

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the ministry) reconsideration decision dated December 27, 2019, which found that the appellant did not meet four of the five statutory requirements of Section 2 of the *Employment and Assistance for Persons with Disabilities Act* for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement. However, the ministry was not satisfied that the evidence establishes that:

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

PART D – RELEVANT LEGISLATION**Majority**

Employment and Assistance for Persons with Disabilities Act (EAPWDA), Section 2

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

Dissent

The relevant legislation is indicated in the majority decision, and

Interpretation Act

8 Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

PART E – SUMMARY OF FACTS**Majority Summary****Evidence before the Ministry at Reconsideration**

The evidence before the ministry at the time of the reconsideration decision included the Persons With Disabilities (PWD) Application comprised of the appellant's self report (SR) dated October 10, 2019, a medical report (MR) dated October 8, 2019 completed by the appellant's general practitioner (the GP), who has known the appellant for less than 1 year and who has seen the appellant 1 time in the past 12 months, an assessor report (AR) dated October 31, 2019 completed by social worker N (the Assessor), who has known the appellant for less than 3 months and has seen the appellant 2-10 times in the past year, and a 4-page addition to the SR, undated, in which the applicant describes the impact of their medical state on performance of their DLA.

The evidence at reconsideration also included the following documents:

- the appellant's Request for Reconsideration received by the ministry on December 11, 2019 including the following attachments:
 - the appellant's typewritten reasons for requesting reconsideration, noting that the appellant is:
 - in severe pain with feet, back and neck;
 - in the process of getting a cane to assist with walking;
 - taking about 15-20 minutes to complete the walk to the GP's office that would normally take a person 5-8 minutes;
 - taking 5-10 minutes to go up the stairs on some days, when it should take less than 3 minutes;
 - having difficulty getting in and out of the bath with no assistive device;
 - dizzy and must wait a few minutes before exiting the bath due to high blood pressure;
 - slow to wash because left arm range of movement is limited, sometimes taking up to 40 minutes to shower;
 - slow in preparing meals, sometimes taking 20-40 minutes, and sometimes taking 90 minutes to do the dishes when they should take only 30 minutes;
 - unable to sweep the floor without suffering back, neck and shoulder pain;
 - needing a 15 minute break before returning from a 1 km walk to the post office;
 - using a handrail to climb stairs;
 - needing 35 minutes to brush, floss and gargle;
 - experiencing pain in feet, legs and left arm while walking;
 - finding it difficult to sit or walk when anal fissures are active;
 - experiencing sharp and shooting left side pain when seated for more than 20 minutes;
 - unable to lift more than 8 pounds with left arm and 12 pounds with right arm.
 - physicians' notes from Province X covering the period February 19 – July 9, 2019 indicating that the appellant was unfit for work;
 - echocardiogram report dated February 26, 2019;
 - scrotal ultrasound report dated March 1, 2019;
 - cervical spine CT scan report dated May 4, 2019;
 - left shoulder ultrasound reports dated November 21, 2018 and January 30, 2019;
 - cervical spine report dated February 19, 2019;
 - lumbar spine imaging report dated June 21, 2019;
 - abdominal ultrasound report dated February 26, 2019;
 - chest imaging report dated February 26, 2019;
 - insurance claim treatment and assessment plans from province X dated August 19, 2019 and September 3, 2019;
 - limitations to participation report from province X dated August 7, 2019 completed by physician Dr. B.

Diagnoses

In the MR the GP noted that the appellant suffers from the following diagnoses:

- Physical – hypertension, chronic neck and back pain, chronic anal fissure (onset date not specified)
- Mental – depression, anxiety disorder (onset date not specified)

Physical Impairment

In the SR the appellant indicated that he suffers from several medical conditions that have not been diagnosed by the GP, including asthma, herpes, rheumatoid arthritis, eczema, scoliosis and whiplash. The appellant also noted the following:

- chronic back pain affects ability to sit or stand for long periods and makes DLA more difficult;
- anal fissures are always causing pain and an inability to sit or stand for long periods, making toileting difficult;
- post pain syndrome causes chronic pain in feet and legs.

