APPEAL NUMBER
2020-00167

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the Ministry) Reconsideration Decision (RD) dated June 5, 2020, which found that the Appellant did not meet one of the five statutory requirements of Section 2 of the *Employment and Assistance for Persons with Disabilities Act* (EAPWDA) for designation as a person with disabilities (PWD).

The Ministry found that:

- The Appellant has met the age requirement;
- The Appellant has a severe 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.

However, the Ministry was not satisfied that the evidence establishes that the Appellant's severe impairment was likely to continue for at least two years.

The Ministry also found that the Appellant is not one of the prescribed classes of persons who may be eligible for PWD designation on the alternative grounds set out in Section 2.1 of the Employment and Assistance for Persons with Disabilities Regulation (EAPWDR) and the Appellant did not appeal the decision on this basis.

PART D – RELEVANT LEGISLATION

EAPWDA, Section 2(2), 2(3) and 2(4)

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

Interpretation Act (IA), Sections 2(1) and 8

PART E – SUMMARY OF FACTS

The evidence before the Ministry at the time of the RD included the PWD Application comprised of an Applicant Information and Self Report (SR) signed by the Appellant on February 23, 2020, a Medical Report (MR) dated March 14, 2020 and completed by the Appellant's General Practitioner (GP) who has known the Appellant for more than 3 years and who has seen them 11 or more times in the past year, and an Assessor Report (AR) dated February 25, 2020 completed by a Social Worker (SW) who has known the Appellant for a year and seen them 11 or more times.

The evidence also included:

- A Request for Reconsideration form (RFR) signed by the Appellant on May 27, 2020 in which the Appellant writes that the question of the duration of the Appellant's injury *"has been addressed in a letter from (the GP) … (which) … states that (the GP's) opinion is that (the Appellant's) injury and accompanied symptoms would last for and possibly past (2 years)*"; and,

- A Letter from the GP dated April 30, 2020 (the April 30 Letter) which states that the Appellant suffered from a head injury in September 2019 which resulted in a cognitive impairment. The GP also writes "*(The cognitive impairment) has been noticeable in (the Appellant's) appointments. Concussions have a larger range of severity and can last for many years. There is no ability to anticipate who will be severely affected and who will not. Acute brain injury can most definitely last for longer than 2 years*".

Diagnoses

In the MR, the GP diagnosed the Appellant with a concussion with a date of onset of September 2, 2019. The GP states that the Appellant's original symptoms included blurry vision and memory loss, and that both of these conditions have persisted since the accident. The GP also indicates that they are unsure whether these conditions will persist for at least 2 years.

In the RD, the Ministry determined that the Appellant has a severe mental impairment which restricts their ability to perform DLA 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 Appellant is appealing the Ministry's other finding: that the Appellant's mental impairment is not likely to continue for at least 2 years, and therefore the Appellant does not meet all of the criteria necessary for a PWD designation.

Additional Information Submitted after Reconsideration

Section 22(4) of the EAA says that a panel may consider evidence that is not part of the record that the panel considers to be reasonably required for a full and fair disclosure of all matters related to the decision under appeal. Once a panel has determined which additional evidence, if any, is admitted under EAA Section 22(4), instead of asking whether the decision under appeal was reasonable at the time it was made, a panel must determine whether the decision under appeal was reasonable based on all admissible evidence.

In the Notice of Appeal (NOA), the Appellant states that the Appellant's GP has provided a note saying that the Appellant's concussion and resulting brain injury could last for 2 years and beyond. At the hearing, the Appellant was joined by an Advocate who spoke on the Appellant's behalf and provided a

formal verbal submission which is summarized below. The Panel considered the written information in the NOA and the formal verbal submission to be argument.

At the hearing, the Advocate spoke on behalf of the Appellant and said that the Appellant had suffered a severe concussion in a September 2019 motor vehicle accident that resulted in short term hospitalization and a traumatic brain injury.

