Appeal Number 2021- 0243

Part C – Decision Under Appeal

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the Ministry) Reconsideration Decision (RD) dated December 2, 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 the Appendix

Part E – Summary of Facts

The evidence before the Ministry at the time of the RD included the PWD Application comprised of an applicant information and self report (SR), completed by the Appellant on August 9, 2021, a Medical Report (MR) dated August 6, 2021 and completed by the Appellant's General Practitioner (GP) who has known the Appellant for 25 years and who has seen the Appellant 2 – 10 times in the past year, and two Assessor Reports: one dated October 20, 2021 (the First AR), completed by a Family Physician (FP), as locum for the GP, who first saw the Appellant for the first time on the date that they completed the AR (October 20, 2021), and another Assessor Report (the Second AR) completed by a registered social worker (SW) who had known the Appellant for 5 months when she completed the Second AR and had seen him 2 – 10 times in the past year.

The evidence available to the Ministry at the time of the RD also includes:

- A Request for Reconsideration form (RFR) signed by the Appellant on November 23, 2021;
- An undated letter from a mental health facility associated with a hospital on the Appellant's community confirming that the Appellant saw a medical practitioner at that facility between September 2020 and May 2021 for psychiatric consultation, followed by treatment by a mental health clinician from May 2020 to March 2021;
- A letter dated November 12, 2021 and signed by a mental health clinician from a community health facility on the Appellant's community confirming that the Appellant was admitted to counselling programs at that facility on February 1, 2019, was assigned to one of the counsellors at that facility, and participated in "*one of (the facility's) anxiety mental health groups*" in April 2019; and,
- A 19 page document listing 300 prescriptions for medications prescribed by the Appellant's GP and other medical practitioners between Nov 27, 2014 and Nov 10, 2021 (the Medical History List).

Diagnoses

In the MR, the GP diagnosed the Appellant with the human immunodeficiency virus (HIV) with a date of onset of 2000, depression and anxiety, both with an onset of 2000, cardiomyopathy and ischemic heart disease, both with a date of onset of 2015, and substance use disorder, with a date of onset of 2000.

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 writes that the Appellant suffers from longstanding HIV disease well controlled with HIV medication, and cardiomyopathy and ischemic heart disease restricting his physical abilities with decreased exercise tolerance, associated shortness of breath and angina.

With respect to functional skills, the GP reports that the Appellant can walk 4 or more blocks unaided on a flat surface, climb five or more flights of stairs unaided, lift 7 - 16 kg, and is not limited in the amount of time he can remain seated. In the section of the MR where the prescribed professional is asked to

provide any additional information that might be considered relevant in understanding the significance of the applicant's medical condition and the nature of their impairment, the GP has written "*(The Appellant's) medical condition significantly impacts (his) daily function by reduced mobility (and) exercise capacity* ".

In the section of the First 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 FP has indicated that the Appellant is independent in all listed activities (walking indoors and outdoors, standing, climbing stairs, lifting, and carrying and holding).

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 SW indicates (with additional explanations in *italics*) that the Appellant requires continuous assistance from another person with walking indoors, and outdoors (*takes 3 to 5 times longer than typical, able to walk a maximum 2 blocks without a break outdoors*), requires continuous assistance from another person with climbing stairs (*takes 5 to 6 times longer than typical, requires* elevator), lifting (*chronic low back pain, knee pain*) and carrying and holding (*max. 15 – 35 lbs.*), and requires periodic assistance form another person with standing (*knee pain*). In the space for comments in this section of the AR the SW has written "*Hypertrophic cardiomyopathy causes pain and pressure in chest, extreme fatigue and out of breath. Ongoing heart tests and medications. Chronic low back pain, nerve damage on shoulders, 2 surgeries on right knee*".

