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PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction's ("ministry") reconsideration decision dated December 3, 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

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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 October 8, 2019 and denied on October 21, 2019. On November 19, 2019, the appellant submitted a Request for Reconsideration ("RFR"), and on November 22, 2019, the ministry completed the review of the RFR.

2. An RFR, signed by the appellant on November 18, 2019 with a typed submission from the appellant dated November 18, 2019. In the submission, the appellant summarizes the information provided by a general practitioner ("GP") and an occupational therapist ("OT") in the PWD application highlighting the appellant's need for various assistive devices. The appellant states that chronic asthma and COPD impacts the appellant's functional ability to walk outdoors, lift 15-35 lbs., and climb 5 or more stairs, requiring frequent rest stops.

The appellant explains how breathing problems, infections, and dizziness cause Activities of Daily Living ("ADL") to take significantly longer than typical, requiring support from inhalers as well as bathroom rails and a shower bench. The appellant notes that personal care, in particular bathing, is restricted by a limited range of shoulder motion and difficulties with reaching up and bathing is "impossible" at times. Grocery shopping (lifting and carrying items from store shelves) is impacted by severe shoulder and neck pain. The appellant reports having to take breaks while cooking and washing dishes, and struggles to reach items in cupboards and shelves on "bad days", with cooking precluded altogether on the appellant's "worst days."

3. The ministry's *Decision Summary* with attached letter dated October 21, 2019, indicating the appellant does not meet all of the criteria for PWD designation.

4. The PWD application comprised of:

- the applicant information (self-report - "SR") dated September 23, 2019;
- a Medical Report ("MR") dated September 11, 2019, completed by the appellant's GP who has known the appellant since February 2018 and has seen the appellant 11 or more times in the past 12 months; and an
- Assessor Report ("AR") dated September 25, 2019, also completed by the GP who has known the appellant for 2 years, has seen the appellant 2-10 times in the past 12 months, and 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 COPD, hepatitis, alcohol misuse, recurrent sepsis, depression, and neck pain (dates of onset not indicated).

Under *Health History*, the GP writes that the appellant's COPD is marked by progressive worsening of breathlessness despite therapy. The appellant is currently followed by a substance misuse team (comment, "controlled but has long history of alcohol and cocaine abuse"). The appellant has recurrent sepsis, with recent hospital admissions for IV antibiotics due to chronic infection (comment, "results in fatigue and decreased performance status"). The GP reports that the appellant's depression is characterized by "low mood linked to physical health issues." The appellant's neck pain is more recent and "limits physical activity." The appellant is awaiting assessment at a pain clinic.

Functional skills

<u>Self-report</u>

The appellant reports "struggling with endurance/breathing at the best of times." The appellant describes being unable to work due to breathing difficulties. The appellant reports that "diffused nerves both in my neck and shoulder" results in constant pain, diminishing the appellant's ability to lift more than 20-30 lbs. The appellant

reports that hand and finger pain causes so much stiffness “some days” that the appellant “can hardly bend them or grip anything.”

The appellant reports that depression and stress result in crying and feeling hopeless and useless “some days.” The appellant also reports difficulties with concentration, in particular, answering questions without having them repeated several times. The appellant indicates working with a counsellor for alcohol use disorder and is planning to begin treatment for Hepatitis C soon if the appellant can maintain abstinence from substances. The appellant reports being in the hospital several times this year due to “over-exerting.”

Medical Report

Under section D, *Functional Skills*, the GP indicates the appellant can walk 1-2 blocks unaided on a flat surface and climb 5 or more steps unaided. The appellant is limited in lifting (15-35 lbs. maximum) and has no limitations with remaining seated and no difficulties with communication.

The GP indicates the appellant has significant deficits with cognitive and emotional function in 4 of the 12 areas listed on the form: *Executive*, *Memory*, *Emotional disturbance*, and *Impulse control*. Under *Comments*, the GP writes, “memory affected, is depressed and alcohol misuse.”

Under *Additional Comments*, the GP reports that recurrent sepsis has led to prolonged hospital admissions and subsequent worsening of the appellant’s performance status (comment, “i.e., weight loss, weakness, dizziness”).

