

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the Ministry) Reconsideration Decision (RD) dated March 17, 2021, 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 July 21, 2020, including a Medical Report (MR) dated July 20, 2020 and completed by the Appellant's General Practitioner (GP) who has known the Appellant for 11 years and who has seen the Appellant 11 or more times in the past year, and an Assessor Report (AR) dated July 20, 2020, conducted by telephone interview by a Registered Nurse (RN) who had not known the Appellant before the RN completed the AR.

The evidence also included:

- A Request for Reconsideration (RFR), signed by the Appellant on March 9, 2021, which states that:
 - The Appellant is unable to perform several specified DLA on a regular basis;
 - While the GP states in the MR that it has not been established that the Appellant has a severe mental or physical impairment, in MR Section E (DLA) the GP writes "*(The Appellant) has periods of exacerbation of symptoms*" which is more often than not;
 - While the GP indicates in the MR that it has not been established that the Appellant's impairment directly and significantly restricts DLA, in MR Section B (Health History) the GP states that "*(The Appellant) is very restricted with mobility and (her) ability to do housework and other (DLA activities)*", and in MR Section F (Additional Comments) the GP writes that "*(The Appellant) is now having difficulty with doing her household chores due to the conditions. Treatments to date have helped, but (the Appellant) remains disabled*"; and,
 - The Appellant feels like she is being discriminated against because she is not wheelchair bound and that she knows of individuals who use walkers and who can walk more than 2 blocks and lift more than 15 lbs. but still receive disability benefits.

Diagnoses

In the MR, the GP diagnoses the Appellant with Degenerative Disk Disease (DDD) with a date of onset of 2010, Fibromyalgia with a date of onset of 2011, Depressive Disorder/Dysthymia with a date of onset of 2011, and Chronic Fatigue Syndrome (CFS) with a date of onset of 2011.

Physical Impairment

In the MR, under Health History, the GP states that the Appellant has had chronic lower back pain for about 10 years, and that she has severe episodes of low back pain and paraesthesia in her legs. The GP also states that the most recent magnetic resonance imaging (MRI) showed multiple disk bulges in the lumbar spine with the worst bulges at L5-S1 and a central disk bulge at that level. The GP wrote that the Appellant had been assessed by a neurosurgeon who did not think that the Appellant was a candidate for surgery. The GP also wrote that the Appellant has had physiotherapy, analgesics and neuromodulators for pain management and is receiving some treatments from a pain clinic, but it is likely that she will have back pain indefinitely. 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 that it is unknown how long she can remain seated. 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 "*(The Appellant) suffers from multiple chronic conditions which are likely to progress with time ... Treatments to date have helped, but she still remains disabled*". The GP also states that the Appellant has generalized pain due to her fibromyalgia.

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 RN indicates that the Appellant is independent with walking outdoors, standing ("*not for long periods and has to sway*"), lifting ("*nothing >15 lbs.*"), and carrying and holding ("*nothing >15 lbs.*"), but that the Appellant needs periodic assistance from another person with walking indoors ("*in morning or if fatigued*") and climbing stairs, where she takes significantly longer than normal.

In the SR, the Appellant states that her fibromyalgia makes her skin hurt and "*muscles burn so bad*" and that some days it hurts to wear clothes.

Mental Impairment

In the MR, under Health History, the GP has written that the Appellant is presently on an antidepressant medication to treat her chronic depression (dysthymia) and her CFS, which is helping with some of her symptoms. The GP adds that other medications were tried but either caused significant fatigue and the side effects were intolerable, or she was not covered by Pharmacare. 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 memory, emotional disturbance, motivation and attention, adding the comment "*emotional disturbance, lack of motivation, reduce(d) concentration and impaired memory due to chronic depression*".

In the section of the AR where the assessor is asked to indicate the level of ability to communicate, the RN indicates that the Appellant's abilities are good in all 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 RN has indicated no major impacts, a moderate impact on bodily functions, emotion, impulse control, attention/concentration and memory, and no impact on consciousness, insight and judgment, executive functioning, motivation, motor activity, language, psychotic symptoms, other neuropsychological problems, and other emotional or mental problems. With respect to social functioning, the RN indicates that the Appellant requires no support or supervision and is independent in all listed areas (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 RN also indicates that the Appellant has marginal functioning with her immediate social network and good functioning with her extended social networks. The RN makes no other comments and provides no further explanations in the space provided.