In the SR, the Appellant writes "*Sometimes it is physical pain having to go buy groceries. All these issues have affected my heart severely. My heart doesn't pump enough blood. I have an enlarged heart/hypertrophic cardiomyopathy. I get extremely tired just making my bed, taking a shower, or just walking 1 block I get short of breath, having to stop for a few minutes to catch my breath. I am still having test done on my heart because the issues have gotten worse in the last 2 years. Next test is on August 20 and I am HIV. I have a lot of medications for the heart and high blood pressure.*"

In the RFR, the Appellant writes "*(I) have been seeing a cardiologist and he just prescribed a new mediation last week, because I get tired very easy, doing minimum stuff, like just showering. Exercise is not recommended. My heart doesn't pump enough blood, and I get chest pain, just by walking. That's what the new medication will try to see if it helps so I don't feel so tired. I have to take nitroglycerine pumps during the day so I don't get chest pain … I have serious low back problems for years now, from many years of (physical strain from my previous job). I have nerve damage on my shoulders from the same, which I need physio, and I cannot pay at all for that. I only wish I could go to a chiropractor. I don't have the money for that. My knees are destroyed. I had 2 surgeries on my right knee, and it has started to hurt a lot now, don't have money for physio again for that.*"

<u>Severe Mental Impairment</u>

Mental Functioning

In the MR, under Health History, the GP has written that the Appellant suffers from "*depression and anxiety followed by psychiatry, multiple suicide attempts, (and) substance use disorder in remission at present*".

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 "*(The Appellant's medical condition significantly impacts) social interactions, mood disorder*".

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, and motivation, adding the comment "*long history of depression, anxiety. Substance use disorder*".

In the section of the First AR where the assessor is asked to indicate the level of ability to communicate, the FP indicates that the Appellant's abilities are good in all listed areas (speaking, reading, writing and hearing). In the section of the First AR where the assessor is asked to indicate to what degree the applicant's mental impairment restricts or impacts functioning, the FP has indicated a major impact on emotion, insight and judgement, motivation, and other emotional or mental problems; a moderate impact on impulse control and attention/concentration; and no impacts in any of the other listed areas (bodily functions, consciousness, executive functions, memory, motor activity, language, psychotic symptoms, or other neuropsychological problems). No space is provided in the AR form for further explanation or comment. Where asked to provide any other information that might be relevant in understanding the nature and extent of the applicant's impairment, the FP has written "*significant depression, anxiety*".

In the section of the Second AR where the assessor is asked to indicate the level of ability to communicate, the SW indicates that the Appellant's hearing and speaking abilities are good. Regarding reading and writing, the SW indicates that the Appellant's abilities are satisfactory, adding the explanation "*dyslexia*" and the comment "*Not taking any medications for dyslexia because of substance use disorder to Adderall*". 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 SW has indicated a major impact on bodily functions, consciousness, emotion, attention/concentration executive functions, motivation, and motor activity; a moderate impact on memory; a minimal impact on insight and judgement, and language; and no impacts in any of the other areas.

With respect to social functioning, the FP indicates in the First AR that the Appellant needs periodic support or supervision in all areas (making appropriate social decisions, developing and maintaining relationships, interacting appropriately with others, dealing appropriately with unexpected demands, and securing assistance form others). No comments are provided in the space provided in the form to explain or describe the degree and duration of "support/supervision required". The FP also indicates that the Appellant has very disrupted functioning with his immediate social network and good functioning with his extended social network. The FP also left blank the space provided for explanation or description.

In the social functioning section of the Second AR, the SW indicates (with comments in *italics*) that the Appellant requires continuous support from others in making appropriate social decisions and interacting appropriately with others (*Major social isolation and withdrawal. Avoids public spaces and social interactions*); continuous support from others in dealing appropriately with unexpected demands (*Severe anxiety and depression inhibits ability to cope*); and that the Appellant requires periodic support or supervision in developing and maintaining relationships (*Ex-partner of 21 years kicked client out of home. Severe emotional and mental health impacts*), and securing assistance from others (*Reconnected to supports for mental and physical health*). The SW also indicates that the Appellant has very disrupted functioning with both his immediate social network and extended social networks. The SW does not describe the degree of support or supervision required in the space provided or offer any additional comments.