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 *Walking indoors*. The appellant takes significantly longer than typical with *Walking outdoors*, *Climbing stairs*, and *Standing* (comment, “stops frequently due to breathing and weakness”). The appellant requires periodic assistance with *Lifting* and *Carrying and holding* (comment, “helped regularly by roommate”).

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:

- *Bodily functions* (poor hygiene, comment “showering”), *Consciousness* (comment, “alcohol use”), *Emotion*, *Insight and judgment*, *Attention/concentration*, *Executive*, *Memory*, and *Motivation* - **moderate impact**;
- *Impulse control* and *Other neuro-psychological problems* - **major impact.**

The GP indicates **no impact** for 4 areas: *Motor activity*, *Language*, *Psychotic symptoms*, and *Other emotional or metal problems*.

Daily Living Activities

Self-report

The appellant describes the impact of numerous disabilities on the ability to work. The appellant reports having to take breaks “on a good day” while cooking and washing dishes and is unable to cook and shower at all on a “bad day.”

Medical Report

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

Assessor Report

The GP indicates that depression, recurrent sepsis, COPD, and alcohol misuse are the impairments that impact the appellant's ability to manage DLA. In section C of the AR, the GP provides the following information for DLA:

Personal Care: The appellant is independent with 7 of the 8 listed areas: *Dressing*, *Grooming*, *Toileting*, *Feeding self*, *Regulating diet*, *Transfers* (*bed*), and *Transfers* (*chair*). *Bathing* takes significantly longer than typical (comment, "showering is an issue, needs handrail as dizzy").

Basic Housekeeping: The appellant needs periodic assistance from another person with all areas: *Laundry* and *Basic Housekeeping* (comment, "does it slowly, help from roommate").

Shopping: The appellant needs periodic assistance with *Going to and from stores* and *Carrying purchases home* (comment, "assistance from roommate with shopping").

Under *Additional comments* (including a description of the type and amount of assistance required and identification of any safety issues) the GP writes, "following sepsis had psychological assessment - driving licence revoked [*illegible*]. Has help from roommate at times with activity."

Meals, **Pay Rent and Bills**, **Medications**, and **Transportation**: The appellant is independent with all areas of these DLA including *Meal planning*, *Food preparation*, *Cooking*, *Safe storage of food*, *Banking*, *Budgeting*, *Pay rent and bills*, *Filling/re-filling prescriptions*, *Taking* (medications) *as directed*, *Safe handling and storage* (of medications), *Getting in and out of a vehicle*, *Using public transportation*, and *Using transit schedules and arranging transportation*.

Social Functioning: The appellant is independent with 4 of the 5 listed areas: *Able to develop and maintain relationships*, *Interacts appropriately with others*, *Able to deal appropriately with unexpected demands*, and *Able to secure assistance from others*. 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 SR, the appellant reports feeling nervous about falling in the shower without handrails. The appellant states that the OT has made an assessment for assistive devices but said that the appellant will not qualify for the required devices without PWD funding.

In the MR, the GP check marks *No*, the appellant does not require prostheses or aids for the impairment, and at the same time the GP comments, "needs handrails to shower."

In the AR, section D, the GP indicates that help with DLA is provided by the appellant's friends. Under *Assistance provided through the use of assistive devices*, the GP check marks *Bathing aids* (comment, "shower rails"). The GP check marks *No*, the appellant does not have an assistance animal.

5. A psychological consultation report dated July 2, 2019. The appellant was referred to a registered psychologist for a re-assessment of cognitive function to assist with treatment planning. The appellant was given a battery of cognitive tests. Under *Background History*, the psychologist indicates the appellant is re-applying for PWD designation and presents with a lengthy history of chronic alcohol abuse. The appellant has reduced the frequency and amount of alcohol use significantly "but denied full abstinence." The appellant had not misused alcohol at the time of the assessment.