In the SR, the Appellant states that she suffers from depression for which she is on medication and that on some days she gets forgetful and doesn't remember things.

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 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 states that the Appellant is having difficulty doing her household chores due to her impairment and that, while treatments have helped, the Appellant is still disabled.

In the section of the MR where the prescribed professional is asked whether the applicant's impairment directly restricts her ability to perform DLA, the GP indicates that the Appellant is periodically restricted in meal preparation, shopping and mobility outside the home, adding that the Appellant has "*periods of exacerbation of symptoms, resulting in increased pain resulting in activity restriction*" and that her "*level of restriction is mild to moderate in general, but severe during exacerbation of symptoms*". The GP also indicates that the Appellant is continuously restricted with housekeeping.

In the AR, the RN states that the Appellant is independent with respect to most DLA tasks, but that she needs periodic assistance from another person with dressing ("*help from family*") and transfers on and off a chair ("*needs help getting out of chair*") and continuous assistance with getting in and out of bed ("*needs help every morning*"). Regarding housekeeping, the RN indicates that the Appellant needs periodic assistance from another person with basic housekeeping, adding "*can load washer only*" and "*no sweeping or vacuuming*", going to and from stores ("*can't drive some days*") and getting in and out of a car ("*sometimes requires assistance getting out*").

In the SR the Appellant writes "*There are days that I need help just to get dressed because I can't bend over to put my socks on ... I have to have my kids or mother help me with (dressing) on a weekly basis*". She also writes that "*Driving has become a struggle as sitting for a bit causes lots of pressure on (my) lower back and pain goes right down my lower leg*". The Appellant also states that some days she needs help getting out of bed, that she needs daily help from her children with the household chores, and that she can't lift items weighing over 15 lbs. as her pain gets worse.

In the RFR, the Appellant states that she requires help getting dressed because on a bad day she can't do it on her own and on really bad days she needs help going up and down the stairs, that she requires assistance with all housekeeping chores, and that she is only able to drive short distances because she can't be seated for long periods.

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 RN has ticked "Family" and "Friends". Where asked what assistance is provided using assistive devices, the RN has ticked "Cane" and "Power wheelchair", adding "*Applicant uses power scooter sometimes when shopping*". The RN also states that the Appellant does not have an assistance animal.

Additional Information Provided 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 she disagrees with the Ministry's RD because *"the facts are there written by my doctor and myself"*.

On April 7, 2021, the Appellant provided a submission comprising a two-page letter dated April 6, 2021 and signed by the GP (the GP Letter) in which the GP writes:

- The Appellant suffers from multiple medical conditions which significantly affect the Appellant's DLA, stating *"As a result of lower back pain and fibromyalgia (the Appellant) suffers from significant back and generalized pain which make it exceedingly difficult for her to get out of bed in the mornings or off the couch after she has been sitting for a while. She has difficulty with driving, as sitting for more than 10-15 minutes results in low back pain and shaking of her right leg. She is unable to stand for any significant time ... and she needs help with ... cooking, cleaning and shopping. As a result ... she experiences chronic depressive symptoms for which she is on medication ..."*;
- Regarding the Ministry's finding in its RD that it has not been established that the Appellant's DLA are significantly restricted either continuously or periodically for extended periods, *"In (the) MR I indicated that (the Appellant) was restricted in ... basic housework on a continuous basis and meal preparation, daily shopping and mobility outside the home on a periodic basis when she has a flare up of ... symptoms. I also indicated that due to the cumulative effect of these conditions, (the Appellant) is very restricted in her ability to complete (DLA) tasks ... (including) dressing (for which she needs help from family), laundry ..., basic housekeeping ..., and ... going to and from stores"*;
- That they agree that the Appellant does not suffer from a severe mental impairment; and
- Regarding the Ministry's finding in its RD that the GP has not indicated in the MR that the Appellant uses a cane or a power wheelchair, that they were unaware the Appellant uses assistive devices for mobility and sometimes when shopping as the topic did not arise in previous conversations, but that it is clear that the Appellant did have this conversation with the RN.

The Appellant was joined at the hearing by an advocate.

At the hearing, the Appellant explained that she couldn't understand why the Ministry thought that she didn't meet the PWD criteria. She gave some examples of the impacts of her physical impairments: if she sits on the floor for more than ten minutes she is unable to stand up without the assistance of a family member, she is unable to twist her body without experiencing severe pain, which results in her needing help with getting out of bed and dressing, and she can't stand for more than 10 or 15 minutes.

