

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the Ministry) Reconsideration Decision (RD) dated July 13, 2020, which found that the Appellant did not meet three of the five statutory requirements of Section 2 of the *Employment and Assistance for Persons with Disabilities Act* (EAPWDA) for designation as a person with disabilities (PWD). While the Ministry found that the Appellant met the age requirement and had an impairment which was likely to continue for at least two years, it was not satisfied that the evidence establishes that:

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

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

EAPWDA, Section 2

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

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

PART E – SUMMARY OF FACTS

The evidence before the Ministry at the time of the RD included an undated and unsigned PWD Application submitted by the Appellant, including a Medical Report (MR) dated April 30, 2020 and completed by the Appellant's General Practitioner (the GP), who has known the Appellant since September 16, 1988 and who has seen the Appellant 2 – 10 times in the past year, and an Assessor Report (AR) dated April 30, 2020, also completed by the GP. The Appellant chose not complete a self report.

The Ministry also had before it a Request for Reconsideration (RFR) signed by the Appellant on June 24, 2020 which included:

- A one page letter dated June 29, 2020 (the June 29 Letter), signed by the Appellant's current general practitioner (the Current GP), summarizing the Appellant's medical diagnoses, the impact of her impairments on specific DLA and the activities for which she required assistance from others as set out in the MR and as listed below. The June 29 Letter also stated that the Appellant was currently being assessed by a neurologist (the Neurologist) for management of seizures;
- A five page document prepared by the Appellant's advocate (the Advocate) on behalf of the Appellant titled "REQUEST FOR RECONSIDERATION" and dated June 30, 2020 in which the Advocate summarized the issue and the Ministry's grounds for denial and stated that the GP has retired since completing the MR and the AR and that the Current GP has provided supporting information. The document also comprised two forms, both dated June 22, 2020 and signed by the Appellant, authorizing a community social services agency to receive information from specified provincial agencies and prescribed professionals.

Diagnoses

In the MR, the GP diagnosed the Appellant with asthma with a date of onset of 1989, seizures and diabetes, both with a date of onset of 2007.

Physical Impairment

In the MR, under Health History the GP has written "*frequent exacerbation due to resistant asthma*", "*last seizure Oct 2018, seizure at bedtime unwitnessed*" and "*stable Type II Diabetes mellitus*". With respect to functional skills, the GP reports that the Appellant can walk 2 to 4 blocks unaided on a flat surface, climb more than 5 steps unaided, lift 2 to 7 kg, and is not limited in how long she can remain seated.

In the section of the AR where the assessor is asked to indicate the assistance required related to impairments that directly restrict the applicant's management of mobility and physical abilities, the GP indicates that the Appellant requires continuous assistance with carrying and holding, but has not completed the column that asks for an explanation and to specify any assistive devices required. The GP has indicated that the Appellant is independent with respect to all other activities (walking indoors and outdoors, standing, climbing stairs, and lifting). No additional comments are provided.

In the June 29 Letter the Current GP states that the Appellant is being assessed by a neurologist for management of seizures.

Mental Impairment

In the MR, under Health History the GP has written “*Seizure – poor memory & organization*”. In the section of the MR where the prescribed professional is asked if there are any significant deficits with cognitive and emotional function, the first GP has ticked “yes” for the areas of memory, emotional disturbance, and attention and sustained concentration, but has not provided any information in the comments section. The GP has also indicated that there are no issues with communication. In the section of the MR where the prescribed professional is asked to provide any additional information that might be considered relevant in understanding the significance of the Appellant’s medical condition and the nature of her impairment the GP has written “*Cognitive dysfunction due to seizure disorder*”.

In the section of the AR where the assessor is asked to indicate the level of ability to communicate, the GP indicates that the Appellant’s abilities are good with respect to hearing, satisfactory in speaking, and poor in writing and reading. No explanations are given in the space provided.

In the section of the AR where the assessor is asked to indicate to what degree the applicant’s mental impairment restricts or impacts functioning, the GP has indicated no major impacts, moderate impacts on insight and judgment, attention/concentration, executive functioning, memory and learning, minimal impacts on bodily functions, consciousness, emotion, impulse control, motivation, motor activity, psychotic symptoms, and other emotional or mental problems (without indicating which other emotional or mental problems), and no impact on language.