In the SR, the Appellant writes "*I have suffered from mood disorders, and I am clinically depressed. (I) have social anxiety. I have been taking antidepressants and antianxiety pills for more than 15 years … they work, but not completely. Depression is always there, always waiting. I have had 2 suicide attempts, have been seeing by (a) psychologist, and therapist before the attempts and after. I have "addiction" problems as well from Adderall and Ativan. The depression is so strange that taking these drugs makes me feel better and sometimes it is hard to stop. I have been to rehab 3 years ago for 4 months. It is difficult (for me) to concentrate, planning and organizing sometimes is very difficult. Motivation, even with medication is very low. Almost nothing makes me happy. There is very little joy in life. Anxiety could get so strong that I have used a knife to cut my arm just so that I could feel something else. My depression in the last 2 years has worsened to the point that I don't eat for a couple of days. (I) don't shower for 2 or more days. Going outside is almost impossible because I have to see, talk, or deal with people.*"

In the RFR, in addition to restating some of the information provided in the SR, the Appellant writes "*…my head does not function correctly anymore. In the last two and a half years my way of life changed dramatically. I had a partner for 21 years and one day, he kicked me out of our home, with not even shoes or my wallet. Now I believe he had been planning this … Never really being okay or being able to feel happy … (After trying to commit suicide twice I) ended up in the hospital for 3 weeks … I think my mental health makes me disabled, because … I wake up every morning wishing I weren't alive anymore, because I can't enjoy the simple things about life, when my anxiety makes me unable to talk, breath well, go outside to enjoy the air, see people. When my anxiety won't let me sleep for days cause I can't stop my brain from worrying, that makes me disabled, not functioning like a regular person … I have so many issues, mental issues, with being a homosexual. I have never liked myself for this. I wish I was a normal hetero person; and me having HIV, the thought of that makes me want to end my life, daily … I was prescribed … amphetamines for my depression, to get me out of being depressed and they worked good. I (have an obsessive-compulsive disorder) and the amphetamines worked good for that as well and even for my dyslexia. But they worked so good I became addicted to them. The depression is so strong I need amphetamines daily to perform normal. I chose to stop them cause I didn't want to be addicted to them. I didn't want to take more pills. Plus, the bill for the amphetamines prescribed was 200 dollars a month. So now I don't take them anymore and I am back to not functioning without them. Well, not able to think and do normal stuff, makes me disabled. … Anxiety when it is as much as I get makes you nervous all the time and worried about everything. Simple things like, worried if I am going to be late for something, they become a big thing for me to deal with. I can't control that. It just happens and its always there. This makes living difficult and its always there … It doesn't go away with a pill. All the "medication" I take, so you can see the amount of antidepressants, amphetamines and anti-anxiety pills I take to deal with the depression and I still don't enjoy "living."*

Restrictions in the Ability to Perform DLA

In the MR, the GP indicates that the Appellant has been prescribed medications or treatments that interfere with his ability to perform DLA, adding the comment "*Beta blockers decrease exercise tolerance*" and indicating that the anticipated duration of medications or treatments is indefinite. 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 "*Medical condition significantly impacts daily function by reduced mobility, exercise capacity.* "

In the First AR, the FP states that the Appellant is independent with respect to all listed DLA tasks.

In the Second AR, the SW states that the Appellant is independent in performing the following listed DLA tasks: the personal care DLA of toileting and feeding himself, the shopping DLA task of reading labels, the safe storage of food, banking, paying rent and bills, filling and refilling prescriptions and the safe storage of medications. The SW indicates that the Appellant requires the periodic support from another person for the following DLA tasks (with the SW's explanations provided in *italics*): dressing, grooming, bathing (*takes 5 to 6 times longer than typical, requires prompts*), regulating diet (*requires prompts*), transferring in and out of bed or a chair (*takes 3 to 5 times longer than typical, requires prompts*), laundry and basic housekeeping (*takes 5 to 6 times longer than typical, requires prompts, limited mobility*), meal planning, food preparation and cooking (*takes 3 to 5 times longer than typical, requires support*), budgeting, taking medications as directed (*occasionally skips medications*), and getting in and out of a vehicle (*takes 3 to 5 times longer than typical, limited mobility*). The SW also indicates that the Appellant requires continuous support from another person or is unable to perform the DLA of going to and from stores, making appropriate shopping choices, paying for purchases and carrying purchases home (*requires support*), and using public transit and transit schedules or arranging transportation (*severe anxiety*). The SW adds the following additional comment: "*See Medical History List. Client takes 12 different medications daily for past 2 years. Addiction to amphetamines. When depression and anxiety is severe, client will skip taking medication for days at a time. Client was making $7,000 per year for several years prior to accessing income assistance or COVID-19 financial supports. Explained he was minimal with his spending and had assistance from his ex-partner, family, friends. Client unable to leave home, go to public spaces, or have social interactions due to severe anxiety and anxiety attacks.*"