The Appellant also stated that she needs help doing everything and that she feels like she's living in the body of an 80 year old. She stated that she has seen several specialists, including an anesthetist and a back specialist. She explained that the reason that her back surgeon had determined that surgery was not an option was because they were not sure which disk in her spine was herniated and that exploratory surgery was risky and might result in permanent damage. The Appellant also said that because of the Covid-19 pandemic she had been unable to visit her GP in over a year, and explained that she had in the past noticed the RN "*in the office*" but that she had not been assessed in person by the RN and that the AR was completed by telephone interview.

The Panel pointed out that there were several references in the SR, the MR and the AR to periodic restrictions, indicating that they occurred "*sometimes*", "*on some days*" or "*more often than not*", and asked the Appellant to provide more information about the frequency of those periodic restrictions. The Appellant said that she needs assistance from a family member in going up and down the stairs every second day and always has to lean on the handrail, that the severe restrictions that the GP said were present when she was experiencing an exacerbation of symptoms was 90% of the time, that she felt fatigued most afternoons, that she needs help getting dressed every day and help getting out of bed every second day, and that she uses a cane every day and a walker on longer walks when her back is bad. The Appellant also explained that by identifying "power scooter" as an assistive device she was referring to a power-assisted shopping cart, provided by the store, that she must use on every second occasion when shopping for groceries. She said that her vehicle has a running board that she uses when entering or exiting it and that she relies on the door handle to pull herself up. She also stated that she uses a handicapped driver parking sign that her GP had requested on her behalf.

When asked by the Panel to explain a typical day, the Appellant said that when she needs help getting out of bed she rolls on her side and her daughter pushes her into an upright position and helps her stand. She gets her daughter to help her dress and to get downstairs where she can make breakfast, though she is unable to take anything out of the fridge. She does as much walking as she can because she can't sit for long and needs to be moving all the time. She stretches throughout the day which sometime helps, but she can never get comfortable and when she is tired she rests on a heating pad.

At the hearing, the Ministry relied on the RD and explained that the Ministry's decision was based on the medical information available at reconsideration. The Ministry acknowledged that the GP has indicated that the Appellant is continuously restricted with daily housekeeping, but said that for the DLA where restrictions are identified as periodic there was not enough information about the frequency or duration of the restrictions for the Ministry to assess whether those restrictions were for extended periods, as required under the legislation. The Ministry stated that the additional information contained in the GP Letter was helpful in understanding the severity of the Appellant's impairment, but the Ministry was still unable determine whether periodic restrictions were for extended periods, citing as an example the GP's statement that the Appellant is "*unable to stand for any significant time because of exacerbation of her symptoms*". The Ministry explained that "*any significant time*" was too vague to allow it to draw any conclusions regarding whether that would indicate that impacted DLA are restricted "*periodically for extended periods*" as required under the legislation.

The Panel considered the written information in the NOA to be argument. At the hearing, the Panel confirmed that the Ministry did not object to the admittance of any of the new information provided by the GP or the Appellant after reconsideration. The Panel considers the new evidence in the GP Letter (their opinion that the Appellant does not suffer from a severe mental impairment, that her chronic depressive symptoms exacerbate her physical symptoms, and that the GP was not aware that the Appellant sometimes uses a cane and a power scooter) 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 this additional information in accordance with Section 22(4) of the EAA.

Regarding the new evidence provided by the Appellant at the hearing (the reasons why back surgery was not an option, her use of a handicap parking permit and regular use of an opioid for pain management), the Panel finds that this verbal evidence is evidence that is reasonably required for a full and fair disclosure of all matters relating to the decision under appeal. Therefore, the Panel also admitted the additional information in accordance with Section 22(4) of the EAA.

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

Persons with Disabilities

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.

Duration and Restrictions

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 decision 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 GP and the RN.

Physical Functioning

The Ministry's position is that it is unable to determine whether the Appellant has a severe physical impairment because the GP has not described how often the Appellant requires assistance from another person to manage walking indoors and climbing stairs. In addition, the GP has not described how much longer it takes the Appellant to walk indoors or climb stairs, or how often she has bad days that impact her ability to climb stairs. The Ministry also notes that AR is to be completed based on the assessor's knowledge of the applicant, observations, clinical data, and experience, and that the RN had not met the Appellant prior to completing the AR and a phone interview was used to conduct her assessments, indicating that their assessment was based on the Appellant's self-reporting.

