

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 November 22, 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 the 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 September 30, 2019 and denied on October 8, 2019. On November 7, 2019, the ministry received the appellant's Request for Reconsideration ("RFR") with information from an advocate, and on November 22, 2019, the ministry completed the review of the RFR.

2. An RFR, signed by the appellant on October 30, 2019 with handwritten notation "missing information", and attached letter from an advocate dated November 6, 2019. Medical documents with the date range June 2009 to September 2019 were also submitted with the RFR.

The letter from the advocate contains argument for the reconsideration and also provides information regarding the appellant's medical conditions and the impact on daily functioning. The advocate has known the appellant for the past 4 years as community acquaintances, and was employed in the field of "long term disability related to injury and to sickness." The advocate interviewed the appellant at length to gain a complete picture of the appellant's disability. The advocate intends to share the letter with the appellant's general practitioner ("GP") for the purpose of obtaining an amended report from the GP regarding the severity of the appellant's conditions [*Panel note: the ministry confirmed that an amended report was not provided*].

The advocate reports:

Severity of impairment

- The appellant is unable to work at either light duty employment or customer service due to generalized pain, back pain, and exhaustion. The appellant needed help when lifting heavier items at work. The appellant always put on a happy face but would go home at the end of the day and cry and sleep due to overwhelming pain, depression, and anxiety.
- The appellant's depression has not gone away and has instead become worse. The appellant's high blood pressure is also getting worse and sleep issues result in the need for more naps. The appellant lives alone in isolation, with failing memory, ankle pain due to a previous fracture, kidney disease, a heart issue, painful cysts and hemorrhoids, regular back pain (which recently required treatment at the hospital ER), foot issues which cause pain on walking and limitations to standing, claustrophobia, malnourishment, and osteoporosis.
- The appellant's life started to unravel in 2014 when the appellant was diagnosed with chronic kidney disease and a specialist doctor "implies a lifespan of around 6 years." The appellant experienced significant family and financial stressors around the same time and had difficulty maintaining a stable residence which added to the multiple stress factors.
- The appellant tries to be active with walking but is worn out after a few blocks and has serious foot pain due to the previous ankle fracture. Constant back pain greatly limits the appellant's physical activity and the appellant also has zero motivation for walking.
- The appellant avoids going upstairs unless absolutely necessary, and it is a slow process due to back pain and the need to rest on nearly every step after the first few steps.
- The appellant can lift up to 20 lbs. maximum but definitely not 35 lbs., and the appellant can only lift under very specific conditions when the load does not press against the appellant's painful cysts or is heavy enough to aggravate back pain.
- The appellant will sit for periods of time due to boredom, fatigue, and racing thoughts. Fatigue results in the need to nap and rest; however, lengthy sitting in a small room aggravates the appellant's claustrophobia and causes back pain and discomfort due to ever present pain from the appellant's cysts.
- The appellant's memory is impacted by depression and anxiety; comment, "I forget things very quickly."

Daily living activities

- The appellant resides in a small space, and often the only chore that gets done is making the bed each morning. If the appellant vacuums, the appellant would not be able to do any other chore that day. Over the spread of a week or two, the appellant will only do cursory dusting and sweeping and will be overcome with fatigue after each cleaning event. The appellant will then need to rest for a couple of hours.
- The appellant can perform DLA independently as long as the activity does not involve lifting, moving, or pushing as those activities cause pain and exhaustion.
- Regarding social functioning, the appellant is isolated and has no social life. In any given week, only one person will visit the appellant and on a rare occasion, the appellant will have two visitors. Performing DLA and social activities causes the appellant increased stress, physical pain and discomfort, fatigue and exhaustion, and social withdrawal.
- The appellant's typical day is to get up early and wait for dizziness to subside before getting dressed and driving to a local fast food outlet for a beverage. The appellant consumes the beverage in the car and never goes into the restaurant (comment, "i sit there and then go home"). The appellant does not have breakfast but sits in a chair due to exhaustion and has a nap for a couple of hours.
The appellant has a light snack only for lunch and then goes for a short drive in the community which leads to further exhaustion and the need for another two hour nap. The appellant does not usually have dinner and cannot remember cooking any recent meals. The appellant goes to bed early, spends some time on the internet, and then sleeps very badly with frequent waking.
- The appellant attends community resources for food and shops for basic supplies. The appellant's financial situation increases the level of stress and depression.

