

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the Ministry) Reconsideration Decision (RD) dated November 1, 2019, which found that the Appellant did not meet three of the five statutory requirements of Section 2 of the *Employment and Assistance for Persons with Disabilities Act* (EAPWDA) for designation as a person with disabilities (PWD). While the Ministry found that the Appellant met the age requirement and had an impairment which was likely to continue for at least two years, it was not satisfied that the evidence establishes that:

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

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) and the Appellant did not appeal the decision on this basis.

PART D – RELEVANT LEGISLATION

EAPWDA, Section 2

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

Employment and Assistance Act (EAA), Section 22(4)

PART E – SUMMARY OF FACTS

The evidence before the Ministry at the time of the RD included the PWD Application comprised of:

- The applicant information and self report (SR) completed by the Appellant and dated August 7, 2019;
- A medical report (MR) dated August 21, 2019 and completed by the Appellant's general practitioner (GP) who at the time had known the Appellant for 18 months and who had seen the Appellant 2 to 10 times in the past year; and,
- An assessor report (AR) dated September 4, 2019, completed by a registered nurse (RN) who at the time had known the Appellant for 2 months and who had seen the Appellant 2 to 10 times in the past year.

The evidence also included:

- A Request for Reconsideration (RFR) signed by the Appellant on October 21, 2019 in which the Appellant provides information about their physical and mental impairments and their impact on DLA and need for help, as detailed below;
- A letter of support signed by the RN and dated September 30, 2019 (RN's Support Letter) which indicates that the RN has been counselling the Appellant for the past few months and provides information about the Appellant's mental impairments, their symptoms, their impact on DLA and the Appellant's need for help, as detailed below; and,
- A letter of support signed by the GP and dated October 17, 2019 (GP's Support Letter) which also provides information about the Appellant's mental impairments, their symptoms, their impact on DLA and the Appellant's need for help, as detailed below.

The Panel notes that the GP's Support Letter, while available to the Ministry at reconsideration, was initially excluded from the evidence provided to the Tribunal by the Ministry and was not referred to in the RD.

Diagnoses

In the MR, the GP diagnosed the Appellant with left knee pain with a date of onset of October 2017, chronic liver disease since January 2018, and stated in another section of the MR that an unspecified specialist had recently diagnosed the Appellant with chronic pain syndrome (CPS).

Physical Impairment

In the MR, the GP states that the Appellant's knee pain is ongoing, that the Appellant is unable to afford medication for the pain, and that the Appellant is unable to walk more than 1 to 2 blocks or climb more than 5 stairs without a cane. The GP also states that the Appellant has chronic abdominal pain for which the Appellant had been examined by a specialist in internal medicine in September 2018. In addition, the GP reports that the Appellant had had an oesophago-gastroduodenoscopy (OGD) in April 2018, and was presently awaiting a gastro review, a computerized tomography (CT) scan, and a colonoscopy. The GP states that the Appellant's related symptoms include recurrent vomiting and weight loss. The GP

also indicates that an orthopedics report, an internal medicine report and CT scan results are included with the MR but they are not included in the appeal documents. The GP indicates that the Appellant's weight has dropped from 72 kg to 60 kg since January 2018. With respect to functional skills, the GP reports that the Appellant can walk 1 - 2 blocks unaided on a flat surface, and has no limitation with respect to lifting or remaining seated.

In the section of the AR where the assessor is asked to indicate the assistance required related to impairments that directly restrict the applicant's management of mobility and physical abilities, the RN indicates (*with comments in italics*) that the Appellant uses an assistive device and takes significantly longer than typical for walking indoors and outdoors (*uses cane at all times*) and climbing stairs (*very slow and poor balance*), uses an assistive device for standing, and requires the continuous assistance of another person or is unable to lift, carry or hold. Where asked to provide any additional information that may be relevant to understanding the nature and extent of the applicant's impairment and its effect on DLA, the RN writes "*(The Appellant) had an accident 2 years ago that has severely impacted (the Appellant's) level of functioning and ... life. (The Appellant) has not been able to work due to ... low mobility and pain. This has resulted in (the Appellant) being evicted from (their) home and living in (their) car for (the) past 6 months. (The Appellant) has since developed further physical problems like nausea, vomiting and weight loss as well as moderate anxiety, depression and panic symptoms. (The Appellant) is struggling with ... (performing DLA) and doing just enough to survive*".

