

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction's ("ministry") reconsideration decision dated March 17 2021, in which the ministry found the appellant was not eligible for designation as a Person with Disabilities ("PWD") under section 2 of the *Employment and Assistance for Persons with Disabilities Act* ("EAPWDA"). The ministry found that the appellant meets the age and duration requirements but was not satisfied that:

- the appellant has a severe mental or physical impairment;
- the appellant's impairment, in the opinion of a prescribed professional, directly and significantly restricts the ability to perform daily living activities ("DLA") either continuously or periodically for extended periods; and
- as a result of restrictions caused by the impairment, the appellant requires an assistive device, the significant help or supervision of another person, 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"). 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

Employment and Assistance for Persons with Disabilities Act - EAPWDA - section 2

Employment and Assistance for Persons with Disabilities Regulation - EAPWDR - section 2

PART E – SUMMARY OF FACTS

The evidence and documentation before the minister at the reconsideration consisted of:

1. Information from the ministry's record of decision indicating that the PWD application was received on August 31, 2020 and denied on September 1, 2020. On January 26, 2021, the appellant submitted the signed *Request for Reconsideration* ("RFR"). The ministry granted an extension for submissions and the appellant provided additional information on March 9 and 15, 2021. On March 17, 2021, the ministry completed its review of the RFR.

2. An RFR signed by the appellant on January 25, 2021, with a handwritten statement in which the appellant states she was injured in a motor vehicle accident ("MVA") on December 19, 2020 and continues to be under medical examination and radiographic investigation ("MRI, CT scan, etc."). The appellant states that her health condition is not stable and she is taking "strong medication and am on rest."

In March 2021, the appellant submitted the following documents for the reconsideration:

- A letter from a general practitioner ("Dr. M.") dated March 5, 2021, confirming the MVA. The letter states that the appellant suffered a concussion as well as some physical injuries. The appellant has headaches, dizziness, neck and shoulder pain, knee pain, and right ankle pain. The appellant suffered emotional distress after the accident. The appellant is under treatment for these conditions and is unable to work.
- A letter from a Registered clinical counsellor dated March 11, 2021. The letter indicates the appellant has been a client since February 2021 and is struggling with anticipatory anxiety, depressed mood, emotional dis-regulation, chronic physical pain, and "PTSD" symptoms. The letter states the appellant is highly engaged in the sessions but may need long term treatment due to the severity of her symptoms.
- A letter from an advocate dated March 15, 2021. The advocate indicates knowing the appellant since October 2019 as the case manager for her family at a community program. The letter describes the family's situation; in particular, neither the appellant nor her spouse are able to work due to disability. All of the appellant's family members have medical conditions as well.

The letter states the appellant was hospitalized for serious head, shoulder, and knee injuries as the result of the MVA and a CT scan showed a blood clot in her brain which led to a worsening of her mental stability. The letter states that the appellant cannot perform daily living activities due to her health conditions. The appellant recently burned herself while trying to cook for her family as she could not concentrate due to severe headaches and back pain for which she is taking prescribed medication.

3. The PWD application comprised of:

- the *Applicant Information* (self-report – "SR") dated August 24, 2020, in which the appellant describes her medical conditions, impacts on her daily functioning, restrictions to daily living activities, and the help she gets from her family.
- a *Medical Report* ("MR") dated August 9, 2020, completed by Dr. M. who has known the appellant since January 2020 and has seen the appellant 2 to 10 times in the past 12 months; and an
- *Assessor Report* ("AR") dated August 9, 2020, completed by Dr. M. who based the assessment on an office interview with the appellant and file/chart information.

Summary of relevant evidence from the application:

Diagnoses

In the MR, the appellant is diagnosed with neck pain (onset January 2019), left wrist pain (onset 2017) and depression (onset 2017).

Under Section B, *Health History*, Dr. M. states that the appellant's neck pain radiates into her shoulder. The appellant also developed a lump on her left wrist following an injury.

Functional skills

Self-report

The appellant reports that the lump on her wrist became more painful over time and reduced the mobility in her hand. The appellant feels an "unbearable pain" in her neck that radiates to her shoulder and affects daily activities such as lifting objects for daily chores at home.

The appellant reports not being able to sleep "most nights" due to the severity of the pain, and painkiller pills don't help. The appellant states that she suffers from anxiety which her doctor said is from chronic depression. The appellant states that pain has aggravated her depression and she "loses concentration" for her family responsibilities.

Medical Report

Under *Health History*, Dr. M. writes that the appellant "is unable to lift heavy objects" due to pain in her neck and left shoulder as well as the injury to her wrist.

Under Section D - *Functional Skills*, the appellant can walk 4 or more blocks unaided on a flat surface; climb 5 or more steps unaided, and lift under 2 kg. (5 lbs.). The appellant has no limitation with remaining seated and no difficulties with communication.

Under section D-6, when asked if there are any significant deficits with cognitive and emotional function, Dr. M. indicates *yes* and checks 2 of the 12 listed functions: *Emotional disturbance*, and *Motivation* (comment: "chronic low mood/depression but she is not on medication").

