Part C – Decision Under Appeal

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the Ministry) Reconsideration Decision (RD) dated September 17, 2021, which found that the Appellant did not meet three of the five statutory requirements of Section 2 of the *Employment and Assistance for Persons with Disabilities Act* (EAPWDA) for designation as a person with disabilities (PWD). While the Ministry found that the Appellant met the age requirement and had an impairment which was likely to continue for at least two years, it was not satisfied that the evidence establishes that:

- The Appellant has a severe physical or mental impairment;
- The Appellant's daily living activities (DLA) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and,
- As a result of these restrictions, the Appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

The Ministry also found that the Appellant is not one of the prescribed classes of persons who may be eligible for PWD designation on the alternative grounds set out in Section 2.1 of the Employment and Assistance for Persons with Disabilities Regulation (EAPWDR) and the Appellant did not appeal the decision on this basis. As there was no information or argument provided for PWD designation on alternative grounds, the Panel considers that matter not to be at issue in this appeal.

Part D – Relevant Legislation

EAPWDA, Section 2

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 an undated and unsigned applicant information and self report (SR), apparently completed by the Appellant, a Medical Report (MR) dated June 14, 2021 and completed by the Appellant's General Practitioner (GP) who has known the Appellant since October 1992 and who has seen the Appellant 11 or more times in the past year, and an Assessor Report (AR) dated June 14, 2021, also completed by the GP.

The evidence available to the Ministry at the time of the RD also include a Request for Reconsideration form (RFR) signed by the Appellant on September 7, 2021, in which the Appellant gives the reasons why she is asking the Ministry to reconsider its decision. Those reasons are detailed in the appropriate sections of the discussion below.

Diagnoses

In the MR, the GP diagnosed the Appellant with Polyarthralgia without an identified date of onset, but which the GP has indicated has been "*worse since July 2019*", Fibromyalgia with a date of onset of 2021, Anxious Depression with a date of onset of 2019, and asthma with a date of onset of 2009.

Severe Physical Impairment

Physical Functioning

In the MR, under Health History, where asked to indicate the severity of the applicant's medical conditions and how they impair the applicant, the GP wrote that the Appellant complained of Polyarthralgia in 2019 and told the GP that she has had it in the past, but it has been getting worse since 2019. The GP also said that the Appellant has been able to manage her asthma with inhalers. The GP further notes that the Appellant has ongoing pain, poor sleep, feelings of exhaustion, diffuse headaches impacting day-to-day activities including DLA, and that she is unable to work.

With respect to functional skills, the GP reports that the Appellant can walk 2 to 4 blocks unaided on a flat surface, climb one flight of stairs unaided, lift under 2 kg, and can remain seated for less than 1 hour, adding "*gets … stiff*". In the section of the MR where the prescribed professional is asked to provide any additional information that might be considered relevant in understanding the significance of the applicant's medical condition and the nature of their impairment, the GP has written "*(Appellant) is highly motivated to improve but her symptoms impair her daily. In the past she was able to function very well in a managerial position … huge change in function with current impairments*".

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 with walking indoors, but takes significantly longer than normal with all other listed mobility and physical abilities (walking outdoors, standing, climbing stairs, lifting, and carrying and holding), adding "*walking limited by arthralgia, similarly standing – short periods only, lifting/carrying < 2 kg*".

In the SR, the Appellant states that she suffers from stiff muscles and joints, and that the pain moves around, adding "*Some days more intense than others. The more I do, the more intense the pain gets so I have to stop and rest*". She also says that she is unable to carry things or do anything for a period of time because her joints crack and are painful. She writes that her eyesight has deteriorated, and she can't sit or stand, walk, or concentrate. She says that she suffers from extreme tiredness and wakes constantly due to pain.

In the RFR, the Appellant says that she has severe daily muscle and joint pain, and in completing the "Functional Skills" section of the MR, her GP had asked her to provide information about her functional

skills (walking, climbing, etc.) on her best days. The Appellant wrote that even on her best days she can only walk one block and experiences pain when she walks.

