## Part C – Decision Under Appeal

The decision under appeal is the Ministry of Social Development and Poverty Reduction's ("ministry") reconsideration decision dated November 2, 2021, in which the ministry found the appellant was not eligible for designation as a Person with Disabilities ("PWD") under section 2 of the *Employment and Assistance for Persons with Disabilities Act* ("EAPWDA"). At the reconsideration, the ministry found the appellant met the requirements for age and duration (impairment to continue at least 2 years), but was not satisfied that 3 requirements were met:

- severe mental or physical impairment;
- significant restrictions to daily living activities ("DLA"), and
- needs help with DLA.

The ministry found the appellant was not one of the prescribed classes of persons who may be eligible for PWD designation on the alternative grounds set out in section 2.1 of the Employment and Assistance for Persons with Disabilities Regulation ("EAPWDR"). As there was no information or argument provided for PWD designation on alternative grounds, the panel considers that matter not to be at issue in this appeal.

## Part D – Relevant Legislation

The ministry based the reconsideration decision on the following legislation:

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

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

The full text is available in the Schedule after the decision.

## Part E – Summary of Facts

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

**1.** Information from the ministry's *Record of Decision* which stated that the PWD application was received on August 12, 2021 and denied on September 2, 2021. On October 4, 2021, the appellant submitted a *Request for Reconsideration* ("RFR") asking for an extension of time to submit information as his family doctor was away. On November 2, 2021, the ministry completed the review of the RFR finding that the appellant met only 2 of the PWD criteria.

**2.** The RFR signed by the appellant on October 3, 2021, "please extend reconsideration time" to November 2, 2021. The appellant attached a note from a family physician ("Dr. S.") confirming that the appellant's usual doctor at the clinic ("Dr. G.") was away until October 12, 2021. On October 18, 2021, the appellant submitted a note from Dr. G. dated October 14, 2021, that set out employment limitations due to the appellant's ongoing medical conditions: "patient can work for a duration of 1.5 hours at a time and requires 1-2 breaks in that time."

On October 18, 2021, the appellant provided a 1-page submission prepared by a friend ("RFR submission") that set out the appellant's argument for the reconsideration; described ongoing treatment for his chronic hemorrhoids/fissure at a specialized clinic ("Colorectal health centre"), and summarized his restrictions in employment. The appellant described 3 years of treatment for chronic hemorrhoid/fissure pain including several medications as well as the application of rubber bands. The appellant said that the health centre's doctor told hm the condition keeps coming back and the appellant will have to live with it.

**3.** The PWD application comprised of:

- the *Applicant Information* (self-report - "SR") dated June 13, 2021,
- a *Medical Report* ("MR") dated July 21, 2021, completed by Dr. G. who has known the appellant since 2016, and has seen him 11 or more times in the past 12 months, and
- an *Assessor Report* ("AR") dated July 21, 2021, also completed by Dr. G. who said they have known the appellant since 2018. Dr. G. indicated that file/chart information was used to complete the AR.

**4.** The ministry's PWD *Decision Summary* with attached letter dated September 2, 2021, in which the ministry found that the appellant met 2 of the criteria for PWD designation.

*Summary of relevant evidence from the application*:

**SR**

The appellant reported that his medical conditions include:

- chronic depression/anxiety ("more than 13 years") that has worsened;
- chronic knee pain ("more than 13 years");
- chronic fissure/hemorrhoid ("more than 15 years") for which he has received treatment for the past 3 years at the Colorectal health centre;
- heart issues.

*Symptoms*

The appellant described feeling anxious with a racing heart, and worsening palpitations. The appellant said his blood pressure is high and his heart rate gets too fast.

*Functional limitations*

- The appellant said he cannot stand for more than 10 minutes (due to knee pain).
- The appellant described his struggles with sleeping.

**MR**

*Diagnosis*

In section A, the appellant is diagnosed with depression/anxiety (date of onset 13 years ago), and knee pain. Under *Health History* (section B) Dr. G. said the appellant has "low mood, hard to participate, difficult to walk."

*Degree and course of impairment*

In section C, Dr. G. indicated that the appellant requires an increased dose of antidepressants to help his situation.

*Functional skills - physical impairment*

In section D (1-4) Dr. G. indicated the appellant can walk less than 1 block unaided on a flat surface, climb 2-5 steps unaided, lift under 5 lbs., and he has no limitation with *remain seated*.

*Functional skills - mental impairment*

In section D (5-6) Dr. G. indicated the appellant has no difficulties with communication. Question 6 asks whether there are *any significant deficits with cognitive and emotional function*? Dr. G. checked *yes*, indicating the appellant has significant deficits with *Emotional disturbance*. The doctor left *Comments* (section F) blank.