The Appellant's position is that her physical functioning is severely impacted and that her daily functioning is significantly impaired by her DDD and fibromyalgia.

Panel Decision

The Panel acknowledges that neither the GP, the RN nor the Appellant provide precise explanations of the frequency and duration of the Appellant's impairments in the Appellant's initial PWD application, and that, given the fact that the RN did not know the Appellant prior to providing the AR and that the information contained in the AR was based on a telephone interview, the RN's assessment is reasonably considered by the Ministry to be an assessment based on the Appellant's self-reporting. For this reason, the Panel gives little weight to the information provided by the RN in the AR.

Even if the RN's evidence is fully discounted, the Panel notes that a great deal of the more generalized evidence presented by the GP in the MR and the GP Letter, both in terms of the breadth and the severity of the impact of the Appellant's impairment on her physical functioning, was expounded on and reinforced by the Appellant in her SR, the RFR, and at the hearing. For example, in the MR and the GP Letter, the GP indicates that the Appellant is likely to have significant back and generalized pain and restricted mobility indefinitely, which would reasonably explain why the Appellant finds it exceedingly difficult and sometimes impossible to get out of bed in the mornings or off the couch after she has been sitting for a while. In addition, the GP states in the MR that the Appellant has been prescribed several medications and other treatments for pain management, and the Appellant stated at the hearing that she takes analgesics regularly and an opioid periodically to manage her pain.

The Panel notes that in PWD assessment reporting, the frequency and duration of many restrictive conditions, such as how long an individual can stand or sit without pain, will often be communicated by a prescribed professional based on a patient's self-reporting, sometimes with an indication of whether the prescribed professional feels that this self-reporting is reasonable given the patient's diagnoses. The Panel further notes that, in this instance, in the MR the GP has noted significant restrictions in the Appellant's physical functioning, including walking, climbing and standing, which is corroborated and expanded on by the Appellant in her testimony. For example, in the GP Letter, the GP states that the Appellant cannot stand for more than 10-15 minutes at a time, but they were unaware of any restrictions on the Appellant's ability to remain seated (indicating "unknown"), whereas the Appellant explained at the hearing that she is unable to either stand or sit for more than 10-15 minutes at a time.

Based on all the available evidence, the Panel finds that the Ministry's determination that the information provided does not establish that the Appellant has a severe physical impairment was not reasonably supported by the evidence.

Mental Functioning

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, while acknowledging that the Appellant experiences symptoms of emotional disturbance, lack of motivation, reduced concentration, and impaired memory due to chronic depression, the information provided does not establish that she has a severe mental impairment.

The Appellant's position that she suffers from depression for which she is on medication and that on some days she gets forgetful and doesn't remember things.

Panel Decision

The Panel notes that the GP acknowledges that, while the Appellant's depression, memory issues, challenges with attention and concentration and lack of motivation exacerbate her physical symptoms, she does not suffer from a severe mental impairment. The Panel also notes that the legislation requires that a severe mental impairment must significantly restrict a person's ability to perform specified DLA, including, in addition to impacts on any of the specified DLA which might also be restricted by physical impairment, making decisions about personal activities, care or finances, and communicating or interacting effectively with others.

While the evidence presented by the GP indicates that the Appellant suffers from emotional disturbance, lack of motivation, reduced concentration and impaired memory due to chronic depression, the GP does not indicate that the Appellant has any difficulties making decisions about personal activities, care or finances, or communicating or interacting effectively with others, nor are there any significant impacts identified in any of the other DLA as a result of impaired mental functioning. In addition, the Appellant has not described a major impact or significant degree on impairment to any of the assessed skill areas. In addition, with respect to social functioning, neither the Appellant nor a prescribed professional has indicated a need for support or supervision or dependency in making appropriate social decisions, ability to develop and maintain relationships, appropriate interaction with others, dealing appropriately with unexpected demands, or ability to secure assistance from others.

Based on all the available evidence, the Panel finds that the Ministry was 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 it is difficult to establish that the Appellant's ability to prepare meals, shop, or be mobile outside the home is significantly restricted periodically for extended periods as the GP does

not confirm the frequency or duration for which the Appellant experiences periods of exacerbation of symptoms.

The Appellant's position is that she is often unable to get out of bed or up and down the stairs on her own, cannot get dressed, or carry out many aspects of daily housekeeping without help, and that she is only able to drive short distances because she can't be seated for more than 10-15 minutes due to pain.