Severe Mental Impairment

Mental Functioning

In the MR, under Health History, the GP has written that the Appellant has symptoms of anxious depression, which surfaced in 2020 and which are being treated with prescription medications. The GP also notes that in early 2020, the Appellant's worsening anxious depression forced her to take time off work, and she subsequently returned to work, but in January 2021 she was unable to continue working due to increased pain and arthralgia. She was then referred to a specialist who prescribed medication which proved ineffective and was discontinued. The GP further notes that the Appellant has worsening anxious depression and low mood and energy. In the section of the MR where the prescribed professional is asked if there are any significant deficits with cognitive and emotional function, the GP has ticked "yes" for the areas of executive planning, memory, emotional disturbance, motivation and attention and sustained concentration, adding the comment "*Despite (the Appellant taking prescription medications) these symptoms continue day-to-day*".

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 listed areas (writing, speaking, reading ability and hearing) and does not provide any comments or explanations in the spaces 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 a major impact on emotion and attention/concentration; a moderate impact on bodily functions (specifically sleep disturbance), executive functioning, memory, and motivation; no minimal impacts; and no impacts in any of the other areas (consciousness, impulse control, insight and judgment, motor activity, language, psychotic symptoms, other neuropsychological problems, and other emotional or mental problems). No space is provided in the AR for further explanation or comment.

With respect to social functioning, the GP indicates in the AR (with comments in *italics*) that the Appellant is independent in making appropriate social decisions, interacting appropriately with others, and ability to secure assistance from others. The GP has indicated that the Appellant needs periodic support or supervision in developing and maintain relationships (*struggles with maintaining relationships due to anxious depression*), and that she needs continuous support or supervision from others in dealing appropriately with unexpected demands (*anxiety … impacted by ability to adapt to change*). The GP also indicates that the Appellant has marginal functioning with her immediate social network and extended social network. The GP does not describe the degree of support or supervision required in the space provided, but comments that there are "*no safety issues*".

In the SR, the Appellant writes that she can't concentrate and has no short-term memory. She states that there are times when she doesn't know what she's doing and that she cries all the time. She says that there are some days when she can't leave the house and her anxiety "*makes (her) cry or shut down*". She also says that she must write everything down but still forgets what she's doing and loses the paper she has written her reminders on. She writes that when she was working, she couldn't remember conversations she'd had with staff, and that she is unable to "*remember being asked something or full conversations*". She describes her feelings of "*living in a forgetful fog*". She also says that anxiety and depression are controlling her life, and that at least three times a week she doesn't leave the house or get out of bed due to anxiety and depression. She says that she feels down and hopeless and doesn't have coping skills anymore.

In the RFR, the Appellant says that she must "*fight back*" depression every day. She writes that she can barely leave her house due to anxiety and depression, and has trouble remembering things like where she is going and how to do things she used to do. She says that she has no coping skills and no longer

sees her friends as "*just the thought of having one friend visit (her) sets (her) anxiety (into) overdrive*". As a result, she has an extremely isolated, sad and painful life. She also says that she is unable to be in crowded places.

Restrictions in the Ability to Perform DLA

In the MR, the GP indicates that the Appellant has not been prescribed any medications or treatments that interfere with her ability to perform DLA. Where asked to provide any additional information that might be considered relevant in understanding the impact of the Appellant's medical condition on daily functioning, the GP has written "*(The Appellant) is highly motivated to improve but her symptoms impair her daily. In the past she was able to function very well in a managerial position, therefore huge change in function with current impairments.*"

