APPEAL NUMBER
2021-0119

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the Ministry) Reconsideration Decision (RD) dated May 31, 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 Appendix A.

PART E – SUMMARY OF FACTS

The evidence before the Ministry at the time of the RD included the PWD Application comprised of the applicant information and self report (SR) completed by the Appellant on March 31, 2021, a Medical Report (MR) dated March 31, 2021 and completed by the Appellant's General Practitioner (GP), who has known the Appellant for four and a half years and who has seen the Appellant 11 or more times in the past year, and an Assessor Report (AR) dated March 31, 2021, also completed by the GP.

The evidence available when the RD was made also included:

- A Request for Reconsideration (RFR), signed by the Appellant on May 6, 2021, in which she describes her medical condition and impairments, identifies the difficulties she has in performing DLA, and the help she needs and receives from roommates and family members in performing her DLA (as specified in detail below);
- A one-page letter, dated April 29, 2021, from a registered physiotherapist at a community wellness centre (the Physiotherapist's Letter) outlining the Appellant's symptoms, the type of treatment the Physiotherapist is providing, and indicating that the Appellant's symptoms are unchanged;
- A one-page letter, dated April 29, 2021, from a registered nurse at a congenital heart clinic (the Nurse's Letter) identifying the Appellant as a patient awaiting cardiac surgery;
- A two-page letter dated May 1, 2021 from the Appellant's Mother (the Mother's letter) describing the Appellant's medical condition and her impairments, providing a history of her illness, identifying the difficulties the Mother has observed the Appellant having with her DLA, and the help the Appellant needs with those DLA; and,
- An undated one-page letter from the Appellant's employer (the Employer's Letter) providing examples of difficulties the Appellant has had completing required tasks at work.

Diagnoses

In the MR, the GP diagnosed the Appellant with congenital heart disease, with a date of onset of May 2000.

Physical Impairment

In the MR, under "Health History", the GP states that the Appellant reports that her condition affects her ability to live and work independently. The GP also refers to two attached documents for more information:

- A cardiology procedure note dated March 22, 2021 (the Cardiology Procedure Note) identifying the Appellant as the patient and providing the results of a medical procedure involving a tricuspid valve replacement, an "*ASD repair*" and an atrial pacemaker; and,
- A cardiology consultation note (the Cardiology Consultation Note) dated January 19, 2021 referring to the Appellant and summarizing the Appellant's diagnoses and symptoms and tests

administered during the consultation, and concluding that the Appellant "*is showing progressive inflow stenosis and likely has reached something of a more critical degree of inflow compromise across her tricuspid valve*".

With respect to functional skills, the GP reports that the Appellant can walk less than one block unaided on a flat surface, climb more than 5 steps unaided, and has no limitations in the amount of time she can remain seated. The GP indicates that the Appellant's lifting limitations are unknown. 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 their impairment, the GP has written "*Please see (the Cardiology Procedure Note) and the* (*Cardiology Consultation Note)*". While the Cardiology Procedure Note does not address the Appellant's physical limitations, the Cardiology Consultation Note says, in part, "*(The Appellant) is on ongoing follow-up due to challenges with exertion intolerance over the past month. She is now on medical employment insurance (EI). She describes frequent postural lightheadedness. Her fatigue has been progressive, and she is finding herself slowing on stairs, often having to sit and recover after walking up to her apartment. A stress test performed in (a different community in the Province) showed a relatively rapid tachycardia to 150 per minute and she was only able to achieve 4 minutes on the Bruce protocol … She has nonspecific chest tightness concurrently with some of her external symptoms. She has not had complete syncope … She was previously working 8 hour shifts and no longer can handle them; hence is now in EI. She has seen a physiotherapist for her intermittent vertigo and is receiving treatment in this regard*".

In the section of the AR where the assessor is asked to indicate the assistance required related to impairments that directly restrict the applicant's management of mobility and physical abilities, the GP indicates that the Appellant is independent in all areas (walking indoors and outdoors, standing, climbing stairs, lifting, and carrying and holding), providing the following explanation "*Limited by progressively worsening inflow stenosis of tricuspid valve*". The GP has not provided any additional comments in the space provided.