3. A self-assessment questionnaire to indicate the severity of the test taker's depression. The questionnaire was completed by the appellant and administered by the advocate on November 5, 2019. The advocate indicates obtaining the questionnaire from the internet. The appellant endorses items indicating low mood and energy, loss of interest in activities, feelings of hopelessness and worthlessness, anxiety, social isolation, and cognitive deficits in areas such as memory and concentration. The appellant's score on the assessment is 29 - "severe depressive."

4. Sonography results (breasts) from June 23, 2009, indicating small cysts and no evidence of malignancy (follow up from June 19, 2009 imaging).

5. A diagnostic imaging report (breasts) dated April 28, 2015, indicating small unchanged masses and benign findings.

6. A diagnostic imaging report (kidneys) dated September 18, 2014, indicating small renal cysts with no suspicious lesion or bladder/ other organ involvement.

7. A diagnostic imaging report (ankle) dated September 23, 2014, indicating soft tissue swelling and callus formation with no additional fracture or aggressive periostitis.

8. A medical imaging report (lower spine) dated September 23, 2019, indicating mild joint arthrosis, minor disc narrowing, and no concerning lesion. Alignment and body heights are maintained.

9. A medical imaging report (right foot and ankle) dated May 24, 2019, indicating an "old healed fracture deformity", mild soft tissue swelling, no ankle joint effusion, and no significant osteoarthritic changes.

10. A referral to a nephrologist dated August 27, 2018.

11. A Clinical note from the appellant's GP dated August 28, 2019. The appellant attended the appointment to obtain a sick note for time off work. The GP reports moderate obstructive sleep apnea and the appellant is unable to afford a C-PAP machine to treat this condition. Due to frequent waking the appellant barely sleeps 3-4 hours in total, feels exhausted throughout the day, "and is hardly functional and needs to take naps to feel better."

The GP reports the appellant has poor concentration and irritability and is able to do daily chores but has no motivation to go to work. The appellant denies being anxious or having a low mood, and also denies any breathing

problems or chronic pain. The GP reports that all recent lab tests including kidney function were normal. The appellant's blood pressure was high. The GP recommended good sleep hygiene and increased physical activity among other things.

12. A clinical note from the GP dated August 14, 2019. The appellant attended the appointment for completion of disability forms. The GP reports that the appellant has been struggling with daytime sleepiness due to sleep apnea. The appellant cannot afford C-PAP until disability is approved to cover the cost. The appellant feels exhausted at work, is very emotional and tearful at times but is still functional despite lacking the motivation to go to work.

The appellant has a good appetite, is not suicidal and has "a good support system" and still goes out to take the dog for walk. The appellant's blood pressure is controlled with medication, kidney function is stable, and there are no side effects from the medications. The appellant's mood is "slightly low", affect and thought processes are normal. The appellant has sleep apnea and hypertension and is encouraged to stay active. The appellant thinks that a C-PAP machine will improve the sleep and mood symptoms.

13. A hospital Emergency Department outpatient record dated September 23, 2019 [*largely illegible*] with a diagnosis of low back pain.

14. A clinical note from the GP dated September 30, 2019. The appellant attended the appointment for multiple issues including completion of disability forms, review of blood pressure, and worsening anxiety and mood. The appellant has moderate obstructive sleep apnea and is trying to obtain funding for a C-PAP machine. The appellant has continuing sleep problems with frequent waking and insufficient sleep resulting in poor concentration and irritability during the day and the need for naps.

The appellant denies chronic pain. The appellant's mood has been low of late accompanied by a poor appetite and crying spells. The appellant is very emotional but only slightly anxious (about the employment situation). The GP reports that all recent lab tests including kidney function were normal and kidney function has been stable. The appellant's blood pressure was high.

The appellant presented as well-groomed with good eye contact. The appellant was tearful with normal affect (congruent with mood), normal speech and thought form. The GP assessed the appellant with Depressive Disorder (not elsewhere classified), essential hypertension, and "special symptoms or syndromes not elsewhere classified." The GP encouraged frequent self-testing of blood pressure and started the appellant on an anti-depressant medication. The GP indicates that additional disability forms were filled out [*Panel note: the ministry confirmed that no additional medical forms were received*].