With respect to social functioning, the GP indicates that the Appellant is independent in all activities (making appropriate social decisions, ability to develop and maintain relationships, appropriate interaction with others, dealing appropriately with unexpected demands and ability to secure assistance from others). The GP also indicates that the Appellant has good functioning with both her immediate social network and her extended social networks. The GP does not provide any additional comments.

In the June 29 Letter the Current GP writes “*(The Appellant) has uncontrolled ongoing unpredictable seizures that interfere with her cognitive functioning and present great issues of safety*”.

Restrictions in the Ability to Perform DLA

In the MR, the GP indicates that the Appellant has been prescribed life-long medication that will interfere with her ability to perform DLA. Where asked to provide any additional information that might be considered relevant in understanding the impact of the Appellant’s medical condition on daily functioning, the GP has written “*Frequent exacerbations of her asthma (has) limited her (ability to perform DLA)*”.

In the AR, the GP states that the Appellant is independent with respect to all listed tasks for the DLA of personal care except for bathing and diet regulation, for which she needs periodic assistance. The GP has indicated that the Appellant also requires periodic assistance from another person for all tasks of the basic housekeeping DLA and for all shopping activities with the exception of paying for purchases, for which she is independent. In the additional comments section of the DLA section of the AR the GP has written “*Periodic assistance due to the sedating effects of her medication and asthma exacerbations*”. No comments are included in the space provided for a description or explanation of the type and amount of assistance required. Regarding the tasks of meal planning, food preparation, cooking, budgeting, taking medications as directed, and safe handling and storage of medications, the GP indicates that the Appellant requires periodic assistance from another person but no explanation or description of the type of assistance required or other additional comments are noted in the space provided. The GP has indicated that the Appellant requires continuous assistance from another person with banking, paying

rent and bills and filling and refilling prescriptions, but again, no explanation or description of the type of assistance required or other additional comments are noted in the space provided. With respect to the transportation DLA the GP has indicated that the Appellant is independent in getting in and out of vehicles and that her ability to using public transit is not applicable because she is driven to wherever they need to go.

In the June 29 Letter the Current GP states that the Appellant has severe asthma "*with episodes causing shortness of breath that interferes with her performing all ... (DLA)*", adding "*(The Appellant) has continuous restrictions with ... (DLA) of personal self care, cooking and meal preparation, housework, shopping, laundry, filling prescriptions and taking medication, accessing bank services and transportation*".

Need for Help

In the MR the GP indicates that the Appellant does not require any prostheses or aids for her impairment.

In the section of the AR that asks who provides the help required for DLA the GP has ticked "Family" and "Friends" and written "*has extended family with adequate supports so far*". Where asked what assistance is provided through the use of assistive devices, the GP has ticked "None". The GP also states that the Appellant does not have an assistance animal.

In the June 29 Letter the Current GP writes that the Appellant is not medically fit to drive and always has to have someone present due to the unpredictable nature of her seizures. The Current GP also states that the Appellant requires the assistance of her "*extensive family and friends*" with personal self care, cooking and meal preparation, housework, shopping, laundry, filling prescriptions and taking medication, accessing bank services and transportation.

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 "*The ministry erred in its application of (relevant) information and legislation*".

On August 11, 2020 the Appellant provided additional information relating to her impairments (the August 11 Submission). This additional evidence includes:

- A two page letter dated July 31, 2020 prepared by the Neurologist (the Neurologist's Submission) summarizing the Neurologist's findings with respect to the Appellant's medical issues and focusing on the impacts on her DLA and need for help resulting from her epilepsy and the resulting seizures, including:
 - With respect to the Appellant's diagnosis, that the Appellant "*has a history of epilepsy. She has manifested daytime generalized tonic clonic seizures and suspected nocturnal seizures*" that have been episodic, and that she had a seizure in May 2020 and a "breakthrough

seizure” in early June of 2020, since which time she has been seizure free. The Neurologist further states that, as a result of her epilepsy, the Appellant has “*accrued significant fearfulness of seizures and behavioural modifications in response to that fearfulness*”. The Neurologist says that it is unclear if the disorder is a persisting or a permanent disorder which has evolved into an anxiety disorder, or whether the disorder is modifiable. In any event, the Neurologist states that the seizures have a significant behavioural impact on the Appellant’s life;