The psychologist notes that the appellant was admitted to hospital in December 2018 due to respiratory failure. A CT scan of the brain in January 2019 showed some chronic and mild changes. A neuro-psychological assessment in January 2019 indicated significant deficits across a number of cognitive domains, in particular, impairment with visual attention, speed of visual information processing, word fluency, new learning, visual memory, visual-spatial analysis, copying/planning of a complex figure, basic non-verbal reasoning, and higher level non-verbal reasoning/problem-solving. Strengths were noted in the areas of tapping orientation, visual scanning, verbal

memory, recognition memory, and basic non-verbal abstraction. The appellant reported being restricted from driving and required further psychological assessment to determine resumption of driving.

Formal testing in June 2019 found the appellant to be oriented to person, place, and time. Simple auditory attention span and working memory were found to be low average. Verbal fluency was weak but likely impacted by language factors (English as a second language); semantic cueing was normal. The appellant was weak on a more demanding expressive vocabulary task and verbal abstraction was low normal (again likely impacted by English as a second language). Immediate attention for verbal information (word lists) was normal with performance on subsequent acquisition trials low-normal to normal, but not impaired and largely consistent with the January 2019 administration of these measures. Significant proactive interference was observed following the presentation of a distractor task.

Simple visual scanning and speed of processing were found to be normal. More complex visual attention, associative learning, and speed of processing tasks were weaker and low-normal. An additional task of more complex, sustained visual attention and speed of processing was at the low end of the normal range but not necessarily impaired. Visual-perceptional ability and non-verbal induction/reasoning were normal. Visual copying was weak but with delayed memory recall in the low end of the normal range. Cued recall was normal. Non-verbal problem-solving/reasoning, abstraction, and executive decision making were well within normal limits.

In summary, the psychologist reports that the current assessment suggests some improvements in cognitive functioning since the assessment in January 2019 and weaknesses that persist may be accounted for to some extent by the appellant's language barrier. The psychologist states that the appellant will benefit from ongoing use of memory compensation strategies such a day timer/calendar, bulletin board, or electronic organizer as well as the use of reminders and cues.

The psychologist recommends working on one activity at a time rather than multitasking, and states that learning tasks and information via multiple sensory modalities may result in better acquisition and retention. The appellant may also benefit from consistent routines, structure, and activity scheduling; an emphasis on "hands-on learning" may be the most helpful approach. The psychologist indicates that the test results do not indicate further cognitive decline and the appellant is no longer precluded from driving with the caveat that the appellant continue with treatment and support for alcohol misuse.

6. A hospital *Discharge Summary* dated January 29, 2019, indicating the appellant had sepsis secondary to pneumonia and Influenza A (comment, "resolved"), a history of alcohol use disorder and substance use disorder (comment, "currently abstaining"), and neuro-cognitive deficits identified by the neuro-psych testing team. The appellant was advised to refrain from driving until further testing can be done. The appellant was in stable condition upon discharge. The addictions team will continue to follow up with the appellant as an outpatient and the appellant is to follow up as an outpatient with the GP regarding Hepatitis C analysis.

7. A letter from the OT dated September 25, 2019, describing the appellant's limited ability to work due to shortness of breath on exertion and limited activity tolerance. The OT reports on the appellant's ability to perform ADL, indicating that the appellant relies on assistance from friends for ADL such as transportation, cleaning, home repairs, grocery shopping, and laundry. The OT states that the appellant has limited range of motion and decreased strength in both shoulders and would benefit from equipment such as a long-handled reacher, long handled shoehorn, and a bath sponge to complete ADL. The OT indicates the appellant is able to borrow a bath seat and walker from a community agency but would benefit from owning these items as the appellant's condition is not expected to improve.

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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 that the panel accepts as argument. The ministry relied on the reconsideration decision to provide argument at the hearing.

Oral testimony

The appellant attended the hearing with an advocate (the appellant's counsellor who is also a social worker at the local health authority). Neither the appellant nor the ministry provided new evidence requiring an admissibility determination. The advocate indicates that the appellant went back to the GP but there was not enough time for the GP to provide a further medical report. The panel accepts both parties' oral testimony as argument on appeal.

ATTACH EXTRA PAGES IF NECESSARY

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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 SR, the appellant argues the depression and stress are so bad on some days that the appellant cries and feels helpless. The appellant reports feeling useless as well due to pain and low endurance combined with depression. In the SR, the appellant describes difficulty with concentration to the extent that even two questions on the form are a struggle to answer and the appellant needs the questions repeated several times. At the hearing, the advocate noted that the appellant's conditions are getting worse which does not help with depression as the appellant's self-care has decreased causing further isolation.