*Daily living activities*

Dr. G. checked *yes*, the appellant's medications interfere with his ability to perform DLA. The appellant requires the medications "lifelong" for depression/anxiety (escitalopram), hemorrhoids (anusol), and heart symptoms (nitroglycerin).

Dr. G. indicated that all of the DLA listed on the form are continuously restricted by the appellant's impairment, comment: "significant fatigue makes doing the above difficult."

- *Personal self-care*
- *Meal preparation*
- *Management of medications*
- *Basic housework*
- *Daily shopping*
- *Mobility inside the home*
- *Mobility outside the home*
- *Use of transportation*
- *Management of finances*
- *Social functioning* (comment: "anhedonia due to his depression").

*Help required*

In section B, Dr. G. checked *no*, the appellant does not require any prostheses or aids for the impairment.

**AR**

*Physical impairment*

Dr. G. indicated the appellant takes significantly longer than typical with most of the physical abilities listed on the form: walking (indoors and outdoors), climbing stairs, and standing (comment: "due to fatigue"). Dr. G. check marked *independent* for lifting and carrying/holding.

*Mental impairment*

Dr. G. indicated the appellant has good communication skills for all areas listed on the form: speaking, reading, writing, and hearing.

Dr. G. checked that the appellant's mental impairment has no impact for 12 of the 14 areas of cognitive and emotional functioning listed in section B-4:

- *Bodily functions*
- *Impulse control*
- *Insight and judgment*
- *Attention/concentration*
- *Executive*
- *Memory*
- *Motivation*
- *Motor activity*
- *Language*
- *Psychotic symptoms*
- *Other neuro-psychological problems*.
- *Other emotional or mental problems*.

Dr. G. checked *moderate impact* for 2 areas:

- *Consciousness* (comment: "fatigue")
- *Emotion*

In Section E - *Additional Information*, Dr. G. wrote, "low mood, feeling anxious." Dr. G. indicated the appellant's conditions are severe and prolonged (comment: "symptoms greater than 15 years"). Dr. G. stated that medications have helped but the appellant "gets a lot of side effects so symptoms have not improved."

*Daily living activities*

For Part C, Dr. G. checked *independent* for all areas of the all DLA listed on the form:

- ***Personal Care***: *Dressing*, *Grooming*, *Bathing*, *Toileting*, *Feeding self*, *Regulating diet*, *Transfers* (bed and chair)
- ***Basic housekeeping***: *Laundry*, *Basic housekeeping*
- ***Shopping***: *Going to and from stores*, *Reading prices and labels*, *Making appropriate choices*, *Paying for purchases*, *Carrying purchases home*
- ***Meals***: *Meal planning*, *Food preparation*, *Cooking*, *Safe storage of food*
- ***Pay rent and bills***: *Banking*, *Budgeting*, *Pay rent and bills*
- ***Medications***: *Filling/refilling prescriptions*, *Taking as directed*, *Safe handling and storage*
- ***Transportation****: Getting in and out of a* vehicle, *Using public transit*, *Using transit schedules and arranging transportation*

Under *Additional comments* for the above DLA, Dr. G. wrote: "can do tasks but hard to do due to fatigue"

- ***Social Functioning***: *Appropriate social decisions*, A*ble to develop and maintain relationships*, *Interacts appropriately with others*, *Able to deal appropriately with unexpected demands*, *Able to secure assistance from others*

Dr. G. indicated the appellant has good functioning with his immediate and extended social networks.

In Section E - *Additional Information*, Dr. G. wrote, "has anhedonia (does not want to do anything) due to depression, significant fatigue/anhedonia making it hard to do his ADLs. He notes all household tasks are difficult for him."

*Help required*

Dr. G. indicated the appellant lives with family who help him with DLA (sections A and D). No assistive devices were indicated (comment: "none"). Dr. G. checked *no* the appellant does not have an assistance animal.

**Additional submissions**

With the consent of both parties, the appeal proceeded as a written hearing pursuant to subsection 22(3)(b) of the *Employment and Assistance Act* ("EAA"). The Tribunal granted an granted a 2-week adjournment as requested by the appellant, to give him more time for written submissions.

Subsequent to the reconsideration decision the appellant submitted the following evidence to the Tribunal requiring an admissibility determination under section 22(4) of the EAA. All documents were received at the Tribunal on December 21, 2021 and forwarded to the ministry for review.