- The Neurologist also writes that the Appellant “*has a coexistent history of unilateral throbbing headaches*” which the Neurologist refers to as episodic common migraine, and a gait impairment resulting from the Appellant’s diabetes, which, “*with sensory change in the feet a minimally symptomatic diabetic neuropath*” will affect the Appellant’s balance and is unlikely to improve;
- Regarding need for help with DLA, the Neurologist states that the Appellant “*requires assistance and escorting throughout most ... (DLA) and, though the seizures are episodic in nature, the anxiety and fearfulness and the behavioural impact thereof are continuous and are the main source of her day-to-day disability/inability to function*”.
- A one page overview prepared by HealthLinkBC titled “Epilepsy: Generalized Tonic Clonic Seizures” describing the characteristics of a generalized tonic clonic seizure;
- A two page information sheet prepared by the BC Epileptic Society providing advice and safety tips for persons with epilepsy in different locations including at home, outside the home and at work;
- A five page submission prepared by the Advocate (the Advocate’s Submission) arguing that “*(the Ministry) erred in concluding that (the Appellant) did not meet the legislated criteria because (the Ministry) made factual errors and errors in law*”, providing the Advocate’s position with respect to what she feels are “factual reasons and errors in law”, as summarized below, and the evidence that the Advocate feels supports that position.

The Panel considered the written information in the NOA and the Advocate’s Submission to be argument. The Panel considered the written evidence in the Neurologist’s Submission to be evidence that is reasonably required for a full and fair disclosure of all matters relating to the decision under appeal. Therefore, the Panel admitted the additional information in accordance with Section 22(4) of the EAA. As the Neurologist is a specialist medical practitioner he qualifies as a “prescribed professional” and accordingly the Panel gave significant weight to his testimony.

At the hearing, the Appellant provided a verbal account of the seizures she had experienced since their onset. She stated that she had had a “*big one*” in 2009 and another big seizure in November 2019, following which she also experienced dizziness and a headache. She stated that since November 2019 she has experienced night seizures every second or third day. The Appellant stated that she was prescribed medication which required an initial dose of 5 capsules, followed by 3 capsules for 3 days and then returning to 5 capsules. She stated that she had been tested after beginning to take the medication and that her “*tested levels were better than before the medication*”. Since the seizures experienced by the Appellant in May 2020 and early June of 2020 identified in the Neurologist’s Submission, the Appellant stated that she had experienced one additional seizure on July 30, 2020 accompanied by shaking and a headache, on which occasion she considered calling an ambulance but was convinced by

her son, with whom she lives, not to call. She stated that she had to rest in bed following the July 30 seizure for 24 hours.

Regarding help from family, the Appellant explained that she is assisted by her adult son who lives with her all the time and a niece who is also living with her until she has to return to school in the Fall. The Appellant said that she doesn't cook because she had once fallen in the kitchen and is afraid of falling again, and that she relies on her son or niece to handle hot pans and a pressure cooker for fear of burning herself if she were to experience a seizure while cooking.

Speaking on behalf of the Appellant, the Advocate argued that the evidence presented by the prescribed professionals demonstrates that the Appellant's impairments are severe, that she is in significant need of assistance and that the Ministry had made a number of factual errors in its RD. In providing examples of factual errors, the Advocate made reference to the statement in the RD that the Current GP had not provided information relating to the specific DLA set out in the legislation, whereas in fact the letter from the Current GP specifically lists the DLA and states that the Appellant always needs to have someone present with her for those activities due to the unpredictable nature of her seizures. In addition, the Advocate stated that, while the RD says that "*there is no indication of the type of assistance required other than supervision*", EAPWDA Section 2(3) (b) (ii) requires *either* the supervision *or* the significant help of another person (not both) and that the episodic nature of the Appellant's epilepsy requires the continuous supervision of her son and niece.