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 with cognitive and emotional function, the GP indicates that the appellant is independent with all DLA related to making decisions regarding personal activities, care and finances. These DLA include "reading prices and labels, making appropriate choices while shopping, paying for purchases, meals, finances, medication, and transportation." In addition, the ministry notes that the appellant is reported to be independent with most areas of social functioning and is under continuing supervision for alcohol misuse.

The ministry argues that the assessment by the registered psychologist does not support a severe degree of mental impairment because all of the assessed areas of ability are in the low-normal to normal range. The ministry argues that tools to assist with cognitive function, such as scheduling aids and reminders, do not support a severe degree of mental impairment.

Evidence for mental impairment

In the MR, the appellant is diagnosed with depression, characterized by low mood and linked to the appellant's physical health issues. The appellant is reported to have no difficulties with communication. Significant deficits with cognitive and emotional function are reported for *Executive*, *Memory*, *Emotional disturbance*; and *Impulse control* related to substance misuse. The GP reports that the appellant's substance misuse is controlled with the support and supervision from the substance misuse team.

In the AR, the appellant's mental impairment is reported to have moderate and major impacts on most areas of cognitive and emotional functioning including *Bodily functions* (poor hygiene - showering), *Consciousness* (alcohol use), *Emotion*, *Impulse control*, *Insight and judgment*, *Attention/concentration*, *Executive*, *Memory*, *Motivation*, and *Other neuro-psychological problems* [panel note: these problems are not explained].

Regarding DLA involving cognitive, motivational, impulse control, and social components, the appellant is reported to be independent with *Personal Care*, *Shopping* (*Reading prices and labels*, *Making appropriate choices*, and *Paying for purchases*), *Meals* (*Meal planning* and *Safe storage of food*), *Pay Rent and Bills*, *Medications*, and *Transportation* (although the GP also comments that the appellant had their driving license revoked based on a neuro-psychological assessment).

Regarding *Social Functioning*, the appellant is reported to need continuous support with *Appropriate social decisions* due to alcohol misuse but is "under supervision at present." The appellant is reported to be independent with all other areas of social functioning and to have good functioning with their social networks.

In the re-assessment of the appellant's cognitive function by the registered psychologist, the appellant is assessed as low-normal to normal on most measures including memory, problem-solving, executive decision making, and learning. Any language deficits were found to be impacted by the appellant's English - second language fluency. The assessment indicates the appellant has shown cognitive improvement since the hospital admission in January 2019. The psychologist reports no further cognitive decline. The appellant is cleared to return to driving with the caveat that support and supervision for alcohol misuse is maintained.

Panel's decision - mental impairment

The panel has considered the evidence in its entirety and finds that the ministry's decision on mental impairment is reasonably supported by the evidence. The GP confirms that the appellant is depressed and has significant cognitive and emotional deficits, as well as impacts in most areas of cognitive and emotional functioning due to depression and substance misuse. However, the GP, the psychologist, and the hospital staff at the recent discharge indicate the appellant is under continuing support and supervision for addictions and is not currently misusing any substances despite non-total abstinence from alcohol. Notwithstanding the appellant's low mood (confirmed by the GP) and the advocate's argument that the appellant is becoming more depressed and isolated due to worsening physical conditions, the GP assesses the appellant as independent with all DLA involving mental and social functioning.

The GP reports significant deficits and impacts with cognitive functioning in the areas of *Executive*, *Memory* and *Attention/concentration* but the psychologist assesses the appellant in the low-normal to normal range on these and other specific aspects of cognitive functioning. The panel finds that the ministry reasonably gave more weight to the psychologist's information which is a detailed neuro-psychological assessment involving a battery of testing instruments. The appellant experiences some cognitive and emotional difficulties due to low-normal functioning and low mood but the panel finds that the ministry was reasonable in concluding that the evidence falls short of establishing a severe mental impairment.