**1.** A 1-page typed submission ("appeal submission") prepared by a friend, in which the appellant stated his argument and provided additional detail about his medical conditions:

- The ministry approved the appellant's application for *Persons with Persistent Multiple Barriers* to employment ("PPMB") based on health conditions that have been getting worse.
- The appellant's knee pain is continuous and severe and requires a medical knee brace and walking cane which were prescribed by Dr. S. (a family doctor at the appellant's usual clinic).
- The appellant is more than 30 lbs. overweight which increases his problems with mobility, knee pain, and sitting. Dr. S. also prescribed a medical seat cushion.
- The appellant has a migraine that is getting worse, is in constant pain every day due to several health issues, and cannot manage his life without painkillers. He described lying down and sleeping "the whole day" and said that his heart races significantly even with small movements. In the mornings, the appellant "felt his head stuck on the pillow and I could not leave the bed." The appellant reported feeling fatigued most of the time, forgetting everything easily, and having things fall out of his hands quite often. The appellant said he is unable to work at all now.
- The appellant said that his landlord helps him with shopping and cooks for him sometimes. Otherwise, he only eats fast food or canned, ready to eat food because "cooking is impossible for me."

**2.** A copy of a prescription from Dr. S. dated November 18, 2021: brace for left knee pain.

**3.** A copy of a prescription from Dr. S. dated November 24, 2021: seat cushion for hemorrhoid pain, and a walking cane for left knee pain.

**4.** A tele-health note from Dr. G. dated December 18, 2020. The note states the appellant has major depressive disorder and has been taking an anti-depressant medication for more than 10 years with the dose increased a few months ago. The appellant is "feeling unwell, head is heavy, unable to get up from bed, hemorrhoid and knee pain, patient denies any suicidal ideation or harm intent. No new issues noted." Dr. G. recommended counselling services for the appellant's depression because further increasing the does of the anti-depressant is not an option "due to increased Qtc" (heart rate interval). The appellant refused counselling and wants to try different medications at this point. Dr G. discussed the success and evidence of counselling combined with medication and

will switch the appellant to a different medication (Zoloft) and prescribe a repeat electrocardiogram ("ECG") in 1 month.

**5.** A *Certificate of Health Status* from Dr. G. dated December 2, 2021, stating that the appellant is off work due to medical conditions that are impacting his ability to do occupational tasks. The return-to-work date is uncertain and dependent on reassessments of clinical progress.

**6.** A letter from a doctor at the Colorectal health centre, dated July 4, 2019. The letter indicates the appellant was diagnosed with hemorrhoids and fissure with symptoms including bleeding and pain that have been present for several years. The appellant has not had abdominal pain or weight loss and his clinical history is unremarkable with no previous history of colorectal problems, significant diseases, or family history of cancer.

An imaging test (procto-sigmoidoscopy) showed a posterior anal fissure and hemorrhoids with other clinical features absent or normal. The doctor prescribed medication, and banding treatment which was performed in successive weekly sessions. The appellant was counselled to take a dietary fibre supplement, increase his intake of water, and change his toileting habits. The appellant requires an annual follow up examination and annual fecal occult blood test.

**7.** A referral from the Colorectal health centre (undated) to another doctor for "severe anal fissure." The referral indicates the appellant is taking the anti-depressant medication prescribed by Dr. G. in the tele-health note of December 18, 2020.

**8.** A copy of a *Health Assessment* from the appellant's PPMB application (section 1-C). The assessment was completed by a family physician ("Dr. K.") on October 5, 2019. The assessment included the following evidence:

- The appellant's health conditions include chronic depression and anxiety (since 2009), knee pain (since 2019), and hemorrhoids (since 2018).
- The conditions are episodic and do not recur predictably, comment: "it can fluctuate but the condition is present most of the time." The appellant is suffering from chronic depression/anxiety that is ongoing and fluctuates depending on stressors. The appellant has "low interest and motivation to perform activities necessary for executive functioning." The appellant "has problems with concentration and memory secondary to his frequent mood changes." The appellant probably does not register information "most of the time" to remember later. The hemorrhoids and knee pain "are just regular health issues but put an extra load mentally on him to have something extra to worry about."

*Admissibility of additional evidence*

The ministry did not raise any objections to additional documents. With the exception of the *Certificate of Health Status* which addresses employability but none of the factors relevant to PWD eligibility, the panel admits the documents under section 22(4) of the EAA as evidence that is reasonably required for a full and fair disclosure of all matters related to the decision under appeal. The panel finds that the appeal submission, prescriptions for assistive devices, tele-health note, and PPMB *Health Assessment* contain information that is directly related to PWD eligibility criteria including descriptions of the appellant's functional restrictions and need for help.