Other examples of factual errors in the RD raised by the Advocate at the hearing included the Ministry's statement "*(The GP) indicates that you have been prescribed (medication) which **may** interfere with your ability to perform (DLA) due to drowsiness*" (emphasis added), whereas nowhere in his report does the GP indicate "*may*". The Advocate also suggested that the GP might have indicated in the AR that the Appellant's need for supervision was periodic rather than continuous because the footnote in that section of the AR says that periodic assistance "*refers to the need for significant help for an activity some of the time as would be the case where a person required help due to the episodic nature of the impairment*", and the Appellant's epileptic seizures are episodic in nature. The Advocate also stated that the Appellant has relied on the information sheet prepared by the BC Epileptic Society to set up her home to avoid some of the risks associated with her seizures.

In response to a question from the Ministry, the Appellant said that Dilantin, the medication referred to in the Neurologist's Submission, is the same medication as Phenytoin, which is the medication identified by the GP in the MR. The Appellant also stated that her seizures are not fully controlled by the medication, and that the Neurologist, who had indicated that the previous dosage was toxic, was conducting tests to try to identify the most effective medication and a safe dosage. The Appellant also confirmed that she was under the ongoing care of the Neurologist and has an upcoming appointment with him on August 14, 2020 and a computed tomography (CT) scan scheduled for August 23, 2020. In response to another question from the Ministry, the Appellant said that her doctor had contacted ICBC to arrange for her driving privileges to be revoked due to the risk of seizures and that her driver licence had been cancelled effective June 1, 2020.

In response to a question from the Panel regarding which of the Appellant's impairments resulted in a need for help, the Advocate, speaking for the Appellant, said that while epilepsy is the most significant impairment for which the Appellant requires significant help or supervision, the Appellant's fear of seizures also contributes to her need for assistance, as did the shortness of breath brought on by her asthma, as described by the GP in the MR and the AR.

At the hearing, the Ministry relied on its RD, making specific reference to fact that, while the Appellant's asthma causes shortness of breath, the Current GP has provided no further information on her physical abilities to support a severe degree of impairment and, with respect to the Current GP's reporting of the Appellant's cognitive impairment, neither the GP nor the Current GP indicates whether the Appellant's impairment occurs during an episode of seizures or if there is ongoing impairment related to her history of seizures.

Regarding assistance from her family for reminders and completing specific DLA, the Ministry also emphasized that the amount and specific assistance required by the Appellant is not reported by the GP in the MR or the AR, nor is the frequency or duration of the assistance indicated and that there is no indication of the type of assistance required other than supervision. In summary, the Ministry stated that the evidence provided in the Appellant's PWD application should have been in more depth, giving an indication of what kind of help was required and how much of the time help was needed. The Ministry also pointed out that none of the information in the Neurologist's submission was available to the Ministry at the time it completed its RD.

In response to a question from the Panel as to whether the Ministry gives greater weight to evidence proved by a specialist physician than to a general practitioner, the Ministry stated that it depends on to what extent the general practitioner and the specialist agree and the relative levels of detail provided. The Ministry also offered that specialists tend to provide more detail in their assessments and as a result their assessments might typically be given more weight.

PART F – REASONS FOR PANEL DECISION

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

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

Persons with disabilities

2 (1) In this section:

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

"daily living activity" has the prescribed meaning;

"Prescribed professional" has the prescribed meaning.

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

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

(b) in the opinion of a prescribed professional

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

(A) continuously, or

(B) periodically for extended periods, and

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

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

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

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

(i) an assistive device,

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

(iii) The services of an assistance animal.

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

The EAPWDR provides as follows:

Definitions for Act

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

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

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

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

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

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

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

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

Part 1.1 — Persons with Disabilities

Alternative grounds for designation under section 2 of Act

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

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

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

The EAA provides as follows:

Panels of the tribunal to conduct appeals

22(4) 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.