In the AR, the GP states that the Appellant is independent with respect to all tasks for the DLA of personal care, adding the comment *"But if joints are sore will take somewhat longer*". Regarding basic housekeeping, the GP indicates that the Appellant takes significantly longer than typical, adding "*Tires and needs to rest*". With respect to the DLA of shopping, the GP indicates that the Appellant is independent with all tasks except carrying purchases home and writes that the Appellant uses a trolley as an assistive device to carry her shopping bags. Regarding the other listed DLA, the GP indicates that the Appellant is independent with all aspects of paying rent and bills and managing medications, and with some aspects of meals (specifically meal planning and storage of food) but takes significantly longer than normal with food preparation and cooking ("*due to polyarthralgia and fatigue … sore to chop/stir/lift/carry and fatigue with standing*"). With the transportation DLA tasks, the GP indicates that the Appellant is independent with using transit schedules and arranging transportation but requires continuous assistance from another person in using public transit ("*sore/fatigued to walk to/from and unable to stand on transit*") and takes significantly longer than typical for getting in and out of a vehicle ("*sore joints, therefore needs to move slowly as can be painful*"). In the space provided for an explanation or description of the type of assistance required, the GP has written "*Polyarthralgia impacts her (DLA) but (she) is able to perform them except laundry/cleaning … always requires rest and (performs) small tasks at a time … carrying limited to <2 kg*".

In the SR the Appellant states that the more she does, the more intense the pain gets, so she must stop and rest, and that, because her joints are "*cracking and painful*", she is only able to carry things or perform actualities for short periods. She says that she can't do any housework for long due to pain (referring specifically to vacuuming and changing the sheets). She also writes that she often forgets what she's doing, "*(she) frequently leaves faucets and things going*", and that grocery shopping is difficult, adding that "*(she has) a little trolly (she uses). Carrying things is out of the question.*"

In the RFR, the Appellant writes that on a typical day it hurts her so much both physically and mentally that she spends her time in her bedroom as she is unable to do much in her day. She also says that it takes her days to clean her bathroom as she keeps having to sit down and take a break, and that this is how it is for all her DLA. She also states that she uses the elevator in her building and has her groceries delivered.

Need for Help

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

In the section of the AR that asks who provides the help required for DLA, the GP written "*lives alone*". The GP has not indicted that any assistive devices are required in the section of the MR where the prescribed professional is asked what assistance is provided through the use of a specific list of assistive devices. The GP also indicates that the Appellant does not have an assistance animal.

In the RFR, the Appellant says that she gets "*as much help as she can*".

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 the requirements set out in the legislation and on all admissible evidence.

The section of the Notice of Appeal (NOA) asking why the appellant disagrees with the Ministry's RD, the Appellant has indicated that "*justification documents*" will be provided. These documents were submitted on October 1, 2021 (the Appellant's Submission or AS). A list of the documents provided in the AS, together with the comments provided, are summarized below.

New information provided in the AS comprised:

- A two-page undated document titled "*Justification and Documentation for NOA for (the Appellant)*" (the Justification) provided by the Appellant's advocate (the Advocate), who is a registered social worker (SW) and also served as a witness. In the Justification, the Advocate writes that:
  - The Advocate works as a clinical SW at a hospital in the Appellant's community and had met the Appellant on August 29, 2021 when the Advocate was called by the nursing team for an urgent assessment of the Appellant because "*the team informed (the Advocate) that the (Appellant) appeared very depressed, continued to cry incessantly and was expressing suicidal ideation*";
  - The Advocate met with the Appellant "*and obtained the necessary information and history from her. (The Appellant) explained how she just could not get out of bed and for the most part had no desire to go on*", adding that the Appellant could not stop crying throughout the interview;
  - The Appellant explained to the Advocate that she had "*suffered multiple losses*" in the past year "*which had impacted her ability to concentrate, sleep and focus*";
  - After arranging for written consent from the Appellant for the Advocate to act on the Appellant's behalf, the Appellant contacted the Ministry, which confirmed that the Appellant had recently applied for and been denied the PWD designation;
  - Despite the Advocate telling the Appellant not to submit any additional information until the Advocate was ready with their documentation, the Appellant completed and submitted the RFR, which, the Advocate writes "*only speaks to her state of mind, anxiety and inability to retain the simplest of information*";
  - While the GP has accurately described the Appellant's physical conditions limiting her ability to perform DLA, "*a big part of (the Appellant's) capacity is dependent on her mood which is very low … She has suffered numerous losses and (a recent major medical procedure) has only added to her feelings of grief and loss … Therefore, although (the Appellant) has the physical capacity to perform DLA as reported by the (GP), her mental state is preventing her from doing so*". The Advocate also wrote that they noted in their consultations with the Appellant that her insight and judgement are questionable at times, adding "*she is unable to think clearly and her anxiety interferes with her ability to concentrate or retain information resulting in impulsivity and getting easily overwhelmed*"; and,