In the SR, the Appellant writes that she has Ebstein's anomaly, the symptoms of which are shortness of breath, especially with exertion, fatigue, heart palpitations or abnormal heart rhythms, and a bluish discoloration of the lips and skin caused by low oxygen. She also states that she has cervically induced dizziness which is responsible for a neck-related sensation in which she feels she is spinning or the world around her is spinning. It also affects her sense of balance and concentration. Symptoms include headaches, neck pain, loss of balance, weakness, and problems concentrating. In addition, she states that she has pericarditis, which causes sharp chest pain, which may also be felt in the shoulders, neck or back. She says that there have been many times in her life that she has missed school or work for days and sometimes months because of her heart condition, and that she can have difficulties at any time with little to no warning.

In the RFR, the Appellant writes that it is extremely difficult for her to walk any distance, even when only going from her couch to the other areas of her home. She can walk less than one block or for more than a minute because she quickly becomes short of breath, gets tightening and pain in her chest that makes her feel like she is being suffocated. She states that she tires easily when walking or climbing stairs and gets dizzy. She quickly becomes short of breath which increases her chest pain, and on several occasions she has fainted. She wrote that she tries to avoid climbing stairs at all costs, and that she had

to relocate from her last home a few months ago because she could no longer walk up the stairs to her apartment. Regarding lifting and carrying, she writes that she has had a doctor's note for the past several years, originally written to her employer, stating that she is unable to lift more than five pounds. She writes that she has trouble sleeping because she gets chest pains and feels like she's suffocating when she lies down. She says that she also has neck and shoulder pain due to her cervical vertigo, and she is unable to look up or side to side without getting dizzy.

Mental Impairment

In the section of the MR where the prescribed professional is asked if there are any significant deficits with cognitive and emotional function, the GP has ticked "yes" for the areas of emotional disturbance and "other" without specifying the other area, adding the comment "*Patient reports vertigo and cervical induced dizziness by physiotherapist (see attached). Leads to concern with cognitive abilities*". The attached document to which the GP refers is the Physiotherapist's Letter, which states that "*During the course of her treatment, (the Appellant complained) of dizziness, headache, ringing in her ears, shortness of breath, lower activity tolerance and faint feeling since May 2020, affecting her work duties as well as (DLA) to the point that she was able to work only 2 hours per day with support and required support from her family for (DLA)*".

In the section of the AR where the assessor is asked to indicate the level of ability to communicate, the GP indicates that the Appellant's abilities are good in all areas (writing, speaking, reading ability and hearing) with no explanation or description provided in the section of the AR where comments can be provided. In the section of the AR where the assessor is asked to indicate to what degree the applicant's mental impairment restricts or impacts functioning, the GP has indicated no major impacts, a moderate impact on bodily functions, emotion and motivation, a minimal impact on attention/concentration, memory, motor activity and other neuropsychological problems, and no impact on consciousness, impulse control, insight and judgment executive functioning, language, psychotic symptoms, or other emotional or mental problems. (It is noted that, while the AR asks the assessor to "*explain in the section below*" if any impact is episodic or varies over time and to "*explain on next page*" what other neuropsychological problems exist, no comments section or space to explain appear on that page or the next page of the form.)

With respect to social functioning, the GP indicates in the AR that the Appellant is independent in all 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). No comments are provided in the space provided. The GP also indicated that the Appellant has good functioning with their immediate and extended social networks. The GP makes no other comments or explanations.

In the RFR, the Appellant writes that she has cognitive difficulties due to cervical vertigo, depression, anxiety, and attention deficit disorder (ADD). She states that she has been tested for these conditions and "*been diagnosed with (these conditions) by medical professionals*". She also says that she becomes lightheaded and dizzy when faced with stairs and must stop and sit for up to 10 minutes after walking up five steps before she can continue walking. It is difficult for her to concentrate or explain things as her mind wanders or will blank out, and she has trouble following written or verbal directions as she will

quickly forget what is said. She says that she has trouble sleeping because when she lies down, she gets chest pains and feels like she is suffocating.

In the SR, the Appellant also states that she is unable to concentrate for long periods of time and is unable to communicate properly because she loses concentration and quickly forgets what was said. She has trouble following written instructions, which she must re-read many times, and verbal instructions, which must be repeated many times.

