APPEAL NUMBER
2020-00177

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 29, 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.

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)

The relevant legislation is provided in Schedule A.

PART E – SUMMARY OF FACTS

The evidence before the Ministry at the time of the RD included the PWD Application (the First PWD Application) comprised of the applicant information and self report (SR) completed by the Appellant on February 25, 2020, including a Medical Report (MR) dated April 2, 2020 and completed by the Appellant's Neurology Specialist (NS) who had known the Appellant for 6 months on that date and has seen the Appellant 2 - 10 times in the past year, and an Assessor Report (AR) dated June 9, 2020, also completed by the NS.

The evidence also included:

- A Request for Reconsideration form (RFR), completed by the Appellant on June 15, 2020, in which the Appellant:
  - States that she believes that letters submitted with the first application were missed in the latest application;
  - Indicates that she intends to submit letters from her family doctor, her physiotherapist and her psychiatrist, and to resubmit a letter from her neurologist;
  - States that the assessments in the application are based on an average day and that on a bad day her impairments are much worse;
  - Restates some of the symptoms included in her original application (and as summarized in the physical and mental impairment sections below); and
  - Writes that the AR was completed in a rush by the NS;
- A letter dated June 24, 2020 from a doctor (the GP) at a medical clinic in the Appellant's community (the GP's Letter) in which the GP:
  - States that the Appellant is a new patient of the doctor;
  - Indicates that the Appellant suffers from a myelin oligodendrocyte glycoprotein (MOG) antibody disorder, chronic back pain following a motor vehicle accident (MVA) and a history of auto-immune encephalitis which are affecting her DLA; and
  - Provides information about the Appellant's physical and mental impairments, their impact on her DLA and her need for help (as summarized below); and
- An undated, hand-written note from the Appellant addressed "to whom it may concern", stating that the note was being written following a full physical exam and that the neurologist who completed the "disability package" did not perform a physical examination. The note also states "*This letter also lists the diagnosis from my mental health assessment on … the 22nd of June, 2020*", that in recent weeks the assistance needed with housekeeping has increased, and that she has 30 seconds warning relating to bladder/bowel control, which "*puts strain on me physically and mentally*".

Diagnoses

In the MR, the NS diagnoses the Appellant with an N-Methyl-D-aspartate (NMDA) receptor encephalitis with a date of onset of May 2015 and multiple sclerosis (MS)/MOG antibody disease with a date of onset of February 2016. This diagnosis is also given by the GP in the GP's Letter.

Physical Impairment

In the MR, under "Health History", the NS has inserted a one page letter addressed to the Ministry dated April 2, 2020 (the April 2 Letter) and an outpatient clinical consultation report dated January 20, 2020 (the First NS Report) which together indicate that the Appellant's symptoms for the above-noted disorders appeared on the dates of onset as set out above but were not diagnosed till 2020 after magnetic resonance imaging (MRI) showed multiple spinal cord lesions and a lesion in the brain. The NS states in these two documents that the Appellant has imperfect balance, a reasonable ambulatory range and "*needs to use the restroom much more than is normal*". The NS also states that the Appellant has been having significant back and neck pain since suffering an MVA in February 2015, and had been experiencing intermittent extreme body itching, numbness and tingling, fatigue and weakness in her arms and legs for a period of a week in early 2018. The NS writes that the Appellant's then current physical disabilities include chronic back pain, bladder and bowel urgency, imbalance and fatigue and that she has been battling knee and joint pain for 3 to 4 years.

With respect to functional skills, the NS reports in the MR that the Appellant can walk more than 4 blocks unaided on a flat surface, climb more than 5 steps unaided, lift 7 - 15 kg and can remain seated for 2 - 3 hours. 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 applicant's medical condition and the nature of their impairment the NS has written "*see (April 2 Letter and First NS Report)*".

In the GP's Letter, the GP states that the Appellant is only able to walk ½ to 1 block at a time and can't stand for very long and has major fatigue and chronic pain issues with her bladder and bowel movement control.