In the MR the GP assessed the appellant's functional skills as follows:

- can walk 2-4 blocks unaided on a flat surface;
- can climb 2-5 steps unaided;
- is limited to lifting 2-7 kg (5-15 pounds);
- can remain seated for 1-2 hours

In the AR the Assessor reported that the patient suffers chronic pain affecting neck, shoulder back and legs, resulting in the following restrictions to mobility and physical ability:

- takes significantly longer than typical to walk indoors and outdoors, climb stairs and stand (*"chronic pain limits ability to stand and walk for more than 15 minutes and to climb more than 5 stairs, which impacts overall mobility"*)
- uses an assistive device when climbing stairs and standing;
- requires continuous assistance from another person or is unable to lift;
- requires periodic assistance from another person with carrying and holding.

Mental Impairment

In the SR the appellant indicated that he suffers from post-traumatic stress disorder and insomnia, neither of which is diagnosed by the GP. The appellant also indicated that depression makes him not want to get out of bed in the morning and anxiety makes him nervous about the future.

In the MR the GP noted that the appellant suffers significant deficits to cognitive and emotional functioning in 1 of the 12 listed areas, namely emotional disturbance. The GP commented: *"patient has depression and anxiety disorder. This affects daily function, sleep and interpersonal interactions."*

In the AR the Assessor indicated the following impacts to the appellant's cognitive and emotional functioning:

- major impacts in the areas of emotion (excessive or inappropriate anxiety, depression) and motivation;
- moderate impacts in the areas of bodily functions (eating problems, toileting problems, poor hygiene, sleep disturbance) and attention/concentration;
- minimal impacts in the areas of impulse control, insight and judgement, executive (planning, organizing, sequencing, abstract thinking, problem-solving, calculations) and memory;
- no impacts in the areas of consciousness, motor activity, language, psychotic symptoms, other neuropsychological problems or other emotional or mental problems

The Assessor commented that:

- the appellant is in recovery for substance abuse;
- the appellant's mental conditions involve persistent low and unstable moods and excessive worry;
- the appellant experiences sleep disruption, lack of motivation, lack of energy to complete daily routines and lack of appetite;
- attention and concentration are affected, thus making planning and problem-solving a challenge.

Daily Living Activities (DLA)

In the MR the GP noted that the appellant's ability to perform DLA is periodically restricted in 1 of the 10 listed areas, namely mobility outside the home. The GP commented: *"Patient's mobility outside the home is periodically*

restricted because of limitation in distance able to walk and duration of standing. Degree of restriction is mild to moderate”.

In the AR the Assessor commented that the appellant's emotional functioning greatly impacts his DLA. Specific impairments to DLA listed in the AR are:

- periodic assistance required in regulating diet, going to and from stores and carrying purchases home;
- use of assistive devices for bathing, transfers in/out of bed and on/off chairs (*“uses objects and bars to support weight”*), filling/refilling prescriptions and taking as directed (*“uses tools for cues and reminders”*) and getting in/out of a vehicle (*“uses grab bars for support”*);
- takes significantly longer than typical when:
 - dressing, grooming, bathing (*“limited ability to stand and limited range of motion in arm impact dressing, grooming, bathing. Takes approximately 30 minutes longer.”*);
 - doing laundry;
 - basic housekeeping (*“limits to mobility and pain impact ability to do basic housekeeping tasks”*);
 - going to/from stores, carrying purchases home (*“limited to 15 minutes standing and walking, no transportation, no public transit, must walk to and from stores making shopping quite difficult”*);
 - meal planning, preparation and cooking (*“reduced mobility in left arm and legs and limited ability to stand more than 15 minutes impacts cooking”*)

Impairments to cognitive functioning noted by the Assessor in the AR included:

- meal preparation/planning (*“problems with motivation and planning interfere with meal preparation and planning”*);
- filling prescriptions (*“sometimes avoids getting prescriptions due to anxiety”*);
- periodic support/supervision needed for all listed areas of social functioning (*“lives with an anxiety disorder and depression which can impact his relationships and social functioning. [The appellant’s] anxiety often surrounds worries about bad things happening and fear of judgment from others.”*)

The Assessor also noted that the appellant’s mental impairment results in marginal functioning with immediate and extended social networks.