- In the Advocates opinion the Appellant needs periodic support "*with all areas*" and that "*anxiety appear to play a big part in preventing her from engaging with people and she is further isolating herself. As indicated by the (GP, the Appellant's) level of functioning … is marginal*";

- An annotated copy of the AR (the Second AR), bearing the Advocate's additional comments and explanations as detailed below; and
- A one-page scoring sheet titled "*PHQ-9 and GAD-7*" (the Questionnaire) prepared with the Appellant identified as the person being scored and indicating how often the Appellant has been bothered by a list of 16 specific problems, ranging from "Not at all" to "Nearly every day". Details about the scores provided for more frequently occurring problems are provided below.

Severe Physical Impairment

Physical Functioning

In the section of the Second 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 Advocate has indicated that the Appellant can only walk indoors independently if she is well, and has added the following comment in the appropriate space provided in the AR: "*(The Appellant's) depression results in lack of motivation and this leads to inability to even get out of bed, bathe, or tend to basic hygiene*".

Severe Mental Impairment

Mental Functioning

In the section of the Second AR where the assessor is asked to indicate to what degree the applicant's mental impairment restricts or impacts functioning, the Advocate has changed the GP's assessment of the impact of the Appellant's mental impairment on Insight and Judgement from "*No Impact*" to "*Moderate Impact*" and added the comment: "*Incessant crying, feelings of despair and hopelessness, suicidal ideation – as (observed by the Advocate in the clinic at a hospital in the Appellant's community)*".

In the section of the AR that deals with social functioning, the Advocate has changed the ratings made by the GP from "*Independent*" to "*Periodic Support/Supervision*" in the Second AR for **making appropriated social decisions** (adding the comment: "*Not always! Anxiety leads to making hasty decisions without thinking through consequences*"); **interacting appropriately with others** ("*Sometimes misses social clues*"); and **able to secure assistance from others** ("*Depending on state of mind; for the most part she just freezes in a crisis situation*").

In the Questionnaire, the Advocate indicates that the Appellant scored "Nearly ever day" for how often she experienced 10 of the 16 problems. These problems were: little interest or pleasure in doing things; feeling down, depressed or hopeless; trouble falling or staying asleep or sleeping too much; feeling tired or having little energy; poor appetite or over eating; feeling bad about yourself or that you are a failure and have let yourself or your family down; trouble concentrating on things, such as reading the newspaper or watching television; feeling nervous, anxious or on edge; trouble relaxing; and, feeling afraid as if something awful might happen. Of the other 6 problems, the following 4 were identified as occurring "More than half the days": thoughts that you were better off dead or of hurting yourself in some way; not being able to stop or control worrying; worrying too much about different things; and, being so restless it's hard to sit still.

Restrictions in the Ability to Perform DLA

In the Second AR, where asked to describe the type and amount of assistance required, the Advocate has provided the following additional explanations:

- Regarding **Personal Care** – "*Unable to (perform any of the individually listed tasks, which include dressing, grooming, bathing, etc.) for the most part – not just pain but depression leading to lack of motivation and drive*";
- Regarding **Basic Housekeeping** and **Shopping** – "*… will not get out of bed for days at a time*";
- Regarding the **Meal Planning** task of the **Meal** DLA (but without changing the GP's assessment that the Appellant can function independently in this task) – "*Due to low mood*"; and,
- Regarding **Pay Rent and Bills** and **Medications** – "*Unable to perform these simple tasks – low mood, cyclical in nature"*.