In the SR the Appellant writes "*My depression in the last 2 years has worsened to the point that I don't eat for a couple of days. Don't shower for 2 or more days. Going outside is almost impossible because I have to see, talk, or deal with people. Sometimes it is physical pain having to go buy groceries.*"

In the RFR, the Appellant writes "*My ex-partner helped me a lot (with DLA). I didn't have it difficult with him, because when my depression or anxiety were too strong he would "cook" for me, clean the house, do daily chores that I couldn't do. The depression not letting me get out of bed for sometimes a whole week, not eating, not showering for days and of course, not able to step out of the house. The thought of seeing people, or talking to them, or just being watched by people on the street would be impossible for me to do, when I "get" so low … now that I had to restart my life at 45 years old, it's extremely difficulty when, now I am alone, and don't have the extra help … I can't go out, to even buy food, which is just a block away but the anxiety that gives me, being outside with other people, it's scary, very uncomfortable, even sometimes painful. Just yesterday, I tried going to the dollar store, but I felt it was very busy and (I) had an anxiety attack and had to leave the store. The friend that was with me finished on his own, buying some stuff for me. I went home … I get tired very easy, doing minimum stuff, like just showering.*"

Need for Help

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

In the section of the First AR that asks who provides the help required for DLA, the FP has ticked "other" and written "*sees therapist* ". The FP has not indicated 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 FP also indicates that the Appellant does not have an assistance animal. Where asked to provide any other information that might be relevant in understanding the effect of the applicant's impairment on DLA, the FP has written "*doing counselling*".

In the Second AR, the SW indicates that braces are routinely used by the Appellant to help compensate him for his impairment, adding the comment "*Knee braces to help with walking*". The SW also indicates that the Appellant does not have an assistance animal, adding the comment "*Ex-partner has custody of emotional support dog, client getting legal action to see dog*". Where asked who provides the Appellant the help he requires with DLA, the SW has ticked "Family", "Health Authority Professionals", "Community Service Agencies", and "Friends", and has indicated that the following additional assistance would be necessary: increased income assistance, physiotherapy, chiropractor, message therapy, occupational therapy, mental health counselling or psychiatry and peer support.

Where asked in the Second AR to provide any other information that might be relevant in understanding the effect of the applicant's impairment on DLA, the SW has written:

> "*- Client has impairments beginning from 2000 and is expected to be lifelong chronic illness.*
>
> *- Client('s) ex-partner of 21 years unexpectedly kicked client out of home and ended relationship. Ex-partner was supporting client financially, physically, mentally and emotionally. Client suffered an extreme loss at the separation and is still managing legal separation of assets. Client has to move in with a friend and sleep on friend's couch for 2 years until securing his own apartment in the same building this summer.*
>
> *- Client has had 2 previous suicide attempts, self-reports engaging in harmful behaviours such as cutting, and daily mental health concerns, including medication addiction and dependency for managing severe depression and anxiety.*
>
> *- Client … has been unable to work due to history of injuries and surgeries, ongoing chronic illness and physical health concerns. Client requires support from friend or partner for (DLA).*
>
> *- Client('s) mental health severely impacted by sexual identity and HIV status.*"

In the RFR, the Appellant says that his ex-partner used to help him a lot with DLA, including cooking meals for the Appellant, cleaning the house, and doing daily chores that the Appellant couldn't do.

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 written "*I need help*."