Assistance Required

In the MR the GP did not indicate that the appellant requires assistance with DLA.

In the AR the Assessor noted that the appellant has fallen in the past and risks falling again, commenting that grab bars and a cane would eliminate some risk. The Assessor also noted that help for DLA is provided by family, friends, health authority professionals and friends. The Assessor added that the appellant routinely uses bathing aids (*“grab bars in bathroom”*) and a cane but later on the same page noted that the appellant is not currently using a cane but would benefit from one for walking.

In Part E of the AR the Assessor noted that the combination of symptoms greatly impacts the appellant’s ability to manage DLA.

Additional Information Received after Reconsideration

Documents:

1. Letter from the appellant dated January 14, 2020 noting that the appellant has been seeing the GP on a regular basis since October 8, 2019 and saw Dr. B, former family physician from province X, approximately 25-30 times during the past 2 years;
2. 5-page chart signed by the GP dated January 13, 2020 which provided the following additional information:
 - Impairments 1 (chronic neck and back pain), 2 (depression), 3 (anxiety) and 5 (hypertension) are expected to continue for at least 2 years;
 - the appellant’s DLA are continuously restricted in:
 - performing personal hygiene and self care, preparing meals, housecleaning, shopping, moving about indoors and outdoors and using public or personal transportation;
 - the appellant’s DLA are periodically restricted in:

- taking medications (*high blood pressure medication has affected short-term memory and appellant must write it down every time medication is taken*);
 - interacting or communicating with people; (*about once a month feels anxious about asking for help. The feeling can last 2 weeks or longer*);
 - the appellant needs significant help with housework but not in other listed areas of DLA and needs an assistive device (*cane*) to move about in the residence and to assist in walking;
 - the appellant uses a calendar to track medication and appointments;
 - the appellant takes significantly longer to perform the following DLA:
 - moving indoors and outdoors (*4 times longer*)
 - using public or personal transportation (*30 seconds-3 minutes longer*)
 - make decisions and communicate with others (*no time given*)
3. copy of signed last page of MR;
4. copy of Limitations to Work report from province X dated August 7, 2019.

At the hearing the appellant provided oral evidence. The appellant:

- sees the GP once or twice each week;
- is taking prescribed medication for anxiety and has seen a psychiatrist once a month for a total of 3-5 times, but prefers online support groups;
- meets with the psychiatrist before making major decisions;
- has not been admitted to a hospital for psychiatric reasons;
- experiences anxiety approximately 4 days per week;
- procrastinates on performing DLA, including getting out of bed and doing dishes;
- isolates self, making it hard to maintain friendships;
- needs 2-3 breaks to walk a 1 km round trip;
- was recently prescribed a cane by another doctor and obtained a cane 2-3 months ago;
- needs a cane to get off the toilet and in/out of the bathtub, which have no installed bars to assist.

Admissibility of Additional Information

The ministry did not object to the admissibility of the appellant's oral or documentary evidence. The panel admitted all of the information under EAA Section 22 (4)(b) as evidence that is reasonably required for full and fair disclosure of all matters related to the appeal decision except Documents 3 and 4, which are duplicate copies of information that was before the ministry at reconsideration.

Dissent

The Summary of Facts is as indicated in the majority decision with some additions from the SR that was before the ministry at the time of reconsideration, and a clarification of a few points on the second document received after the reconsideration decision (the 5-page chart signed by the GP providing additional information on DLA).

In the SR, the appellant indicates, among other things, that

- the appellant has had several falls, and
- the appellant can walk for only 15 minutes before being overwhelmed with pain

The 5-page chart signed by the GP indicates

- The appellant needs significant help or supervision with the DLA of performing housework due to pain and depression and needs a cane to move about while doing so. (It takes 3 times as long to complete.)
- The appellant takes significantly longer performing the DLA moving about indoors and outdoors (4 times as long) and requires a cane daily to move about indoors and out.