The panel therefore concludes that the ministry reasonably determined there is insufficient evidence of significant restrictions with the appellant's cognitive, emotional, 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 appeal submission, the appellant argues that the difference between a moderate and severe impairment is one of semantics and the ministry is "splitting hairs" by downplaying the evidence of the GP and OT. In the SR, the appellant reports struggling with endurance and breathing function "at the best of times." The appellant argues that

constant neck and shoulder pain and “diffused nerves” restrict lifting more than 20-30 lbs. and hand/finger pain precludes the appellant from gripping anything at times.

In the RFR submission, the appellant argues that the severity of symptoms are clearly articulated in the self-report; including, among other things, a limited range of motion in the appellant’s shoulders that restricts activities involving reaching. The appellant notes that the GP has confirmed restrictions with walking, climbing stairs, lifting, and standing due to the appellant’s breathlessness and weakness. The appellant argues that the severity of symptoms is confirmed by three people as the OT also indicates that the appellant’s condition is severe as it is not expected to improve.

At the hearing, the appellant reports that getting up and moving about in the morning takes 2-3 hours due to pain, breathlessness, and dizziness as well as weakness from frequent pneumonia and bronchitis. The advocate explains that while they realize that the ability to work is not the focus of the PWD application the appellant is a lifelong worker and therefore tends to focus on work when describing limitations to function. The appellant argues that the conditions are “getting worse and worse.” The advocate reports that the appellant cannot do ADL independently and argues that this is confirmed by the OT.

Ministry

The ministry argues that the information provided in the PWD application and RFR does not demonstrate a severe physical impairment because the GP indicates a moderate level of restriction or no restriction for the physical skills and abilities listed in the MR and AR. The ministry submits that restrictions are moderate despite the appellant taking significantly longer than typical with walking outdoors, climbing stairs, and standing. The ministry argues that there is no information on how frequently the appellant has to stop and rest to support a severe degree of physical impairment. The ministry concludes that the appellant has a moderate rather than severe impairment of physical functioning.

The ministry further argues there is not enough detail regarding restrictions with lifting. The ministry submits that the information provided does not establish whether the appellant needs assistance only when lifting, carrying, and holding items that weigh more than 20-30 lbs. or whether assistance is also required for lighter loads. As well, the ministry notes that the limited range of shoulder motion reported by the appellant has not been confirmed by the GP. The ministry argues it is therefore not able to make a full assessment of severity regarding any impairment with the appellant’s shoulders.

Regarding the appellant’s sepsis, the ministry argues it is difficult to assess the continued impact on the appellant’s physical function as the hospital report indicates that the appellant’s infections had been resolved upon discharge. The ministry argues that the absence of information on the frequency of the appellant’s “bad days” also makes it difficult to confirm a severe impairment of physical functioning as does the lack of detail about how often periodic assistance is required and the limited information from the GP on the need for assistive devices.

Evidence for physical impairment

In the MR, the appellant is diagnosed with a number of physical conditions including COPD, recurrent sepsis, and neck pain. The appellant’s COPD is worsening progressively and sepsis is reported to be recurrent. Sepsis has led to a progressive worsening of the appellant’s “performance status…i.e. weakness, dizziness.” The appellant’s neck pain is reported to “limit physical activity.”

Considering the rating scales for physical functional skills in the MR, the appellant is assessed as having a moderate degree of restriction with walking (1-2 blocks unaided), the least degree of restriction for stairs (5 or more steps unaided), a low degree of restriction with lifting (15-35 lbs.), and no restriction with remaining seated.

In the AR, the appellant is independent with walking indoors but restrictions are reported for all other areas of *Mobility and Physical Ability* including taking significantly longer than typical with walking outdoors, climbing stairs, and standing. The GP does not detail how much longer these activities take the appellant but notes that the appellant “stops frequently due to breathing and weakness.”

In the AR, the appellant requires periodic assistance with lifting and with carrying/holding. The GP comments that the appellant receives "regular" help from a roommate. For specific DLA (housekeeping and shopping trips) the GP reports that the appellant has help from the roommate "at times" and needs "shower rails" for bathing.

