

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the Ministry) Reconsideration Decision (RD) dated September 10, 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)

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 comprised of the applicant information and self report (SR) completed by the Appellant on March 6, 2020, including a Medical Report (MR) dated March 10, 2020 and completed by the Appellant's General Practitioner (GP) who has known the Appellant for 2 years and who has seen the Appellant 2 - 10 times in the past year, and an Assessor Report (AR) dated March 10, 2020, also completed by the GP.

The evidence also included:

- A Request for Reconsideration form (RFR) signed by the Appellant on August 17, 2020 which the Appellant states that:
 - They have been working for 47 years but are unable to continue working due to their medical conditions;
 - They experience shortness of breath and dizziness and have had many falls, including one that required hospitalization;
 - They live out of town and do not feel comfortable driving because of the risk of injuring themselves and others;
 - They get tired after walking short distances, cooking and doing laundry;
 - Chores are undertaken in stages, such that they require 15 minutes to open a can of soup, 10 minutes to make a sandwich, and almost 30 minutes to open cans;
 - They are not able to sit for long periods due to a back injury caused by an automobile accident;
 - They have been dealing with depression for 20 years, which is getting more difficult to cope with, and they experience anxiety and stress because of their physical and mental health;
 - They are forced to rely on other people to drive them to the food bank to get groceries and that they often are unable to shop for groceries because there is no one available to drive them there; and
 - They find it hard to ask people for help all the time and had to have the assistance of an advocate to complete the RFR because they are dyslexic.
- A letter dated August 25, 2020 signed by the GP and addressed "to whom it may concern" (the GP's Letter), indicating that the GP is the Appellant's primary care physician and asking that the Appellant's application for a PWD designation be reconsidered. (Specific details contained in the GP's Letter are included in the "Summary of Facts" section below.)
- A three page document titled "Questionnaire for Doctor" signed by the GP and dated August 25, 2020 in which the GP indicates that:
 - The Appellant has both a severe mental impairment and a severe physical impairment;
 - The Appellant takes 2 to 3 times longer than normal to perform DLA as a direct result of their mental and physical limitations;
 - The Appellant needs to take frequent rest breaks after walking approximately 10 feet;
 - The Appellant's level of activity is severely restricted as a result of their impairments;

- The Appellant is always restricted in performing DLA by one or more of their medical conditions;
- The Appellant's impairments significantly restrict their ability to perform a wide range of DLA on a continuous basis or a periodic basis for extended periods (without indicating whether those restrictions are continuous or periodic, or providing any further comments); and,
- As a result of their health restrictions, the Appellant requires significant help with DLA either by taking much longer to complete routine tasks, needing other people for ongoing help, or needing to use an assistive device.

Diagnoses

In the MR, the GP diagnosed the Appellant with moderate chronic obstructive pulmonary disease (COPD), hypoxemia with exertion and a possible interstitial lung disease, depressive and anxiety symptoms with significant social anxiety, and dyslexia, with reading and writing affected.

Physical Impairment

In the MR, under Health History, the GP states that pulmonary function testing of the Appellant indicates that they have moderate pulmonary obstruction consistent with COPD and that an associated diagnosis of mild pulmonary restriction cannot be ruled out. The GP also states that a chest (CT) scan is pending to look for evidence of a tumor or interstitial lung disease. The GP further reports that the Appellant experiences hypoxemia with exertion, their oxygen saturation (SpO₂) level was at 93% and fell to 88% with 200 feet of walking, they get light-headed and dizzy with minimal exertion, they sleep poorly and wake with dyspnea, and that the Appellant does not drive due to fear of getting light-headed, dizzy, and fear of a presyncopal or a syncopal episode. With respect to functional skills, the GP reports that the Appellant can walk 1 - 2 blocks unaided on a flat surface, climb 2 - 5 steps unaided, lift 2 - 7 kg, and has no limitation in the amount of time they 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 has COPD and that they take significantly longer than typical with walking indoors and outdoors, climbing stairs, lifting, and carrying and holding (*hypoxemia with light-headedness, dizziness and presyncope with minimal exertion, sits and rests frequently*).