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 NS indicates that the Appellant is independent with walking indoors and outdoors, standing, climbing stairs, and lifting, while indicating that she has periodic impairment with carrying and holding, adding the comment "*limited by back pain*". The NS has not provided any further comments or explanations in the space provided.

In the SR, the Appellant states that in 2015, after having previously been misdiagnosed with a mental condition, she was diagnosed with NMDA receptor encephalitis which causes seizures and autoimmunal shutdown of the heart, lungs and digestive system. The Appellant also states she was confined to a psychiatric ward as a result of a misdiagnosis and suffered frequent seizures, including 9 seizures (which were classified as "temper tantrums") recorded on a single day. The Appellant also wrote that she suffers a lot of back pain from two MVAs occurring in 2016.

The Appellant also states in the SR that in the summer of 2019, after all of her symptoms had worsened significantly, she was referred again to a neurologist who did more tests which appeared to indicate that she might have MS. As a result, the Appellant was sent to an MS clinic where she was diagnosed with MOG antibody disorder, which cannot be cured. The Appellant says there is treatment for this disorder but it leaves the patient vulnerable to the flu, colds and infections, which significantly increases the Appellant's anxiety. In addition, the Appellant states that her MOG antibody disorder causes lesions and an inflammation on her spine, resulting in her feeling like her skin is on fire and giving her pain in her neck and lower back, frequent migraines and headaches, fatigue, bowel and bladder urgencies, numbness in her extremities, and, on rare occasions, temporary vision loss.

The Appellant also writes in the SR that she has always suffered from stomach pain, which remains undiagnosed. The Appellant says that she was taking expensive medication for the stomach pain but can no longer afford the medication and she doesn't have a family doctor and can't find one who is taking on new patients in her community or in any nearby communities.

Mental Impairment

In the April 2 Letter and the First NS Report that were appended to the MR, the NS writes that the Appellant has residual emotional difficulties, difficulty sleeping and post-traumatic stress disorder as a result of NMDA receptor encephalitis. In addition, the NS writes that the Appellant has no memory of a full year and her memory and energy levels are also abnormal as a result of the NMDA receptor encephalitis. The Appellant's concentration is imperfect and she is unable to multi-task. If the Appellant has several things to do in a day she cannot complete one task before moving to another. The NS states that "*my opinion is that (the Appellant) has substantial residual cognitive impairment from her NMDA receptor encephalitis as well as symptoms that are classic for MS including poor concentration and substantial fatigue*." In the First NS Report the NS writes that the Appellant's mental disabilities include memory deficit.

In the section of the MR where the prescribed professional is asked if there are any significant deficits with cognitive and emotional function, the NS has ticked "yes" for the areas of memory, emotional disturbance and attention and sustained concentration adding the comment "*see (April 2 Letter and First NS Report)*".

In the section of the AR where the assessor is asked to indicate the level of ability to communicate, the NS indicates that the Appellant's abilities are *good in all listed areas (writing, speaking, reading ability and hearing)*. 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 NS has indicated no major impacts, a moderate impact on emotion, attention/concentration, executive functioning and memory, a minimal impact on insight and judgment and motivation, and no impact on any of the other items (bodily functions, consciousness, impulse control, motor activity, language, and psychotic symptoms).

With respect to social functioning, the NS indicates in the AR that the Appellant is independent in making appropriate social decisions, ability to develop and maintain relationships, appropriate interaction with others, and ability to secure assistance from others, and needs periodic support or supervision in dealing appropriately with unexpected demands. The NS also indicated that the Appellant has good functioning with her immediate social network and her extended social networks. The NS does not describe the

degree of support or supervision required in the space provided, and makes no other comments or explanations.

In the GP's Letter, the GP states that the Appellant suffers from depression and anxiety.

In the SR, the Appellant states that she was diagnosed with severe anxiety and moderate depression in 2009 which have cost her relationships and jobs and forced her to drop out of college in 2018. The Appellant also states that her NMDA receptor encephalitis causes psychosis and "*shuts everything in my brain down*". The Appellant writes that in 2015 she was in a coma for 2 weeks in an intensive care unit, following which she had to "*relearn everything all over again from infancy to adulthood*".