PART F – REASONS FOR PANEL DECISION

The issue in this appeal is whether the ministry reasonably determined that the appellant did not meet four of the five statutory requirements of Section 2 of the *Employment and Assistance for Persons with Disabilities Act* for designation as a PWD. The ministry found that the appellant met the age requirement. However, the ministry was not satisfied that the evidence establishes that:

- the impairment is likely to continue for at least two years;
- the appellant has a severe physical or mental impairment;
- the appellant's DLA are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and,
- as a result of these restrictions, the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

Relevant 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.

EAPWDR:

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

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

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

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

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

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

- (a) authorized under an enactment to practise the profession of
 - (i) medical practitioner,

- (ii) registered psychologist,
 - (iii) registered nurse or registered psychiatric nurse,
 - (iv) occupational therapist,
 - (v) physical therapist,
 - (vi) social worker,
 - (vii) chiropractor, or
 - (viii) nurse practitioner, or
- (b) acting in the course of the person's employment as a school psychologist by
- (i) an authority, as that term is defined in section 1 (1) of the *Independent School Act*, or
 - (ii) a board or a francophone education authority, as those terms are defined in section 1 (1) of the *School Act*,
- if qualifications in psychology are a condition of such employment.

Majority Reasons

Introduction

To be eligible for designation as a PWD an applicant must meet the 5 legislative criteria set out in EAPWDA Section 2 (2). The ministry found that the first criterion had been met, namely that the appellant is at least 18 years of age.

At reconsideration the ministry found that the remaining 4 criteria were not met, namely that:

1. the impairment is likely to continue for 2 or more years;
2. the appellant has a severe physical or mental impairment;
3. in the opinion of a prescribed the severe impairment directly and significantly restricts ability to perform DLA either continuously or periodically for extended periods, and
4. as a result of those restrictions the person requires help in the form of an assistive device, the significant help of another person or the services of an assistive animal.

This appeal decision will address Criteria 2, 3, 4 and 5.

2. Impairment Likely to Continue for 2 or More Years:

The information provided by the GP in the MR indicated that the duration of the appellant's impairments is uncertain. However, the additional information contained in Document # 2 (the January 13, 2020 letter from the GP) clearly indicates that 4 of the 5 diagnosed impairments (chronic neck and back pain, hypertension, depression and anxiety) are likely to continue for at least 2 years.

Based on the additional information provided by the GP described above the panel finds that the appellant's physical impairments and mental impairments are likely to continue for 2 or more years.

3. Severe Impairment Based on the Combination of Physical and Mental Impairments

The appellant argues that the combination of physical and mental impairments establishes a severe impairment that directly and significantly restricts ability to perform DLA. The ministry's reconsideration decision considers physical impairment separately from mental impairment.

EAPWDA Section 2 states: "The minister may designate a person as a person with disabilities if the person has a severe mental **or** physical impairment" (*emphasis added*). The plain meaning of this section is that the ministry must in its discretion determine that the severe impairment is *either* mental or physical. The legislation does not speak to the combined effect of moderate mental and physical impairments. The panel will therefore consider the ministry's determination of the severity of physical and mental impairments separately.

3 (a). Severe Physical Impairment:

The appellant argues that the information establishes a severe physical impairment arising from chronic neck and back pain, chronic anal fissure and hypertension

The ministry's position is that the information provided by the appellant, the GP and the Assessor related to the appellant's functional skills are not indicative of a severe physical impairment.

Panel Decision

Under the legislation, eligibility for PWD hinges on an “impairment” and its severity. “Impairment” is more than a diagnosed medical condition. Impairment is a medical condition that results in restrictions to a person’s ability to function independently, appropriately, effectively or for a reasonable duration.

To assess the severity of impairment one must consider the nature of the impairment and the extent of its impact on daily functioning, as evidenced by functional skill limitations and the degree to which the ability to perform DLA is restricted. The legislation makes it clear that the determination of severity is at the discretion of the minister, taking into account all of the evidence, including the evidence of the appellant. Significant weight is attributed to the evidence from a “prescribed professional” – in this case, the appellant’s GP and the Assessor, who is a social worker. The legislation requires that for PWD designation, the minister must be satisfied that the person has a severe mental or physical impairment.