The panel acknowledges that the PPMB medical report was written for an application that assesses barriers to employment but notes that it has detailed information about the appellant's depression and other conditions from a general perspective without any reference to employability. The letter and referral regarding the appellant's fissure/hemorrhoid condition are especially relevant to the appeal as they confirm a diagnosis that the ministry said was not mentioned in the PWD medical reports or the note from Dr. G. submitted with the RFR.

The ministry did not submit any new evidence. In an email to the Tribunal, the ministry stated that the reconsideration summary is the ministry's submission on appeal. The panel will consider the arguments of both parties in Part F - *Reasons*.

## Part F – Reasons for Panel Decision

The issue on appeal is whether the ministry's decision that found the appellant ineligible for PWD designation because not all the criteria under section 2 of the EAPWDA were met, was reasonably supported by the evidence or was a reasonable application of the legislation in the circumstances of the appellant. Specifically, was the ministry reasonable to find that a severe mental or physical impairment, significant restrictions to DLA, and help with DLA were not established on the evidence?

***Severe mental or physical impairment***

*Appellant's argument*

In the RFR submission, the appellant argued he has a severe impairment of physical functioning because Dr. G. selected "the most restricted and limited choices" in the MR and AR for functions such as walking, climbing stairs, and lifting and indicated the appellant is very slow with mobility and with standing due to knee pain and fatigue. The appellant argued that even though Dr. G. indicated that standing is independent and there are no restrictions with sitting, the appellant can only stand for maximum 10 minutes, and sit for up to 15-30 minutes with assistance from a special cushion for his hemorrhoids/fissure.

In the *Notice of Appeal*, the appellant argued the reconsideration decision was not rational or supported by evidence. In the appeal submission, the appellant argued that his hemorrhoids/fissure is severe and periodic for an extended period of time as confirmed by the Colorectal health centre. The appellant argued his knee pain is also continuous and severe as it requires him to use a knee brace and cane for mobility.

Regarding his depression and anxiety, the appellant noted that he feels anxious; has worsening heart palpitations; his heart rate gets too fast, and he has difficulty sleeping (feels fatigue most of the time). In the appeal submission, the appellant argued that major depressive disorder (diagnosed by Dr. G.) is the "highest level of depression if it continues for 2 weeks" but in his case, it has continued for more than 12 years. The appellant argued that his mental health condition also affects his weight ("30 lbs. overweight") making his knee pain and problems with sitting more severe.

*Ministry argument*

The ministry argued there was insufficient evidence to establish a severe impairment of physical or mental functioning. The ministry acknowledged that Dr. G. reported restrictions with physical functions such as walking, climbing stairs, and lifting, and indicated the appellant takes significantly longer for most physical activities due to fatigue. However, the ministry argued the information did not establish a severe impairment because Dr. G. did not indicate how much additional time was needed, and in the AR, lifting was check marked *independent.*

The ministry said it was unable to assess the appellant's functioning due to the hemorrhoids/fissure because no information about that condition was provided by Dr. G. or another medical professional. The ministry argued that a severe physical impairment was not established on the evidence because the need for assistance was not indicated for activities requiring mobility or lifting/carrying.

Regarding a mental impairment, the ministry argued the appellant's depression/anxiety was not severe despite Dr. G.'s comments regarding the appellant's "severe and prolonged" symptoms of low mood, anxiety, and fatigue from his medication. The ministry said the appellant does not have a severe mental impairment because only one significant deficit in cognitive and emotional functioning (*Emotional disturbance*) was reported in the MR with no major impacts indicated in the AR.

The ministry argued that the moderate impacts for *Consciousness* (fatigue) and *Emotion* reported in the AR were not supported by the evidence for DLA including activities related to decision-making about personal care, finances, and social functioning which were assessed as independent. The ministry argued that the information provided "is more in keeping with a moderate impairment, as opposed to a severe mental impairment."

*Legislative requirement*

To be eligible for PWD designation, the legislation (EAPWDA section 2) requires several criteria to be met including the minister being satisfied that the applicant has a severe mental or physical impairment. The ministry found the appellant was not eligible for PWD because not all of the five criteria were met. "Severe" is not defined in the legislation but in the ministry's view, the diagnosis of a serious medical condition does not in itself establish a severe impairment of mental or physical functioning. The PWD medical reports ask for information on functional skills and abilities and the panel finds that the ministry's assessment of severity based on daily function is a reasonable interpretation of the legislation.