Assessor Report

Under Section B-2, *Ability to Communicate*, Dr. M. indicates the appellant's ability to communicate is *good* in all areas: *Speaking, Reading, Writing, and Hearing*.

Under section B-3, *Mobility and Physical Ability*, Dr. M. checked *independent* for *Walking indoors, Walking outdoors, Climbing stairs, and Standing*. The appellant requires *continuous assistance from another person* for *Lifting, and Carrying and holding* (comment: "unable to lift objects > 2 kg.").

For section B-4, *Cognitive and Emotional Functioning*, the doctor provides information on impacts to functioning that are due to the appellant's mental impairment:

- *No impact* in 10 of the 14 areas listed: *Bodily functions, Consciousness, Impulse control, Insight and judgment, Executive, Motor activity, Language, Psychotic symptoms, Other neuro-psychological problems, and Other emotional or mental problems*;
- *Minimal impact* in 1 area: *Attention/concentration*;
- *Moderate impact* in 3 areas: *Emotion, Memory, and Motivation*;
- *Major impact*: no areas are checked.

In Part E - *Additional Information*, Dr. M. states that left wrist pain prevents the appellant from "working with her left hand." Low mood "affects her motivation."

Daily Living Activities

Self-report

The appellant states that the combination of wrist, neck, and shoulder pain and being unable to lift more than 2 kg. leads to a failure to do daily household activities. The appellant said she cannot perform daily chores such as washing dishes, laundry, cooking, and shopping/doing errands.

Medical Report

Dr. M. check marked *No* when asked if the appellant is prescribed medications or treatments that interfere with the ability to perform DLA (comment: "she was recommended to take Advil/Tylenol for pain management").

In section F - *Additional Comments*, Dr. M. writes: "neck and shoulder pain and left wrist pain preventing her to do some of her daily living activities, she also has a chronically low and depressed mood."

Assessor Report

In Section B-1, *Mental or Physical Impairment*, Dr. M. states that neck pain, left shoulder pain, left wrist pain, and low mood are the impairments that impact the appellant's ability to manage DLA.

In Section C, *Daily Living Activities*, the doctor marks the appellant as independent with all areas for 4 (out of 8) DLA listed on the form:

- *Personal Care*: the appellant is independent with *Dressing, Grooming, Bathing, Toileting, Feeding self, Regulating diet, Transfers (in/out of bed), and Transfers (on/off chair)*;
- *Pay Rent and Bills*: the appellant is independent with *Banking, Budgeting, and Pay rent and bills*;
- *Medications*: the appellant is independent with *Filling/refilling prescriptions, Taking as directed, and Safe handling and storage*;
- *Transportation*: the appellant is independent with *Getting in and out of a vehicle, Using public transit, and Using transit schedules and arranging transportation*;

Restricted DLA

For 4 DLA: *Basic Housekeeping, Shopping, Meals, and Social Functioning*, Dr. M. indicates the following restrictions:

- ***Basic Housekeeping***: the appellant requires *continuous assistance from another person with Laundry*. The appellant needs *periodic assistance with Basic Housekeeping* (comment for both: "due to the pain in her wrist and neck").
- ***Shopping***: the appellant needs *periodic assistance with Going to and from stores, and continuous assistance with Carrying purchases home*. The appellant is independent with the 3 remaining areas of *Shopping: Reading prices and labels, Making appropriate choices, and Paying for purchases*.

Under *Additional comments* for the above DLA, Dr. M. writes: "some days she feels low and more depressed. She has neck and shoulder and wrist pain which prevent her from lifting or carrying objects which are heavier than 2 kg."

- ***Meals***: the appellant requires periodic assistance in 2 areas: *Food preparation, and Cooking*. The appellant is independent with the 2 remaining areas: *Meal planning, and Safe storage of food*;
- ***Social Functioning***: the appellant requires *periodic support/supervision* for 2 out of the 5 areas listed: *Able to develop and maintain relationships* (comment: "due to her depressed mood"), and *Able to deal appropriately with unexpected demands* (comment: "due to her low mood").

The appellant is independent with 3 areas of *Social Functioning: Appropriate social decisions; Interacts appropriately with others, and Able to secure assistance from others.*

Dr. M. checked that the appellant has *marginal functioning* with her immediate and extended social networks. Dr. M. did not answer the question about whether there are any safety issues.

Need for help

Self-report

The appellant states that she was referred to a plastic surgeon for her wrist impairment but instead of surgery, the surgeon advised the appellant to use a wrist splint. The appellant reports that the splint did not bring her any pain relief. The appellant reports that her spouse is helping her with daily living activities.

Medical Report

In Part B - *Health History*, Dr. M. confirms that the appellant was referred to a plastic surgeon who recommended a splint for the appellant's wrist. In Part B4, Dr. M. check marked *No*, the appellant does not require prostheses or aids for the impairment.

Assessor Report

In the AR, Dr. M. indicates the appellant lives with family. In Part C - *Daily Living Activities (Social Functioning)*, Dr. M. comments that the appellant gets help from her spouse and sometimes other family members. In Part D - *Assistance Provided by other people*, Dr. M. checked that the appellant needs help from her family to do her DLA.