In the SR, the Appellant states that they had an accident on October 28, 2017 in which their left knee cap was damaged which has resulted in a baker's cyst under the knee cap and from which, due to injury, blood clotting can occur. The Appellant also states that they have a hiatal hernia, that they cannot kneel on their left knee, stand, walk or bend the knee for a prolonged time without serious pain and swelling.

In the GP's Support Letter, the GP states that the Appellant's mental impairment symptoms as set out below are exacerbated by chronic physical health problems and environmental challenges.

In the RN's Support Letter, the RN writes that the Appellant's mental impairments, as outlined below, are exacerbated by physical challenges, including chronic pain, swollen feet and hands, impaired mobility and gastric problems.

Mental Impairment

In the MR, the GP indicates that the Appellant has significant deficits with cognitive and emotional function in the area of emotional disturbance, adding the comment "*Patient has lost employment due to ongoing symptoms and is now homeless and living out of car. Mood affected by this and currently struggling with low mood as a result*". In the section of the MR where the prescribed professional is asked to provide any additional information relevant to an understanding of the significance of the applicant's medical condition, the GP writes "*Patient has been unable to work which has had catastrophic effects on life – lost job, lost home and is now living out of car / in campsite*".

In the AR, the RN indicates that the Appellant has satisfactory speaking, reading, writing and hearing abilities, adding that the Appellant struggles with "*poor focus, concentration and cognition*". In the section of the AR where the prescribed professional is asked to indicate the degree to which the applicant's mental impairment restricts or impacts daily functioning, the RN indicates a major impact in

bodily functions (underlining “eating problems” and “sleep disturbance”), emotion, attention/concentration, executive functioning, memory, motivation and “other emotional or mental problems” (without specifying which other problems). The RN also indicates that there is a moderate impact on daily functioning in the area of insight and judgement, a minimal impact in four of the listed areas (consciousness, impulse control, language and psychotic symptoms) and no impact in the other listed areas.

In the SR, the Appellant states that they suffer from CPS, chronic fatigue syndrome and central sensitivity syndrome. As a result the Appellant writes that their cognitive decision making is impaired, they have daily panic attacks, and that they vomit daily and have lost teeth, hair and weight due to high stress.

In the RFR the Appellant writes “*Every morning I wake up in pain and think of the uphill battle. Serious panic attacks daily. My (GP) has prescribed ... Citalopram to address my stress and unhappy thoughts. My memory is poor / cannot focus / extremely overwhelmed*”.

In the GP’s Support Letter, the GP states that the Appellant is struggling with depression, low mood, fatigue and poor appetite, that their sleep is disrupted and that the Appellant is “*struggling to improve despite regular input from (the RN) and the community mental health team*”.

In the RN’s Support Letter, the RN states that the Appellant “*has been struggling with recurrent moderate depression and anxiety which greatly impairs (their) functioning. (The Appellant) has low mood, fatigue, poor appetite, disrupted sleep (and) ... cognitive deficits (and is) experiencing frequent suicidal ideation with daily panic attacks. These symptoms are severe and resistant to treatment.*”

Restrictions in the Ability to Perform DLA

In the MR, the GP has indicated that the Appellant has not been prescribed any medications and/or treatments that interfere with their ability to perform DLA, but that the Appellant’s impairments directly restrict their ability to perform DLA, indicating that the Appellant is continuously restricted in the areas of basic housekeeping and mobility outside the home.

In the AR, the RN indicates that the Appellant takes 4 to 5 times longer than typical to perform all aspects of personal care, adding “*presently doing very little bathing as living in ... car since March 2019*”. In the section of the AR where the assessor is asked to identify the applicant’s mental and physical impairments that impact their ability to perform DLA, the RN has written that the Appellant has impaired mobility due to the knee injury, painful swollen feet, CPS, nausea, weight loss, moderate chronic fatigue syndrome, moderate depression, anxiety and panic attacks.