15. A *Chronic Disease Management* report from a nephrologist/general internist dated October 30, 2014. This report indicates the appellant has chronic kidney disease and describes the etiology of the disease, the appellant's symptoms and medications, laboratory test results, and lifestyle recommendations including increased exercise, a healthy diet, and smoking cessation.

16. A letter from the nephrologist dated September 3, 2014, describing an assessment plan to investigate the appellant's kidney condition.

17. An *Outpatient Consultation* report from the nephrologist dated September 3, 2014. The nephrologist indicates the appellant has a history of hypertension, dyslipidemia (high cholesterol), and chronic kidney disease. The appellant was seen by a cardiologist for hypertension and at that time the appellant's kidney condition was assessed as stable and likely due to hypertension. The appellant also had pulmonary function tests and cardiology investigations which were normal.

The appellant reported having vertigo once a week, and bleeding hemorrhoids for which colonoscopy and fecal occult blood test results were normal. The appellant also complained of swelling in the right foot (comment, "query osteoporosis"). The nephrologist recommended further investigations and lifestyle changes including dietary changes for foot swelling and pain.

18. A letter from a sleep clinic dated July 18, 2017 (attached to the PWD application), indicating the appellant underwent a sleep study that found moderate obstructive sleep apnea. The appellant elected not to go forward with a C-PAP evaluation at that time and it was recommended that the appellant consider alternatives to C-PAP as suggested by the clinic's sleep physician.

19. The PWD application comprised of:

- the applicant information (self-report - "SR") dated August 14, 2019;
- a Medical Report ("MR") dated August 18, 2019, completed by the appellant's GP who has seen the appellant 2-10 times in the past 12 months; and an
- Assessor Report ("AR") dated September 30, 2019, also completed by the GP who has known the appellant for 2 months and based the assessment on an office interview with the appellant and file/chart information. The GP indicates providing counselling to the appellant for depression and anxiety, insomnia, high blood pressure, and sleep apnea.

Summary of relevant evidence from the application:

Diagnoses

In the MR, the appellant is diagnosed with sleep apnea (date of onset 2017), hypertension, and chronic kidney disease.

Under *Health History*, the GP writes that the appellant needs to be on C-PAP for sleep apnea, and is suffering from fatigue and daytime sleepiness which makes it hard for the appellant to function at work. The appellant is unable to afford C-PAP.

Functional skills

Self-report

The appellant reports being at the point of mental, physical, and emotional exhaustion despite trying to live a normal life. The appellant reports doing everything alone, being very fatigued after work, and crying from exhaustion. The appellant indicates trying to keep active by walking but feels worn out after a few blocks and is becoming less capable of working as a result of medical issues. The appellant reports a low concentration level due to not sleeping properly.

Medical Report

Under *Health History*, the GP reiterates that it is difficult for the appellant to function at work due to fatigue and sleepiness.

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 or remaining seated and no difficulties with communication.

The GP indicates the appellant has significant deficits with cognitive and emotional function in 3 of the 12 areas listed on the form: *Emotional disturbance, Motivation, and Attention or sustained concentration*. The space for *Comments* is left blank.

Assessor Report

Under section B-2, *Ability to Communicate*, the GP assesses the appellant's ability in all areas of communication as *Good* (speaking, reading, writing, and hearing).

Under section B-3, *Mobility and Physical Ability*, the GP marks the appellant as independent with all of the listed skills: *Walking indoors, Walking Outdoors, Climbing stairs, Standing, Lifting, and Carrying/holding*.

For section B-4, *Cognitive and Emotional Functioning*, the GP indicates that the appellant's mental impairment restricts or impacts functioning in the following areas:

- *Impulse control* - **minimal impact**;
- *Consciousness, Executive, and Motivation* - **moderate impact**;
- *Emotion and Attention/concentration* - **major impact**.

The GP indicates **no impact** for 7 areas: *Bodily functions, Insight and judgment, Motor activity, Language, Psychotic symptoms, Other neuro-psychological problems, and Other emotional or mental problems*.

The GP does not provide any impact information for *Memory* (there are no check marks on the form for this item).

Daily Living Activities

Self-report

The appellant indicates that house chores are not as difficult as being at work because the appellant can rest when needed while doing laundry or cooking at home.

Medical Report

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

In Part E - *Daily Living Activities*, the GP checks *No*, the impairment does not directly restrict the person's ability to perform DLA.