*Mental and physical impairment - specific considerations*

To assess the severity of a mental impairment, the ministry considers the extent of any impact on daily functioning as evidenced by limitations/restrictions with mental functions and emotion. The ministry does not only look at the diagnosis or a medical practitioner's comment that the condition is "severe" but considers functional abilities and whether there are restrictions to DLA requiring mental/social functioning including any safety issues. The panel finds that an assessment of severity based on cognitive, emotional, and social functioning is a reasonable interpretation of the legislation.

To assess whether the applicant has a severe physical impairment, the ministry considers information on the degree of restrictions to physical functioning and whether the applicant requires significant help or any assistive devices to manage physical tasks. The panel finds that the assessment of severity based on daily physical functioning is a reasonable interpretation of the legislation.

***Panel's decision - severe mental or physical impairment***

The panel finds that the ministry's decision (no severe physical or mental impairment) is not reasonably supported by the evidence. The panel has taken a cumulative view of the evidence and finds that the documents submitted on appeal add a detailed narrative to the PWD medical reports (MR, and AR) and updated information from the appellant. The additional information is also recent, with the documents dated between July 2019 and November 2021. For these reasons, the panel gives significant weight to the additional information.

*Evidence for severe physical impairment*

The panel finds that the additional information supports Dr. G's original check marks and comments regarding the appellant's significant difficulties with walking and other physical functions due to both knee pain and chronic fatigue from depression and medication side effects. Specifically, restrictions for walking, climbing stairs, and lifting were reported in both the MR and AR ("difficult to walk", can walk less than 1 block, climb 2-5 steps, and lift less than 5 lbs). As the appellant noted, Dr. G.'s ratings on the scale in the MR indicated a high degree of restriction for walking and lifting.

Dr. G. gave climbing stairs a more moderate rating (2-5 steps unaided) but indicated in the AR that the appellant performs most physical functions slowly, taking significantly longer than typical with walking, climbing stairs, and standing. The appellant reported being able to stand for 10 minutes (maximum) which is consistent with fatigue as described by both Dr. G. and the appellant throughout the submissions. Based on these ratings of physical functions including the appellant being "very slow", the panel is satisfied that the evidence establishes that knee pain, as well as fatigue/anhedonia from depression, results in a severe physical impairment.

The ministry argued the appellant was independent with all physical functions and DLA involving physical movement despite the functional limitations reported in the PWD application. However, the prescriptions submitted on appeal confirm that the appellant needs assistive devices (knee brace, walking cane, and seat cushion) to perform physical activities. The appellant indicated in the RFR submission that he can sit for a low to moderate duration (15-30 minutes) only with the assistance of a special cushion for his hemorrhoids/fissure, and he needs the brace and cane for mobility. The panel finds that the need for assistive devices is consistent with the degree of restrictions reported in the MR, AR, and additional submissions and is further evidence of a severe physical impairment.

The ministry said the hemorrhoid condition was not diagnosed in the MR or additional medical information for the RFR, but the panel notes that in the MR the appellant was prescribed a medication for his hemorrhoids (anusol). The appeal submissions provide detailed information about the hemorrhoid condition. In the PPMB *Health Assessment*, Dr. K. stated that although the appellant's knee pain and hemorrhoids are "regular health issues", they are impacted by depression and anxiety, giving the appellant something extra to worry about.

The letter from the Colorectal health centre did not indicate any unusual or medically remarkable aspects to the appellant's hemorrhoid/fissure diagnosis but indicated the condition is ongoing and requires repeat treatments. The subsequent referral from the Colorectal health centre indicated a "severe anal fissure" and the tele-health note from Dr. G. confirmed hemorrhoid pain. From the appellant's perspective, the prolonged, ongoing nature of the condition and restrictions with sitting make it a severe impairment. Based on the sensitive nature of the condition, ongoing need for treatment, subsequent description of "severe", and need for an assistive device, the panel is satisfied that the hemorrhoid condition contributes to a severe impairment of physical functioning.

The evidence indicates the appellant's physical impairments (knee pain, fatigue, and chronic hemorrhoids/fissure) restrict his mobility and other physical functions such as standing and sitting, to the extent that the appellant requires assistive devices and finds physical tasks very slow and arduous. The appellant's mental health conditions further exacerbate his difficulties with physical functioning with symptoms of anhedonia that make it very hard for him to "get moving." The panel finds that the reconsideration decision is not reasonable because the evidence in its entirety establishes a severe physical impairment under section 2(2) of the EAPWDA.

*Evidence for severe mental impairment*

The panel finds that the additional information supports Dr. G's original check marks and comments regarding the appellant's significant difficulties with depression and anxiety including his chronic low mood, and severe anhedonia and fatigue due to his mental health conditions and medication side effects.

