Part C – Decision Under Appeal

The decision under appeal is the Ministry of Social Development and Poverty Reduction's ("ministry") reconsideration decision dated November 8, 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 impairment to continue for at least 2 more years, but was not satisfied the other 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 indicating that the PWD application was received on May 20, 2021. On June 14, 2021, the ministry denied the application finding that the appellant met only 2 of the criteria for PWD designation. On October 26, 2021, the appellant submitted a *Request for Reconsideration* ("RFR"). On November 8, 2021, the ministry completed the review of the RFR finding that the appellant did not meet 3 PWD criteria.

2. the RFR signed by the appellant on October 13, 2021, with a 2-page typed document ("RFR submission"), signed by a family member ("F.") on behalf of the appellant. The submission states that the appellant is undergoing medical trials with Dr. A. and other medical professionals to test an experimental drug. F. described the following memory deficits:

- The appellant forgot names at work and left work early "with no due understanding of time or his schedules." He was fired on 2 occasions as a result.
- The appellant loses items at home on countless occasions, including keys, bags, wallets, cards, passports, documents, and appointments for everyday life. This happens despite reminders such as labels for boxes, or hangers for keys. The appellant frequently attends the Lost and Found counter at stores "looking for yet another article left at an unrecalled counter."
- The appellant has difficulty finding his way when there are several mall entrances. He also has difficulty locating a parked car. Shopping becomes overwhelming "when familiar stores seem in wrong places or buses go by with vague express destinations."
- The appellant has difficulty finding his way back if taking a wrong turn or wrong lane. The original purpose for going to a store can quickly fade from his memory.

3. The appellant's PWD application comprised of:

- the *Applicant Information* (self-report - "SR") dated October 13, 2021,
- a *Medical Report* ("MR") dated May 4, 2021, completed by a general practitioner ("Dr. A.") who had the appellant as a patient for 2 months but had not seen the appellant prior to the appointment on May 4th.
- an *Assessor Report* ("AR") dated May 4, 2021, also completed by Dr. A. who did the assessment through an office interview with the appellant.

4. The ministry's PWD *Decision Summary* with attached letter dated June 14, 2021, in which the ministry found that the appellant did not meet 3 of the criteria for PWD designation.

Summary of relevant evidence from the application:

<u>SR</u>

The appellant explained that he was diagnosed with dementia while living in another country ("Country X").

Symptoms

The appellant described having memory problems which cause him to experience anxiety and a loss of spatial direction. His memory problems have eroded his self-confidence, especially in stressful situations.

Functional limitations

- The appellant reported losing the ability to recognize where he is in unfamiliar places. He sometimes had to ask the police for assistance.
- The appellant described being unable to remember what he was explaining to people at work and when he didn't remember names it caused him stress and embarrassment. The appellant said he was let go from jobs as a result. He then returned to Canada to live with family and convalesce.

- The appellant provided an example of not being able to find a familiar place (when he was driving to visit a friend). He had to ask his family to assist him in meeting the friend.

Restrictions to DLA

- The appellant indicated that he has a lot of difficulty with transportation (driving) and social interactions due to his memory difficulties.

Help/support

- The appellant indicated needing help from his family even for simple activities such as meeting a friend in a familiar place.

MR

Diagnosis

In the MR (section A), Dr. A, did not provide a diagnosis. Under *Health History* (section B) Dr. A. confirmed that the appellant has memory and anxiety issues (for the past 3-4 years) and recently lost his job.

Functional skills - physical impairment

In section D (1-4) Dr. A. indicated the appellant can walk 4 or more blocks unaided on a flat surface, climb 5 or more steps, and has no limitations with lifting or sitting.

Functional skills - mental impairment

In section D (5-6) Dr. A. indicated the appellant has no difficulties with communication. Question 6 asks whether there are *any significant deficits with cognitive and emotional function.* Dr. A. checked *yes*, indicating the appellant has significant deficits with *Executive*, *Memory*, *Emotional disturbance*, and *Attention (sustained concentration)*. Under *Comments*, the doctor wrote, “unexpected cognitive decline - dementia.”

Daily living activities

In section B-3, Dr. A. indicated the appellant has been prescribed medications that interfere with his ability to perform DLA. The doctor did not assess specific DLA in the MR (section E) but provided the assessment in the AR.