The Appellant also states in the SR that she gets lightheaded when she stands up, so she must sit for three to five minutes first. She says that she is always tired and feels mentally drained and is unable to look up or side-to-side without getting dizzy. If she holds a position for too long, she might pass out and is unable to communicate properly because she loses concentration or forgets what was said to her.

Restrictions in the Ability to Perform DLA

In the MR, the GP indicates that the Appellant has been prescribed medications or treatments that interfere with their ability to perform DLA, adding the comment "*Patient reports Furosemide prescribed by (a different medical practitioner) led to presyncope with potential changes and now takes this medication every other day*", and in response to the question "What is the anticipated duration of the medication" writes "*Unknown. No consults were available from (the other medical practitioner) to review*".

In the RFR, the Appellant states that when shopping she gets overwhelmed and finds it hard to concentrate on what she needs to purchase. Grocery shopping takes a lot longer than the average person because she must walk slowly. She says that she gets lightheaded, dizzy, faint and feels increased chest pain. She needs to stop often and sit, which creates a ton of anxiety as she becomes "*a focal point to other customers and staff*", and that afterwards she has to lie down for the rest of the day and is unable to do anything the following day because she is very light-headed, faint and both mentally and physically exhausted.

Regarding housekeeping, the Appellant writes in the RFR that she struggles to pick up laundry to place it in a basket as the movement creates dizziness due to her cervical vertigo, and when she tries to do laundry, load or unload the dishwasher, clean the house or cook, her heart rate increases rapidly and she gets short of breath, lightheadedness, dizziness and chest pain. She also writes that she has difficulties remembering when bills are due each month, the times and dates of appointments, etc., and that she must create lists, or she will forget. She is unable to read more than a paragraph without taking a break or watch TV or videos for long periods because she gets headaches and has difficulty focusing. She reports that she can't retain information and when reading must continually go back and re-read what she just read.

In the SR the Appellant says that she has trouble following written instructions and must re-read the many times and have verbal instructions repeated many times. She writes that she forgets basic things like taking something out of the microwave, or she will walk into room and forget what she is doing and is unable to do basic housework or make meals because she gets shortness of breath, dizziness, and chest pains.

In the Nurse's Letter, the registered nurse writes that "*(The Appellant) is currently limited even with (DLA) due to the severity of her symptoms*" and "*As per (a medical practitioner at the congenital heart clinic) we anticipate that (the Appellant) will be able to return to work six month's post surgery*".

In the Mother's Letter, the Appellant's Mother writes that the Appellant struggles with DLA, indicating by way of example that "*A simple 30 minute meal will take (the Appellant) over 2 hours to make as she continually needs to sit or (lie) down*", and that she is unable to do any cleaning, including laundry, and that the Mother was doing all of the Appellant's shopping because the Appellant is unable to walk around a store.

In the Employer's Letter, the Appellant's employer identifies several work-related activities for which the Appellant demonstrated similar difficulties to those relayed by the Appellant and others with respect to her DLA.

Need for Help

In the MR the GP indicates that the Appellant does not require any prostheses or aids for their impairment. Under "Health History", the GP writes "*Patient reports her condition affects her ability to live … independently*".

In the section of the AR that asks who provides the help required for DLA the GP has ticked "Family" and "Friends" without completing the comments section. In the AR, the GP has ticked the box labelled "Independent" with respect to all DLA except for the basic housekeeping DLA, going to and from stores, carrying purchases home, food preparation, cooking, and using public transit, where the GP has ticked the box labelled "Periodic Assistance from another person". With respect to all listed DLA, the GP adds the comment "*Patient reports difficulty with most DLA as she tires easily and is concerned that she could pass out and therefore limits her independence with these activities … She states that she is unable to walk to a bus or make a meal alone*". The GP also provides the additional comment "*Patient concern walking to transit alone*".

In the section of the AR whether the assessor is asked to describe what assistance is necessary if there is no help available, the GP has written "*She would like meal preparation/delivery, help with getting to public transit or Uber/taxi use and grocery delivery/help with putting away groceries*". Where asked what assistance is provided using assistive devices, the GP has written "*None currently*" and where asked what devices might be useful the GP has written "*Power wheelchair may be of benefit*". The GP also states that the Appellant does not have an assistance animal.

In the RFR, the Appellant says that she is very lucky to have great roommates and supportive family members who consistently help her. She writes that when climbing stairs, she always makes sure there is a handrail or someone to help her and that she has to have someone with her or someone who is able to check on her regularly to make sure she hasn't passed out and hurt herself.