Restrictions in the Ability to Perform DLA

In the MR, the NS indicates that the Appellant has not been prescribed any medications or treatments that 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 NS has written "*The disability arising from NMDA receptor encephalitis combined with the MOG myelitis will make it very challenging for (the Appellant) to make a meaningful recovery to the point that she is able to work. Fortunately she survived, but it is clear that many patients with NMDA receptor encephalitis DO NOT make a full recovery. Similarly with MOG, even in small cohorts, there is disability accrual that is important for functioning.*"

In the AR, the NS states that the Appellant is independent with respect to all of the DLA of tasks except for basic housekeeping, for which the NS indicates she requires periodic assistance from another person. No explanation or description of the type of assistance required is noted in the space provided and no further comments are provided.

In the GP's Letter, the GP states that the Appellant "*needs help with basic housework; cooking, mopping, cleaning, etc.*" and that her anxiety and depression also affects their DLA.

In the SR the Appellant writes that her anxiety and depression affects her daily, making it hard to get out of bed and dressed, remembering to shower and gathering the energy to go grocery shopping. The Appellant also writes that sleep is irregular and unsatisfying. The Appellant states that following her coma in 2015 she had to relearn reading, writing, toileting, showering, eating, drinking and even speaking, and that she still has a hard time with a lot of these activities.

Need for Help

In the MR the NS 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 NS has ticked family and friends but no comments are made in the space provided. The NS has not indicated that any assistance is provided through the use of assistive devices. The NS also indicates that the Appellant does not have an assistance animal.

The Appellant does not identify any need for help from another person or need for the use of an assistive device in her SR.

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 her disability affects her daily and if she listed everything that she had to deal with on a daily basis the list would be several pages long.

On November 16, 2020, the Appellant submitted additional information (the November 16 Submission) to the Tribunal comprising a new consultation report prepared by the NS dated October 27, 2020 (the Second NS Report), a new SR, and new MR and AR completed by the GP (the Second PWD Application), and a diary written by the Appellant's mother describing the Appellant's mental and physical condition between April and September 2015, including time the Appellant spent in a psychiatric ward in May 2015, followed by a diagnosis of NMDA receptor encephalitis on May 28, 2015 while in intensive care at a hospital, her time in a coma in late May and early June of 2015, and the first three months of her recovery after the coma.

The information in the Second NS Report and the Second PWD Application the Appellant, the NS and the GP confirm some of the evidence previously submitted, and provide new or updated evidence as indicated below.

Diagnosis

In the November 16 Submission, the NS reconfirms his original diagnosis. The GP, who has known the Appellant for 7 months and seen the Appellant 2 or more times in the past year, states that the Appellant has MOG associated demyelinating disease with lesions on her cervical spine and frontal lobe, depression, anxiety and PTSD.

Physical Impairment

In the Second NS Report, the NS states that the Appellant has some sensory changes in her hands but her manual dexterity is OK, that she can walk one block "*before pain or deconditioning intervenes*", that she "*was substantially impaired as a result of her demyelinating disease and NMDA*", and that the NS would like the GP to make repeat referrals to see the Appellant every six months "*to ensure that both of her neurologic illnesses are stable*".

In the MR section of the Second PWD Application, where asked to indicate the severity of the Appellant's medical conditions, the GP states that the Appellant can't walk for more than one block or lift more than 5 lbs. In the section of the second MR that deals with functional skills, the GP reports that the Appellant

can walk 1 - 2 blocks unaided on a flat surface, climb 2 - 5 steps unaided, lift 7 - 15 kg and can remain seated for 1 - 2 hours.

In the AR section of the Second PWD Application, the GP indicates that walking outdoors, climbing stairs and standing take significantly longer than normal (*discomfort and pain when standing more than 5 minutes*), that the Appellant needs periodic help from another person when walking indoors or outdoors (*uses walls, countertops to stabilize herself/episodes of dizziness, imbalance, takes multiple breaks, takes longer time*), continuous assistance from another person in lifting and carrying and holding (*can't carry or lift more than 2 - 5 lbs. causes back pain*), and that she requires an assistive device when climbing stairs (*use of railing*).