Help required

In section B-4, Dr. A. checked *no*, the appellant does not require any prostheses or aids for the impairment.

AR

Physical impairment

Dr. A. indicated the appellant is independent with all physical abilities listed on the form: walking, climbing stairs, standing, lifting, and carrying/holding.

Mental impairment

In section B-2, Dr. A indicated the appellant has good communication skills in all areas (speaking, reading, writing, and hearing).

Dr. A. checked that the appellant's mental impairment impacts 4 of the 14 areas of cognitive and emotional functioning listed in section B-4:

- minimal impact for *Consciousness*, *Emotion*, and *Attention/Concentration*.
- moderate impact for *Memory.*

Dr. A. reported no major impacts and checked *no impact* for *Bodily functions*, *Impulse control*, *Insight and judgment*, *Executive*, *Motivation*, *Motor activity*, *Language*, *Psychotic symptoms*, *Other neuropsychological problems*, and *Other emotional or mental problems*.

Daily living activities

Dr. A. stated that the appellant's cognitive decline and early onset dementia impacts his ability to manage DLA.

For Part C, the doctor assessed the appellant as independent with all DLA:

- *Personal Care - all areas* were independent *including Dressing*, *Grooming*, *Bathing*, *Toileting*, *Feeding self*, *Regulating diet*, and *Transfers* (bed and chair);
- *Basic housekeeping:* all areas were marked as independent: *Laundry*, and *Basic housekeeping;*
- *Shopping*: all areas were independent including *Going to and from stores*, *Reading prices and labels*, *Making appropriate choices*, *Paying for purchases*, and *Carrying purchases home*;
- *Meals*: all areas were independent including *Meal planning*, *Food preparation*, *Cooking*, and *Safe storage of food*;
- *Pay rent and bills:* independent in all areas: *Banking*, *Budgeting*, and *Pay rent and bills;*
- *Medications*: independent in all areas: *Filling/refilling prescriptions*, *Taking as directed*, and *Safe handling and storage*;
- *Transportation - all areas were independent: using public transit* and *using transit schedules*, *arranging transportation*, and *getting in and out of a vehicle*;
- *Social Functioning*: all areas were independent including *appropriate social decisions*, *able to develop and maintain relationships*, *interacts appropriately with others*, *able to deal appropriately with unexpected demands*, and *able to secure assistance from others.*

Regarding social functioning, Dr. A. also checked that the appellant has good functioning with his immediate and extended social networks, and no safety issues were identified.

Help required

Dr. A. checked that help with DLA is provided by family, adding that friends and neighbours are available if needed. No support/supervision with social functioning was indicated; the appellant does not use any assistive devices or have an assistance animal.

Additional submissions

The appeal was adjourned twice to give the appellant more time to get his medical records from Country X and to arrange for a family member ("the advocate") to speak at the hearing on his behalf. Subsequent to the reconsideration decision, the appellant submitted new evidence to the Tribunal requiring an admissibility determination under section 22(4) of the *Employment and Assistance Act*.

1. The appellant provided a submission package received at the Tribunal on January 7, 2022, and consisting of the following documents:

- A letter from Dr. A. dated January 4, 2022, stating that the appellant has been receiving care for "cognitive decline of unknown origin" and has a lesion on his pituitary gland as shown in a recent Magnetic Resonance Imaging scan ("MRI") of his brain. The lesion is under investigation as being a probable cause for the appellant's cognitive decline.

- An MRI report dated October 26, 2021, indicating the appellant was referred for a "brain MRI without contrast" because of "progressive memory loss plus cognitive decline 4 years." The MRI was ordered by a Geriatric/Internal medicine specialist ("Dr. B."). The MRI showed an enlarged pituitary gland with no additional masses or abnormalities. The MRI indicates a diagnosis of "probable pituitary adenoma" with a recommendation for further tests/imaging studies.

- A letter from Dr. B. dated September 27, 2021, and addressed to Dr. A. Dr. B. describes an appointment with the appellant, accompanied by F. who provided important collateral information. Dr. B. reports "progressive short term memory loss and cognitive impairment" of about 4 years duration that began to manifest itself in Country X and has continued upon the appellant's return to Canada.