The Appellant also writes in the RFR that her roommates shop for her or she relies on delivery services. She says that her roommates drive her wherever she needs to go or takes Ubers because she is unable to walk to bus stops or wait for buses. She also writes that her roommates and family members always make sure she has meals that can be prepared in the microwave, and she always make sures she has ready-made frozen meals on hand. She says that her roommates and family members assist with

housework and meals for her, and she never bathes alone and always has her roommate sit close to the bathroom in case she needs help.

In the SR, the Appellant says that she is unable to walk for more than a minute without assistance and can't shower or bathe without someone present in case she gets faint or passes out.

In the Mother's Letter, the Appellant's Mother writes that the Appellant's roommate moved out in December 2020 after which the Appellant's Mother moved in to assist the Appellant with her DLA. In February 2021 the Appellant's mother moved out of the Appellant's home when the Appellant moved to another community in the Province to be nearer to specialists. The Appellant's Mother writes that the Appellant now has new roommates who help when they can, but that the Mother also travels to the Appellant's home every few weeks to assist with laundry, shopping, medical appointments and to prepare frozen meals.

In the Employer's Letter, the Appellant's employer writes that "*some of our staff have assisted (the Appellant) at home with (DLA) she is unable to perform*".

At the hearing, the Appellant was also represented by her Mother. The Appellant relied on the evidence provided in the SR and RFR. She stressed that she is unable cook, clean her home, go to and from stores and to shower alone, and relies on her roommates and her Mother to clean, cook and shop for her. She said that she was aware that the information provided by her GP in the MR and the AR might not have provided enough detail, so she asked her heart surgeon to provide additional information and submitted it to the Employment and Assistance Appeal Tribunal (the Tribunal) on June 21, 2021 (the new information in the Heart Surgeon's Letter is summarized below).

The Appellant's Mother said that when she was living with the Appellant for a few months after her previous roommate left the Appellant's home in December 2020, she would bring the Appellant to the Appellant's Mother's home on weekends so that the Mother could spend some time with her husband. The Appellant's Mother said that the Appellant has always been disabled and that her heart condition, which was diagnosed 3 months before she was born, has "*prevented (the Appellant) from living a normal life*". She also said that the Appellant's serious heart condition, which might eventually require a heart transplant, was "*not going to go away with surgery*".

In response to a question form the Panel, the Appellant said that her health has seriously deteriorated over the past year. She stated that the GP was not aware of the details of her health decline because she has not had an in-person appointment with the GP since just after pandemic began in March 2020, and her health begam to significantly decline about three months after the pandemic began (i.e. in about June 2020).

At the hearing, the Ministry relied on its RD, stressing that there were significant discrepancies between the GP's information as presented in the MR and the AR and the Appellant's information in the SR. The Ministry said that in these situations the prescribed professional's evidence is given greater weight. The Ministry also stated that evidence of a severe medical condition is not enough; that there needs to be evidence of a severe impairment resulting from a severe medical condition.

In response to a question from the Panel, the Ministry suggested that the reason why the Ministry did not refer to the evidence in the Cardiology Consultation Note in the RD might have been because generally

the evidence presented by an applicant's GP is given more weight than that provided by a medical specialist.

Additional Information Submitted after Reconsideration

Section 22(4) of the EAA says that a panel may consider evidence that is not part of the record that the panel considers to be reasonably required for a full and fair disclosure of all matters related to the decision under appeal. Once a panel has determined which additional evidence, if any, is admitted under EAA Section 22(4), instead of asking whether the decision under appeal was reasonable at the time it was made, a panel must determine whether the decision under appeal was reasonable based on all admissible evidence.

In the Notice of Appeal (NOA), the Appellant states that she is physically impaired and in need of assistance. The Panel considered the written information in the NOA to be argument.

On June 21, 2021, the Appellant provided an email to the Tribunal with an attached three-page letter. The email said that the Appellant had not been able to attend her initial appeal hearing as she was unaware of the hearing because she was in the hospital for open heart surgery on the date that the original hearing was scheduled. She also said that her hospital stay was longer than expected "*due to complications*".