Assessor Report

The GP indicates that the "inability to concentrate due to lack of sleep and daytime sleepiness", chronic fatigue, low mood, high blood pressure, and chronic kidney disease are the impairments that impact the appellant's ability to manage DLA. In section C of the AR, the GP marks all DLA as independent and does not provide any additional comments. Regarding *Social Functioning*, the appellant is reported to have good functioning with both immediate and extended social networks and no safety issues are identified.

Need for help

In the MR, the GP check marks *Yes*, the appellant requires prostheses or aids for the impairment (comment, "C-PAP at night...might help the condition and resolve the issue").

In the AR, section D, the GP does not fill in any information for *Assistance provided by other people*. Under *Assistance provided through the use of assistive devices*, the GP check marks *Other*, "C-PAP" (comment, "not using any device at the moment"). When asked to describe what equipment is required but not currently being used, the GP indicates, "C-PAP for sleep apnea." The GP check marks *No*, the appellant does not have an assistance animal.

20. The ministry's *Decision Summary* with attached letter dated October 8, 2019, indicating the appellant does not meet all of the criteria for PWD designation.

Additional information

Neither party provided new evidence requiring an admissibility determination in accordance with section 22(4) of the *Employment and Assistance Act*. Subsequent to the reconsideration decision, the appellant filed a *Notice of Appeal* with a hand-written statement indicating an appointment with the kidney specialist on November 29, 2019, "obtaining more documents." [Panel note: *No further documents were submitted to the Tribunal*].

APPEAL NUMBER:

Procedural matters

The appellant did not attend the hearing. Upon confirming the appellant was notified of the date and time of the hearing and the teleconference instructions, the panel considered the appeal in a party's absence as it is authorized to do under section 86(b) of the Employment and Assistance Regulation.

The ministry relied on the reconsideration decision and provided argument at the hearing. The ministry noted that the appellant submitted additional information to the ministry on December 11, 2019 (after the date of the reconsideration decision). In response to the ministry's question about the Tribunal's procedure for considering additional evidence on appeal, the panel explained that if a party wishes to submit additional information it would need to be sent to the Tribunal office, or presented to the panel at the hearing.

While there is a possibility that the appellant intended to submit new information to the Tribunal rather than the ministry, the panel confirmed that no additional information was received by the Tribunal. The panel does not know what information was submitted to the ministry or whether the information was for the purpose of this appeal and therefore relies on the evidence in the Tribunal record to decide the 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. The panel's role is to determine whether the ministry was 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 the 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. The ministry found the appellant was not eligible for PWD because not all of the criteria were met. "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 considers the extent of any impact on daily functioning as evidenced by limitations/restrictions with mental functions and emotion. The ministry does not only look at the diagnosis or a medical practitioner's comment that the condition is "severe" but considers the bigger picture including whether there are restrictions with DLA requiring mental/social functioning and whether significant help is required to manage DLA.

Arguments - mental impairment

Appellant

In the letter for the reconsideration, the advocate argues the appellant has a severe mental impairment because the appellant is "currently balancing between Dr. Jeckal [*sic*] and Mr. Hyde... lives in pain, depression, anxiety and suffers throughout the day" while presenting as positive and optimistic. The advocate argues the appellant did not present the GP with a proper and detailed report of restrictions, "nor the implication of the outcomes when [*the appellant*] does try to live life." The advocate submits as well that the GP "could not truly know of [*the appellant's*] circumstances" when the GP was new to the practice and had only known the appellant for two months during the course of brief appointments.

The advocate argues that the appellant's chronic medical conditions and stressful family and financial circumstances have led to worsening mood, loss of motivation to work, and profound social isolation ("fewer acquaintances", "few good friends", "no social life"). The advocate argues that the internet test the appellant completed confirms a high level of distress ("severe depressive"). The advocate emphasizes that the appellant also has memory problems and the appellant, in the self-report, describes being at the point of "mental, physical and emotional exhaustion" and frustration, and experiencing poor concentration and irritability from not sleeping properly despite trying very hard to function normally.