In Part D - *Assistance provided through the use of Assistive Devices*, Dr. M. checked *Splints* (comment: "wrist splint") as an item the appellant routinely uses to help compensate for her impairment. In response to the question, *if equipment is required but is not currently being used, please describe the equipment or device that is needed*, Dr. M. wrote "splint." For *Assistance provided by Assistance Animals*, Dr. M. checked *No*.

4. The ministry's *Decision Summary* with attached letter dated September 1, 2020, stating that the appellant does not meet all of the criteria for PWD designation.

Additional information

Letter from Dr. M.

Subsequent to the reconsideration decision, the appellant filed a *Notice of Appeal* without a written submission. The appellant then provided a letter from Dr. M. dated April 8, 2021. The letter contains evidence requiring an admissibility determination under section 22(4) of the *Employment and Assistance Act* ("EAA"). The ministry said it did not receive a copy of the letter but upon summary by the panel chair, the ministry said it does not object to the letter being admitted into evidence.

The letter states that the appellant's health has deteriorated in the past 4 months. The appellant was suffering from chronic neck and wrist pain as well as depression for the past few years and sustained a "severe head injury as well as injuries to her shoulder, neck, elbow, and ankle" as a result of the December 2020 MVA in which the appellant was thrown to the ground.

The letter states that head trauma has left the appellant with "severe concussion symptoms" including daily severe headaches, and dizziness throughout the day. The appellant has been experiencing "foggy brain, lack of concentration, eye pain, and intolerability to light and sound." The appellant has been prescribed "different pain medications but pain has not been managed."

The letter states that one of the most severe symptoms after the accident (apart from headache and dizziness) is “worsening of her depression.” The appellant is “very depressed and anxious. She does not have any motivation and lacks concentration. Her judgment is also affected.”

The letter indicates the appellant also has “severe neck, left shoulder, and left ankle pain.” The pain is so severe that it is difficult for the appellant to lift objects. The appellant “constantly feels muscle pain.” The appellant also has ankle pain and “walking is now quite painful.” The appellant cannot stand for “more than a few minutes and cannot walk even a block now due to her pain.”

The letter says that since the accident, the appellant “has not been able to manage the housework.” Due to dizziness and brain fog the appellant burned herself twice while trying to make food for her family. The appellant had to go to the hospital Emergency room for burn treatments. The appellant is no longer cooking due to the risk of burns. The letter states that it is not safe for the appellant to cook due to risk of further injuries.

Further, the appellant has been “totally dependent” on her spouse’s help “for all her instrumental activities of daily living (“IADL”) such as shopping, cooking, laundry, and managing finances and medications.” The appellant is also quite dependent on her spouse for most activities of daily living (“ADL”) including personal care: “dressing, bathing and sometimes transferring.” The letter states that the appellant’s conditions make her significantly restricted in most IADL as well as ADL and without help the appellant’s well being would be in danger.

Admissibility of letter

Under section 22(4) of the EAA, the panel may admit new evidence that is reasonably required for a full and fair disclosure of all matters related to the decision under appeal. The panel admits the April 8, 2021 letter from Dr. M. because it provides an update on the medical conditions (neck, shoulder, and wrist pain; and depression) that were cited in the original PWD medical reports.

In addition, the letter provides additional detail on how the appellant’s physical and mental functions and DLA (already impacted by her impairments) have been further impacted by the concussion, knee pain, and right ankle injury/pain sustained in the MVA. As the ministry notes, the concussion, knee, and right ankle injuries were mentioned in the submissions for the reconsideration (including the March 5, 2021 letter from Dr. M.) but there was no detail from the doctor about the impact of these impairments on function and DLA except the appellant “is not able to work.” The panel finds that the letter provides that detail.

The panel finds that the update on existing impairments is clearly required for a fair and full disclosure regarding the severity of the appellant’s condition and how it impacts the appellant’s daily life. The panel finds that the additional information about injuries sustained in the MVA is required because it gives a full picture of the appellant’s overall functioning to further assess the reasonableness of the ministry’s decision.

Appellant’s testimony at the hearing

The appellant attended the hearing with the advocate. The appellant’s spouse attended the hearing as the appellant’s support person. The appellant also had an interpreter at the hearing.

The appellant (through submissions from her advocate) explained that she had taken injections for the wrist injury but these did not help with the pain for a long period. The pain came back again.

Regarding the MVA, the appellant said she was thrown onto her right side and ended up with bruises and a blood clot in her head. The appellant said she has not gotten back to normal since the accident. She tried to cook but burned herself twice due to concussion symptoms. The appellant said she could take a shower by herself before but now she needs help because she is afraid of falling in the shower.

The appellant said she is still attending counselling but she has trouble understanding things and is unable to concentrate. The appellant said that her spouse and family help her as much as they can but it is difficult for them to assist her due to their own medical conditions. The appellant said she does not feel well and has nobody else to help her.