The letter attached to the Appellant's June 21, 2021 email was signed by the Appellant's heart surgeon (the Surgeon's Letter) and was also dated June 21, 2021. The heart surgeon referred to a written communication from the Appellant which formed the largest part of the surgeon's letter. In the Appellant's written communication following the heart surgeon's comments (which are provided below), the Appellant explained her diagnosis, the impact of her impairment on her ability to perform DLA, and her need for help, much of which was evidence included in the SR and the RFR. The following additional new information was included in the written communication:

- The Appellant had to relocate from her previous home a few months ago because she could no longer walk up the stairs to her apartment;
- When she tries to do something as simple as laundry, her shortness of breath and heart rate won't return to normal for 20 minutes or longer, and she experiences chest pain for 40 minutes or more; and,
- She is unable to shower because standing up for that long while moving when washing herself results in the same side effects she experiences when doing household activities, so she must use the bath.

The Appellant also said that it took her over a week to complete the written communication.

In the Surgeon's Letter introduction, the heart surgeon wrote "*(A)s (the Appellant's) consulting surgeon I agree that her symptoms remain very significant it is unclear if this most recent procedure will significantly improve her quality of life. Please do not hesitate to contact me if you have any questions or concerns*".

The Panel considered the new information from the Appellant and the heart surgeon's comments in the Surgeon's Letter, and the verbal evidence provided by the Appellant's Mother at the hearing regarding the Appellant's diagnosis of heart disease three months prior to her birth, to be new evidence that is reasonably required for a full and fair disclosure of all matters relating to the decision under appeal. Therefore, the Panel admits all the above-noted new evidence in accordance with Section 22(4) of the EAA and assigns it full weight.

The Panel did not admit the verbal evidence presented at the hearing by the Appellant's Mother suggesting that the Appellant might eventually need a heart transplant because no such evidence has been provided by a prescribed professional.

PART F – REASONS FOR PANEL DECISION

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

ANALYSIS

Severity of Impairment

Neither the terms "*impairment*" nor "*severe*" are defined in the EAPWDA. The Cambridge Dictionary defines "*impairment*" in the medical context to be "*a medical condition which results in restrictions to a person's ability to function independently or effectively*" and defines "*severe*" as "*causing very great pain, difficulty, worry, damage, etc.; very serious*". "*Impairment*" is defined in the MR and the AR sections of the PWD application form to be "*a loss or abnormality of psychological, anatomical, or physiological structure or function causing a restriction in the ability to function independently, appropriately or for a reasonable duration*". While the term is not defined in the legislation, the Panel finds that the Ministry's definition of "impairment" as set out in the MR and the AR is a reasonable definition of the term for the purpose of partially assessing an applicant's eligibility for the PWD designation.

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

Physical Functioning

The Appellant's position is that she has had a severe physical impairment since before she was born, and that her severe impairment has gotten worse in the past 11 months, requiring heart surgery in June 2021.

The Ministry's position is that, while the Appellant has a serious medical condition, it has not been established that she has a severe impairment because the evidence does not establish that her medical condition has a significant impact on daily functioning as a result of functional skill limitations or restrictions. The Ministry also notes that there is a significant discrepancy between the information provided by the GP and the Appellant. The Ministry concludes that the information from the GP and attached medical reports and letters from other prescribed professionals do not confirm a severe physical impairment.

Panel Decision

The Panel notes that the Ministry relies solely on the information provided by the Appellant's GP in the MR and the AR, but does not refer in the RD to the additional evidence that the GP had attached to the MR contained in the Cardiology Consultation Note, where the cardiologist writes that they are having to follow-up with the Appellant on an ongoing basis *"due to challenges with exertion intolerance over the past month*", that "*her fatigue has been progressive and she is finding herself slowing on stairs, often having to sit and recover after walking up to her apartment*", and that "*she has nonspecific chest tightness concurrently with some of her external symptoms*", and that "*she has seen a physiotherapist for her intermittent vertigo and is receiving treatment in this regard*".

The Panel also admitted the additional evidence provided in June 2021 in the Surgeon's Letter, which states "*(A)s (the Appellant's) consulting surgeon I agree that her symptoms remain very significant it is unclear if this most recent procedure will significantly improve her quality of life*".