On December 23, 2021, the Appellant provided an additional submission (the Appellant Submission). New information provided in the Appellant Submission comprised:

- A one-page physiotherapy referral in the name of the Appellant dated December 13, 2021 and signed by a physiotherapy practitioner at a wellness clinic in the Appellant's home community (the December 13 Referral) in which the physiotherapy practitioner has written that the reason for the referral is "1. *Acute or chronic rotator cuff + LMB pathology – left (client reports previous scan*

shows LMB + cuff tears) 2. Mechanical neck pain (and lower) left-sided radicular pain, symptoms into left hand vs (carpal tunnel syndrome);

- A one-page letter dated December 15, 2021 signed by a mental health therapist at an outpatient clinic in a hospital in the Appellant's home community address to whom it my concern and referring to the Appellant (the December 15 Letter). The letter says, in part, *"(the Appellant) was seen by me, his therapist, from June 2020 until March of 2021 for depression, anxiety and suicidal ideation. He was also seen by (an outpatient services psychiatrist), who diagnosed (the Appellant) with recurrent major depressive disorder and generalized anxiety disorder along with cluster B traits. This diagnosis, because it is recurrent, makes it difficult for periods of time for (the Appellant) to function. Currently he is re-experiencing more anxiety and depression and it is difficult for him to function on a daily basis. To prevent suicidal ideation from developing he has agreed to start therapy again and has an appointment with me on January 6th.*";
- A two-page letter dated December 22, 2021 signed by the GP addressed to the "*Appeal tribunal Hearing*" regarding the Appellant (the December 22 GP's Letter). The letter apologizes "*for confusing the matter*", explaining that the GP has been the Appellant's physician for more than 20 years and stating that the GP completed the MR, adding "*I never completed (the AR), I leave that to his SW. During my vacation, (the Appellant) brought the (AR) back to the clinic and (the FP), who does not know (the Appellant) at all, tried to complete (the AR) which clearly led to confusion.*" The GP goes on to summarize the Appellant's diagnoses, as stated in the MR, and writes the following with respect to the Appellant's disabilities:

  "*1. Severity of Impairment*

  (The Appellant's) psychiatric diagnosis namely depression and anxiety severely impairs him. He is followed closely by a psychiatric team and as with all chronic medical illnesses his condition improves at times and deteriorates at times. When it is worse, he is unable to leave his home, has low motivation, cannot leave his bed, cannot do DLA, finds it impossible to go buy groceries, etc., difficult to interact with people an avoids people. During this time he needs assistance to function.

  His cardiac condition … limits him on a daily basis. Specifically with exertion, walking, trying to do exercises. He becomes short of breath develops chest pain and then has to rest. This clearly impacts again all DLA. This impairment is severe and not intermittent.

  2. Directly and significantly affects DLA

  His cardiac condition affects DLA on a daily basis. His psychiatric condition is as with all chronic conditions … more intermittent and unpredictable. When his psychiatric conditions are worse he is of course more impacted during all DLA.

  3. Assistance required for all DLA

  During periods of worsening psychiatric depression and anxiety he needs some assistance with DLA. His cardiac condition is such that he can manage activities by himself but it takes an extraordinary time to complete tasks; and,

- A two-page letter dated December 23, 2022 signed by the SW, addressed to the Employment and Assistance Appeal Tribunal on behalf of the Appellant (the December 23 Letter). In the letter the SW states that she has been the Appellant's case manager since June 2021 and that "*(the FP) has no prior relationship with (the Appellant) and was an inappropriate assessor that led to*

conflicts in reporting … I resubmitted the AR (with the RFR) requesting for the (First AR) to be disregarded. In the RD, it did not seem that request was honoured as the denial continued to reference (the FP's) assessment of the patient not meeting the criteria for PWD." The SW goes onto say that she can confirm that the Appellant's physical and mental health have declined since the original application for the PWD designation was submitted on October 20, 2021, that he is unable to perform DLA and requires additional supports, and that his physical impairments have also worsened over time "*causing severe pain and a significant reduction in mobility to perform DLA*".

Evidence Presented at the Hearing

The Appellant was represented at the hearing by the SW, who served as his Advocate.

At the Hearing, the Appellant stated that he had been the GP's patient for 22 years and that FP, who was filling in for the GP, did not know the Appellant, and that when the FP filled out the First AR it was "*the first time I met him and the second time I had talked to him*". The SW said that both she and the GP had intended to complete the AR that formed part of the Appellant's initial PWD application, and that she did not know that the application had been provided to the Ministry without her input until she learned in early November 2021 that the Appellant' application had been denied. At that point she immediately completed the Second AR and provided it to the Ministry on the Appellant's behalf, together with the other documents that comprised the RFR.