Where asked to provide additional comments in this section of the Second AR, the Advocate has written: "*Only when she is well [depression and anxiety managed] can she successfully complete these (DLA) tasks – not been well in months! Otherwise she stays in bed all day [this can go on for weeks]. Her recent (significant medical procedure) … has made matters even worse – feelings of grief and loss adding to her already existing sense of hopelessness and despair*".

Need for Help

In the section of the Second AR where the assessor is asked to describe what assistance would be necessary if help is required but none is available (a section of the AR that the GP had left blank), the Advocate has written: "*Counselling would really help to manage feelings of grief and loss, depression and anxiety. Cognitive Behaviour Therapy?*

<u>Evidence Presented at the Hearing</u>

The Advocate, who, as explained above, also served as a witness, spoke on behalf of the Appellant at the hearing.

The Advocate said that the Ministry did not have adequate information on the Appellant's mental health, as the GP's reporting focussed on physical issues. The Advocate stated that in their experience there is a tendency for medical practitioners to be dismissive of depression and related mental impairments. In addressing the Appellant's mental health issues, the Advocate said that the Appellant's depression, anxiety and low mood are "*preventing her from get up and go",* leaving her unable to even get out of bed most days. In response to a question from the Panel, the Appellant said that on average she is unable to get out of bed three or four times a week, and that when she is unable to get out of bed, she contacts her brother or sister-in-law who shop for her or make her meals. The Appellant added that she hasn't had a shower in about a week.

The Advocate stated that they submitted a Second AR by adding comments that focus on the Appellant's mental impairments, since, in the Advocate's opinion, the Appellant's physical impairments are accurately represented by the GP. In response to a question from the Panel, the Advocate said that she had meant to change the GP's assessment of the Appellant's ability to manage the meal planning task from "independent" to "unable to perform" but had forgotten to do so.

The Advocate said that the Questionnaire was provided in the AS because the Appellant had scored very high on the frequency with which the Appellant shows difficulties in coping with a range of problems. In response to a question from the Panel, the Advocate said that they had not presented the Questionnaire to the Appellant to complete but had asked the Appellant about how often the problems listed in the Questionnaire occur when they interviewed the Appellant and completed the Questionnaire on the Appellant's behalf from their notes. In response to another question from the Panel, the Advocate

said that they had interviewed the Appellant on August 29, 2021 for about an hour and a half at the hospital after the referral from the nurses and followed up with the Appellant by telephone on five occasions for clarification or additional information.

At the hearing, the Ministry relied on its RD, and stressed that the Advocate cannot use the original AR to add information that was missing from the initial PWD application. The Ministry also said that it had determined that not enough information had been provided with the original application, giving the example of the section of the original AR dealing with mobility and physical ability, where the GP had not provided information about how much longer than typical it takes the Appellant when walking outdoors, climbing stairs, lifting, and carrying and holding.

The Advocate emphasized that they had asked the Appellant not to submit the RFR until the Advocate had had an opportunity to prepare a new AR, but that the Appellant, being forgetful due to her mental impairment, had submitted the RFR without the Advocate's input. The Advocate wanted to make it known that, had they had the opportunity to provide their input, the Ministry would have had the information in the Second AR before the RD was made. The Ministry said that if the Panel confirmed the Ministry's decision, the Appellant was welcome to apply for the PWD designation again and have the Advocate (in their capacity as a SW) complete a new AR. In response to a question from the Advocate, the Ministry said that there was no fast-track application process in these circumstances, and the usual time for the Ministry to complete its review of the application, which is usually about six weeks, would apply.

<u>Admissibility of New Evidence</u>

No new evidence was presented in the NOA.

Section 2(1)(a) of the EAPWDR says that a "*prescribed professional*" includes a person who is authorized under an enactment to practise the profession of SW. The Advocate confirmed at the hearing that the Advocate was a registered under the *Social Workers Act* to practice the profession of SW.