In the GP's Letter, which was written on August 25, 2020 (over 5 months after the MR and the AR were completed), the GP states that they believe that the Appellant has a severe physical impairment. The GP also states that:

- Due to the Appellant's COPD, they get short of breath with minimal exertion. As a result, the Appellant:
 - Needs to stop after walking about 10 feet to catch their breath, requiring 32 minutes for their breathing to return to baseline and for normal breathing to resume, adding "*This makes walking anywhere, housework, yardwork, cleaning, cooking etc. take longer than it would for someone who does not need to stop as frequently*";
 - Often experiences dizziness, light-headedness, presyncope and sometimes syncope, which make the Appellant fearful of driving. Because they live out-of-town, this makes shopping and other tasks difficult, adding that the Appellant would benefit from having someone to drive them or to do their shopping for them. The GP also states that the Appellant would benefit from a cane for balance and mobility; and

- The Appellant has considerable nighttime hypoxia which causes the Appellant to feel fatigued throughout the day, resulting in it taking longer than normal for them to walk anywhere, do housework, yardwork, cleaning, and cooking etc. The GP adds that the Appellant would benefit from supplemental oxygen at night, but that they do not qualify for funding for supplemental oxygen because the Appellant does not suffer from heart failure or pulmonary hypertension.

In the SR, the Appellant states that their COPD causes moderate shortness of breath, dizziness and vertigo. The dizziness and vertigo make standing up or sitting down for more than 5 minutes difficult. The Appellant also states that they had a heart attack in the past year and has passed out twice in the past year, ending up in Emergency after passing out in February 2020. As a result the Appellant is worried that they might pass out or fall when they are alone. The Appellant also states that they had back surgery about 40 years ago which makes it even harder to move up and down.

Mental Impairment

In the MR, under Health History, the GP states that the Appellant generally suffers from a low mood and anxiety and has "*significant social anxiety*" and has told the GP that they are "*basically a hermit*", adding that the Appellant is taking "*an appropriate dose of (an antidepressant)*". The GP also writes that the Appellant's dyslexia affects their reading speed (they have to read everything twice) and writing, adding that spelling is done phonetically and that the Appellant requires help completing forms, indicating that a social justice advocate had to complete the PWD application forms on the Appellant's behalf. 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 emotional disturbance, executive planning, motivation and language, adding the comment "*Patient is very socially isolated due to social anxiety*". In the section of the MR where the prescribed professional is asked to explain how social functioning is impacted, the GP has written "*Pretty much a hermit. Likes to be alone. Has been known to lock self in house for 2 days, go away in a tent for one week. Attributes to social anxiety, depressive symptoms.*"

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 for speaking and hearing but poor to satisfactory for reading and writing, adding the comment "*Dyslexia. Spells phonetically. Slow reading. Reads everything twice in order to understand*". 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 a moderate to major impact on emotion, motivation and other neuropsychological problems (specifically dyslexia), a moderate impact on bodily functions, a minimal impact on attention/concentration executive functioning and memory, and no impact on the other listed functions (consciousness, impulse control, motivation, insight and judgment, motor activity, language, psychotic symptoms, other neuropsychological problems, and other emotional or mental problems). With respect to social functioning, the GP indicates (with comments in *italics*) that the Appellant is independent in making appropriate social decisions, and has written "*Patient has no relationships with anyone*" beside ability to develop and maintain relationships, and "*Socially isolated, no social supports except for two people who occasionally drive (the Appellant)*" beside appropriate interaction with others. The GP also indicates that the Appellant has marginal functioning with their immediate social network and their extended social networks. The GP describes the degree of support or supervision required to maintain the Appellant in the community by writing "*Patient has social anxiety and does not want community/social support*" in the space provided.

In the GP's Letter, the GP writes that the Appellant has a severe mental impairment and "*Due to (their) significant anxiety and social isolation (the Appellant) does not have any friends.*"

In the SR, the Appellant states that they have suffered from depression for 15 years.

Restrictions in the Ability to Perform DLA

In the MR, the GP indicates that the Appellant has not been prescribed any medications or treatments that interfere with their ability to perform DLA.

In the AR, the GP states that the Appellant is independent with all of the listed DLA tasks except going to and from stores (indicating that continuous assistance from another person is required) and carrying purchases home (indicating that periodic assistance required). The GP also indicates that the Appellant takes significantly longer than typical for all listed personal care DLA except toileting, all housekeeping DLA, and all shopping DLA except making appropriate choices and paying for purchases. In addition, the GP indicates that the Appellant takes significantly longer with food preparation, cooking and getting in and out of a vehicle. By way of explanation, the GP writes that the Appellant takes significantly longer with DLA due to their hypoxemia, which is symptomatic with minimal exertion. Regarding shopping, the GP explains that the Appellant *“cannot drive due to episodic dizziness / light-headedness”*, and as a result the Appellant needs rides to the store and is slow reading labels due to their dyslexia. In the same section of the AR the GP has written *“Fall risk, needs someone to drive (them), if help available requires help carrying purchases into home, requires help with writing”* in the additional comments section.