In the Second PWD Application, the Appellant writes that following her entry into a comatose state in late May 2015 her mother was told that the Appellant had minimal brain activity and upon receiving "*extremely aggressive treatment*", she lost all of her hair and gained more than 50 lbs. She also states that she is unable to take anti-inflammatories because of her stomach problems.

The Appellant also reports that when she had to go to the emergency room (ER) at a local hospital in June 2020 she was diagnosed with a stomach ulcer.

Mental Impairment

In the MR section of the Second PWD Application, the GP provides an additional diagnosis of PTSD and writes that the Appellant has issues with poor motivation and memory. In the section of the MR where the prescribed professional is asked if there are any significant deficits with cognitive and emotional function, the GP has ticked "yes" for the areas of executive functioning, language, memory, emotional disturbance, motivation, impulse control and attention and sustained concentration. The GP has also added the comment "*suffers from depression/anxiety, PTSD, has decreased memory, low motivation, decreased concentration.*"

In the AR section of the Second PWD Application, the GP indicates that the Appellant's speaking is satisfactory but that her reading is poor, adding the explanation "*When talking for a long period of time, words can become slurred. It takes longer to translate them from a thought to a sentence. Worsens when fatigued. Reading for more than 10 to 15 minutes takes extra time.*"

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 major impacts to emotion, motivation, and other emotional or mental problems, a moderate impact on bodily functions, consciousness, impulse control, executive functioning, memory and language, a minimal impact on attention/concentration, and no impact on most of the other items (motor activity, other neurological problems and psychotic symptoms). Insight and judgement impacts are not rated.

In the SR in the Second PWD Application the Appellant writes that she struggles with remembering appointments, taking medication and "*even things like laundry*". She also states that she has undiagnosed bilateral swelling in her knees that results in a lot of discomfort when standing and waking and that sometimes the swelling can cause her knee to double in size. The Appellant writes that she has

been diagnosed with post-traumatic stress disorder (PTSD) by three different medical practitioners, including the GP who indicated that it was from the severe trauma the Appellant faced in the hospital.

In the second SR the Appellant states that it took her six months to remember to take her morning medication on time and that her depression was worsened because she lost all of her friends due to her personality changes. She also writes that she is lucky if she gets 5 to 6 hours sleep a night due to her PTSD, which frequently disturbs her sleep "*with nightmares and waking up.*" She states that attention deficit hyperactivity disorder (ADHD) causes disorientation and time management problems, gives her difficulty in coping with stress, and leaves her with a low frustration tolerance. She explains that she has a messy roommate with whom she gets frustrated and angry and she feels she doesn't have the appropriate skills to confront her roommate without getting enraged. She also states that she has difficulties completing tasks like cleaning her apartment or meal preparation, indicating that she loses interest easily and gives up.

Restrictions in the Ability to Perform DLA

In the MR section of the Second PWD Application, where asked whether the impairment directly restricts the applicant's ability to perform DLA, the GP indicates that the Appellant's activity is periodically restricted in the areas of personal self care, meal preparation and mobility inside the home, and continuously restricted in basic housework, daily shopping and mobility outside the home. Regarding the Appellant's periodic restrictions, the GP adds "*Depends on degree of fatigue and dizziness.*" Regarding the impact on DLA on the Appellant's social functioning, the GP explains that her mental impairments affect her daily decision making, (*illegible word*), motivation, concentration, speech and (*illegible word*).

In the AR section of the Second PWD Application, the GP indicates that the Appellant is independent in the DLA tasks of dressing, regulating diet, transferring in and out of bed and on and off chairs, reading prices and labels and paying for purchases when shopping, safe storage of food, banking and paying rent and bills and the safe handling and storage of medications. The GP indicates that the Appellant takes significantly longer than normal with grooming, bathing, toileting, laundry, basic housekeeping, food preparation (*takes longer to prepare a meal*), cooking and filling prescriptions (*often forgets to pick up prescriptions*). The GP also indicates that the Appellant requires periodic assistance with going to and from stores, meal planning (*making a meal plan is difficult as planning ahead is difficult*) and getting in and out of a vehicle. In addition, the GP indicates that the Appellant needs continuous assistance from another person or is unable to carry purchases home and with budgeting (*creating a budget and following it is extremely difficult*). The GP also states that the Appellant does not use public transit because it induces extreme anxiety.