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ANALYSIS

Severity of Impairment

Neither the terms “*impairment*” nor “*severe*” are defined in the EAPWDA. The Cambridge Dictionary defines “*impairment*” in the medical context to be “*a medical condition which results in restrictions to a person’s ability to function independently or effectively*” and defines “*severe*” as “*causing very great pain, difficulty, worry, damage, etc.; very serious*”. “*Impairment*” is defined in the MR and the AR sections of the PWD application form to be “*a loss or abnormality of psychological, anatomical, or physiological structure or function causing a restriction in the ability to function independently, appropriately or for a reasonable duration*”. While “*impairment*” is not defined in the legislation, the Panel finds that the Ministry’s definition is reasonable given the emphasis in the legislation on restrictions and help required.

The designation of a person as a PWD arises from the application of legislation, specifically Section 2 of the EAPWDA reproduced above. It is clear from the legislation that a PWD designation is at the discretion of the minister. However, it is also clear that this discretion is limited, by requiring the minister to be “satisfied” that the applicant meets the criteria set out in section 2.

For the minister to be “satisfied” that the person’s impairment is severe and will continue for at least 2 years, the legislation requires the minister to rely primarily on the evidence provided by an independent prescribed professional completing the MR and AR, in this case the GP. Given these legislative requirements, the Panel considers it reasonable for the Ministry to expect that the material submitted by the prescribed professional completing the application will provide the minister with sufficient information on the nature and extent of the impacts of the person’s medical conditions on daily functioning. As the legislation requires the minister to make determinations regarding the duration and degree of impairment, the degree of restrictions in the ability to perform DLA and the resulting degree of help required, it is therefore important that the MR and the AR include explanations, descriptions or examples in the spaces provided so that the minister has the information needed to make these determinations.

Significant weight must also be placed on the evidence of the applicant unless there is a legitimate reason not to do so. Such information provided by the applicant, while optional in the application form, may be helpful in fleshing out the general picture provided by the prescribed professional. The

reconsideration process provides the opportunity for prescribed professionals and the applicant to clarify or add to the information provided on application, and the panel hearing an appeal must consider any information provided on appeal, as long as the panel finds it admissible.

Thus, a diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a severe impairment; information on the nature and extent of the resulting restrictions is required to fully assess the severity of impairment.

Physical Functioning

The Ministry's position is that the Appellant's reported physical functioning does not establish a severe impairment because, while the GP reports that the Appellant's asthma is severe with episodes causing shortness of breath, the information on her physical abilities provided (able to walk 2 to 4 blocks, etc.) does not support a severe degree of physical impairment. The RD does not address whether it considers the Appellant to have any physical impairments relating to her diabetes or epilepsy.

The Appellant's position is that her asthma results in a severe shortness of breath which significantly affects her physical functioning, and that her epilepsy causes seizures that further restrict her physical functioning and present significant safety issues.

Panel Decision

The Panel notes that there are discrepancies between the AR and the MR regarding the Appellant's ability to carry and hold objects, and that other physical activities are not identified as being severely restricted. The Panel further notes that the GP did not complete the section of the AR that asks the prescribed professional to explain any restrictions. The GP has indicated in the AR that the Appellant is restricted in carrying and holding, but also that she is independent with respect to all other physical activities and no additional comments are included in the space provided in that section of the application.

Regarding the Ministry's position as expressed in the RD that inconsistencies in the information provided by the GP and the Current GP make it unclear whether the Appellant has a severe physical impairment resulting from the effect of her seizures, the Panel notes that the Neurologist's Submission provides more information regarding the frequency of the Appellant's seizures and their impact on her behavioural functioning, but does not provide any detail regarding the resulting help or supervision provided that would enable the panel to conclude that the Appellant's epilepsy has resulted in a severe impairment.

The Panel also notes that the Neurologist states in the Neurologist's Submission that he is still making adjustments to the Appellant's treatment and medication and implies that the physiological symptoms of her epilepsy might be contained with medication ("*Dilantin had been toxic, dosing was reduced, and currently she has been seizure free*"). In addition, despite the Appellant's evidence presented at the hearing that she suffered another seizure on July 30 (of which the Neurologist was unaware), the Neurologist states that treatment of the physical impairment is ongoing and the prognosis unconfirmed.