In the AR the RN also indicates that the Appellant requires periodic assistance from another person and takes significantly longer than typical with laundry (*not able to carry and use(s) cane*) and requires continuous assistance with basic housekeeping. Regarding shopping activities, the RN indicates that the Appellant takes significantly longer than typical and uses an assistive device in going to and from stores and requires continuous assistance from another person in carrying purchases home, adding “*friends will assist carrying things*”. Regarding meals, the RN indicates that the Appellant uses an assistive device and takes significantly longer than typical in food preparation and cooking and takes significantly longer in meal planning (*4 to 5 times longer for these tasks due to impaired mobility, fatigue, pain and impaired*

cognition). The RN also indicates that the Appellant uses an assistive device to get in and out of a vehicle and takes significantly longer than typical with that activity, as well as with paying rent and bills and medications. The RN states that the Appellant is independent with respect to all social functioning activities (making appropriate social decisions, ability to develop and maintain relationships, interacting appropriately with others, ability to deal appropriately with unexpected demands, and ability to secure assistance from others), adding the comment “*quite isolated, increasingly mistrustful of people*” with respect to the ability to develop and maintain relationships. In assessing how the applicant’s mental impairment impacts their relationship with their immediate social networks, the RN has ticked “good functioning”, adding “*few friends/family*”, and “marginal functioning” for extended social networks. The RN adds the following comment to this section of the AR: “*No safety concerns – can set boundaries but is very isolated and disconnected*”. Where asked to provide any additional information relevant to understanding the nature of the Appellant’s impairment, the RN says that the Appellant is struggling with DLA and doing just enough to survive.

In the SR, the Appellant states that they cannot pull the car door closed with their left arm and in the RFR the Appellant states that regular chores and hygiene are “*a lot of trouble*”.

In the GP’s Support Letter, the GP states that the Appellant’s impairments significantly impair their functioning, that they are no longer able to care for themselves appropriately, and that the Appellant frequently neglects DLA such as cleaning and self care.

In the RN’s Support Letter, the RN writes that the Appellant’s ability to function, maintain safe housing and care for themselves appropriately has declined significantly since the October 2017 accident, and that the Appellant frequently neglects DLA or takes 4 times longer than typical to complete them.

Need for Help

In the MR, the GP indicates that the Appellant requires the use of a cane for their impairment due to ongoing left knee pain.

In the AR, the GP indicates that the Appellant has lived at times with friends but currently is homeless and lives in a car. In the section of the AR where the assessor is asked to identify assistance provided by other people, the RN indicates that the Appellant is able to perform minimal DLA by themselves at a slow pace and that friends assist the Appellant periodically. The RN indicates that the Appellant uses a cane to help them compensate for their impairment and does not have an assistance animal.

In the RFR the Appellant writes “*... I need help (from) friends. I have to rely on my cane for my knee injury at all times*”. In the SR the Appellant states that they require a cane to walk.

In the GP’s Support Letter, the GP states that the Appellant often has to ask friends for help.

In the RN’s Support Letter, the RN writes that the Appellant requires continuous use of a cane and has to ask friends to help them with DLA, if they are available, adding that friends are often not available as the Appellant lives alone.

Additional Information Submitted after Reconsideration

In the Notice of Appeal (NOA), the Appellant writes “*I am struggling with day to day living. I need help with chores and hygiene. I am in pain every day. I need my cane to walk anywhere – going upstairs is very painful and slow, so I avoid them. My mental health ... has deteriorated every day*”.

Regarding the GP Support Letter, the Appellant stated at the hearing that it was delivered by hand to the Ministry’s office in the Appellant’s community within a few days of October 17, 2019 and definitely before the date of the RD (November 1, 2019). The Ministry was unable to confirm when the GP Support Letter was first delivered to the Ministry and did not object to the admissibility of the information in the GP Support Letter. Having considered all of the evidence, the Panel determined that it was reasonable to conclude that the GP Support Letter was evidence submitted *before* the RD was made and was therefore information that the Ministry had at reconsideration.