Regarding social functioning, the GP indicates that the Appellant is independent in making appropriate social decisions. The GP indicates that the Appellant requires periodic support in developing and maintaining relationships (*Friendships seem to come and go, frequently unable to maintain them*), ability to deal with unexpected demands (*Can't deal with unexpected tasks, demands*), and ability to secure assistance from others (*Sometimes does not want to bother or inconvenience others*). The GP also indicates that the Appellant needs continuous support from another person in interacting appropriately with others (*Patient interrupts often, sometimes says wrong things, her understanding of social cues is*

delayed). The GP also notes that the Appellant has marginal functioning with her immediate social network and good functioning with her extended social network.

In the Second PWD Application the Appellant states that her daily pain makes it hard to do everything, including making her bed, sweeping and mopping, laundry and loading and unloading the dishwasher. In addition, her depression makes every DLA difficult, and that getting out of bed and dressed for work or having a shower "*are among the hardest things to mentally prepare to do*."

Need for Help

In the MR section of the Second PWD Application, the GP writes that the Appellant needs constant help at home with cleaning (*requires a housecleaner*), some help with cooking, and that she needs help with personal self care (*boyfriend helps with shower when [she] has flare ups*). The GP also writes that friends are helping her with cooking and grocery shopping. In the section of the second MR that asks whether the applicant requires any prostheses or aids for her impairment, the GP has ticked "Yes" and written "*Knee brace, back brace to alleviate the pain and help with mobility*".

In the AR section of the Second PWD Application, the GP indicates that the Appellant also requires toileting aids and often needs help from another person with getting in and out of a vehicle.

In the Second PWD Application the Appellant writes that to relieve the swelling in her knee she uses various kinds of braces and cold compresses. She also states that she receives some help from her boyfriend when he is available, writing "*he will do shopping for me, unloading groceries, helping me shower when it's too painful to move and … help me with cleaning … he also reminds me of appointments.*"

*** * * ***

The Panel considers all of the above-noted new information contained in the Appellant's November 16 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 admits the additional information in accordance with Section 22(4) of the EAA. As the information in the Second PWD Application is provided by a prescribed professional the Panel gives it full weight.

At the hearing, the Ministry confirmed that it had received and considered the information in the November 16 Submission. After reviewing the new evidence, the Ministry determined that the Appellant now met all of the criteria for the PWD designation. Specifically, in addition to meeting the age requirement and having an impairment which was likely to continue for at least two years, the Ministry determined that the Appellant has a severe physical or mental impairment, which, in the opinion of a prescribed professional, directly and significantly restrict her 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 or the use of an assistive device to perform those DLA.

PART F – REASONS FOR PANEL DECISION

The issue under appeal was whether the Ministry's RD, which originally found that the Appellant was not eligible for designation as a PWD, was reasonably supported by the evidence or was a reasonable application of the legislation in the circumstances of the Appellant.

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 the term is not defined in the legislation, the Panel finds that the Ministry's definition of "impairment" as set out in the MR and the AR is a reasonable definition of the term for the purpose of partially assessing an applicant's eligibility for the PWD designation.

A diagnosis of a severe impairment does not in itself determine PWD eligibility. Section 2(2) of the EAPWDA requires that in determining whether a person may be designated as a PWD, the Ministry must be satisfied that the individual has a severe physical or mental impairment with two additional characteristics: in the opinion of a prescribed professional, it must both be likely to continue for at least two years [EAPWDA 2(2)(a)] and it must directly and significantly restrict a person's ability to perform DLA continuously or periodically for extended periods, resulting in the need for the person to require an assistive device, significant help or supervision or an assistance animal in performing those activities [EAPWDA 2(2)(b)]. Therefore, in determining PWD eligibility, after assessing the severity of an impairment the Ministry must consider how long the severe impairment is likely to last and the degree to which the ability to perform DLA is restricted and assistance in performing DLA is required. In making its determination the Ministry must consider all the relevant evidence, including that of the Appellant. However, the legislation is clear that the fundamental basis for the analysis is the evidence from prescribed professionals – in this case the NS and the GP.