The Advocate stated that the Ministry had determined that the Appellant had satisfied all of the conditions for the PWD designation except for duration of impairment, where the Ministry found that the Appellant's GP had not indicated that it was likely to continue for at least 2 years. The Advocate referred to the April 30 Letter in which the GP stated that complications from a concussion *can* last for many years and argued that if the GP had written *will* instead of *can* the required criterion would have been met. The Advocate also argued that, due to the nature of a concussive injury, medical professionals will not predict the duration of resulting symptoms as they are difficult to assess at any point-in-time. As a result, if a medical professional did write a definitive diagnosis as to the duration of the symptoms from a concussion it would be considered unprofessional. For these reasons, the Advocate argued that the Ministry's interpretation of the "*likely to continue for at least 2 year*" requirement was unreasonably narrow.

The Ministry relied on the RD, emphasizing that the GP had initially checked "No" in the box on the MR where asked whether the impairment was likely to continue for at least 2 years and written "*Unsure*" where asked for the estimated duration of the impairment. The Ministry also made specific reference to the lack of a definitive diagnosis regarding the duration of the impairment in the April 30 Letter and the section of the RD that concluded that the duration of severe impairment criterion had not been met because the GP had not provided information to indicate how long the GP expected the Appellant's impairment to last.

In response to a question from the Panel regarding the Ministry's practice in consideration of rescinding PWD designations under EAPWDA Section 2(4), the Ministry acknowledged that it might sometimes investigate continuing the eligibility of a client who had previously been granted PWD status. The Advocate stated that they had 2 clients who have had their PWD status reviewed by the Ministry and that in one case it involved a review of the client's medical condition. The Advocate also described the review process as "*standard*" procedure and said that it was "*done regularly*".

PART F – REASONS FOR PANEL DECISION

The issue under appeal is whether the Ministry's RD, which found that the Appellant is not eligible for designation as a PWD, was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the Appellant. Was it reasonable for the Ministry to determine that the evidence does not establish that, in the opinion of a prescribed professional, the Appellant's severe mental impairment was likely to last for 2 years or more?

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

Persons with disabilities

2 … (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

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 …

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

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

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

The EAA provides as follows:

Panels of the tribunal to conduct appeals

22(4) A panel may consider evidence that is not part of the record as the panel considers is reasonably required for a full and fair disclosure of all matters related to the decision under appeal.

The IA provides as follows:

Application

2(1) Every provision of this Act applies to every enactment, whether enacted before or after the commencement of this Act, unless a contrary intention appears in this Act or in the enactment …

Enactment remedial

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.

*****

Eligibility under section 2.1 of the EAPWDR

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

Eligibility under section 2 of the EAPWDA

Duration of Mental Impairment

Section 2(2) of the EAPWDA states that the Ministry may designate a person as a PWD if, among other things, that person, in the opinion of a medical practitioner or a nurse practitioner, has a severe mental impairment that is likely to continue for at least 2 years. The GP is a medical practitioner, so the GP's opinion is acceptable in assessing severity and duration of impairment. Because the Ministry has determined that the evidence establishes that the Appellant has a severe mental impairment, the issue is whether there is sufficient evidence to establish that the Appellant's severe mental impairment is likely to continue for at least 2 years. Section 2(4) of the EAPWDA permits the Ministry to rescind the PWD designation, for whatever reason it might find appropriate, after it has been applied.

Section 2(1) of the *Interpretation Act* (IA) says that every provision of the IA applies to every enactment unless it is specified in either the IA or (in this case) the EAPWDA that a given provision does not apply. Neither the IA nor the EAPWDA contains any provision which would exclude the application of IA Section 8 to an interpretation of any of the legislated requirements for a PWD designation. Section 8 of the IA says that every enactment *must* be construed as being remedial and *must* give a *fair, large and liberal construction and interpretation as best ensures the attainment of its objectives* (emphasis added).

The Ministry's position is that, while it acknowledges that the Appellant has a severe impairment, the evidence provided by the Appellant's medical practitioner does not indicate that the severe impairment is likely to last for 2 years or more, and, as all legislated criteria have not been met, the Appellant does not qualify for the PWD designation.