Ministry

The ministry argues that the information provided in the PWD application and RFR does not establish a severe mental impairment because despite significant deficits and impacts in the areas of emotional disturbance, motivation and attention/concentration, most areas of the appellant's cognitive and emotional functioning are assessed as not restricted or minimally impacted. Further, the GP reports that the appellant is able to independently manage all DLA including activities related to making decisions about personal activities and finances, as well as communicating, and interacting with others effectively.

The ministry does not give very much weight to the internet assessment of the appellant's level of distress, arguing that the minister is "not sure of the medical significance of the test as an assessment tool." The ministry acknowledges that the appellant is diagnosed with depression and is very emotional and tearful at times; however, the ministry concludes there is insufficient medical evidence to confirm a severe impairment of mental functioning.

Panel's decision - mental impairment

The panel has considered the evidence in its entirety including the submissions from the advocate. The panel finds that the ministry's decision on mental impairment is reasonably supported by the evidence. The GP confirms that the appellant is depressed and that the appellant's mood has worsened between August and September 2019 according to the clinical notes. Nevertheless, the record indicates the appellant still goes out in the community; manages finances, medications, and medical appointments independently; communicates effectively, and displays appropriate affect. The appellant has recently begun treatment with anti-depressant medication and is reported to be independent with all DLA.

While the advocate argues that the appellant under-reports the level of distress and that the GP is too new to the practice to fully understand the appellant's circumstances, the appellant's mood symptoms including crying spells, poor motivation, and low energy/exhaustion are carefully recorded in the GP's clinical notes. The additional medical documentation provided with the RFR does not address a mental impairment and the self-assessment questionnaire from the internet was not administered by the appellant's medical professional. There is also no indication the GP endorses the appellant's responses on items such as difficulty making decisions and avoidance of social interactions. While the advocate notes the appellant's memory issues, these are not described by the GP.

The panel therefore finds that the ministry reasonably determined there is insufficient evidence of restrictions in the appellant's cognitive and social functioning despite the appellant's mental impairment. The panel finds that the ministry's determination that a "severe" mental impairment under section 2(2) of the EAPWDA was not established, is reasonable based on the evidence.

Physical impairment

To assess whether the applicant has a severe physical impairment, the ministry considers the information on 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**Appellant*

In the submission for the reconsideration, the advocate argues the appellant is unable to work, walk, lift or stand without foot and back pain. Due to claustrophobia, the appellant is unable to remain seated for very long in a small room and pain also impacts sitting. The advocate submits that "constant pain" as well as exhaustion and fatigue due to sleep apnea, in particular, limit the appellant's physical capabilities. The advocate submits that the appellant is unable to effectively perform household chores due to pain and fatigue.

As with a mental impairment, the advocate argues the appellant did not present the GP with full disclosure regarding restrictions. The advocate submits that the GP "does not really know [*the appellant*] on the basis of a couple of 10 minute appointments addressing a few issues." While sleep apnea was determined to be the main cause of the appellant's restrictions, the advocate states that the rest of the appellant's issues also "need to come into play and focus." The advocate argues that the expanded information in the advocate's letter confirms a severe physical impairment.

In the self-report, the appellant reports trying to lead a normal life and remain active but exhaustion limits walking more than a few blocks and the appellant cannot afford a sleep apnea machine. The advocate indicates that the GP would be asked to provide an amended assessment of the severity of the appellant's conditions based on the advocate's detailed information.

Ministry

The ministry argues that the information provided in the PWD application and RFR does not demonstrate a severe mental impairment because the GP indicates the highest level of function/ lowest level of restriction for all of the physical skills and abilities listed in the MR and AR. The ministry notes that the appellant is independent in all

mobility and physical ability tasks including walking indoors/outdoors, climbing stairs, standing, lifting, and carrying/holding as reported by the GP. In addition, the ministry notes that the appellant is assessed as independent with all physical DLA. The ministry acknowledges the appellant's fatigue caused by moderate sleep apnea but finds that this condition does not severely impact the appellant's physical functions.

The ministry further argues that the information from the advocate identifies some limitations with the appellant's physical activity but does not confirm a "severe" physical impairment. While the appellant is reported to be absent from work due to disability, the ministry notes in the reconsideration decision that the PWD application is not intended to assess the client's employability or capacity to work.

At the hearing, the ministry stated that the appellant may want to consider another disability program (*Persons with Persistent Multiple Barriers to employment - PPMB*) because the client's ability to work is assessed in that process and clients who are eligible for PPMB may be eligible to receive funding for C-PAP therapy or other supports.