The Appellant was accompanied at the hearing by the RN who also served as the Appellant’s advocate at the hearing. The RN explained that they had completed the AR as a prescribed professional, but because the Appellant lived in a small community the Appellant did not have the opportunity to seek the services of an advocate from a community services agency as none existed in the community, and the RN had agreed to serve as an advocate for the Appellant at the hearing so that the Appellant had representation.

At the hearing, the Appellant stated that in 2017 they had suffered a broken knee cap in an accident at a business location which was not the Appellant’s workplace, so a workers’ compensation claim was not a consideration. Following the accident a cyst that had developed under the Appellant’s knee cap “*burst and went into (their) body*”. The Appellant said that they had gone through a large number of medical tests since the injury and had developed anxiety to the point that they were unable to sleep or eat properly and they had lost a large amount of weight. The Appellant explained that they now have to use a cane for support every day and that they can’t bend their knee or kneel on it due to severe pain. The Appellant stated that even though the injury was sustained two years ago they still have to elevate the knee and they get headaches every day.

The Appellant explained that they stopped living in their car a couple of months ago (after making the application) as temperatures began to drop with the approaching winter, and that the Appellant was now living on a temporary basis with a married couple who were friends of the Appellant, but that it is difficult for the Appellant to be there all the time because one of the two people the Appellant lives with operates a business from their home. In response to a question from the Ministry the Appellant explained that they had not attempted to acquire any assistive devices other than the Appellant’s cane for use in the house they were now living in because it was a temporary living arrangement and the Appellant was hoping to be able to obtain the PWD designation, which would provide them with access to additional health supplements such as any necessary additional assistive devices.

Regarding DLA, the RN stated that the Appellant was struggling to perform DLA and was “*trying to survive*”. The RN stated that the Appellant has problems looking after personal hygiene and the Appellant stated that while they would like to be able to shower every day, they had not managed to

have a shower before the hearing. The Appellant also explained that the couple with whom they are currently living brings in a housekeeper to assist with basic housekeeping, including that required by the Appellant.

The Appellant said that the GP had told them that they were in a hurry when the GP completed the MR and that the GP referred the Appellant to the RN to assist with the AR, knowing that the RN would have more time to do a more complete assessment of the Appellant. When the GP saw the RN Support Letter the GP provided the GP Support Letter to indicate that they agreed with the RN's assessment. The RN added that the RN was disappointed that the GP Support Letter had not been considered by the Ministry in its RD and surmised that it might have been because the Ministry made the mistake of including the RN's letter twice in the appeal package rather than one copy of the RN's letter and one copy of the GP's letter, and thus, did not take the information in the GP Support Letter into account in making its RD.

In response to a question from the Panel, the Appellant stated that in the 2 years that the Appellant has been a patient of the GP they have seen the GP every 2 to 3 weeks but their next visit will be on December 4, 2019, which is two months after the most recent visit, and that having to wait this long for the next appointment is unusual. Regarding appointments with the RN, who serves as a mental health worker for the local health authority, the Appellant stated that since the end of June 2019 the Appellant has had appointments with the RN for counselling and support once every two weeks, which is as often as the RN can provide support due to the RN's heavy caseload.

At the hearing, the Ministry relied on its RD and stressed the differences in the assessments provided by the GP in the MR and the RN in the AR. The Ministry explained that it had given more weight to the GP's assessments because the GP had known the Appellant longer than the RN had and because the GP was a medical practitioner. A panel member pointed out that the frequency of contact sections of the MR and AR group the number of appointments with the prescribed professional using tick boxes that say "0", "Once", "2-10 times" and "11 or more times", noting that "2-10 times" is a very wide range and asked whether the Ministry ever follows up to narrow down this range. In response the Ministry stated that the Ministry sometimes seeks more information from the Appellant but in this case it didn't appear that the Ministry needed it.

In response to another question from the Panel the Ministry stated that the Ministry adjudicators who review PWD applications have some knowledge of medical conditions and have access to medical professionals should they need to consult with them, but the Ministry was not aware whether such consultations were sought in this case.