In the hospital discharge report from January 2019, the appellant is reported to have left the hospital in stable condition with sepsis secondary to pneumonia and influenza "resolved." The GP notes recurrent sepsis in the MR that is worsening the appellant's function but no other hospital records, or clinical notes were provided.

The OT's letter describes restrictions to employment due to shortness of breath and limited endurance, and restrictions to ADL due to "limited range of motion and decreased strength in both shoulders." The OT reports that the appellant's condition is not expected to improve.

Panel's decision - physical impairment

The panel finds that the ministry's decision on physical impairment is reasonably supported by the evidence. The appellant, the GP, and the OT focus on the appellant's ability 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 is that the appellant can perform all physical functions on the moderately restricted or least restricted ends of the rating scale despite having chronic, progressive COPD, recurrent sepsis, and neck pain. The appellant stops frequently when walking and climbing stairs due to breathing difficulties and weakness but as noted by the ministry there is insufficient information on how much longer than typical these activities take.

While the appellant and the OT report a limited range of shoulder motion that restricts activities which involve reaching, the GP does not provide any information about the appellant's shoulder problem and indicates in the AR that the appellant requires only periodic assistance with lifting, and carrying/holding. The appellant reports hand/finger stiffness and pain (with difficulty gripping things) but this is also not confirmed by the GP. Regarding the appellant's pain problems, the GP indicates only that neck pain "limits physical activity." The panel finds that the ministry was reasonable in concluding there is insufficient detail about significant limitations due to pain and mobility restrictions to establish a severe impairment of physical functioning.

The OT indicates that the appellant's conditions are not expected to improve and the appellant relies on others for assistance with most DLA. At the same time, the GP indicates that the appellant has the physical skills and abilities needed for daily activities and requires only periodic assistance with housekeeping chores and shopping trips.

The panel gives more weight to the GP's assessments of physical functioning in the MR and AR because the OT has provided a one paragraph letter only, and has not included an assessment of specific functions. Based on the more comprehensive assessment by the GP, which indicates the appellant is able to function physically despite worsening shortness of breath and pain, 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 OT who provided a letter.

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 directly and significantly restricted due to the appellant's "severe and persistent" disabilities; "I can no longer push through the pain." In the RFR submission, the appellant submits that it can take up to two hours to get ready in the morning due to COPD symptoms. The appellant reports being able to "carefully shower" once dizziness and breathlessness subside. The appellant reports that it is difficult to "reach up to wash my hair and down to wash my body" due to shoulder problems (limited range of motion). The appellant describes washing as "painful at the best of times and impossible on other days."

In the RFR submission, the appellant argues that the type of assistance and amount of assistance required for housekeeping, laundry, and shopping are described by the GP who indicates the appellant receives periodic assistance from a roommate. The appellant argues that the GP did not need to repeat that the appellant takes breaks while cooking and washing dishes because the appellant already described that restriction in the SR. In the SR, the appellant indicates needing breaks while cooking and washing dishes even on a "good day", and is unable to cook at all on a "bad day" due to low stamina and a lack of endurance.

The appellant reports struggling to reach items in cupboards and shelves on "bad days" and on the "worst days" not cooking at all if help is not available. The appellant reports that severe shoulder and neck pain impacts shopping, in particular, the appellant's range of motion and ability to lift items from store shelves.

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 prescribed professional (the appellant's GP). The ministry notes that the DLA assessments by the GP (AR) indicate the appellant is independent with most DLA. The ministry argues that the periodic assistance reported for laundry, housekeeping, and shopping is not detailed enough to confirm periodic restrictions for extended periods of time because the GP does not comment on the nature, frequency, or duration of assistance provided by the appellant's roommate.

In addition, the ministry argues that despite suffering from fatigue, limited activity tolerance, and little to no endurance, the appellant requires additional time to complete only one DLA (bathing, as reported by the GP). The ministry notes that no detail has been provided to indicate how often this occurs and therefore it has not been confirmed that the restriction is significant. The ministry notes that the GP has not provided any information about how often the appellant experiences "bad days", for cooking in particular, as the GP has indicated the appellant is independent with all areas of *Meals*.