Based on all of the available evidence, given the inconsistencies identified above, the lack of detailed descriptions and explanations in the MR and the AR and the Neurologist's statement regarding the ongoing adjustments that are being made to the Appellant's medication, the Panel finds that the Ministry reasonably determined that the information provided does not establish that the Appellant has a severe physical impairment.

Mental Functioning

The Ministry's position is that the information reported does not establish that the Appellant currently has a severe mental impairment because there are inconsistencies in both the information provided by the GP in the MR and the AR, and between the information provided by the GP and the Current GP. In addition, in the RD the Ministry notes that the Appellant's most recent confirmed seizure was in October 2018 and that neither the GP nor the Current GP describe whether the Appellant's mental impairment occurs during an episode of seizures or if there is ongoing impairment related to her history of seizures.

The Appellant's position is that she has uncontrolled ongoing unpredictable seizures that interfere with her cognitive functioning and that the Ministry failed to correctly read and apply the information provided by the prescribed professionals in the original application and the June 29 Letter.

Panel Decision

The Panel notes that, while the GP has indicated in the MR that the Appellant has a cognitive dysfunction due to her seizure disorder, the GP has not provided any information to explain the nature of this dysfunction or how it manifests in daily life. In addition, while in the MR the GP indicates that the Appellant has significant deficits to her cognitive and emotional functioning in several areas, in the AR the GP reports no major impacts or restrictions on her mental functioning and indicates that she is independent with respect to all social functioning activities, having good functioning with both her immediate social network and her extended social networks. The Panel further notes that the Current GP indicates in the June 29 Letter that the Appellant has "*uncontrolled ongoing unpredictable seizures*" that interfere with her cognitive functioning, which is inconsistent with the GP's assessment that her last seizure was in October 2018 and if there were any bedtime seizures they were unwitnessed.

Regarding the Ministry's position as expressed in the RD that inconsistencies in the information provided by the GP and the Current GP make it unclear whether the Appellant has a mental impairment relating to her seizures, the Panel notes that the Neurologist's Submission addresses the significant behavioural impact of the fear of the seizures.

With respect to possible mental impairments (fear of seizures and behavioural modifications in response to that fearfulness) raised in the Neurologist's Submission, the Neurologist states that it is unclear if the Appellant's fear of seizures is a permanent disorder which has now evolved into an anxiety disorder, or whether it is a modifiable disorder. He goes on to say that if the fear of seizures persists over time he would engage Psychiatry "*to see if there is any modifiable component of this element of her disability*". Even though the question of the expected duration of the Appellant's mental impairment relating to her fear of seizures was not put to the Neurologist, he makes it clear that treatment options are still being considered.

Based on all of the evidence available at the time that the RD was made, given the inconsistencies identified above, the lack of detailed descriptions and explanations in the MR and the AR and the Neurologist's statement regarding the treatment options being considered for the Appellant's fear of seizures, the Panel finds that the Ministry reasonably determined that the information provided does not establish that the Appellant has a severe mental impairment.

Restrictions in the Ability to Perform DLA

The Ministry's position is that it is not satisfied that the Appellant has a severe impairment that directly and significantly restricts her ability to perform the DLA continuously or periodically for extended periods

because, while the GP has indicated in the MR that the Appellant requires periodic assistance with a number of DLA due to the sedative effects of her medication and asthma, the amount and specific assistance required is not reported, nor is the frequency or duration of the periodic assistance indicated. In addition, where the GP has indicated that the Appellant requires continuous assistance with some DLA, the GP does not identify the specific assistance she requires. Furthermore, the Current GP indicates in the June 29 Letter that the Appellant requires someone to be present with her at all times due to the unpredictable nature of the seizures, but does not provide information related to which specific DLA require help, and there is no indication of the type of assistance required other than supervision.

The Appellant's position is that she requires help with a number of DLA due to both the risks associated with her seizures (for which she requires both supervision and assistance), and due to the shortness of breath from her asthma, and that the DLA impacted by these conditions are specifically identified by the GP in the AR and by the Current GP in the June 29 Letter.