When asked if there was an insurance ("ICBC") claim or settlement from the accident, the advocate explained that a police file was submitted to ICBC but the claim is still in process. The advocate said that ICBC is "still in the middle of the process", waiting to determine whether the injury is minor versus very severe. The appellant has been referred to a neuro-surgeon to see if the blood clot in her brain is still there. The advocate said "it is not determined yet how long it will take to heal."

The advocate said that the appellant went to physiotherapy but was afraid of going out, worried about being involved in another MVA. Dr. M. sent a letter to ICBC because the appellant needs a caregiver at home but they have not heard back from ICBC in 2 months.

The appellant said her problems have "increased considerably after the accident." The appellant said she has a lot of headaches and dizziness and is very anxious. The appellant said she cannot sleep due to severe headaches and her legs "go numb" if she tries to walk. The pain in her shoulder is worse as well, and the appellant gets dizzy if she stands.

The advocate also testified about the family's difficult financial situation and the medical conditions of the appellant's family members.

Admissibility of oral evidence

The ministry did not raise any objections to the appellant's testimony. The panel admits the submissions on medical conditions, symptoms and restrictions under section 22(4) of the EAA as evidence that is reasonably required for a full and fair disclosure of all matters related to the decision under appeal. The panel finds that the information about medical conditions and restrictions to functions and DLA, as well as the information about the ICBC claim are relevant to the legislative criteria for PWD designation. The panel considers the ICBC claim to be relevant to the duration and the severity of the new impairments that resulted from the MVA (concussion, knee and ankle injuries).

The panel is sympathetic towards the appellant's financial stress and the medical conditions of her family members but does not admit that information as evidence because the PWD legislation does not consider the person's financial need for disability assistance or the medical conditions of family members. At the hearing, the ministry emphasized that it does not consider employability or the ability to work when determining PWD eligibility, and the ministry does not assess the family unit, the ministry "looks at just the applicant when adjudicating the PWD application."

The ministry asked to have an observer at the hearing for training purposes. The appellant consented to the observer attending the video-conference. The ministry relied on the reconsideration record and did not submit any new evidence at the hearing.

The advocate said that he has medical training and over 2 years of involvement with the family as their case manager. The advocate provided his professional opinion on the severity and duration of the appellant's medical condition but the panel notes he is not the appellant's doctor. The panel therefore views those submissions as argument. Both parties provided argument at the hearing which the panel considers in Part F - *Reasons for panel decision*.

PART F – REASONS FOR PANEL DECISION

The issue on appeal is whether the ministry's decision that found the appellant ineligible for PWD designation is reasonably supported by the evidence or is a reasonable application of the legislation in the circumstances of the appellant. The panel's role is to determine whether the ministry was reasonable in finding that the following eligibility criteria in section 2 of the EAPWDA were not met:

- the appellant has a severe mental or physical impairment;
- the appellant's impairment, in the opinion of a prescribed professional, directly and significantly restricts the ability to perform DLA either continuously or periodically for extended periods; and
- as a result of restrictions caused by the impairment, the appellant requires an assistive device, the significant help or supervision of another person, or the services of an assistance animal to perform DLA.

The ministry based the reconsideration decision on the following legislation:

EAPWDA

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).

EAPWDR**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,

Analysis

Severe mental or physical impairment

To be eligible for PWD designation, the legislation requires several criteria to be met including the minister being satisfied that the applicant has a severe mental or physical impairment. The ministry found the appellant was not eligible for PWD because not all of the criteria were met. "Severe" is not defined in the legislation but in the ministry's view, the diagnosis of a serious medical condition does not in itself establish a severe impairment of mental or physical functioning.

Mental impairment

To assess the severity of a mental impairment, the ministry considers the extent of any impact on daily functioning as evidenced by limitations/restrictions with mental functions and emotion. The ministry does not only look at the diagnosis or a medical practitioner's comment that the condition is "severe" but considers the bigger picture including whether there are restrictions to DLA requiring mental/social functioning ("mental DLA") and whether significant help is required to manage DLA. The panel finds that a global assessment of severity based on mental and social functioning including any restrictions to mental DLA is a reasonable interpretation of the legislation because information about function as well as DLA can be used to determine whether the impairment is severe.

Arguments - mental impairment

Appellant

In the RFR and oral submissions, the appellant argues that her depression has gotten worse since the MVA. The appellant submits she has a severe impairment of mental functioning because she cannot concentrate due to considerable pain (which is not relieved by medication), dizziness, and headaches and she has trouble understanding things. The appellant describes her anxiety; although she was able to attend physiotherapy appointments she is scared to go out in case of another accident and she relies on her spouse to manage her medications, finances, and errands.

The appellant argues that her sleep pattern has also gotten worse; she cannot sleep due to severe headaches. The advocate said he has seen the appellant's condition getting worse and "the situation is different from how the application was written." The advocate argues that if a blood clot remains in the brain "it can bring a human being down." The advocate said that he knew the appellant "as a normal woman with a physical disability" but now she is "both physically and mentally disabled and cannot concentrate."