In response to a question from the Panel, the SW said that she has now known the Appellant for eight months and has witnessed a further deterioration in the Appellant's physical and mental health over the months since she completed the Second AR. She also pointed out that the evidence provided in the Appellant Submission also demonstrates a recent further deterioration in his health. The Appellant said that his heart doesn't pump enough blood and that in recent weeks he has been taking nitroglycerine. He said that it is now even harder to walk any distance, that now he has to stop and rest after walking a block, and the DLA that he can perform now take even longer.

In response to another question for the Panel, the Appellant said that he now has to wear a knee brace at all times, that he needs someone to accompany him whenever he goes shopping, and he has great difficulty cooking and preparing meals because he is unable to grip and hold with one hand.

At the hearing, the Ministry relied on its RD, and acknowledged that the Ministry had the Second AR but that it was not identified or referenced in the RD, and acknowledged that there was no evidence that it was considered when the RD was made.

Admissibility of New Evidence

New evidence submitted in the Appellant Submission and at the hearing comprises details of the reasons for the Appellant's referral to a physiotherapist, the dates that Appellant saw the mental health therapist and other mental health professionals, further details from the GP relating to how the First AR came to be completed by someone who did not know the Appellant, and information about a more recent decline in the Appellant's physical and mental health, increasing the severity of his impairment since the application for PWD designation was made, the effect on the Appellant's ability to perform DLA, and his need for help.

The Ministry did not object to the Panel considering any of the new evidence. The Panel considered the new written evidence included in the Appellant Submission 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 or physical 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 help to perform DLA.

The Panel finds all the new information contained in the Appellant Submission to be credible and of significant probative value as it both reconfirms the evidence contained in the Appellant's initial application and the Second AR, and it provides more current information regarding the Appellant's present physical and medical health conditions. The Panel also assigns this new evidence full weight as it is information provided by the Appellant's GP, who completed the MR and has served as his physician for 22 years, a physical therapist, and the Advocate, all of whom are defined in the EAA as prescribed professionals.

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

The Panel notes that the information provided in the First AR varies significantly from the information provided in the Second AR. The First AR was submitted with the Appellant's PWD application and the Second AR was submitted with the RFR and was therefore available to the Ministry at the time of the RD, but the Second AR was not mentioned in the RD or identified in the section of the RD titled "*Additional Information Submitted with the Request for Reconsideration*".

EAPWDA Section 2(2)(b) says that a prescribed professional must provide an opinion that a PWD applicant's mental or physical impairment directly and significantly restricts the applicant's ability to perform DLA either continuously or periodically for extended periods, and, as a result of those restrictions, the applicant requires help to perform those activities. The Ministry obtains some of that information from opinions expressed by the prescribed professional in the AR.

EAPWDR Section 2(2)(a) provides a definition of "prescribed professional", and that definition includes a medical practitioner and a social worker "*authorized under an enactment to practise the profession*" (i.e. a registered social worker). Therefore, both the Advocate (who is registered social worker and completed the Second AR) and the FP (who is a medical practitioner and completed the First AR) are prescribed professionals.

The Panel found no reason for the Ministry to have failed to recognize or address the Second AR. It is not clear why the Second AR was not mentioned in the RD and it appears to the Panel that it was not considered. Leaving that aside, there are also familiarity and temporal differences between the First and Second AR that bear consideration here.

Both the testimony provided by the SW at the hearing and evidence contained in the December 22 GP's Letter confirm that the GP had intended for the SW to complete the original AR that formed Section 3 of the Appellant's application. The FP was a locum substituting for the GP when completing the First AR and had had no prior dealings with the Appellant. In contrast, the Second AR was prepared by the SW who had known the Appellant for 5 months and had seen him 2 – 10 times over that period, and this form was more current in time. For those reasons the Panel finds that, in reaching its RD, the Ministry should reasonably have given significant weight to the Second AR and accepted the evidence in the Second AR wherever discrepancies between the two ARs are found.

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.

Evidence – Assessor Reports

Panel Decision

The Panel finds that in determining whether the Appellant has a severe physical impairment, the Ministry should have considered the assessor's evidence in the Second AR. The failure to recognize and address the Second AR in the RD is unreasonable. It is unreasonable to make a decision without consideration and reference in reasons to duly provided substantive evidence.