In the SR the Appellant states that *“every simple task in everyday life is a challenge – cooking, showering, dressing ... cleaning the house ...”*

Need for Help

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

In the section of the AR that asks who provides the help required for DLA the GP has written *“two acquaintances who drive (the Appellant)”*. Where asked what assistive equipment is required but not used, the GP has written *“A cane would be helpful. May require supplemental oxygen”*.

In the GP’s Letter, the GP writes that the Appellant requires help with their DLA, including someone to drive them to and from the stores, and would benefit from the use of a cane for balance and mobility, supplemental oxygen at night.

In the SR, the Appellant states that they *“definitely need help with maintaining the house and cooking”* and to have their bathroom adapted and maybe an emergency call device.

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 asserts that they have severe physical and mental impairments and asks that the evidence in the GP’s Letter and the Doctor’s Questionnaire be considered.

Additional information submitted by the Appellant for the Panel's consideration at the written hearing comprised:

- A letter dated October 15, 2020 signed by a social justice advocate (the First Advocate) and addressed "to whom it may concern", in which the First Advocate states that they have been working with the Appellant since June 2020 and have witnessed the Appellant's physical and mental health decline since then, adding that the Appellant "*has difficulty walking, trouble breathing and is extremely weak*". The First Advocate also states that the Appellant has been waiting for their PWD designation application to be processed "*since the beginning of the year*", and that the Appellant's application was "*lost, found, case closed, case opened and then denied*"; and,
- A letter dated January 31, 2020 signed by a social justice advocate (the Second Advocate) and addressed "to whom it may concern", in which the Second Advocate states that the Appellant's health is preventing them from finding a job fitting their qualifications and that the Advocate is assisting the Appellant in applying for income assistance.

The Ministry provided an email dated October 27, 2020 stating that its submission will be the reconsideration summary provided in its RD.

The Panel considered the written information in the NOA to be argument. The Panel considered the written evidence from the First Advocate in their October 15, 2020 letter stating that the Appellant's physical and mental health have declined since the First Advocate began working with the Appellant in June 2020 to be new evidence that is reasonably required for a full and fair disclosure of all matters relating to the decision under appeal. Therefore, the Panel admitted this additional information in accordance with Section 22(4) of the EAA. Even though the First Advocate is not a prescribed professional, the Panel assigns moderate weight to this evidence because the GP, who is a prescribed professional, states in the MR that "*COPD is a **progressive** lung disease*", suggesting that a noticeable health decline over a period of four months might occur.

The Panel also admitted the new information in the Second Advocate's Letter stating that the Appellant's health is preventing them from finding a job, but does not assign it any weight as a PWD application is not intended to assess employability or vocational abilities.

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 legislation 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?

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 a prescribed professional – in this case the GP.

Physical Impairment

The Ministry's position is that based on the information provided in the Appellant's original application and RFR, the Appellant does not have a severe physical impairment. While it acknowledges the Appellant's physical limitations, it is not satisfied that they are significant enough to severely restrict the Appellant's ability to perform the majority of DLA.

The Appellant's position is that their COPD causes shortness of breath and dizziness that severely restricts their physical functioning to the extent that the Appellant takes significantly longer than typical

with walking indoors and outdoors, climbing stairs, lifting, and carrying and holding.

Panel Decision

The Panel notes that the legislation requires that the Ministry first be satisfied that an applicant for the PWD designation has a severe mental or physical impairment, and then to rely on a prescribed professional's assessment of the impairments' impacts on DLA and need for help. While it is clear that the legislation requires that the fundamental basis for the analysis of DLA impacts and need for help is to be based on the evidence from a prescribed professional, the legislation does not provide any guidance as to how the Ministry might determine whether the applicant has a severe impairment. The Panel finds that it would be reasonable to assume that the determination as to whether an applicant has a severe impairment should be based on the legislated items required to be met and the evidence requested by the ministry in its application, which is the evidence from a prescribed professional and, to a lesser degree, the appellant.

While the GP has diagnosed the Appellant with *moderate* rather than *severe* COPD, in the GP's Letter the GP reports several other impairments, including that:

- Pulmonary function testing indicates moderate pulmonary obstruction consistent with COPD;
- The Appellant experiences hypoxemia with exertion with oxygen saturation dropping significantly with 200 feet of walking
- The Appellant gets light-headed and dizzy with minimal exertion and takes rest breaks to catch their breath after walking 10 feet; and
- The Appellant sleeps poorly and wakes with dyspnea.

When all of the Appellant's physical impairments are considered, the GP has concluded that the Appellant has a severe impairment, and reported "*I do believe that this applicant has ... a severe physical ... impairment*" in the GP's Letter.