Ministry

In the reconsideration decision, the ministry's position is the appellant does not have a severe mental impairment based on the assessments by Dr. M. The ministry acknowledges the significant deficits that Dr. M. reports for *Emotion, Motivation, and Memory*; the *marginal functioning* the appellant has with her social networks; and the support/supervision she requires from family to be maintained in the community. However, the ministry argues the impacts on these areas are only moderate based on the information in the AR and the appellant requires *periodic support* with only 2 areas of *Social Functioning*.

The ministry argues that DLA involving mental functions (such as making decisions about personal care, food choices, finances, arranging transportation, or relating to other people effectively) would need to be significantly restricted in order to establish a severe mental impairment. The ministry notes that Dr. M. assessed the appellant as independent with these areas.

Regarding the appellant's mental functioning as a result of injuries sustained in the MVA, the ministry argues the additional information for the reconsideration was not sufficient to establish a severe mental impairment because Dr. M. only said that the appellant developed emotional distress and is unable to work (March 5, 2021 letter).

The ministry acknowledges the letters from the appellant's counsellor and advocate regarding the impact of the accident on the appellant's mental health and restrictions to DLA but argues that "unfortunately, a prescribed professional or medical practitioner has not confirmed your medical condition and restrictions on your ability to manage your daily living activities. Further, the ministry notes that Dr. M. "has not provided any information on the expected duration of your symptoms."

At the hearing, the ministry acknowledged that the most recent letter from Dr. M (April 8, 2021) contains additional information about the severity of the appellant's impairment. However, the reconsideration was done without the benefit of the letter and the ministry stands by the decision as reasonable based on the evidence presented.

Panel's decision - mental impairment

The panel finds that the evidence as a whole supports a severe mental impairment when considering the reported deficits and impacts in the appellant's cognitive and emotional functioning across all of the reports (MR and AR in conjunction with the SR/appellant's submissions and the recent letters from Dr. M. and the counsellor). In particular, the panel gives significant weight to the recent letter from Dr. M. because the April 8, 2021 letter provides the most detailed account of the appellant's mood disorder and cognitive functions.

The record indicates that:

- The appellant has significant deficits with *Emotional disturbance* and *Motivation* due to chronic low mood/ depression (MR). The AR indicates *moderate impacts* in the areas of *Emotion*, *Memory*, and *Motivation*, and a *minimal impact* for *Attention/concentration*. However, further to the MVA, Dr. M. writes that the appellant "does not have motivation and lacks concentration." The appellant's judgment is now affected as well. The appellant describes her inability to concentrate in both the SR and the submissions at the hearing.
- The appellant is not on medication for depression (MR) but the appellant is currently receiving counselling for depressed mood, emotional dis-regulation, and anxiety ("PTSD symptoms"). The counsellor anticipates a need for longer term therapy "due to the severity of [the appellant's] symptoms."
- The appellant's depression has worsened since the MVA according to Dr. M's letters from March and April 2021. The letters say that the appellant "suffered emotional distress after the accident"; experienced a "worsening of her depression"; and is "very depressed and anxious." The panel notes the consistency between the appellant's reports and the information from the doctor and counsellor on the severity of the appellant's mood symptoms.

In the reconsideration decision, the ministry argued that a severe mental impairment was not established because the appellant was largely independent with mental DLA. Dr. M.'s assessments of mental DLA, indicate the appellant is independent with all areas of *Personal Care*, *Pay Rent and Bills*, *Medications*, and *Transportation* and needs only *periodic support* from family with some areas of *Social Functioning*. As the ministry notes, the appellant was assessed as independent with appropriate social decisions and interacting appropriately with others despite having marginal functioning with her social networks.

The panel finds the ministry was reasonable when it concluded that the appellant 's mental impairment was not severe given her independence with mental DLA as assessed in the PWD application. However, the updated assessment by Dr. M. (April 2021 letter) clearly indicates that these DLA are significantly restricted continuously. Specifically, Dr. M. reports that the appellant is "totally dependent" on [spouse's] help for all instrumental activities of daily living" including finances and medications. Further, the appellant is "quite dependent" on her spouse for personal care including dressing and bathing.

The ministry argued that the expected duration of the appellant's symptoms (further to the MVA) were not confirmed by Dr. M. However, the doctor indicates the appellant's low mood and depression are chronic (MR) and in the reconsideration decision the ministry accepts that the legislative requirement for a longer lasting impairment (impairment to continue for 2 years or more) was met. While the appellant's concussion symptoms are still being evaluated and Dr. M. has not indicated how long they will last, the appellant's worsened depression; her anxiety about going out or falling in the shower; and her lack of motivation and concentration, significantly restrict her mental DLA according to the evidence from the prescribed professional.

The information on record indicates the appellant has suffered increased cognitive and emotional deficits and her depression has gotten worse since the MVA. The panel finds that the ministry's decision which found that a severe mental impairment under section 2(2) of the EAPWDA was not established, is not reasonably supported by the evidence.