The Panel notes some significant discrepancies regarding an assessment of the Appellant's physical functioning, impacts on DLA and need for help both within the information provided by the NS in the April 2 Letter, the First NS Report, the MR, the AR, and the Second NS Report; and between the information provided by the NS and the GP as set out in the GP's Letter and the Second PWD Application.

In the RD, the Ministry states that it acknowledges that the GP reports significantly more limitation with walking and standing than the NS and that it is unclear why these restrictions were not reported by the NS in the AR. The Ministry also states that because the Appellant is a new patient of the GP the ministry gives greater weight to the information provided by the NS. The Panel notes that there is no requirement in the EAPWDA Section 2(2) that the prescribed professional must have a minimum amount of contact with an appellant in order to render an opinion. The Panel finds that it is not reasonable for the Ministry to put less weight to the information provided by a prescribed professional only because that prescribed professional has not known the appellant for as long as another prescribed professional providing

conflicting evidence. Rather, faced with conflicting evidence from prescribed professionals, the Ministry should give more weight to whichever information is more complete, clear and convincing.

The Panel notes that the NS states in the MR that the Appellant's physical impairments (NMDA receptor encephalitis and MS/MOG antibody disease) result in a "*disability accrual that is important for functioning*", which suggests a likely impact on DLA. Yet in the AR the NS has ticked "Independent" for all DLA except for basic housekeeping, and either provided no comment or explanation to support the Appellant's independence or refers to the April 2 Letter or the First NS Report for comments or explanations. In addition, in the AR the NS indicates that the Appellant requires periodic assistance from another person with basic housekeeping but gives no description of the type of assistance required or explanation of who provides the assistance.

Regarding these discrepancies and gaps in the information provided by the NS, the Panel further notes that in the RFR the Appellant writes that the AR was completed "*in a bit of a rush as (the NS) was away due to a Covid case in the family so everything may not have been filled out perfectly, but the letters should have 100% cleared up anything.*" Given the incomplete and conflicting information in the MR and the AR, it does appear likely that the MR and the AR were completed by the NS in a hurry. As a result, and because new and more complete MRs and ARs are provided in the Second PWD Application, the apparently conflicting information in the MR and the AR should not be assigned weight.

Not only is the GP's information in the second MR and the second AR much more complete, it also confirms and expands upon both the information previously provided by the GP in the GP's Letter and the information provided by the NS in the April 2 Letter, the First NS Report and the Second NS Report. Particularly in light of the new information contained in the November 16 Submission, the Panel finds that it is not reasonable for the Ministry to rely on the evidence in the MR and the AR in determining the Appellant's eligibility for a PWD designation, but rather that the Ministry should rely on the information contained in the other available documents provided by the prescribed professionals (the First NS Report, the April 2 Letter, the Second NS Report and the Second PWD Application) to make that decision.

Physical Impairment

Panel Decision

The Panel notes that the Ministry confirmed at the hearing that it would have determined that the Appellant has a severe physical impairment had it had the evidence included in the Appellant's November 16 Submission when it made the RD.

The Panel finds that the most complete, clear and convincing information is provided by the GP in the November 16 Submission. In that submission the GP has stated that the Appellant can't walk for more than one block, climb more than 5 steps or lift more than 5 lbs, or remain seated for more than 2 hours. In addition, the Panel notes that the GP's Letter states that the Appellant can't stand for very long and has major fatigue and chronic pain issues with her bladder and bowel movement control.

Therefore the Panel finds that the Ministry, after reviewing the evidence in the November 16 Submission and having reversed the RD, reasonably determined that the Appellant has a severe physical impairment.

Mental Impairment

Although the legislation contains no formalized criteria to define what constitutes mild, moderate or severe cognitive deficits, prescribed professionals are required to indicate in the MR and the AR the severity of a mental impairment by assessing the number of skill areas affected by the deficit, the severity of the deficits in psychological processes, and the degree of impairment in skill areas.