Although the GP cannot make the determination for the Minister, the Panel assigns significant weight to the GP's determination for several reasons: the GP is a prescribed professional; this evidence is fundamental to the determination; and the GP has, in the Panel's view, set out significant physical limitations. The Ministry has not provided any evidence to suggest that another prescribed professional has provided a second opinion, nor is it clear how the Ministry concluded, contrary to the GP's expert opinion, that the Appellant did not have a severe physical impairment.

The Panel finds it reasonable to conclude that the progressive nature of COPD, when considered with all of the associated impairments, would reasonably add up to a severe physical impairment, as indicated by the GP.

Based on all of the available evidence, the Panel finds that the Ministry was not reasonable in determining that the information provided does not establish 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.

The Ministry's position is that, after considering the significant deficits and impacts as reported by the GP in the MR and the AR in conjunction with the GP's reporting of the Appellant's DLA, it finds that the evidence does not represent a significant restriction to the Appellant's mental functioning.

The Appellant's position is that their depression and anxiety have a significant impact on their emotional functioning and motivation. In addition, their dyslexia significantly impacts their reading and writing ability and make it hard for the Appellant to ask people for help. As a result of these conditions they have a severe mental impairment.

Panel Decision

As discussed in the "Physical Functioning" section above, it is reasonable to expect that a prescribed professional's assessment of the severity of an impairment would be the most important source of evidence in assessing the severity of an impairment. The Panel notes that the GP states that she believes that the Appellant has a severe mental impairment.

While the Ministry states in its RD that the GP indicates in the AR that the impact of the significant deficits to the Appellant's cognitive and emotional functioning are *primarily* minimal to none, the Panel notes that the legislation does not require that deficits or impairments must exist in a majority or any other specified minimum number of mental functions.

Regarding the specific evidence provided by the GP in the MR and the AR, the Panel notes that the GP reports in Section D of the MR that the Appellant has significant cognitive and emotional function deficits in the areas of emotional disturbance, executive functioning, motivation and language. In addition, the Panel notes that the GP reports in the AR that deficits are reported as having a moderate to major impact on the Appellant's mental functioning in the areas of emotion and motivation.

The Panel also notes that the GP diagnoses the Appellant with depression and anxiety in the MR, emphasizing that the Appellant has "**significant social anxiety**" and that their depression is severe enough that they have been prescribed an antidepressant. The GP also notes in the MR that the Appellant has been known to lock themselves in the house for 2 days or go away and live in a tent for a week at a time, describing the Appellant as "*a hermit*". In addition, the GP indicates in the GP's Letter that the Appellant does not have any friends due to their significant anxiety and social isolation.

In its RD, the Ministry notes that the GP indicates that the Appellant has a severe mental impairment with significant anxiety and social isolation, but concludes that it is difficult to determine if it represents a significant restriction to the Appellant's overall level of social functioning because no further detail is provided regarding the impact of these impairments on their daily functioning. The Panel finds that in fact there is detail provided in the information available to the Ministry at reconsideration regarding the impact of these impairments on the Appellant's daily functioning. For example, the Appellant's anxiety means they are unable to drive a vehicle so they must rely on acquaintances to drive them to the food bank or to appointments in town, and their social isolation means that they cannot get assistance with DLA such as preparing food, which, due to their physical impairments, takes 2 to 3 times longer than usual.

Based on all of the available evidence, the Panel finds that the Ministry was not reasonable in determining 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, while it recognizes that the Appellant has some limitations in their ability to perform DLA as it takes about 2 to 3 times longer than typical to perform them, the reported functioning does not establish a significant overall restriction. In addition, the Ministry notes in the RD that the GP reports that the Appellant is able to complete the majority of DLA independently.

The Appellant's position is that they take significantly longer than normal for most personal care and housekeeping DLA due to their hypoxemia, and the resulting episodic dizziness means that they cannot drive, further restricting their 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, either continuously or periodically for extended periods. Section 2(2)(a) of the EAPWDR defines "*prescribed professional*" to include a medical practitioner. Therefore, the GP is considered a prescribed professional 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.

"*Restricts*" is not a term defined in the legislation. The Cambridge Dictionary defines a "*restriction*" in this context as "*something that limits someone's actions or movement*", so a direct and significant restriction is anything that directly and significantly limits someone's actions or movement. The Panel finds that it is reasonable to conclude that if someone can perform a task independently but it takes significantly longer than usual to complete the task because of a mental or physical impairment they are restricted in that activity. After determining whether someone is restricted by an impairment the legislation further requires that the restriction be considered a *direct and significant* restriction, which the Panel notes is a separate exercise. In addition, because in the case of the Appellant the impairments causing the restrictions are always present, those restrictions are continuous. In other words, a person can be independent in performing a DLA and still be continuously restricted whether or not that person is *directly and significantly* restricted as a result. The Panel further notes that the Appellant has stated that they take significantly longer to perform a number of DLA tasks (taking 15 minutes to open a can of soup and 10 minutes to make a sandwich, for example) and the GP has stated that the Appellant is always restricted in performing DLA by their medical impairments.