Physical impairment

To assess whether the applicant has a severe physical impairment, the ministry considers information on the degree of restrictions to physical functioning, restrictions to DLA involving movement ("physical DLA"), and whether the applicant requires significant help or any assistive devices to manage physical DLA. The panel finds the global assessment of severity based on daily functioning and restrictions to physical DLA is a reasonable interpretation of the legislation because information about functional skills and abilities as well as information about DLA can be used to assess whether an impairment is severe.

Arguments - physical impairment

Appellant

In the SR, the appellant argues she has a severe physical impairment because the pain in her neck and shoulder, combined with the pain in her wrist "made her totally disabled." She appellant argues that her inability to lift objects that weigh more than 2 lbs. makes her unable to do physical chores such as housework, laundry, and shopping for groceries.

In addition, the appellant argues that her pain has worsened since the MVA; she is taking strong medication but her shoulder pain is still severe. The appellant argues that her physical capabilities have decreased because she is now dizzy and unsteady with walking and standing, her legs go numb if she tries to walk, and she burned herself twice while trying to cook for her family, due to the headaches and dizziness.

Ministry

The ministry acknowledges the appellant's restrictions with *Lifting* and *Carrying/holding* (requires *continuous assistance*) as well as the appellant's need for a wrist splint. However, the ministry argues the appellant does not have a severe impairment of physical functioning, noting that Dr. M. has not provided additional information regarding the impact of the MVA injuries on the appellant's physical functioning except to state that the appellant is unable to work.

Panel's decision - physical impairment

The panel finds that the evidence as a whole supports the finding of severe physical impairment. The panel has considered the reported limitations for physical functioning (MR and AR) in conjunction with the appellant's/advocate's submissions and the recent letters from Dr. M. The panel gives significant weight to the information in the April 8, 2021 letter from Dr. M. regarding the appellant's neck and shoulder pain because that information provides a detailed update on these pre-existing pain conditions. In particular, the appellant's ability to lift is further restricted by worsening pain.

The record indicates that:

- The appellant is “unable to lift heavy objects” (> 2 kg/ 5 lbs.) due to the pain in her neck and left shoulder as well as the injury to her wrist (MR). At the hearing, the ministry argued the appellant could still lift lighter objects but on the rating scale in the MR, the ability to lift under 2 kg. is considered a severe limitation because the only other limitation on the low end of the scale is “no Lifting.” Further, the appellant consistently stated that her wrist is very painful, leaving her unable to lift objects for household chores. In the AR (Part E), Dr. M’s information is consistent with the appellant’s reports as Dr. M. wrote that the appellant’s wrist injury/pain is “preventing” her from working with her left hand.
- In addition to being unable to lift heavier items, the appellant requires an assistive device (splint) for her wrist injury in order to do DLA (AR - Part D). The appellant said the splint does not help with pain but in the AR, Dr. M. indicates the appellant needs the splint even if it is not being used. The appellant also requires assistance from her family to manage physical DLA such as *Meals, Basic housekeeping, and Shopping*.
- The appellant suffered injuries to her shoulder, neck, elbow, and ankle in the December 2020 MVA as confirmed by Dr. M.’s March and April 2021 letters. Dr. M. writes that the appellant’s neck and shoulder pain “is so severe that it is difficult for her to lift objects” and the appellant “constantly feels muscle pain.” In the SR, the appellant describes severe pain that prevents her from doing physical chores and she reports that after the accident her shoulder pain is even worse.

In the panel’s view, the evidence indicates the appellant’s pre-existing neck and shoulder pain have gotten worse since the accident and the appellant’s ability to lift any weight is compromised. Dr. M. states that the appellant’s health “has deteriorated in the past 4 months.”

Additional restrictions: Walking, Standing

The most recent letter from Dr. M. (April 8, 2021) indicates the appellant also has limitations with *Walking* and *Standing* (cannot walk more than 1 block or stand for more than a few minutes due to ankle and knee pain). These limitations stem from an ankle injury sustained in the MVA and restrictions with *Walking* and *Standing* were not reported in the original PWD application. The ministry argued that the expected duration of the appellant’s symptoms (further to the MVA) were not confirmed by Dr. M. and the panel agrees that no information is provided on the prognosis for the ankle injury.

The panel therefore gives less weight to the reported limitations for *Walking* and *Standing* and find they do not contribute to establishing a severe physical impairment under the legislation because the requirement for the impairment to last for 2 years or more is not met in relation to the ankle injury. The panel concludes that the information indicating the appellant’s neck and shoulder pain have gotten worse as the result of new injuries should be given more weight because the appellant was already suffering from neck and shoulder pain that made her unable to lift and carry heavier objects. These pain conditions along with the appellant’s wrist injury/pain are among the main diagnoses in the MR. Dr. M. confirmed they are chronic conditions that will last for 2 years or more.

Furthermore, before the accident, the appellant was unable to work with her left hand and needed an assistive device (wrist splint) at all times to manage physical DLA. The appellant also required help from her family for shopping and household chores. The information on record indicates that before the MVA, the appellant had severe wrist pain combined with neck and shoulder pain that significantly impaired her ability to lift and carry heavier objects (second highest degree of restriction in the MR scale).