In the MR the GP noted that the appellant is able to walk 2-4 blocks and climb 2-5 steps unaided, can lift 5-15 pounds and can remain seated for 1-2 hours. The GP also noted that the “patient’s mobility outside home is periodically restricted because of limitation in distance able to walk / duration of standing” and the ‘Degree of restriction is mild to moderate.’ In the additional information the GP did not specifically address functional ability but noted that the appellant takes approximately 4 times longer to move about indoors and outdoors. The appellant uses a cane and is restricted in performing all DLA except “Managing personal finances” and “Making decisions about personal care, activities or finances”.

In the AR the Assessor noted that the appellant takes significantly longer than typical and requires the use of a cane when walking indoors and outdoors. The Assessor also notes that the appellant can climb a maximum of 5 stairs using assistive devices. The appellant’s ability to remain standing is limited to 15 minutes. As well, the appellant requires periodic assistance with carrying/holding and is unable to manage lifting. Limitations in mobility and standing and the pain experienced impact and increase the time for personal grooming, housekeeping, meal preparation, and shopping.

The doctors’ notes which were included with the appellant’s request for reconsideration relate principally to the appellant’s inability to perform/participate in physical labour and do not specifically address limitations to functional ability, mobility or limitations to performance of DLA. The attached imaging, ultrasound and CT scan reports provide clinical information that also does not address mobility, functional ability or limitations to performance of DLA.

In the SR, Request for Reconsideration, and oral evidence at the hearing, the appellant provided considerable information to support severity of physical impairment. This information is recorded in Part E of the appeal decision. It is clear that the appellant considers the impairment arising from physical conditions to be severe. Examples of the appellant’s impaired mobility, functional ability and restrictions to DLA include: requiring a cane to get on/off the toilet and in/out of the bathtub without installed grab bars, needing to take several breaks when walking even a kilometer, experiencing chronic and sometimes severe pain in back and legs that affect ability to walk, stand or sit, constant pain from anal fissures, difficulty bathing due to restricted range of motion in left arm and an inability to lift more than 8 pounds.

The information clearly establishes that the appellant suffers chronic and sometimes severe back and neck pain and is limited in range of motion when using the left arm. The appellant also experiences pain from anal fissures, which the GP believes will not likely continue for 2 years. Since reconsideration the appellant has acquired and uses a cane, which assists with walking, shopping, standing and rising/sitting. The appellant is able to walk, lift, shop, carry, attend to personal hygiene and manage food and cooking-related tasks. These activities take longer than normal and cause pain to the appellant but do not prevent the appellant from completing most DLA.

For a determination of a severe physical impairment, more limitation in function would be anticipated. For example, the appellant can walk 2 – 4 blocks unaided; less than a block or not at all would be indicators of a severe impairment. Similarly, the appellant is able to lift up to 15 lbs; a severe impairment would be expected to limit the individual to less than 5 lbs. Because the legislation makes it clear that the

determination of severity is at the discretion of the minister, the panel finds that there is insufficient evidence to determine that the ministry's determination that the physical impairment is moderate, rather than severe, is unreasonable. The panel therefore finds that the ministry reasonably determined that the information provided reflects a moderate, rather than severe physical impairment.

3 (b). Severe Mental Impairment:

The appellant argues that his mental conditions of depression, anxiety disorder and PTSD establish a severe mental impairment.

The ministry's position is that the information provided does not establish that the appellant suffers from a severe mental impairment.

Panel Decision

As noted above in Criterion 3 (a) impairment is a medical condition that results in restrictions to a person's ability to function independently, appropriately, effectively or for a reasonable duration. In the SR the appellant noted that anxiety and depression affect daily life, making it hard to get out of bed, and causing worries about the future. The appellant has recently begun to see a psychiatrist and is taking prescribed medication to ease these mood symptoms, but has not been admitted to hospital for psychiatric reasons. The appellant also sees a counsellor and participates in online support groups. The appellant experiences anxiety approximately 4 times per week, which leads to self-isolation and difficulty maintaining friendships.

In the MR the GP noted that the appellant's social functioning is not restricted, and there are no difficulties with communication. The GP also indicated that the appellant needs to keep a record of medication use, and because of depression and anxiety takes significantly longer to clean the house, to make decisions, and to be certain that medication directions are being followed. The GP also noted that approximately once a month the appellant feels anxious about asking for help. The anxiety can last for 2 weeks. In the additional information the GP noted that the appellant does not need the significant help or supervision of another person to make decisions or to interact with people.