Dr. G. said the conditions are "severe and prolonged" but the ministry argued there were few significant impacts for cognitive and emotional functioning. The panel acknowledges that the information in the MR and AR only indicated significant impacts for emotion and consciousness (fatigue) but notes that the PPMB *Health Assessment* provided additional details about the appellant's cognitive and emotional functioning. The assessment indicated that the appellant's mood fluctuates but depression is with him "most of the time" impacting his motivation, executive function, concentration and memory due to "frequent mood changes." The appellant noted in the appeal submission that he forgets most things easily. The panel finds that the additional evidence of restrictions for emotional and cognitive functions such as motivation and memory would impact DLA as well and supports the finding of a severe mental impairment.

Dr. G. further commented on the appellant's "significant anhedonia" in the MR, AR, and tele-health note, and noted the increase in his medication ("taper up anti-depressants to help his situation"). The appellant characterized his major depressive disorder as the "highest level of depression" as it has continued for more than 12 years despite medication. The additional evidence not only confirmed a greater degree of restriction with cognitive and emotional functioning but supports the appellant's view that his conditions have recently worsened. The increased doses of anti-depressant medications is described in both the MR and tele-health note, and the appellant now requires several assistive devices for his impairment which the panel accepts are exacerbated by fatigue and anhedonia as well as by physical limitations.

The appellant was diagnosed with major depressive disorder and anxiety and experiences significant fatigue and anhedonia. The appellant's emotion and cognition are impacted "most of the time" as confirmed by the submissions in the record. The panel therefore finds that a severe mental impairment is established on the evidence and the reconsideration decision is therefore not reasonable under section 2(2) of the EAPWDA.

***Restrictions to DLA***

*Appellant's argument*

In the RFR submission, the appellant said that he might be independent in some aspects of DLA but he finds activities very difficult and time-consuming due to his physical limitations, fatigue, and low mood. The appellant also focused on his inability to work for more than 1.5 hours per day with the need for 1-2 breaks during that time.

In the appeal submission, the appellant said he is in "constant pain everyday" and needs to rely on painkillers and assistive devices to manage his daily life. The appellant said he needs help with shopping and cooking as he drops things quite often. The appellant described lying down or sleeping "the whole day" and said he cannot leave his bed in the morning because he feels fatigued most of the time, and his heart races even with small movements.

*Ministry argument*

The ministry argued there was insufficient information from Dr. G. to confirm that DLA were directly and significantly restricted either continuously or periodically for extended periods. The ministry noted that Dr. G. did not indicate the appellant needs assistance with tasks or takes longer to complete them. The ministry noted that the appellant was assessed as independent with all DLA in the AR despite activities being difficult for him due to fatigue and anhedonia. The ministry noted that the appellant was able to maintain good functioning with his social networks.

*Legislative requirement*

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

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

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

DLA are defined in section 2(1) of the EAPWDR and are also listed in the MR, with additional details in the AR. Therefore, the doctor or other practitioner completing these forms has the opportunity to indicate which, if any, DLA are significantly restricted by the applicant's impairments either continuously or periodically for extended periods and to provide additional details.

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

The appellant focused on his restrictions in employment and inability to work at all with the worsening of his impairment; he provided notes from Dr. G. regarding his employment restrictions. The appellant argued that he needs "good benefits to survive" given that he could earn only a very small income from work if able to work part-time. **It is important to note that under the legislation, the inability to work or manage job or training duties, is not considered a DLA. Also, the ministry cannot consider financial need in determining PWD eligibility.**

***Panel's decision - restrictions to DLA***

The panel finds that the ministry's decision that DLA are not significantly restricted by a severe impairment, either continuously or periodically for extended periods is not reasonably supported by the evidence. The panel has taken a cumulative view of the evidence from prescribed professionals and finds that the narrative comments in the MR and AR and documents submitted on appeal, provide sufficient detail to confirm restrictions to DLA and support Dr. G.'s checkmarks in in the MR which indicated that all DLA are continuously restricted. The comments from doctors throughout the submissions, with additional details from the appellant, confirm that restrictions are due to the appellant's depression and anxiety, physical pain, and fatigue.

For example, Dr. G.'s comments throughout the MR and AR indicated that a significant degree of anhedonia and fatigue makes household tasks and other DLA difficult for the appellant on an ongoing basis. In the MR, Dr. G. assessed all DLA as continuously restricted (section E) and commented that anhedonia and low mood due to depression make it "hard to participate" and restrict social functioning. The evidence indicates that significant fatigue makes all DLA difficult for the appellant.