Since the MVA, the appellant’s ability to lift and carry is further compromised by a greater degree of pain. The panel therefore finds that the ministry’s decision which found that a severe physical impairment under section 2(2) of the EAPWDA was not established, is not reasonably supported by the evidence.

Restrictions in the ability to perform daily living activities

Subsection 2(2)(b)(i) of the EAPWDA requires the ministry to be satisfied that, in the opinion of a prescribed professional, a severe impairment directly and significantly restricts a person's ability to perform DLA either continuously, or periodically for extended periods. This means that restrictions to DLA must be confirmed by the appellant's doctor or one of the practitioners named in the legislation such as an occupational therapist or a registered psychologist.

The term "directly" means that the severe impairment must cause or result in restrictions to activities. The direct restriction must also be significant. A significant restriction will have a large impact on the person's life because they are not able to do DLA without an assistive device or a lot of help and support from others.

Finally, there is a time or duration factor: under the legislation the restriction may be either *continuous* or *periodic for extended periods*. Continuous means that the activity must generally be restricted all the time. The ministry views a periodic restriction as significant when it occurs frequently or for longer periods of time; for example, the activity is restricted most days of the week, or for the whole day on the days that the person cannot do the activity without help or support.

The panel views the ministry's interpretation of the legislation as reasonable. Accordingly, where the evidence indicates that a restriction arises periodically it is appropriate for the ministry to require information on the duration and frequency of the restriction as well as details about the help or support that is needed. With that information, the ministry can assess whether the legislative requirement is met.

DLA are defined in section 2(1) of the EAPWDR and are also listed in the MR, with additional details in the AR. Therefore, the doctor or other practitioner completing these forms has the opportunity to indicate which, if any, DLA are significantly restricted by the applicant's impairments either continuously or periodically for extended periods and to provide additional details. DLA, as defined in the legislation, does not include the ability to work.

Regarding how many DLA need to be impacted for the legislative requirements to be met, the BC Supreme Court decision, *Hudson v. British Columbia Employment and Assistance Appeal Tribunal* [2009 BCSC 1461] states that there must be evidence from a prescribed professional indicating a direct and significant restriction on at least two DLA. Not all DLA need to be affected by the severe impairment.

Arguments - DLA

Appellant

In the SR, the appellant argues that her inability to lift objects (> 2 lbs.) due to her wrist injury and pain restricts her ability to do household chores: washing dishes, laundry, cooking, and grocery shopping/errands. The appellant argues a greater degree of restriction since the MVA because her condition has gotten worse, especially her shoulder pain and she also suffers from headaches and dizziness daily which makes causes safety concerns with cooking (burned herself twice) and showering. The appellant argues that her DLA are further impacted by depression because she cannot concentrate and is anxious to go out.

Ministry

The ministry argues that the information from Dr. M. indicates a moderate level of restriction with DLA and there is not enough evidence to confirm that DLA are significantly restricted continuously or periodically for extended periods. The ministry acknowledges the appellant needs periodic assistance with some activities ("basic housework, going to and from stores, food preparation and cooking") due to low mood and neck, shoulder, and wrist pain. The ministry argues it could not determine if these restrictions are significant because Dr. M. did not indicate the frequency and duration of the help that is required.

At the hearing, the ministry was asked why it would view restrictions to DLA as moderate when Dr. M. indicates the appellant cannot lift more than 2 lbs. (a high level of restriction on the rating scale in the MR) and cannot do laundry or carry purchases home without continuous help. In reply, the ministry argued "there would still be many items the

appellant can lift”, and laundry and carrying purchases “are not done everyday or take up a large portions of the day...Also, only 2 activities are continuously restricted, that’s why (the adjudicator) saw a moderate level of restriction.”

Panel’s decision - restrictions to Daily Living Activities

The panel has considered the evidence from the doctor in its entirety and finds that the ministry’s decision which found that DLA are not significantly restricted as set out in the legislation is not reasonably supported by the evidence.

The evidence for significant restrictions to physical DLA includes the following information:

- The impairment directly restricts the appellant’s ability to perform DLA. (MR, check mark Yes). Dr. M. states several times in the MR and AR that household activities are restricted by neck, shoulder, and wrist pain.
- The appellant needs continuous assistance from another person with *Lifting*, and *Carrying/holding* because she cannot lift objects heavier than 2 kg. (AR). Dr. M. states that wrist pain prevents the appellant from “working with her left hand” (AR - Part E).
- The appellant needs *continuous assistance* from her family with *Basic housekeeping (Laundry) and Shopping (Carrying purchases home)*. The appellant needs *periodic assistance* with *Meals (Food preparation and Cooking)*, *Basic Housekeeping*, and *Going to and from stores*. The appellant is unable to manage physical DLA without an assistive device (wrist splint) - (AR).

The ministry argues that needing continuous assistance with just 1 area of 2 DLA’s and periodic assistance with other areas is indicative of moderate rather than severe restrictions to DLA. However, the additional information from Dr. M. (April 8, 2021 letter) indicates the appellant needs continuous assistance with shopping, cooking, and housekeeping due to the worsening of her pain conditions (“has not been able to manage the housework”).