At the hearing, the Advocate said that they had interviewed the Appellant for one and a half hours on August 29, 2021 when the Advocate was called by the nursing team for an urgent assessment of the Appellant and had followed up by telephoning the Appellant on five subsequent occasions to gather additional information about the Appellant's mental health. The Panel notes that there is no requirement in Section 2(2) of the EAPWDA that a prescribed professional must have a specified minimum amount of contact with a PWD applicant to render an opinion. In addition, the Panel considers the evidence to be credible and trustworthy as it is provided by a prescribed professional, the Advocate witnessed the events to which they provided the evidence, and no evidence was presented to suggest that the Advocate's testimony might have been biased.

The Ministry did not object to the Panel considering any of the new evidence. The Panel considered the new written evidence included in the AS and the new verbal evidence presented at the hearing to be evidence that is reasonably required for a full and fair disclosure of all matters relating to the decision under appeal, pursuant to Section 22(4) of the *EAPWDA*.

General principles of weighing evidence require that the evidence be considered based on its credibility and its probative value. The probative value of evidence is the degree to which the information is useful in answering the question which must be addressed; in this case whether the Appellant has a severe mental impairment that directly and significantly restricts DLA, either continuously or periodically for extended periods, and that as a result of any direct and significant restrictions the Appellant requires the

help to perform DLA. The Panel considers the new evidence to be of high probative value as it directly addresses the criteria set out in the legislation.

As discussed above, the Panel notes that the Advocate's assessment of the Appellant's mental impairment varies from the GP's assessment relating to the impact of the Appellant's mental impairment on insight and judgement and some aspects of social functioning, and her ability to perform the DLA of personal care, basic housekeeping, shopping, meal planning, and paying rent and bills. Specifically, the GP had assessed no impact on insight and judgement, whereas the Advocate had assessed the impact to be a moderate one. With respect to social functioning, the GP had assessed the Appellant's ability to make appropriate social decisions, interact appropriately with others, and secure assistance from others as "independent", and the Advocate had assessed them all as "periodic assistance required". Regarding the DLA impacts, the GP had assessed the DLA impacts in the areas listed above to be "independent" or "takes significantly longer", while the Advocate had assessed them all as "unable to perform".

The Panel notes that the Advocate had direct experience observing the Appellant in a crisis situation (i.e. when the Appellant required intervention at the hospital). No evidence has been presented to suggest that the GP has ever observed the Appellant in similar circumstances.

As the new evidence contained in the AS is both from a credible witness and has high probative value, the Panel gives it full weight.

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 because 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.

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

Both the duration of the impairment criterion and the Appellant's age criterion have been determined by the Ministry to have been met and are not at issue in this appeal.

Physical Functioning

The Ministry's position is that it acknowledges that the Appellant has limitations resulting from her polyarthralgia and fatigue, but finds the assessments provided by her GP are indicative of a moderate rather than a severe restriction in physical functioning.

The Appellant's position is that she experiences muscle and joint pain every day, that her GP had asked her to provide information about her functional skills on her best days, and that even on her best days she experiences pain when she walks and is unable to carry things.

Panel Decision

The Panel notes the discrepancy between the Appellant's limitations in physical functioning as assessed by the GP and the Appellant, and that no evidence has been presented to confirm the Appellant's contention that the GP was expressing the Appellant's physical functioning capabilities on her best days. The Panel also notes the lack of information in the AR about how much longer than typical it takes the Appellant when walking outdoors, or how long a "*short period*" of time is regarding her ability to stand. In addition, there are no comments given by the GP in the sections of the AR where space is provided for the assessor to elaborate on the applicant's physical functioning.

The Advocate (who, as an SW, is a prescribed professional) said at the hearing that in their professional opinion the Appellant's physical impairments are accurately assessed by the GP in the original application. In the RD, the Ministry determined that the assessments provided by the GP represent a moderate rather than a severe physical impairment. Based on all of the available evidence, the Panel finds the Ministry's conclusion that the Appellant's physical limitations do not represent a severe physical impairment was reasonable.

Mental Functioning

The Ministry's position is that, while the GP's information provided in the Appellant's application demonstrates that she experiences worsening anxious depression and related symptoms (low mood, low energy, poor sleep, and feeling very exhausted), the Appellant's level of independence is not indicative of a severe mental impairment.