The Panel notes that both the cardiologist and the heart surgeon are prescribed professionals (medical practitioners) who have examined or operated on the Appellant since the Appellant last had an appointment with the GP, and that the cardiologist's evidence was included by the GP in the MR. The Panel also notes that the GP's assessments of the Appellant's physical functioning in the MR and the AR lack detail and are based on the GP's knowledge of the Appellant's physical functioning abilities before her heart surgery. For example, the GP indicates in the MR that the duration of the Appellant's impairment is unknown (pending potential valve replacement surgery) and that they have not consulted with the prescribing physician to determine the expected duration of medication the Appellant is taking that interferes with her ability to perform DLA. In addition, in the AR the GP indicates that that the Appellant's lifting ability is "unknown" and that she can climb more than five stairs unaided. The information provided by the cardiologist and the heart surgeon is not only more current, it is also more informative: the cardiologist states that the Appellant is slowing on stairs and often has to recover after walking up to her apartment, and the heart surgeon says that her symptoms remain "*very significant*" and that there is no indication that the recent value replacement surgery "*will significantly improve her quality of life*". Because the evidence provided by the cardiologist and the heart surgeon is both more recent and more detailed, the Panel gives greater weight to their evidence, which the Panel finds provides strong evidence that the Appellant has a severe physical impairment.

Based on all the available evidence, the Panel finds that it was unreasonable for the Ministry to determine that the information provided does not establish that the Appellant has a severe physical impairment.

Mental Functioning

Although the legislation contains no formalized criteria to define what constitutes mild, moderate or severe cognitive deficits, prescribed professionals are asked to indicate the severity of a mental impairment in the MR and the AR 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 Appellant's position is that her physical impairment results in cognitive deficits, including impacts on her concentration and memory.

The Ministry's position is that a severe mental impairment has not been established because the GP has not a reported a brain injury, a mental health diagnosis, significant deficits in any of the Appellant's cognitive functioning, or any major impacts on her mental functioning.

Panel Decision

The Panel notes that the Appellant describes her impairment as physical with some impacts to her mental functioning that she says result from her physical impairment. The Panel further notes that the GP describes the Appellant's mental functioning impacts in the MR (where there are any impacts identified) as being moderate or minimal. While the GP considers that the information in the Physiotherapist's Letter "*leads to concern with cognitive abilities*", no evidence of a cognitive impairment diagnosis has been presented.

Based on all the available evidence, the Panel finds that the Ministry reasonably determined that the information provided does not establish that the Appellant has a severe mental impairment.

Restrictions in the Ability to Perform DLA

The Appellant's position is that her severe physical impairment continuously restricts her ability to perform the DLAs of bathing, food preparation and cooking, basic housekeeping, using the stairs, going to and from stores, carrying purchases home, and using public transit.

The Ministry's position is that the information does not establish that the Appellant's impairment directly and significantly restricts her DLA continuously or periodically for extended periods because the GP has indicated that the Appellant is independent in most areas and is periodically restricted in only three areas - food preparation, cooking, and using public transport. In addition, the GP has not reported the frequency and duration of help required. The Ministry's conclusion is also based on its assessment that "*only periodic assistance (is) required in a few areas*". The Ministry also argues in its RD that, while acknowledging that the SR describes restrictions in the Appellant's DLA are more extensive than what was reported by the GP, EAPWDA Section 2(b) requires the assessment of a prescribed professional.

Panel Decision

DLA are defined in Section 2(1) of the EAPWDR and are also listed slightly differently in the MR and, with additional details, in the AR. Section 2(2)(b) of the EAPWDA requires that the Ministry be satisfied

that a prescribed professional has provided an opinion that an applicant's severe impairment directly and significantly restricts their DLA, continuously or periodically for extended periods.

The GP has not provided all the detailed explanations or comments in the spaces provided in the MR and the AR to assist the Ministry in assessing the nature of the impairments (periodic or continuous). However, the evidence provided by the cardiologist, the heart surgeon and the registered nurse (all prescribed professionals) should be given full weight. The Panel notes that the Surgeon's Letter includes a detailed explanation of the difficulties the Appellant faces in performing several DLA, and that, while those difficulties are expressed in that letter by the Appellant, the heart surgeon indicates that they agree that the Appellant's symptoms "*remain very significant*". In other words, in the Panel's view, the heart surgeon is expressing their professional opinion that they agree with the Appellant's self-assessment of her DLA impacts. In addition, the registered nurse writes in the Nurse's Letter that the Appellant is limited in her ability to perform DLA due to the severity of her symptoms.