Admissibility of Additional Information

Section 22(4) of the EAA provides that panels may admit as evidence (i.e. take into account in making its decision) the information and records that were before the Ministry when the decision being appealed was made and "*oral and written testimony in support of the information and records*" before the Ministry when the decision being appealed was made, i.e. information that substantiates or corroborates the information that was before the Ministry at reconsideration. Because a panel can only accept oral and written testimony in support of the information and records before the Ministry when the decision was made, there is limited discretion for a panel to admit new evidence. Once the panel has determined which additional evidence is admissible under EAPWDA Section 22(4), instead of asking whether the

decision under appeal was reasonable at the time it was made, panels must determine whether the decision under appeal was reasonable based on all admissible evidence.

The Panel considered the written information in the NOA to be argument.

The Panel considered the GP's Support Letter to be in support of the information and records before the Ministry, irrespective of whether it was or was not physically in the Appellant's file at the time of the RD.

The Panel considered the oral testimony at the hearing to be in support of the information and records before the Ministry at reconsideration with the exception of the information on the current state of temporary housing in that the Appellant was not, at the time of the hearing, residing in a car.

PART F – REASONS FOR PANEL DECISION

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

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

Persons with disabilities

2 (1) In this section:

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

"daily living activity" has the prescribed meaning;

"prescribed professional" has the prescribed meaning.

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

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

(b) in the opinion of a prescribed professional

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

(A) continuously, or

(B) periodically for extended periods, and

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

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

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

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

(i) an assistive device,

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

(iii) the services of an assistance animal.

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

The EAPWDR provides as follows:

Definitions for Act

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

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

- (i) prepare own meals;
- (ii) manage personal finances;
- (iii) shop for personal needs;
- (iv) use public or personal transportation facilities;
- (v) perform housework to maintain the person's place of residence in acceptable sanitary condition;
- (vi) move about indoors and outdoors;
- (vii) perform personal hygiene and self care;
- (viii) manage personal medication, and

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

- (i) make decisions about personal activities, care or finances;
- (ii) relate to, communicate or interact with others effectively.

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

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

- (i) medical practitioner,
- (ii) registered psychologist,
- (iii) registered nurse or registered psychiatric nurse,
- (iv) occupational therapist,
- (v) physical therapist,
- (vi) social worker,
- (vii) chiropractor, or
- (viii) nurse practitioner ...

Part 1.1 — Persons with Disabilities

Alternative grounds for designation under section 2 of Act

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

- (a) a person who is enrolled in Plan P (Palliative Care) under the Drug Plans Regulation, B.C. Reg. 73/2015;
- (b) a person who has at any time been determined to be eligible to be the subject of payments made through the Ministry of Children and Family Development's At Home Program;

- (c) a person who has at any time been determined by Community Living British Columbia to be eligible to receive community living support under the Community Living Authority Act;
- (d) a person whose family has at any time been determined by Community Living British Columbia to be eligible to receive community living support under the Community Living Authority Act to assist that family in caring for the person;
- (e) a person who is considered to be disabled under section 42 (2) of the Canada Pension Plan (Canada).

The EAA provides as follows:

Panels of the tribunal to conduct appeals

22 (4) In a hearing referred to in subsection (3), a panel may admit as evidence only

- (a) the information and records that were before the minister when the decision being appealed was made, and
- (b) oral or written testimony in support of the information and records referred to in paragraph (a).

Eligibility under section 2.1 of the EAPWDR

In the absence of any evidence or argument respecting eligibility for PWD designation under section 2.1 of the EAPWDR, the Panel finds that the Ministry reasonably determined that it has not been established that the Appellant falls within the prescribed classes of persons under that section. Therefore the Panel's discussion below is limited to eligibility for PWD designation under section 2 of the EAPWDA and section 2 of the EAPWDR.