Side effects from the appellant's medications also interfere with his ability to manage DLA. Dr. G. indicated that due to side effects, the appellant's symptoms of low mood and anxiety have not improved with medication. Dr. G. indicated the appellant required a different anti-depressant medication due to heart symptoms ("increased Qtc") that occurred when his medication was increased. This is consistent with the appellant's recent information in the appeal submission ("I lay down and sleep the whole day and my heart races significantly even with small movements"). In the MR, the appellant was prescribed a medication (nitroglycerin) indicating that he continues to experience heart symptoms.

The panel acknowledges that in the AR, all DLA were assessed as independent on the checklists (Section C) with the caveat "can do tasks but hard to do due to fatigue…significant fatigue and anhedonia make it hard to do his ADLs…he notes all household tasks are difficult for him." In the RFR submission, the appellant said that DLA are very slow and difficult for him even though he "might be independent in some aspects most of the time."

Despite these comments about independence, the panel finds that the evidence from a prescribed professional regarding significant fatigue and anhedonia demonstrates that the appellant is never able to manage DLA in a consistent and sustained manner. The panel finds that despite the inconsistency in the checkmarks between the MR and AR (continuously restricted versus independent for all DLA) it was unreasonable for the ministry to base the reconsideration decision on the tick boxes in the AR given Dr. G.'s narrative comments. The panel finds that the narrative throughout both reports indicated a greater degree of restriction than the moderate degree of restriction suggested by the ministry.

In addition, the panel finds that the medical documents submitted on appeal provide more detailed information about continuous restrictions to DLA. For example, the tele-health note from Dr. G. gave additional detail about the degree of anhedonia the appellant experiences ("feeling unwell, head is heavy, "unable to get up from bed") and supports the doctor's narrative in the AR (the appellant "does not want to do anything"). These descriptions of anhedonia are consistent with the appellant's reports of feeling fatigued most of the time, spending entire days lying down, and having difficulty getting out of bed every morning. The evidence indicates the appellant's DLA are significantly restricted where he is spending large amounts of time in bed due to physical pain and depression.

The panel gives further weight to the PPMB *Health Assessment* in which a prescribed professional (Dr. K.) indicated that DLA are restricted continuously given the appellant's "frequent mood changes" and his "low motivation to perform activities necessary for executive functioning." This information is consistent with the MR as DLA involving motivation, executive function, and attention (personal care, and management of finances and medications) were all continuously restricted. The panel finds that the evidence from Dr. G. and Dr. K. confirms that at least 2 DLA are directly, significantly, and continuously restricted by the appellant's severe physical and mental impairments as required by the legislation and the BC Supreme Court in *Hudson*. The DLA that are restricted include physical tasks such as housework and shopping, and "mental DLA" such as making decisions around personal care and finances.

The ministry said that the appellant did not require help with DLA but in the AR, Dr. G. checked that the required help was provided by family (section D) and the additional evidence on appeal confirmed that the appellant does require help with DLA in the form of assistive devices for mobility due to his severe and chronic knee pain and the impact of depression, anxiety, and fatigue. The panel finds that the reconsideration decision is unreasonable because the requirement for restrictions to DLA under subsection 2(2)(b)(i) of the EAPWDA has been established on the evidence.

***Help with daily living activities***

*Appellant's argument*

In the appeal submission, the appellant said he needs assistive devices for activities requiring mobility and his landlord helps him with shopping and cooking. The appellant said he drops things frequently and it is impossible to cook without help.

*Ministry argument*

The ministry acknowledged that the appellant receives help from family. However, the ministry argued that because DLA are not significantly restricted, it cannot be determined that significant help is required.

*Legislative requirement*

Subsection 2(2)(b)(ii) of the EAPWDA requires that, as a result of direct and significant restrictions in the ability to perform DLA, a person requires help to perform those activities. Help is defined in subsection (3) as the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal to perform DLA. An "assistive device" is defined in section 2(1) of the EAPWDA as a device specifically 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.

***Panel's decision - help with daily living activities***

Under the legislation, confirmation of direct and significant restrictions to DLA is a precondition for needing help to perform DLA. The panel found that the ministry's determination that significant restrictions to DLA were not established on the evidence was unreasonable.

*Evidence of help for DLA*

In the MR and AR, Dr. G. wrote "none" when asked if the appellant requires any assistive devices for the impairment. In the AR, Dr. G. indicated the appellant required help from his family to manage DLA. In the tele-health note, Dr. G. indicated the appellant requires counselling support for his depression even though he chooses to rely solely on medication at this time. The prescriptions from Dr. S. confirmed the need for assistive devices and in the appeal submission, the appellant indicated he relies on his landlord to assist with shopping and cooking.