The Assessor indicated that the appellant experiences major impacts to cognitive and emotional functioning in the areas of emotion and motivation, and is moderately impacted in areas of bodily functions and attention/concentration. Impact is minimal or nil in the remaining 10 of 14 areas of cognitive and emotional listed in the AR, which implies that the appellant is able to manage the majority of daily functions. The Assessor also commented that the appellant experiences low and unstable mood states and excessive worry, amotivation and diminished appetite. Impacts on functioning with immediate and extended social networks are described as marginal.

The information provided by the appellant, GP and Assessor establishes that depression and anxiety impact the appellant's functional ability and ability to perform DLA. However, it does not establish that the appellant's mental impairments severely restrict overall cognitive and emotional functioning. The panel therefore finds that the ministry reasonably determined that the information provided does not establish a severe mental impairment.

4. Restrictions in Ability to Perform DLA:

The appellant argues that ability to perform DLA is significantly restricted as a result of the combination of the appellant's severe physical and mental impairments.

The ministry's position is that a severe impairment has not been established that directly and significantly restricts the appellant's ability to perform DLA, and the information submitted by the prescribed professionals is not sufficient to establish that the appellant's DLA are directly and significantly restricted either continuously or for extended periods.

Panel Decision

The legislation reads: "...if the minister is satisfied that (...)the person has a severe mental or physical impairment that (...) in the opinion of a prescribed professional (i) directly and significantly restricts the person's ability to perform daily living activities...."

This means that either a severe physical impairment or a severe mental impairment must be established before the impact on DLA can be considered. The legislation does not provide flexibility for the ministry to assess the impact on DLA resulting from a combination of physical and mental impairments that are individually not severe.

Although the Assessor did not specifically describe the frequency and duration of periodic support required in the areas of social functioning, and the GP did not describe the help or supervision required for "Keeping the home clean", the information provided by the Assessor and the additional information provided by the GP together demonstrate that the appellant's physical and mental impairments directly impact the appellant's ability to perform DLA continuously in several of the listed activities and periodically for extended periods in all areas of social functioning.

However, because neither a severe physical nor mental impairment has been established the legislative criteria set out in EAPWDA Section 2 (2) (b) pertaining to direct and significant restrictions to DLA cannot be met. The panel therefore finds that the ministry reasonably determined that Criterion 4 (direct and significant restriction of DLA continuously or periodically for extended periods) was not met.

5. Assistance in Performing DLA:

The appellant argues that use of an assistive device (cane) and the help of another person are required to perform DLA.

The ministry's position is that because the information did not establish that the appellant's DLA are significantly restricted it cannot be determined that an assistive device or significant help is required.

Panel Decision

The GP's additional evidence establishes that the appellant requires a cane to move about indoors and outdoors, when preparing meals and while shopping. The information provided by the GP and the Assessor does not establish that the appellant requires the significant help or supervision of another person except in the area of keeping the house clean.

Even though the GP has indicated the need for an assistive device (cane) to perform several areas of DLA, the legislation requires the establishment of direct and significant restrictions to performance of DLA as a precondition of the "need for help" criterion. Because the panel found that the ministry reasonably determined that Criterion 4 was not met (that the appellant has a severe physical or mental impairment that in the opinion of a prescribed professional directly and significantly restricts ability to perform DLA) the panel also finds that the ministry reasonably concluded that it cannot be determined that the appellant requires help to perform DLA as required by section 2(2) ((b) (ii) of the EAPWDA.

MAJORITY CONCLUSION

Having reviewed and considered all of the evidence and relevant legislation the panel finds that although based on the evidence submitted on appeal the ministry did not reasonably determine that the appellant's impairments are likely to continue for 2 or more years, the ministry's remaining determinations set out in Criteria 3(a), 3(b), 4 and 5 were reasonably supported by the evidence, and confirms the decision. The appellant is not successful on appeal.