Further, had it considered it, to the extent that the Ministry found any disparity between those two AR forms the Ministry should have preferred the Second AR for the reasons stated above.

Physical Functioning

The Ministry's position is that, because neither the GP nor the FP report restrictions or limitations to the Appellant's mobility and physical abilities, it cannot be established that he has a severe physical impairment.

The Appellant's position is that his physical impairments make him extremely tired even when he is doing relatively nonstrenuous activities such as walking. As a result, exercise is not recommended. In addition, his issues have gotten worse in the past 2 years.

In the Second AR, the SW says that the Appellant requires periodic assistance with standing and takes 3 to 6 times longer than typical with all other aspects of mobility and physical ability. These physical functioning constraints are confirmed by the GP in both the MR and the Appellant Submission: in the MR, the GP states that the Appellant's cardiomyopathy and ischemic heart disease restrict his physical abilities with decreased exercise tolerance, associated shortness of breath and angina, and in the December 22 GP's Letter he writes "*(The Appellant's) cardiac condition … limits him on a daily basis. Specifically with walking, exertion, trying to do exercises. He becomes short of breath develops chest pain and then has to rest … This impairment is severe and not intermittent.*" In the December 23 Letter, the SW writes that the Appellant's physical health has declined since he completed the PWD application in August 2021.

Panel Decision

The Ministry did not consider information in the Second AR, where the SW, a prescribed professional, uses language that describes a severe physical impairment (e.g. "*This impairment is severe …*"). Similar language was also used by the GP, also a prescribed professional, to describe the Appellant's physical impairment in the December 22 GPs' Letter. Therefore, the Panel finds that the Ministry's determination that the Appellant does not have a severe physical impairment is not reasonably supported by the evidence.

Mental Functioning

The Ministry's position is that, while the Appellant's mental health concerns have a definite impact on his daily life, this same degree of impairment has not been reflected in the assessments provided in the MR and the First AR. As a result, based on the information provided, the Ministry has determined that there is insufficient evidence to conclude that the Appellant has a severe impairment of mental functioning.

The Appellant's position is that he suffers from mood disorders, that he is clinically depressed, and he has tried to commit suicide on two occasions. In addition, he is currently unable to take some of the medication that had previously been prescribed to him because he developed an addiction to it.

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.

In the MR, the GP writes that the Appellant has a long history of depression, anxiety and mood disorders that significantly impact his social interactions, and in the December 22 GP's Letter the GP says that the Appellant's psychiatric diagnosis "*severely impairs him*". In the Second AR, the SW indicates that the Appellant requires either periodic or continuous support with all listed social functioning activities, suffers major social isolation and withdrawal, and avoids public spaces and social interactions. In the December 15 Letter, the mental health therapist writes that a psychiatrist has diagnosed the Appellant with recurrent major depressive disorder and generalized anxiety disorder which make it difficult for periods of

time for him to function, that he is currently re-experiencing more anxiety and depression, and to prevent suicidal ideation from developing the Appellant has agreed to start therapy again. In the December 23 Letter, the SW writes that the Appellant's mental health has declined since he completed the PWD application in August 2021.

The Ministry did not consider information provided in the Second AR, where the SW, a prescribed professional, uses language that explicitly describes a severe mental impairment (e.g. "*Severe emotional and mental health impacts*"). Similar language clearly describing illness with a serious impact was also used by the GP, also a prescribed professional, in the December 22 GP's Letter. Therefore, the Panel finds that the Ministry's determination that the Appellant does not have a severe mental impairment is not reasonably supported by the evidence.

Restrictions in the Ability to Perform DLA

The Ministry's position is that, while the GP reports that the Appellant's medical condition severely impacts his ability to perform DLA in several areas on a periodic basis, the time and duration of those periodic impacts is not provided. In addition, the FP indicates that the Appellant is independent in all DLA areas. As a result, the Ministry is not satisfied that the Appellant has a severe impairment that, in the opinion of a prescribed professional, directly and significantly restricts his ability to perform DLA.

The Appellant's position is that his depression has worsened to the point that he won't eat or shower for a couple of days, get out of bed for up to a week at a time, and that going outside is almost impossible because he has to see, talk, or deal with people. In addition, sometimes his physical pain is so bad that he can't go out to buy groceries.