As noted earlier, the evidence confirmed that the appellant does need help with DLA and was recently prescribed assistive devices for his mobility limitations due to knee pain and fatigue from his physical and mental health conditions. Given the supplementary information on appeal, confirming the need for assistive devices, the panel finds that the reconsideration decision is not reasonable. The ministry's conclusion that the criteria for help under subsection 2(2)(b)(ii) of the EAPWDA were not met, is not a reasonable application of the legislation in the circumstances of the appellant.

***Conclusion***

The panel has considered the information in its entirety and finds that the ministry's reconsideration decision was not reasonably supported by the evidence and was not a reasonable application of the legislation. The information before the minister at the reconsideration and the supplementary information on appeal, establishes that all the requirements for PWD designation have been met.

The EAPWDA states that 5 criteria need to met including a severe impairment that significantly restricts DLA to the point that the person requires an assistive device or the significant help or support from another person to perform DLA. The evidence indicates the appellant has met all 5 criteria under section 2 of the EAPWDA. The panel rescinds the reconsideration decision and refers it back to the minister for a determination on the amount of disability assistance. The appellant is therefore successful with his appeal.

## Schedule – Relevant Legislation

**EAPWDA**

**2 (1)** In this section:

"assistive device" means a device designed to enable a person to perform a daily living activity that, because of a severe mental or physical impairment, the person is unable to perform;

"daily living activity" has the prescribed meaning;

"prescribed professional" has the prescribed meaning.

**(2)** The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act if the minister is satisfied that the person is in a prescribed class of persons or that the person has a severe mental or physical impairment that

**(a)** in the opinion of a medical practitioner or nurse practitioner is likely to continue for at least 2 years, and

**(b)** in the opinion of a prescribed professional

**(i)** directly and significantly restricts the person's ability to perform daily living activities either

**(A)** continuously, or

**(B)** periodically for extended periods, and

**(ii)** as a result of those restrictions, the person requires help to perform those activities.

**(3)** For the purposes of subsection (2),

**(a)** a person who has a severe mental impairment includes a person with a mental disorder, and

**(b)** a person requires help in relation to a daily living activity if, in order to perform it, the person requires

**(i)** an assistive device,

**(ii)** the significant help or supervision of another person, or

**(iii)** the services of an assistance animal.

**(4)** The minister may rescind a designation under subsection (2).

**EAPWDR**

**Definitions for Act**

**2 (1)** For the purposes of the Act and this regulation, "daily living activities",

**(a)** in relation to a person who has a severe physical impairment or a severe mental impairment, means the following activities:

**(i)** prepare own meals;

**(ii)** manage personal finances;

**(iii)** shop for personal needs;

**(iv)** use public or personal transportation facilities;

**(v)** perform housework to maintain the person's place of residence in acceptable sanitary condition;

**(vi)** move about indoors and outdoors;

**(vii)** perform personal hygiene and self-care;

**(viii)** manage personal medication, and

**(b)** in relation to a person who has a severe mental impairment, includes the following activities:

**(i)** make decisions about personal activities, care or finances;

**(ii)** relate to, communicate or interact with others effectively.

**(2)** For the purposes of the Act, "prescribed professional" means a person who is

**(a)**authorized under an enactment to practise the profession of

**(i)** medical practitioner,

**(ii)** registered psychologist,

**(iii)** registered nurse or registered psychiatric nurse,

**(iv)** occupational therapist,

**(v)** physical therapist,

**(vi)** social worker,

**(vii)** chiropractor, or

**(viii)** nurse practitioner,

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**Part G – Order**

**The panel decision is: (Check one)** ☒**Unanimous** ☐**By Majority**

The Panel ☐**Confirms the Ministry Decision** ☒**Rescinds the Ministry Decision**

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

**Legislative Authority for the Decision:**

*Employment and Assistance Act*

Section 24(1)(a)☐ or Section 24(1)(b) ☐
Section 24(2)(a)☐ or Section 24(2)(b) ☒

**Part H – Signatures**

| Print Name<br>Margaret Koren | |
|---|---|
| Signature of Chair | Date (Year/Month/Day)<br>2022/01/07 |

| Print Name<br>Katherine Wellburn | |
|---|---|
| Signature of Member | Date (Year/Month/Day)<br>2022/01/07 |
| Print Name<br>David Handelman | |
| Signature of Member | Date (Year/Month/Day)<br>2022/01/07 |