Dissenting Reasons

I adopt the assessment of the majority of the panel with respect to the legislative criteria for meeting the age and duration of disability requirements set out in EAPWA Section 2 (2). I disagree with the assessment of the remaining criteria that

- the appellant has a severe physical or mental impairment

- in the opinion of a prescribed professional, the severe impairment directly and significantly restrict the ability to perform DLA either continuously or periodically for extended periods, and
- as a result of those restrictions the person requires help in the form of an assistive device, the significant help of another person, or the services of an assistive animal.

Severity of Impairment, Daily Living Activities, and the Need for Help

Section 2 of the EAPWDA states that the ministry may designate someone as a person with disabilities if satisfied that the person has a severe mental or physical impairment. The majority argues that the plain meaning of this section is that the ministry must determine that there is *either* a severe mental impairment *or* a severe physical impairment. They argue the ministry must not consider whether the combined effects of moderate physical and mental impairment result in severe overall impairment.

The Interpretation Act indicates that enactments are to be given fair, large, and liberal interpretation to best ensure that its objects are met. The goal in this legislation is to provide employment and financial assistance to persons with severely restricting disabilities. The disabilities can be as a result of physical or mental impairments. The “or” in this case can be fairly and liberally interpreted to ensure both kinds of impairment are considered, not to indicate that the ministry must consider them only in isolation.

The Ministry’s reconsideration decision does indicate that they will consider whether there is a “severe and/or mental impairment.” But then, as the majority notes, the ministry analyzes physical and mental impairment separately. The decision does not address that “and/or.” The ministry based its decision on finding that the information a) indicates a moderate physical impairment, and b) did not establish a severe mental impairment. So they indicate there is no physical or mental impairment. The effects of combined physical and mental impairment are not considered.

Position of the Parties

As noted, the ministry reconsideration decision analyzes physical impairment separately from mental impairment. For physical functioning, the Ministry decision repeats some information in the MR and AR (as described above) and argues:

- The MR didn’t indicate a need for aids for physical functioning, though the AR did indicate a cane and grab bars would be beneficial.
- The AR indicated that it took significantly longer than a typical person to walk indoors and out, but did not indicate how much longer it took. This makes it difficult to determine if there’s is a significant restriction.

For mental impairment, the reconsideration decision repeats some information in the AR and MR and argues:

- The MR doesn’t indicate a need for support, though the AR indicates a need for periodic support in all areas of social functioning.
- The AR does not describe the periodic support, so it’s difficult to determine if it represents a significant restriction to overall social functioning.

In the ministry’s assessment of the impact of impairment on DLA, the ministry repeats some information in the MR and AR and argues:

- The appellant requires periodic assistance going to and from stores and carrying purchases home. However, the frequency and duration are not described. It is difficult to determine if this indicates a significant restriction to overall functioning. For example, if a restriction arises once a month is less likely to

be significant that one that occurs several times a week.

- The MR does not indicate that that assistance is required for DLA.
- The AR indicates that assistive devices are used for transfers, handling prescriptions, taking medications but does not describe which ones are used (though bars and reminder cues are mentioned).
- The information does not establish that a severe impairment significantly restricts DLA continually or for extended periods.

The reconsideration assessment of help for DLA argues that because significant restrictions to DLA have not been established, it can't be determined that help is required from other persons. It further argues that occasional use of simple assistive devices like a cane do not establish severe impairment.

The appellant argues that documentation shows that a combination of physical and mental impairments establishes a severe impairment that directly and significantly restricts ability to perform DLA. The appellant now uses a cane. The appellant's mental impairment also contributes to significant restrictions to daily living activities already affected by physical restrictions. The GP who completed the original MR has updated their opinion after seeing the appellant frequently since the MR was completed. The revised opinion in the form of a chart indicates that the appellant takes significantly longer to complete daily living activities and requires assistance to do them.

At the hearing, the ministry representative questioned the appellant regarding the new chart provided by the GP. The ministry pointed out the chart was filled out from the perspective of the appellant but was signed by the GP. However, the GP indicated by a signature that it is also their opinion. I give significant weight to the new information on the appellant's medical condition because a) it is in the opinion of a prescribed professional, and b) it is the most recent professional opinion on the circumstances of the appellant.