Eligibility under section 2 of the EAPWDA

Severity of Impairment

Neither the terms "*impairment*" nor "*severe*" are defined in the EAPWDA. The Cambridge Dictionary defines "*impairment*" in the medical context to be "*a medical condition which results in restrictions to a person's ability to function independently or effectively*" and defines "*severe*" as "*causing very great pain, difficulty, worry, damage, etc.; very serious*". "*Impairment*" is defined in the MR and the AR sections of the PWD application form to be "*a loss or abnormality of psychological, anatomical, or physiological structure or function causing a restriction in the ability to function independently, appropriately or for a reasonable duration*". The Panel finds that the Ministry's definition of "*impairment*" as set out in the MR and the AR, while not defined in the legislation, is a reasonable definition of the term for the purpose of partially assessing an applicant's eligibility for the PWD designation.

A diagnosis of a severe impairment does not in itself determine PWD eligibility. Section 2(2) of the EAPWDA requires that in determining whether a person may be designated as a PWD, the Ministry must be satisfied that the individual has a severe physical or mental impairment with two additional characteristics: in the opinion of a prescribed professional, it must both be likely to continue for at least two years [EAPWDA 2(2)(a)] and it must significantly restrict a person's ability to perform DLA continuously or periodically for extended periods, resulting in the need for the person to require

assistance in performing those activities [EAPWDA 2(2)(b)]. Therefore, in determining PWD eligibility, after assessing the severity of an impairment the Ministry must consider how long the severe impairment is likely to last and the degree to which the ability to perform DLA is restricted and help in performing DLA is required. In making its determination the Ministry must consider all the relevant evidence, including that of the Appellant. However, the legislation is clear that the fundamental basis for the analysis is the evidence from a prescribed professional – in this case the Appellant’s GP in the MR and the RN in the AR.

Physical Functioning

The Ministry’s position is that, while the information provided in the Appellant’s PWD application demonstrates that the Appellant experiences limitations to their physical functioning due to left knee pain, the assessments provided by the GP and RN and the information provided in the SR speak to a moderate rather than severe physical impairment. In addition, the Ministry determined that, while the RN’s assessment of the Appellant’s mobility and physical ability indicate the Appellant is much more restricted than the GP’s assessment of their basic functional skills, more weight should be given to the GP’s assessment because the RN indicates that they had known the Appellant for two months at the time the AR was completed, whereas the GP had known the Appellant for 18 months and had seen them between 2 and 10 times when the MR was completed. As a result, the Ministry concluded that the GP “*has had the opportunity to develop an opinion based on a history of contact, experience, observations and knowledge of you*”.

The Appellant’s position is that a serious knee injury sustained by the Appellant in 2017 has not healed and they still can’t kneel on their left knee, stand, walk or bend the knee without serious pain and swelling. As a result they require the use of a cane at all times.

Panel Decision

In its RD, the Ministry notes that, where the prescribed professional completing the form is asked to assess the Appellant’s functional skills relating to walking and climbing, the form notes that the assessment should indicate the applicant’s ability to walk or climb “unaided”, where “unaided” means “**without** the assistance of ... an assistive device ...” and concludes that the RN’s assessment of the Appellant’s mobility indicates a greater degree of restriction than the GP’s assessment in the MR, presumably because the GP has ticked the boxes stating that the Appellant can walk 1 to 2 blocks unaided and climb 2 to 5 steps unaided. However, the GP has stated elsewhere in the MR that the Appellant *requires the use of a cane* for their physical impairment. In addition, the Panel notes that the Appellant indicated at the hearing that the GP had stated that they did not have time to do a complete job of filling out the MR, which is supported by the fact that comments and explanations are not given where the prescribed professional is prompted to provide them. The Panel finds that a more reasonable conclusion to draw from the fact that the GP indicated that the Appellant could walk 1 to 2 blocks and climb 2 to 5 steps is that the GP had not read the application form carefully and did not realize that they were being asked to indicate how far the applicant could walk or climb without the help of an assistive device.

Regarding the Ministry’s decision to give more weight to the GP’s assessment, the Panel notes that there is not a significant difference in the number of times the Appellant has met with the GP and the RN

(both had seen the Appellant between 2 and 10 times in the past year at the time the application was completed). There is no obvious reason why the Ministry should consider a medical practitioner's assessment of an impairment to be superior to that of an RN, based on professional status as both a GP and an RN are considered prescribed professionals under the EAPWDR.