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 activities"), 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, the GP, the FP and the SW are all 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 mark 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.

In making its determinations, the Panel prefers the Second AR for the reasons stated above. In the December 22 GP's Letter, the GP writes ""*During periods of worsening psychiatric depression and anxiety (the Appellant) needs some assistance with (DLA) … When (his Psychiatric depression) is worse, he is unable to leave his home, has low motivation, cannot leave his bed, cannot do DLA, finds it impossible to go buy groceries, etc., difficult to interact with people an avoids people. During this time he needs assistance to* function". In the Second AR, the SW indicates that the Appellant wears a knee brace for his physical impairment.

In summary, the prescribed professionals have indicated that the following physical DLA are periodically or continuously restricted, either because the Appellant can't perform them at all without assistance from another person, or because it takes three to six times longer for him to complete the task without help: dressing, grooming, bathing, regulating diet, transferring in and out of bed or a chair, laundry and basic housekeeping, meal planning, food preparation and cooking, budgeting, taking medications as directed, and getting in and out of a vehicle, going to and from stores, making appropriate shopping choices, paying for purchases, carrying purchases home and using public transit and transit schedules or arranging transportation. The physical activities associated with these DLA are significantly restricted continuously as a result of the Appellant's physical impairments. The Appellant's periodic severe anxiety and depression significantly impede the DLA of taking medications as directed, going to and from stores, making appropriate shopping choices, paying for purchases, and arranging transportation. In addition, peer counselling through prompting is required for a number of DLA at home, such as grooming and housekeeping. While the prescribed professionals do not indicate the frequency or duration of the Appellant's periodic impairments, it is clear in the context of all of the information provided in the MR, the Second AR, and the Appellant's Submission documents that these impairments are not infrequent.

Accordingly, the Panel finds that the Ministry's determination that the Appellant's DLA are not significantly restricted as a result of a severe impairment is not reasonably supported by the 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 his ex-partner used to help him a lot with DLA, including cooking meals for the Appellant, cleaning the house, and doing daily chores that the Appellant couldn't do. Regarding his physical impairment, he now has to wear a knee brace at all times.

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.

In making its determinations, the Panel prefers the Second AR for the reasons stated above.

In the MR, the GP says that the Appellant's medical condition significantly impacts his daily functioning by reducing his mobility and exercise capacity.

In the RFR, the Appellant says that his ex-partner used to help him a lot with DLA, including cooking meals, cleaning the house, and doing daily chores.

In the Second AR, the SW says that the help that the Appellant requires with DLA is provided by family, health authority professionals, community service agencies, and friends, and has indicated that the following additional assistance would be necessary: increased income assistance, physiotherapy, chiropractor, massage therapy, occupational therapy, mental health counselling or psychiatry and peer support. While the SW doesn't say which specific DLA each of these kinds of helpers could support which DLA, the Panel finds it's reasonable to conclude that physiotherapists, chiropractors, massage therapists and occupational therapists could help the Appellant perform the DLA for which he is physically challenged, such as cooking, cleaning and basic housekeeping, whereas mental health counsellors, psychiatrists and peers could assist with DLA that are significantly restricted by the Appellant's mental impairments, such as going out in public or getting out of bed in the morning.

In the December 15 Letter, the mental health therapist has stated that the Appellant requires regular therapy for depression, anxiety and accompanying suicidal ideation. In the December 22 GP's Letter, the GP says that the Appellant is followed closely by a psychiatric team and needs assistance to function during periods of worsening psychiatric depression, which the prescribed professionals have indicated the Appellant requires for DLA involving the need to motivate him to be active or help him in activities where he has to deal with the public, like getting out of bed in the morning or going shopping when he is anxious or depressed.

Accordingly, the Panel finds that the Ministry's determination that the Appellant does not require help to perform DLA as a result of a severe impairment is not reasonably supported by the evidence.

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 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 2021-0243

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) 2022/01/06

Print Name Kent Ashby	
Signature of Member	Date (Year/Month/Day) 2022/01/06
Print Name Don Stedeford	
Signature of Member	Date (Year/Month/Day) 2022/01/07