Panel's decision - physical impairment

The panel has considered the evidence in its entirety including the submissions from the advocate. The panel finds that the ministry's decision on physical impairment is reasonably supported by the evidence. The GP confirms the appellant has moderate sleep apnea that causes fatigue and daytime sleepiness. This makes it difficult for the appellant to work but as noted by the ministry, employability and vocational ability are not criteria for PWD eligibility under the legislation.

The GP's evidence in the MR is that the appellant can perform all physical functions on the least restricted end of the rating scale including walking 4 or more blocks unaided, climbing 5 or more steps, lifting up to 35 lbs., and remaining seated without any limitations. The GP reports no restrictions with standing or carrying and while the appellant's sleep is significantly impacted by sleep apnea to the point where the appellant needs regular naps, the appellant still goes out in the community, drives short distances and walks the dog. The panel therefore finds that the ministry reasonably determined the information in the PWD application does not establish a severe physical impairment.

The advocate describes a greater degree of restriction indicating that the appellant experiences severe pain and fatigue with walking, avoids going upstairs due to pain (unless absolutely necessary), is only able to lift up to 20 lbs. "in special circumstances" and cannot lift heavier items due to the weight of the items pressing against the appellant's painful cysts. Even so, the advocate's information indicates the appellant is able to walk "a few blocks" with rest stops; climb stairs with solid hand railings (taking frequent rest stops); and lift moderate loads despite chronic back, ankle and foot pain. In the SR, the appellant confirms being able to walk "a few blocks" despite being "worn out." In addition, throughout the PWD medical reports and clinical notes, the GP consistently encourages the appellant to be active and engage in physical exercise.

On the evidence, the appellant clearly suffers pain and fatigue with physical activity but given the level of physical function as described in the PWD reports and RFR, the panel finds that the ministry reasonably determined the GP's information as well as the information from the advocate and the appellant, does not confirm a severe physical impairment. While the various medical reports and clinical notes included with the RFR confirm a number of physical ailments, the appellant's conditions are consistently described as mild and/ or stable ("small cysts", "mild" joint arthrosis, "no concerning lesion", "no significant osteoarthritic changes").

The reports that describe more severe symptoms ("prominent" swelling and callus formation subsequent to a previous ankle injury) are almost entirely older records from 2014. The most recent and detailed information from the GP (clinical note of September 30, 2019) indicates the appellant's lab tests continue to be normal and kidney function is stable. The GP indicates that the appellant's most concerning issues are high blood pressure and not being able to access C-PAP treatment for sleep apnea.

Based on the evidence in its entirety, which shows that the appellant is able to function physically despite pain and fatigue, the panel finds that the ministry reasonably determined there is insufficient evidence of restrictions to support a finding of "severe" physical impairment. The panel finds that the ministry's determination that the

appellant does not have a severe physical impairment under section 2(2) of the EAPWDA is reasonably supported by 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 professional is the GP who filled out the PWD medical reports as well as the specialists whose medical reports are attached to the RFR. While the advocate provided an assessment of DLA, and indicates having worked in the field of disability management, there is no indication that the advocate is a prescribed professional as defined in the PWD legislation.

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

Inherently, an analysis of periodic restrictions must also include how frequently the activity is restricted. All other things being equal, a restriction that arises twice 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 this criterion 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

Appellant

In the SR, the appellant argues that DLA are less restricted than the ability to work because the appellant can take rest breaks as required when doing activities at home such as cooking or laundry. The advocate states that the appellant can carry out daily tasks but with significant restrictions; for example, the appellant can only do "limited cleaning" and "cursory housework" due to overwhelming fatigue.

The advocate argues that cleaning the house takes the appellant over a week whereas, a non-disabled person could thoroughly clean the appellant's small space in two hours. The advocate acknowledges that the appellant shops for basic supplies and drives to food outlets and community locations but argues that the appellant's financial management is very limited due to scarce resources. The advocate reports that the appellant rarely prepares meals due to fatigue and a lack of motivation and the appellant also has few social connections and no social life.

Ministry

The ministry argues that the appellant's DLA are not restricted either continuously or periodically for extended periods based on the opinion of a medical professional. The ministry notes that the DLA assessments by the GP (AR) indicate the appellant is independent with all DLA and no safety concerns are reported. The ministry submits that the DLA assessment by the advocate has not been confirmed by a prescribed professional as required by the legislation. The ministry notes that no amended assessment by the GP or additional disability forms were provided for the reconsideration.