Evidence from prescribed professionals on restrictions to DLA

The GP indicates that the appellant is fully or mostly independent with 7 of the 8 DLA listed in the AR. The appellant takes significantly longer with one area of *Personal Care* (*Bathing* - needs handrail for showering due to dizziness); two areas of *Shopping* (*Going to and from stores*, and *Carrying purchases home* - the appellant's

roommate helps “at times”); and one area of *Social Functioning* (continuous support with *Appropriate social decisions* - due to alcohol misuse).

The appellant is restricted in all areas of *Basic Housekeeping* in that periodic assistance is required for both activities (*Laundry* and *Basic Housekeeping*). The appellant does these activities slowly and has help from the roommate.

The OT (also a prescribed professional for the purpose of the legislation) reports a greater degree of restrictions with DLA indicating that the appellant relies on other people to assist with transportation, cleaning, home repairs, grocery shopping, and laundry due the appellant’s limited range of motion and decreased shoulder strength. The appellant also requires various assistive devices to complete ADL involving reaching, as well as bathing and walking. The panel notes that the AR provided by the GP, and the letter from the OT are both dated September 25, 2019.

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. The appellant reports being unable to perform DLA on “bad days” due to breathing and pain symptoms as well as a lack of endurance, and taking up to two hours to get ready in the morning. This degree of restriction is not confirmed by a prescribed professional as required by the legislation. The GP indicates the appellant can perform all DLA, mostly independently or with periodic assistance and extra time required for a few activities.

Regarding DLA that are periodically restricted, the GP has not provided frequency or duration information on the need for periodic assistance, or on how often “bad days” occur to confirm that DLA are periodically restricted for extended periods as required by the legislation. Similarly, the GP does not detail how much longer the appellant takes with “slow” activities to confirm that the restriction is significant.

The appellant argues that the GP did not report the appellant’s restrictions with cooking because the restrictions were already reported in the SR. The panel notes that there is no endorsement of the SR by the GP (e.g., a statement with the GP’s initials or signature) and therefore gives more weight to the GP’s information that the appellant is independent with all areas of *Meals*.

The advocate submits that more weight should be given to the OT’s information regarding DLA because the OT has more expertise on assessing the need for assistive devices. While the ministry overlooks the OT’s information that indicates the appellant relies on help from others for many DLA (in the ministry’s discussion of DLA), the OT does not detail whether restrictions are continuous or periodic for extended periods as required by the legislation. The panel also notes that the OT’s information lacks sufficient detail regarding an assessment of function to confirm that DLA are significantly restricted.

Given that the appellant is able to independently manage most DLA, as assessed by the GP, 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.

Arguments

Appellant

In the submission on appeal, the appellant argues that assistive devices are required for ADL as reported by the OT, "and can be confirmed by physician." At the hearing, the advocate emphasized the OT's information that the appellant would benefit from a number of devices including a long-handled reacher, long handled shoehorn, bath sponge, bath seat, and walker. The advocate argues that the GP did not list all of the required devices because it is the OT's area of specialization.

The advocate notes that the GP does indicate the need for rails in the shower. In the RFR submission, the appellant submits being unable to shower at all on "some days" due to a fear of falling without hand rails. The appellant also reports moving more slowly without the assistance of shower rails and a bath bench.

Ministry

The ministry notes that the GP indicates the appellant receives help from friends and needs shower rails for bathing. The ministry argues that the need for a grab bar alone does not confirm that significant help is required. The ministry argues that the GP has not confirmed the need for a bath seat and a walker as prescribed by the OT. 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.

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. The GP assesses the appellant as independent with the majority of DLA and while the OT recommends a number of assistive devices, the OT has not included any detailed functional assessment to support the need for the specified devices including a walker. Regarding walking, the GP indicates the appellant can walk 1-2 blocks unaided but takes significantly longer than typical when walking outdoors. 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 of 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) ☒**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) 2020-01-08

PRINT NAME	
Robert Kelly	
SIGNATURE OF MEMBER	DATE (YEAR/MONTH/DAY) 2020-01-08
PRINT NAME	
David Kendrick	
SIGNATURE OF MEMBER	DATE (YEAR/MONTH/DAY) 2020-01-08