In addition, significant weight should be placed on the evidence of the Appellant and any others who have provided information about the Appellant's ability to perform DLA unless there is a legitimate reason not to do so. The Panel notes that the evidence provided by those who have directly observed the Appellant performing living and working activities (i.e. her Mother and the Appellant's employer) is entirely consistent with the Appellant's evidence regarding DLA impacts, which the heart surgeon has endorsed. (The Panel notes that employment is not a valid consideration for designation as a PWD; however, specific descriptions of the appellant's difficulties/challenges at work can inform the analysis of the appellant's ability to perform DLA.)

Regarding the Ministry's comment in the RD that the Appellant "*is periodically restricted in only three areas*", The Panel notes that the GP, the Appellant, and her Mother have all said that the Appellant needs help with bathing, food preparation, cooking, all aspects of housekeeping, using the stairs, going to and from stores, carrying purchases home, and using public transit. The Panel further notes that the DLA listed in the MR and the AR differ slightly from each other and from the DLA listed in the EAPWDA. The DLA listed in the EAPWDA for which the GP indicates that the Appellant needs help are: prepare own meals [Section 2(1)(a)(i)], shop for personal needs [Section 2(1)(a)(iii)], use public or personal transportation facilities [Section 2(1)(a)(iv)], perform housework to maintain the person's place of residence in acceptable sanitary condition [Section 2(1)(a)(v)], move about indoors and outdoors [Section 2(1)(a)(vi)], and perform personal hygiene and self-care [Section 2(1)(a)(vii)]. EAPWDA Section 2.2(b)(1) refers to restrictions in a person's ability to perform "*daily living **activities***" (emphasis added). Therefore, as "activities" means more than one activity, the legislated requirement is that at least two DLA be directly and significantly restricted periodically or continuously. As mentioned above, the Panel notes that, based on the evidence provided by the prescribed professionals, five legislated DLA are directly and continuously restricted in the Appellant's case.

Based on all of the available evidence, the Panel finds that it was not reasonable for the Ministry to determine 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.

Help with DLA

The Appellant's position is that she must rely on roommates, family members or work associates to help her with her DLA.

The Ministry's position is that because the information has not established that DLA are significantly restricted it cannot be determined that significant help is required from other persons.

Panel Decision

Having found that it was not reasonable for the Ministry to determine that the information provided does not establish that DLA are significantly restricted, the Panel finds that it was not reasonable for the Ministry to conclude that it cannot be determined that significant help is required from other persons without further analysis of the evidence.

As is the case with an applicant's ability to perform DLA, in many cases, including this one, it is unlikely that a medical practitioner will have direct first-hand knowledge of whether an applicant needs help in performing DLA. Therefore, in determining whether the legislated requirements are met regarding need for help, the Ministry should put significant weight on the evidence of the applicant and any others who have provided information about the applicant's need for help unless there is a legitimate reason not to do so. Such information, whether provided by the applicant or by anyone with an intimate knowledge of the applicant's need for help, will be helpful in rounding out the general picture provided by the prescribed professional and should be given weight. The reconsideration process provides the opportunity for prescribed professionals and the applicant, the applicant's friends, roommates, family or work associates to clarify or add to the information provided in the application forms, and a panel hearing an appeal must consider any admissible information provided on appeal.

The Panel notes that, while the GP has not provided comments or explanations regarding the Appellant's need for help with DLA, they have indicated that the Appellant would benefit from help with meal preparation and delivery, getting to and from stores and help with the delivery and putting away of groceries. The Panel also notes that the heart surgeon states in the Surgeon's Letter that they agree that the Appellant needs help in performing a significant number of DLA. In addition, others who know the Appellant well, including her Mother and employer, have provided evidence that, without exception, validates the Appellant's information about her need for help with many DLA.

Conclusion

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

APPENDIX 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
2021-0119

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) 2021/07/09

PRINT NAME	
Kulwant Bal	
SIGNATURE OF MEMBER	DATE (YEAR/MONTH/DAY) 2021/07/09
PRINT NAME Carla Tibbo	
SIGNATURE OF MEMBER	DATE (YEAR/MONTH/DAY) 2021/07/09