The Appellant's position is that she can't concentrate, has no short-term memory, and that three to four days a week she doesn't leave the house or get out of bed due to anxiety and depression, which she has to fight back every day. She says that she feels down and hopeless and doesn't have coping skills anymore, having trouble remembering things like where she is going and how to do the things she used to do.

Panel Decision

Although the legislation contains no formalized criteria to define what constitutes mild, moderate or severe cognitive deficits, prescribed professionals are required to indicate in the MR and the AR the severity of a mental impairment by assessing the number of skill areas affected by the impairment, the severity of the deficits in psychological processes, and the degree of impairment in skill areas. The Panel notes that the Questionnaire presented by the Advocate in the AS, while not a probative tool used by the Ministry to assess the severity of a mental impairment, could also be reasonably seen to give a useful indication of the severity of an applicant's mental impairment. Therefore, the Panel finds that the information in the Questionnaire is of value in assessing the severity of the Appellant's mental impairment.

As mentioned in Part E above, the GP's assessment in the AR relating to the impact of the Appellant's mental impairment on insight and judgement and some aspects of social functioning varies from the Advocates assessment of the Appellant's capabilities in those areas. In addition, the evidence presented by the GP in the MR and the AR regarding the Appellant's judgement is inconsistent: in the MR, the GP assesses the Appellant as having significant deficits in emotional functioning, which includes judgement, while in the AR the GP indicates that the Appellant's judgement has no impact on her daily functioning.

In the RD, based on the GP's reporting in the MR and the AR, the Ministry assessed the Appellant's mental functioning capabilities as representing a moderate (though worsening) impairment. At the hearing, the Advocate, who is also a prescribed professional, offered the opinion that medical practitioners tend to underestimate the impact of depression and related mental impairments on a patient's ability to function. Whether this generalization is a factor in this case can be a matter for debate, but the Panel has been provided with much additional evidence from a credible source (i.e. the Advocate) to support the conclusion that the Appellant's mental functioning is significantly impaired.

In particular, in addressing the Appellant's mental health issues, the Advocate said that the Appellant's depression, anxiety and low mood were so serious that they prevent her from getting out of bed about half the time (three to four times a week on average, according to the Appellant). While it might have been reasonable for the Ministry to consider the Appellant's mental functioning to represent a moderate mental impairment based on the GP's assessments in the Appellant's application, the Panel considers the evidence presented by the Advocate in the Second AR and at the hearing to clearly support the conclusion that the Appellant has a severe mental impairment.

The Panel finds that the Ministry's decision that the Appellant does not have a severe mental impairment in the RD is not supported by the admissible evidence, in particular by the evidence provided by the Advocate in the Second AR and at the hearing.

Restrictions in the Ability to Perform DLA

The Ministry's position is that, while it acknowledges that the Appellant has certain limitations resulting from polyarthralgia and fatigue and that it is reasonable to expect that she would encounter some restrictions to her ability to perform DLA as a result, the GP has not provided enough evidence to confirm that her impairment significantly restricts her ability to perform DLA continuously or periodically for extended periods, and therefore, the legislative criteria have not been met.

The Appellant's position is that on three to four days a week her feelings of grief and loss and her sense of hopelessness and despair are so bad that she spends the day in bed. As a result, she is unable to perform DLA about half the time, and a recent medical procedure has made matters worse.

Panel Decision

DLA are defined in Section 2(1) of the EAPWDR and are also listed, in an expanded form and using different language, in the MR and in the AR. For example, the DLA of "*prepare own meals*" in EAPWDR Section 2(1) appears in the AR as "*meal planning*", "*food preparation*", "*cooking"* and "*safe storage of food*".

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 term DLA appears in EAPWDA Section 2(2)(b) in the plural ("daily living activit<u>ies</u>"), which means that at least two of the activities listed in Section 2(1) must be significantly restricted for this legislative criterion to be met.

