08/29

PRINT NAME

Anil Aggarwal

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019/08/29