The Appellant's position is that their severe mental impairment resulting from a brain injury suffered in a motor vehicle accident 10 months ago still persists, the GP has provided a note saying that the Appellant's resulting brain injury could well last for 2 years and beyond, and that the Ministry's interpretation of the GP's assessment of the duration of the Appellant's impairment was unreasonably narrow.

Panel Decision

The Panel notes that the Appellant has been seen by the GP more than 11 times over the past year, or an average of at least once a month, and that the GP has stated that the Appellant's cognitive impairment has been noticeable at those appointments. Therefore, as the injury which caused the severe impairment occurred in September, 2019, the GP has confirmed that the severity of the impact of the Appellant's concussion and brain injury has already lasted for 10 months.

The Panel notes that the term "likely" is not defined in the legislation. The Oxford English Dictionary defines "likely" when used as an adverb to mean "probably", and goes on to say "*In standard British English, when likely is used as an adverb it must be preceded by a submodifier such as very, most, or more, as in we will most likely see him later. In informal US English, use without a submodifier is very common and not regarded as incorrect, as in we will likely see him later*".

The legal test is that the severe impairment must be likely to continue for at least 2 years. The Panel notes the absence of a submodifier in the language in the legislation ("… *in the opinion of a medical practitioner or nurse practitioner* ***is likely to continue*** *for at least 2 years*"). Clearly legislative language is not informal usage, but it cannot be determined whether the absence of a submodifier like "somewhat"

or "very" in the legislation is intentional, implying that a degree of certainty is not required, or whether the drafters of the legislation simply neglected to include one. One interpretation might be that the legislators did intend that the severe impairment must be **most likely** or **very likely** to continue for at least 2 years but forgot to include the submodifier; another is that the legislators were intentionally suggesting that there does not have to be a **very strong probability** of the impairment continuing for at least 2 years, or that it does not have to be **virtually certain**.

The Panel finds that the likeliness that an impairment will last for 2 years or more can be impossible to forecast with any degree of certainty given the GP's evidence that the duration of a severe impairment resulting from a concussion or brain injury "*can have a wide range of lasting impacts and can be difficult to predict"*. The Panel concludes that the "at least 2 year" requirement regarding duration of severe impairment most likely exists to ensure that the PWD designation is granted only in circumstances where there is a reasonable expectation that a person will have either a medium term (i.e. at least 2 years), a long term, or a permanent severe impairment.

Given the GP's clarification contained in the April 30 Letter ("*concussions can last for many years*", "*acute brain injury can most definitely last for longer than 2 years*"), it appears that the GP is saying that the Appellant's severe impairment could very well last for 2 years or more but is unable to predict whether it is unlikely, somewhat likely, very likely, or certain. The Panel notes that IA Section 8 requires that the EAPWDA "*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*". Given the requirements of IA Section 8, the difficulty in determining the degree of likelihood that the Appellant's severe mental impairment will continue for at least 2 years, and the fact that the Ministry found all of the other legislated criteria for the PWD designation have been met, the Panel finds that the uncertainty relating to the duration of impairment should be resolved in favour of the Appellant, particularly as EAPWDA Section 2(4) gives the Ministry the ability to audit and rescind a PPWD designation if a recipient's impairment improves.

Conclusion

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

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PART G – ORDER

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

THE PANEL ☐ **CONFIRMS THE MINISTRY DECISION** ☒ **RESCINDS THE MINISTRY DECISION**

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

LEGISLATIVE AUTHORITY FOR THE DECISION:

Employment and Assistance Act

Section 24(1)(a) ☒ or Section 24(1)(b) ☒
and
Section 24(2)(a) ☐ or Section 24(2)(b) ☒

PART H – SIGNATURES

PRINT NAME	
Simon Clews	
SIGNATURE OF CHAIR	DATE (YEAR/MONTH/DAY) 2020/07/05

PRINT NAME	
Jan Lingford	
SIGNATURE OF MEMBER	DATE (YEAR/MONTH/DAY) 2020/07/05
PRINT NAME	
Wendy Marten	
SIGNATURE OF MEMBER	DATE (YEAR/MONTH/DAY) 2020/07/05