Section 2(2)(a) of the EAPWDR defines "*prescribed professional*" to include both a "*medical practitioner*" and a "*social worker*". Therefore, both the GP and the SW are considered prescribed professionals for the purpose of providing opinions regarding the nature of the Appellant's impairment and its impact on the performance of DLA. The term "*directly*" means that there must be a causal link between the severe impairment and the restriction. The direct restriction must also be significant. There is also a component

related to time or duration - the direct and significant restriction must be either continuous or periodic. If periodic, it must be for extended periods.

In the MR and the AR, prescribed professionals are instructed to check marked boxes and to provide additional explanations; for example, a description of the type and amount of assistance required and the frequency and duration of periodic restrictions. Consistent with the instructions provided in the MR, the GP did not complete the DLA capabilities section of the MR because the GP was also completing the AR and was required to provide the DLA performance assessments in that document.

As mentioned in Part E above, the GP's assessment in the AR of the Appellant's ability to perform the DLA of personal care, basic housekeeping, shopping, meal planning, and paying rent and bills was generally assessed as "independent", whereas the Advocate assessed the Appellant's capabilities as "unable to perform" in those areas.

As was the case with the Appellant's mental functioning limitations, the Panel notes that it might have been reasonable for the Ministry to consider that the Appellant's DLA are not directly and significantly restricted based on the GP's assessments in the Appellant's application. However, the Panel considers the evidence presented by the Advocate in the Second AR and at the hearing to clearly support the conclusion that the Appellant is directly and significantly restricted in her ability to perform at least four DLA (i.e. personal hygiene and self-care, preparation of her own meals, housework, and shopping for personal needs). As mentioned previously, the Panel considers the Advocate's evidence to be credible and trustworthy because the Advocate, a prescribed professional, had the opportunity to directly observe the Appellant's mental impairments.

Because a direct and significant restriction in the performance of as few as two DLA is required for the legislative criterion to be satisfied and the Advocate provide credible evidence that four DLA were significantly restricted, the Panel finds that the Ministry's decision 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, is not supported by the admissible evidence.

Help with DLA

The Ministry's position is that it cannot be determined that *significant* help is required from others as it has not been established that DLA are *significantly* restricted either continuously or periodically for extended periods.

The Appellant's position is that she is unable to get out of bed or look after herself on her worst days, which is about half the time. As a result, she tries to get as much help as she can from her brother or sister-in-law, who are able to perform some DLA on her behalf.

Panel Decision

Section 2(2)(b)(ii) of the EAPWDA requires that, because of direct and significant restrictions in the ability to perform DLA, a person requires help to perform those activities. That is, the establishment of direct and significant restrictions under section 2(2)(b)(i) is a precondition of meeting the need for help criterion. 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 to perform one or more DLA.

The Panel notes that the Appellant lives alone and about half the time is unable to get up in the morning. As a result, she is unable to perform at least four DLA (personal hygiene and self-care, prepare her own meals, perform housework, or shop for personal needs). At the hearing, the Appellant explained that on the days when she is unable to get out of bed, she contacts her brother or sister-in-law who will shop for

her or make her meals. Some elements of personal hygiene, such as bathing, are simply not performed. At the hearing, the Appellant said that she hadn't had a shower in a week.

The Panel finds that the Ministry's conclusion in the RD that it could not be determined that the Appellant needs significant help from others because it has not been established that the Appellant's DLA are significantly restricted is not supported by the admissible evidence. As indicated above, the Panel has found that the Appellant's DLA are significantly restricted, and it is clear from the admissible evidence that the Appellant frequently requires significant help from others to perform DLA.

Conclusion

Having reviewed and considered all the admissible 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 available 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 – Relevant 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 2021-0186

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

Part H – Signatures	
Print Name Simon Clews	
Signature of Chair	Date (Year/Month/Day) 2021/10/23

Print Name Kulwant Bal	
Signature of Member	Date (Year/Month/Day) 2021/10/23
Print Name Sameer Kajani	
Signature of Member	Date (Year/Month/Day) 2021/10/24