Panel's decision - restrictions to Daily Living Activities

The panel has considered the evidence in its entirety, and finds that the ministry's determination that DLA are not significantly restricted is reasonably supported by the evidence. While the advocate describes significant

restrictions to DLA, these restrictions are not confirmed by a prescribed professional as required by the legislation. The advocate details restrictions with housekeeping, laundry, meal preparation, transportation, and social functioning, mainly due to the appellant's sleep problems and profound fatigue as well as back and ankle pain and painful cysts, but these restrictions are not confirmed by the GP. The GP assesses the appellant as independent in all areas of all of the DLA listed in the AR. No additional evidence from a prescribed professional was submitted to the ministry for the reconsideration or to the Tribunal on appeal.

The various specialist reports indicate the appellant has multiple medical conditions that are largely mild or stable, and while some of the reports highlight the appellant's symptoms of fatigue and pain, none of the specialists assess the appellant's ability to perform DLA. Furthermore, the GP's detailed clinical notes for August and September 2019 indicate the appellant "is still able to do" daily chores despite fatigue and low mood characterized by a lack of energy or motivation. Given that the appellant is able to independently manage all DLA, the panel finds that the ministry's determination that the criteria in subsection 2(2)(b)(i) of the EAPWDA are not met, is reasonable based on the evidence from prescribed professionals.

Help to perform daily living activities

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.

The ministry notes that the GP does not identify that the appellant requires any help with DLA. The ministry acknowledges that the appellant requires a C-PAP machine for sleep apnea but does not yet have one. 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 advocate argues that the appellant is forced to manage DLA alone due to depression and social isolation.

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. The panel found that the ministry's determination that significant restrictions to DLA were not established by the information provided is reasonable. The panel notes that there is insufficient evidence in the record to confirm that the appellant requires significant help with DLA. Rather, the GP assesses the appellant as independent with all DLA but the appellant does require an assistive device (C-PAP) to reduce the fatigue and daytime sleepiness caused by sleep apnea.

On review of the evidence, the panel finds that the ministry's conclusion that the criteria for help under subsection 2(2)(b)(ii) of the EAPWDA are not met is reasonable based on the evidence.

Conclusion

Considering the information in its entirety, the panel finds that the ministry's reconsideration decision that found the appellant ineligible for PWD designation is reasonably supported by the evidence. The legislation requires all of the criteria to be met. The ministry found that only two of the criteria (age and duration of impairment) were met.

Based on the functional skills and DLA assessments by prescribed professionals and the record as a whole, the panel finds that the ministry reasonably concluded that the information provided does not demonstrate a severe impairment in mental or physical functioning, significant restrictions to DLA, and significant help required for DLA. The panel confirms the ministry's decision. The appellant is not successful on appeal.

PART G – ORDER	
THE PANEL DECISION IS: (Check one) <input checked="" type="checkbox"/> UNANIMOUS <input type="checkbox"/> BY MAJORITY	
THE PANEL <input checked="" type="checkbox"/> CONFIRMS THE MINISTRY DECISION <input type="checkbox"/> RESCINDS THE MINISTRY DECISION	
If the ministry decision is rescinded, is the panel decision referred back to the Minister for a decision as to amount? <input type="checkbox"/> Yes <input type="checkbox"/> No	
LEGISLATIVE AUTHORITY FOR THE DECISION:	
<i>Employment and Assistance Act</i>	
Section 24(1)(a) <input checked="" type="checkbox"/> or Section 24(1)(b) <input type="checkbox"/>	
and	
Section 24(2)(a) <input checked="" type="checkbox"/> or Section 24(2)(b) <input type="checkbox"/>	

PART H – SIGNATURES	
PRINT NAME Margaret Koren	
SIGNATURE OF CHAIR	DATE (YEAR/MONTH/DAY) 2019-12-19

PRINT NAME Linda Pierre	
SIGNATURE OF MEMBER	DATE (YEAR/MONTH/DAY) 2019-12-19
PRINT NAME Adam Rollins	
SIGNATURE OF MEMBER	DATE (YEAR/MONTH/DAY) 2019-12-19