Severity

The legislation reads: "The minister may designate a person ... as a person with disabilities ... if the minister is satisfied ... that the person has a severe mental or physical impairment that ... in the opinion of a prescribed professional (i) directly and significantly restricts the person's ability to perform daily living activities, and (ii) ... the person requires help to perform those activities... "Help" means that, in order to perform DLA, a person requires an assistive device, significant help or supervision of another person, or the services of an assistance animal." As the majority points out, the ministry must consider the reports from the appellant and prescribed professional(s) in the application form. And they must consider additional evidence provided at reconsideration. They must look at functional limitations that affect daily living activities.

The panel must also consider if the decision is reasonable in light of admissible evidence submitted for the appeal. The legislation does not specify how many times longer to perform a DLA would indicate a significant restriction. Or how far without assistance one must walk to have a severe impairment. But I note the ministry decision indicates that, even without the additional information provided after reconsideration, the information already speaks to moderate impairment.

I do not agree with the majority that a severe physical or mental impairment must be established before the impact on DLA can be considered. Part of determining severity is considering the impact of impairment on DLA. The legislation requires the opinion of prescribed professionals on this issue. And the most restrictive indication of severity is that a prescribed professional must find that the impairment significantly restricts DLA such that help is required to perform them. It follows that if those opinions are not given sufficient weight, the ministry's determination on severity would not be reasonable. The ministry and the panel must give significant weight to the opinion of the appellant's GP and Assessor on DLA.

The plain meaning of “activities” is two or more activities. If the opinion of a professional were that impairment significantly restricts two or more DLA such that the appellant needs help to do them, and that is consistent with other professional opinion of restrictions, it would be difficult for the ministry to reasonably say that the impairment is not severe. I will focus on two DLA that, in my view, show that the ministry decision isn't a reasonable application of the legislation in the circumstances of the appellant.

The new chart from the GP indicates that the appellant

- needs significant help or supervision with the DLA of performing housework due to pain and depression, and uses a cane to move about while doing so.
- takes significantly longer performing the DLA moving about indoors and outdoors (4 times as long) and requires a cane daily to move about indoors and out.

The AR also indicates that it takes the appellant significantly longer to do basic housekeeping tasks directly due to both physical and mental impairments. Two prescribed professionals have given their opinion that this is a significant restriction. And the social worker also indicates that the combination of mental health and physical restrictions greatly impacts the ability to manage DLA generally. The GP does not describe what significant or supervision is required for housework, but the legislation does not require that description. The need for help is there for a significant restriction to DLA.

The AR indicates that the appellant has fallen in the past, which is confirmed in the SR. The AR indicates that the appellant either needs a cane or uses one, and is only able to walk or stand for a maximum of 15 minutes. The appellant in the SR indicates that after walking 15 minutes, the pain is overwhelming. The appellant has been prescribed a cane and uses it. Two professionals have spoken to significant restrictions to moving about indoors and out, and have indicated that a cane is needed to perform that DLA.

The new information from the GP updates the MR and speaks to the deficiencies noted by the ministry in both the MR and AR. The opinion of a prescribed professional is that there are at least two daily living activities that are directly and significantly restricted by the appellant's impairment. The appellant requires significant help or supervision to perform housework and must use a cane to move about indoors and outdoors. In addition, the GP and social worker indicate restrictions to other DLA as noted in the Summary of Facts which contribute to overall impairment.

Dissenting Conclusion

Given the new information provided on appeal, the ministry reconsideration decision that

- the appellant does not have a severe physical or mental impairment that
- in the opinion of a prescribed professional, the severe impairment directly and significantly restricts the ability to perform DLA either continuously or periodically for extended periods, and
- as a result of those restrictions the person requires help in the form of an assistive device, the significant help of another person, or the services of an assistive animal

is not a reasonable application of the applicable legislation in the circumstances of the appellant. I would rescind the ministry decision.

PART G – ORDER

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

THE PANEL X 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) X or Section 24(1)(b)

and

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

PART H – SIGNATURES

PRINT NAME

Joan Bubbs

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

PRINT NAME

Wesley Nelson

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

PRINT NAME

Margarita Papenbrock

SIGNATURE OF MEMBER - DISSENTING

DATE (YEAR/MONTH/DAY)