While the RN has spent more time with the Appellant in recent months than has the GP, the GP, who referred the Appellant to the RN, has indicated concurrence with the RN's assessment and said as much in the GP Support Letter, which the Ministry did not refer to anywhere in the RD. Specifically, the RN states in the AR that the Appellant is struggling with performing DLA and is unable to lift, carry or hold. In addition the GP states in the SR support letter that the Appellant's mental impairment symptoms are exacerbated by chronic physical health problems.

Having reviewed all of the evidence, the Panel finds that the Ministry was not reasonable in weighing the GP's assessment greater than that of the RN, in finding that the evidence provided by the two prescribed professionals varied in any substantial way with respect to the severity of the Appellant's physical impairment, in considering that the GP's evidence differed from the RN's, in describing the Appellant's use of the assistive device, and ultimately, in determining that the Appellant did not have a severe physical impairment.

Mental Functioning

The Ministry's position is that, although the RN has indicated that the Appellant has significant mental impairments that greatly impair the Appellant's functioning, the GP has not provided a diagnosis giving rise to a mental impairment and has not indicated that the Appellant's mental functioning is significantly restricted. In addition, the Ministry determined that the Appellant's low mood may change if the Appellant's living situation changes and the GP does not indicate that the Appellant's low mood is likely to continue for at least 2 years. Therefore the Ministry determined that the information provided does not establish that the Appellant has a severe mental impairment.

The Appellant's position is that they suffer from CPS, together with a few other undiagnosed symptoms, and that as a result the Appellant's cognitive decision making is impaired, they have daily panic attacks, and that they vomit daily and have lost teeth, hair and weight due to high stress.

Panel Decision

The record does not support the Ministry's assertion that the GP has not provided a diagnosis giving rise to a mental impairment. The Panel notes that in Section C entitled "Degree and Course of Impairment" under Section C6 of the MR the GP indicated "Yes" in response to the question "Are there any significant deficits with cognitive and emotional function?". The GP also indicated in the MR that "*a specialist has recently diagnosed the Appellant with CPS*". As CPS is a mental disorder, the Ministry was incorrect in concluding that a mental impairment had not been diagnosed.

The Panel finds that there is no reason why the Ministry should discount the assessments of the RN who was clearly identified in the AR as working in mental health and addiction services, and to whom the Appellant was referred by the GP. The Panel further notes that the RN has provided detailed information regarding the Appellant's mental impairments, as set out above and in the RD. In addition, the Panel notes that, in the GP's Support Letter, the GP writes that the Appellant is struggling with depression, low

mood, fatigue and poor appetite, that their sleep is disrupted and that the Appellant is “*struggling to improve despite regular input from (the RN) and the community mental health team*”, all of which are symptoms of a mental impairment. As mentioned earlier, the Ministry did not refer to any of the evidence provided in the GP Support Letter in its RD.

Regarding the Ministry’s determination that the Appellant’s “low mood” may change if the Appellant’s living situation changes, and that the GP does not indicate that the Appellant’s low mood is likely to continue for at least 2 years, the Panel notes that the GP *did* specifically indicate in Section C1 of the MR that the Appellant’s CPS is likely to continue for 2 years or more. There is no indication that the duration of impairment stated in Section C1 of the MR was not applicable to Section C6 of the MR. The Ministry has not provided any explanation or information that contradicted that assessment or that would support its contention that the Appellant’s “low mood” may change if the Appellant’s living situation changes. Neither of the prescribed professionals indicate anywhere in the information provided that this might be the case.

Having reviewed all of the evidence, the Panel finds that the Ministry was not reasonable in determining that the Appellant did not have a severe mental impairment.

Restrictions in the Ability to Perform DLA

The Ministry’s position is that, because the RN’s assessment of the Appellant’s ability to manage DLA is much more restricting than the GP’s assessment of their ability to manage DLA, and because more weight has been given to the GP’s assessment, there is not enough evidence to confirm that the Appellant’s impairment significantly restricts their ability to perform DLA continuously or periodically for extended periods.