Panel Decision

DLA are defined in Section 2(1) of the EAPWDR and are also listed in the MR and, with additional details, in the AR. Section 2(2) (b) of the EAPWDA requires that the Ministry be satisfied that a prescribed professional has provided an opinion that an applicant's severe impairment directly and significantly restricts their DLA, continuously or periodically for extended periods. Section 2(2) (a) of the EAPWDR defines "prescribed professional" to include a medical practitioner. Therefore, the GP, the Current GP and the Neurologist are all prescribed professionals for the purpose of providing opinions regarding the nature of a PWD applicant's impairment and its impact on the performance of DLA. The term "directly" means that there must be a link between the severe impairment and the restriction. The direct restriction must also be significant. There is also a component related to time or duration - the direct and significant restriction must be either continuous or periodic. If periodic, it must be for extended periods. In the MR and the AR, prescribed professionals are instructed to check marked boxes and to provide additional explanations; for example, a description of the type and amount of assistance required and the frequency and duration of periodic restrictions.

The Panel notes that no details are provided in the MR, the AR or the June 29 Letter regarding the type or frequency of periodic assistance required by the Appellant relating to the effects of the Appellant's asthma. With respect to impact of the Appellant's seizures and fear of seizures on her ability to perform DLA, the Panel notes that the Current GP has listed the specific DLA for which the Appellant has restrictions, indicating that all DLA are impacted and that he has classified all of those restrictions as requiring continuous assistance. In addition, the Neurologist states in the Neurologist Submission that the Appellant is unable to perform "*most of her (DLA)*" without continuous assistance, but without identifying which ones. The GP, on the other hand, has indicated that the Appellant has restrictions that require only periodic assistance with respect to several of the DLA and that the Appellant is independent in many others. Regarding the discrepancy between the need for periodic assistance and the need for continuous assistance, the Panel discounts this distinction as the instructions in the AR section of the application form might reasonably have led the GP to classify the restrictions as periodic when they are in fact continuous due to the unpredictable nature of the Appellant's seizures. In addition, the Panel finds that, while the need for help needs to be assessed in relation to specific DLA, contrary to the Ministry's findings in the RD, the legislation does not require that any other type of required assistance be specified in situations where an applicant needs supervision.

Based on all of the available evidence, given the inconsistencies identified above and the lack of detailed descriptions and explanations, the Panel finds that the Ministry reasonably determined that there is

insufficient evidence to establish that the Appellant has a severe impairment that directly and significantly restricts her ability to perform DLA, either continuously or periodically for extended periods.

Help with DLA

The Appellant's position is that, due to her ongoing seizures which are unpredictable and occur frequently, she is in significant need of assistance and requires continuous supervision. As a result, she relies on her son and niece, who live with her, to intervene when necessary and perform many of her DLA on her behalf.

The Ministry's position is that, as it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required from other persons or an assistive device.

Panel Decision

Section 2(2)(b)(ii) of the EAPWDA requires that, as a result of direct and significant restrictions in the ability to perform DLA, a person requires assistance in the form of either significant help or supervision in performing those activities. The establishment of direct and significant restrictions under section 2(2)(b)(i) is a precondition of meeting the need for help criterion.

Given all of the available evidence, the Panel finds that the Ministry reasonably determined that it could not conclude that significant help or supervision is required from other persons or a device because it has not been demonstrated that DLA are significantly restricted.

In conclusion, while the Panel finds that the information in the Neurologist's Submission provides greater and more recent detail concerning the severity of the Appellant's physical and mental impairments resulting from her seizures, their impact on her DLA and her need for help, key questions regarding the specific impacts on the Appellant's DLA and the type and frequency of assistance required remain unanswered. The Panel is of the understanding that an applicant can re-apply for a PWD designation and provide additional and/or new evidence supported and documented by appropriate prescribed professionals.

Conclusion

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

APPEAL NUMBER
2020-00185

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)

2020/08/19

PRINT NAME

Bill Reid

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2020/08/19

PRINT NAME

Richard Roberts

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2020/08/19