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 her DLA, continuously or periodically for extended periods. Section 2(2)(a) of the EAPWDR defines "*prescribed professional*" to include a medical practitioner and a registered nurse. 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.

The Panel notes that the GP indicates in the MR that the Appellant is directly and continuously restricted in performing the basic housekeeping DLA, which the Ministry acknowledges in the RD. For certain other DLA, the GP indicates that the Appellant is periodically restricted, but the Ministry has found that it can't be determined if those restrictions are for extended periods.

One of the DLA identified in the EAPWDA is described there as "*perform housework to maintain the person's place of residence in acceptable sanitary condition*". This DLA is identified in the MR by the more general term "*basic housekeeping*". As both the GP and the Appellant have indicated that the Appellant is continuously restricted in many aspects of basic housekeeping, including vacuuming, sweeping and loading the clothes dryer, which can all be reasonably described as "*housework required to maintain the home in acceptable sanitary condition*", the Panel finds that the Appellant must reasonably be considered continuously restricted in this particular DLA.

In addition, two other DLA are defined in the legislation as "*move about indoors and outdoors*", and "*perform personal hygiene and self care*". In the MR, the GP indicates that the Appellant is periodically restricted in mobility outside the home, adding that the Appellant has periods of exacerbation of symptoms resulting in severe restrictions in her ability to move about when those symptoms flare up. While the Ministry's position is that it is difficult to establish that the Appellant's ability to be mobile outside the home is significantly restricted periodically for extended periods because the GP does not confirm the frequency or duration for which the Appellant experiences periods of exacerbation of symptoms, both the GP and the Appellant have indicated that the Appellant cannot stand for more than 10 – 15 minutes at any time. In addition, the Appellant has stated that her physical capabilities have deteriorated in the year or so since the Appellant last saw the GP, and as a result the Appellant must now use a cane, walker or power-assisted shopping cart often in order to move about. The Panel finds that being unable to stand for more than 10 -15 minutes at a time and having the frequent need of an assistive device must reasonably be considered evidence of a severe restriction in one's ability to move about indoors and outdoors.

Regarding personal hygiene and self care, while all aspects are not periodically restricted for extended periods, the Panel notes that the Appellant has indicated that either every day or every other day (depending on the activity) the Appellant is unable to get out of bed, get up from a chair, or dress herself without the assistance of a family member. In addition, while not indicating a restriction to personal self-care in the MR, the GP states in the GP Letter that due to the cumulative effect of the Appellant's physical and mental impairments she is very restricted in her ability to get dressed without the help of her family.

Based on all the available evidence, the Panel finds that the Ministry's determination that the information provided does not establish that the Appellant is directly and significantly restricted in her ability to perform DLA either continuously or periodically for extended periods was not reasonably supported by the evidence.

Help with DLA

The Appellant's position is that she needs the help of family members to perform many of her DLA, and that she uses a cane daily and a walker on occasion.

The Ministry's position is that it cannot be determined that significant help is required from other persons or an assistive device because it has not been established that DLA are significantly restricted either continuously or periodically for extended periods.

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 must need 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.

In the GP Letter, the GP states that they had not indicated in the MR that the Appellant uses a cane or a power wheelchair because they were unaware the Appellant uses assistive devices for mobility and sometimes when shopping as the topic did not arise in previous conversations. The Panel notes that the Appellant has not been able to visit her GP in over a year due to Covid-19, and that she has reported that her reliance on assistive devices has increased over time. The Panel further notes that the assistive device described in the written evidence as either a "*power wheelchair*" or a "*power scooter*" is a powered-assisted shopping cart. However, the Panel finds that the evidence indicates that the Appellant requires the assistance of family members to get out of bed every second day, to get dressed every day (personal self care), climb stairs every second day (move about indoors), and assistance with many aspects of basic housekeeping every day (including performing housework to maintain the place of residence in acceptable sanitary condition). In addition, the Appellant uses a cane daily and a walker on longer walks when her back is bad (move about indoors and outdoors).

Based on all the available evidence, the Panel finds that the Ministry's determination that the information provided does not establish that the Appellant needs help from other persons or an assistive device to perform some of her DLA was not reasonably supported by the evidence.

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 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 ...

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
2021-00067

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)

2021/04/20

PRINT NAME

Shirley Heafey

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2021/04/20

PRINT NAME

Sameer Kajani

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2021/04/20