Panel Decision

The Panel notes that the Ministry confirmed at the hearing that it would have determined that the Appellant has a severe mental impairment had it had the evidence included in the Appellant's November 16 Submission when it made the RD.

As previously mentioned, the Panel finds that the most complete, clear and convincing information is provided by the GP in the November 16 Submission. In that submission the GP has stated that the Appellant has significant deficits with cognitive and emotional function in a number of the areas and that she suffers from depression/anxiety, PTSD, has decreased memory, low motivation, and decreased concentration. In addition, the GP reports that the Appellant's words can become slurred when she talks for a long period of time, and that it takes longer to translate a thought to a sentence. The Panel also notes that in the April 2 Letter the NS writes that the Appellant's concentration is imperfect and she is unable to multi-task, and offers the opinion that the Appellant has substantial residual cognitive impairment, including poor concentration and substantial fatigue.

Therefore the Panel finds that the Ministry, after reviewing the evidence in the November 16 Submission and having reversed the RD, reasonably determined that the Appellant has a severe mental impairment.

Restrictions in the Ability to Perform DLA

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, both the NS and the GP are considered prescribed professionals for the purpose of providing opinions regarding the nature of the Appellant's impairment and its impact on the performance of DLA. The term "directly" means that there must be a causal 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 the Ministry confirmed at the hearing that it would have determined that the Appellant is directly and significantly restricted in her ability to perform DLA either continuously or periodically for extended periods had it had the evidence included in the Appellant's November 16 Submission when it made the RD.

As previously mentioned, the Panel finds that the most complete, clear and convincing information is provided by the GP in the November 16 Submission. In that submission the GP has stated that the Appellant's activities are periodically restricted in a number of DLA depending on the degree of her fatigue and dizziness, which the Appellant has indicated are regular occurrences. Regarding the impact on DLA on the Appellant's social functioning, the GP explains that her mental impairments affect her daily decision making. In addition, the Appellant takes significantly longer than normal with most personal self care and housekeeping activities, that she requires periodic assistance with going to and from stores, meal planning and getting in and out of a vehicle, and that she needs continuous assistance from another person to carry purchases home and with budgeting. The GP also states that the Appellant does not use public transit because it induces extreme anxiety.

Therefore the Panel finds that the Ministry, after reviewing the evidence in the November 16 Submission and having reversed the RD, reasonably determined that the Appellant's DLA are directly and significantly restricted in the opinion of a prescribed professional.

Help with DLA

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 help to perform those activities. Help is defined in subsection (3) as the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform one or more DLA.

The Panel notes that the Ministry confirmed at the hearing that it would have determined that the Appellant requires significant help from other persons or assistive devices had it had the evidence included in the Appellant's November 16 Submission when it made the RD.

As previously mentioned, the Panel finds that the most complete, clear and convincing information is provided by the GP in the November 16 Submission. In that submission the GP has stated that the Appellant needs the help of her boyfriend, a housekeeper and friends to perform many DLA (showering, cleaning, cooking, shopping, etc.) and that she must rely on assistive devices (knee and back braces) to provide help with her mobility.

Therefore the Panel finds that the Ministry, after reviewing the evidence in the November 16 Submission and having reversed the RD, reasonably determined that the Appellant needs the help of another person or an assistive device in order to perform one or more DLA.

Conclusion

Having reviewed and considered all of the evidence and relevant legislation, the Panel agrees with the Ministry's most recent decision, which determined, after considering the information contained in the Appellant's November 16 Submission, that the Appellant was eligible for the PWD designation under Section 2 of the EAPWDA.

The Panel rescinds the RD and the Appellant is successful in the appeal.

APPEAL NUMBER
2020-00177

SCHEDULE A - LEGISLATION

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 ...

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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APPEAL NUMBER
2020-00177

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) 2020/11/23

PRINT NAME
Bill Haire

SIGNATURE OF MEMBER	DATE (YEAR/MONTH/DAY) 2020/11/23

PRINT NAME
Donald Storch

SIGNATURE OF MEMBER	DATE (YEAR/MONTH/DAY) 2020/11/23