The Appellant’s position is that they struggle to perform DLA and almost all DLA that are performed by the Appellant take 4 to 5 times as long as typical. Due to constant pain relating to the knee injury and their CPS, the Appellant also contends that most activities involving personal hygiene and basic housekeeping are ignored and mobility outside the home is severely restricted.

Panel Decision

Section 2(2)(b) of the EAPWDA requires that the Ministry be satisfied that a prescribed professional has provided an opinion that an applicant’s severe impairment *directly* and *significantly* restricts their DLA, continuously or periodically for extended periods. In this case, the GP and the RN are the prescribed professionals.

As explained earlier, the Panel has determined that there is no legitimate reason why the Ministry would consider a medical practitioner’s assessment of an impairment to be superior to that of a registered nurse. Regardless, the Panel notes that, in the GP’s Support Letter, the GP states that the Appellant’s impairments significantly restrict the Appellant’s functioning, that the Appellant is no longer able to care for themselves appropriately, and that they frequently neglect DLA such as cleaning and self care. Also as previously stated, the Panel notes that the Ministry did not take into consideration any of the information in the GP Support Letter in reaching its RD. Finally, the Panel notes that the impact of the Appellant’s physical and mental impairments on their ability to perform DLA as summarized in the GP

Support Letter largely concur with the information provided by the Appellant in the SR, the RN in the AR, and the verbal evidence presented by the Appellant and the RN at the hearing.

Based on all of the evidence, the Panel finds that the Ministry was not reasonable in determining that the Appellant did not have a severe impairment that, in the opinion of a prescribed professional, directly and significantly restricts the Appellant's ability to perform DLA.

Help with DLA

The Appellant's position is that they either ignore DLA or delay performing them, and that they have to rely on friends to assist them with DLA whenever possible. In addition, the Appellant continually relies on a cane as an assistive device when walking and standing.

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 from another person.

Panel Decision

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. That is, the establishment of direct and significant restrictions under section 2(2)(b)(i) is a precondition of meeting the need for help criterion. Help is defined in subsection (3) as the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform one or more DLA.

The Panel notes that all of the information regarding need for help provided by the GP, the RN and the Appellant is entirely consistent. Specifically, in the MR, the GP indicates that the Appellant requires the use of a cane for all aspects of ambulation, and a cane is listed as an assistive device in the AR. In the SR the Appellant states that they require a cane to walk. In the AR, the RN indicates that the Appellant uses a cane to help them compensate for their impairment and in many aspects of personal care and basic housekeeping. In the RFR the Appellant says that they have to rely on their cane at all times. In the RN's Support Letter, the RN writes that the Appellant requires continuous use of a cane. In the AR, the GP indicates that the Appellant has lived at times with friends upon whom the Appellant relies for help with DLA, which was also the evidence provided by the Appellant at the hearing. In the AR, the RN indicates that the Appellant is able to perform minimal DLA by themselves at a slow pace and that friends provide periodic assistance with carrying things when the Appellant goes shopping and for other unspecified DLA. In the RFR the Appellant says that they need help from friends to perform DLA. In the GP's Support Letter, the GP states that the Appellant often has to ask friends for help. In the RN's Support Letter, the RN writes that the Appellant has to ask friends to help with DLA, if they are available.

Having reviewed all of the evidence, the Panel finds that the Ministry was not reasonable in concluding that the Appellant did not need help to perform DLA.

Conclusion

Having reviewed and considered all of the evidence and relevant legislation, the Panel finds that the Ministry's RD, which determined that the Appellant was not eligible for the PWD designation under Section 2 of the EAPWDA, was not reasonably supported by the evidence and was not a reasonable application of the EAPWDA in the circumstances of the Appellant, and therefore rescinds the decision. The Appellant's appeal, therefore, is successful.

APPEAL NUMBER

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

Simon Clews

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2019/11/26

PRINT NAME

Kent Ashby

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019/11/27

PRINT NAME

Melissa McLean

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019/11/27