In the MR, the appellant was prescribed Advil/Tylenol for pain which did not interfere with DLA, but in the April 8, 2021 letter, Dr. M. states the appellant “has been prescribed different pain medications but pain has not been managed.”

In addition, Dr. M. states that it is not safe for the appellant to cook because she recently suffered serious burns (requiring Emergency Room treatment) on two occasions while trying to cook for her family. While the safety issues are due to the appellant’s severe concussion symptoms, “dizziness and brain fogginess” which have not been confirmed to last for 2 years or more, Dr. M. indicates that the appellant’s conditions as a whole significantly restrict her DLA. Dr. M. states that without help, the appellant’s “well-being would be in danger.”

The evidence for restrictions to mental DLA includes the following information:

- Dr. M. indicates that DLA are restricted by the appellant’s chronic low mood (MR and AR).
- The appellant requires periodic support from her family for some areas of *Social Functioning* (AR). The ministry argues there are not enough restrictions to mental DLA to confirm significant restrictions, but the additional letter from Dr. M. indicates the appellant’s motivation and concentration have decreased since the MVA; her judgment is impacted; and her depression has gotten worse and includes anxiety towards going places and taking a shower on her own.
- Dr. M. indicates the appellant requires continuous help from her spouse for shopping/errands, medications, finances, and personal care (April 8, 2021 letter).

The panel is therefore satisfied that the evidence from Dr. M. in its entirety confirms that mental DLA such as making decisions about personal care and finances and interacting appropriately with others are significantly restricted continuously because of the appellant's worsened pain, lower mood, and additional cognitive symptoms. The appellant is suffering increased pain symptoms that are not relieved by medication, her mood and cognitive symptoms have worsened, and she needed an assistive device and help with DLA even before the MVA. According to Dr. M. the appellant is very dependent on her spouse to manage most DLA. The panel finds that significant restrictions to DLA (that are also continuous) are established on the evidence regarding personal care, finances, managing medications, housekeeping, shopping, and social functioning (anxiety on going out). The ministry's decision is therefore unreasonable because the criteria set out subsection 2(2)(b)(i) of the EAPWDA are met.

Help to perform daily living activities

Subsection 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 DLA.

Arguments

The appellant argues that she cannot manage DLA without her family's assistance. The appellant said her spouse does their best to help her despite their own disabilities. The ministry acknowledges the appellant has a splint for her wrist and help from his family to manage DLA. However, the ministry argues that because DLA are not significantly restricted, it cannot be determined that significant help is required.

Panel's decision - help with Daily Living Activities

Under the legislation, confirmation of direct and significant restrictions to DLA is a precondition for needing help to perform DLA. The panel majority found that the ministry's determination that significant restrictions to DLA were not established by the information provided is unreasonable. The panel found that decision was unreasonable because there is sufficient evidence that DLA are significantly restricted, largely because of the appellant's need for an assistive device at all times and her increased need for help due to the exacerbation of her conditions further to the MVA.

With restrictions to DLA established, the evidence indicates the appellant needs to use an assistive device (splint) for DLA involving lifting and carrying. The appellant's family provides significant help with DLA. The help provided with *Shopping, Basic Housekeeping, Meals, Pay Rent and Bills, and Medications* is also continuous since the accident according to Dr. M.'s most recent letter. On review of the evidence in the record, the panel finds that the ministry's conclusion that the help requirement under subsection 2(2)(b)(ii) of the EAPWDA was not met, is not a reasonable application of the legislation.

Conclusion

The panel considered the information in its entirety and concludes that the ministry's reconsideration decision that found the appellant ineligible for PWD designation is not reasonably supported by the evidence. The legislation requires all of the criteria to be met. The ministry found that two criteria (age, and duration of impairment) were met. The ministry was not satisfied that the appellant has a severe impairment that significantly restricts DLA to the extent that she requires significant help to perform DLA.

However, in the panel's view, the information in the PWD application, in particular the MR and AR, combined with the new information on appeal which the panel has admitted, confirms a severe mental and physical impairment that significantly restricts DLA. The appellant already required an assistive device and help from family to do her DLA and since the accident she has become less independent and even more dependent on her family for help. The panel rescinds the reconsideration decision and refers the matter to the ministry for a determination on the amount of disability assistance. The appellant is successful in her appeal.

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PART G – ORDER

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

THE PANEL CONFIRMS THE MINISTRY DECISION RESCINDS THE MINISTRY DECISION

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

LEGISLATIVE AUTHORITY FOR THE DECISION:

Employment and Assistance Act

Section 24(1)(a) or Section 24(1)(b)

and

Section 24(2)(a) or Section 24(2)(b)

PART H – SIGNATURES

PRINT NAME

Margaret Koren

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2021-05-02

PRINT NAME

Jeanne Byron

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2021-05-02

PRINT NAME

Melvin (Mel) Donhauser

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2021-05-02