Regarding the requirement that restrictions resulting from a severe impairment be both *significant* and occur as a *direct result* of the severe impairment, the Panel finds that they are a direct result because it is the Appellant's COPD and hypoxemia that cause the restriction in their ability to perform DLA, and that they are significant because they have a material impact on the Appellant's ability to perform all aspects of personal self care, housekeeping, food preparation and cooking, as well as getting in and out of a vehicle and several aspects of shopping.

In the RD, the Ministry says that it considers the Appellant's limitation in walking to not appear to directly and significantly impact (their) ability "*to perform the majority of DLA related to mobility, such as personal care, basic housekeeping, and meals, which (they) have been reported to be independent in.*"

As mentioned previously, the Panel notes that it is possible to be both independent in a DLA as well as significantly restricted in it, and the Panel has found that the Appellant has direct and significant restrictions in all aspects of personal self care, housekeeping, food preparation and cooking, as well as getting in and out of a vehicle and several aspects of shopping because they all take significantly longer than typical to complete. Regarding the Ministry's assertion that the Appellant is able to perform the majority of DLA, the Panel notes that the legislation does not require that a majority of DLAs be impacted. As long as at least two DLA are directly and significantly restricted by a severe impairment the legislated test is met. The Panel further notes that the GP has stated that at least two DLA are impacted by the Appellant's walking limitations, specifically shopping for personal needs [EAPWDR Section 2(1)(a)(iii)] and moving about indoors and outdoors [Section 2(1)(a)(vi)].

Shopping for personal needs is a particular problem for the Appellant. In the RD the Ministry determined that the Appellant is able to carry purchases home or take other modes of transportation when help is not available. In fact, the Appellant lives out of town and some distance from a relatively remote community where public transportation is not available.

The Panel also notes that the Appellant's physical limitations affect more than just walking. Their COPD and hypoxemia are also reported by the GP and the Appellant to continuously directly and significantly restrict other DLA, such as preparing meals [Section 2(1)(a)(i)] and performing housework to maintain their personal residence in acceptable sanitary condition [Section 2(1)(a)(v)], as it takes them significantly longer than typical to perform those activities.

Based on all of the available evidence, the Panel finds that the Ministry was not reasonable in determining that the information provided does not establish that the Appellant is directly and significantly restricted in their ability to perform DLA.

Help with DLA

The Ministry's position is that, while the GP indicates that the Appellant would benefit from a cane, support for DLA, 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.

The Appellant's position is that they are forced to rely on other people to drive them to the food bank to get groceries and that they are often unable to shop for groceries because there is no one available to drive them and they find it hard to ask people for help all the time.

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 in order to meet the criteria necessary to be designated as a PWD. 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.

In the RD, the Ministry concludes that requiring periodic assistance for carrying purchases home if help is available indicates that the Appellant is still able to complete the activity when help is not available and therefore does not establish a significant restriction. The Ministry also states in the RD that requiring assistance going to and from stores because the Appellant is not able to drive also does not establish a significant restriction, as other modes of transportation are possible.

The available evidence demonstrates that the Appellant is unable to walk more than one or two blocks unaided, and must stop after walking about 10 feet to catch their breath, requiring 32 minutes for their breathing to return to baseline and for normal breathing to resume. As mentioned above, the Appellant

lives out of town and some distance from a relatively remote community where public transportation is not available. The Panel finds that the Ministry unreasonably concluded that the Appellant is able to carry purchases home or take other modes of transportation when help is not available. Clearly when help with shopping (particularly in bringing purchases home) is not available the only option open to the Appellant is to put off shopping until such help is available. In addition, the Panel notes that the Appellant is directly and continuously restricted in moving about outdoors [EAPWDR Section 2(1)(a)(vi)] and often does not have the necessary means without the help of another person to attend important appointments. Similarly, this would suggest that when a ride to an important event like a doctor appointment is not available the only option available open to the Appellant is to delay the visit until such help is available.

Given all of the available evidence, the Panel finds that the Ministry was not reasonable in determining that significant help is not required from other persons to perform some of the Appellant's DLA.

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 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.

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 ...

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.

APPEAL NUMBER
2020-00228

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

Kulwant Bal

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2020/11/23

PRINT NAME

Shirley Heafey

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2020/11/23