  The letter describes the following impacts from memory loss as presented on a discharge summary from a hospital in Country X [*panel note: a copy of the discharge summary was not included with the submission*]:

  -The appellant would forget schedules at work; have difficulties following a plan; not bring the correct materials needed for his job; and misplace items. The appellant was also not oriented to date but there were no changes in personality.
  -The appellant tried taking a supplement but was non-compliant with his medications.
  -The appellant was admitted to hospital and had an MRI which showed some "deep white matter ischemic changes in the left frontal lobe" that included "decreased hypoperfusion over the frontal lobes more so on the right."
  -The appellant was given a tentative diagnosis of Alzheimer's disease, and there was also a mention of possible Lyme disease.
  -The appellant returned home in December 2020 to live with family and was prescribed a different medication for his memory symptoms upon returning to Canada. At the appointment, F. reported some improvement in the appellant's memory and cognition while taking the medication. Dr. B. wrote that the appellant "continues to be independent for his ADLs [Activities of daily living] and IADLS [Instrumental activities of daily living]." The appellant continues to drive and denies any accidents or traffic violations but he has difficulties finding his destination at times.
  -The appellant denies any psychotic symptoms and most days he exercises, reads, and plays a musical instrument.
  -The appellant showed no motor symptoms and had a normal gait and reflexes, Sensory testing was also normal.
  -The appellant was given memory tests including the Mini Mental Status exam ("MMSE") in which he scored 24/30 on this date, losing points for delayed recall. The appellant was not oriented to year; he had significant difficulties with intersecting pentagons losing points for attention; and he was unable to draw a clock face correctly (mistakes included placing numbers in the wrong position and putting too many hands on the clock).

-On the Montreal Cognitive Assessment Test ("MOCA"), the appellant scored 15/30 losing points for visuo-spatial, series and orientation, and delayed recall. The appellant scored 4/15 on the Montreal Cognitive Assessment Memory Index ("MOCA Index"). The appellant was able to identify current political figures and news events.
-Dr. B. concludes that the investigations done in Country X indicate a "presumed diagnosis of early onset Alzheimer's disease." The appellant will be referred for further screening, blood work, and a brain MRI. The dosage for his memory medication has been increased due to the perceived benefit.

- A letter from Dr. B., dated November 19, 2021, and addressed to Dr. A. Dr. B. states that the appellant reported having a car accident (related to road and traffic conditions) and could therefore not make it to the appointment. A tele-medicine appointment was arranged in which F. participated as well. F. reported that the appellant's condition had stayed about the same and the appellant indicated no changes or new symptoms. The appellant requires further investigation for the pituitary mass and has been referred for an MRI of his pituitary gland as well as "pituitary-related screening blood work."

  Dr. B. states that the appellant did not go for other screenings/blood work that was ordered in September and a new requisition was provided. The appellant has been referred to another doctor for assessment of the pituitary lesion and he can continue with the same medication for now.

Admissibility of MRI report and letters from Dr. A. and Dr. B

The ministry did not raise any objections to the letters, or the MRI report and the panel admits them as evidence under section 22(4) of the *Employment and Assistance Act* ("EAA"). The panel finds that these documents contain additional detail about the diagnosis and its impact on memory and function. The panel finds that the documents are admissible because they are reasonably required for a full and fair disclosure of all matters related to the decision under appeal.

2. The appellant provided a second submission package received at the Tribunal on March 31, 2022, and consisting of the following documents:

- An *Outpatient clinic dispensing prescription* from Country X with the date formatted in the language of Country X. The prescription states that the appellant is diagnosed with early-onset Alzheimer's disease and was prescribed 2 medications and 1 vitamin supplement. The body of the document details the medications and explains the procedures for prescription refill.

- 2 *Return visit appointment forms* with the dates formatted in the language of Country X.

- An invoice confirming that the documents are a certified translation into English.

Admissibility of medical documents from Country X

The ministry did not raise any objections to the documents from Country X and the panel admits them as evidence under section 22(4) of the *Employment and Assistance Act* ("EAA"). The panel finds that these documents are reasonably required for a full and fair disclosure of all matters related to the decision under appeal because they confirm the appellant's original diagnosis and indicate treatment and follow-up.

Oral testimony - admissibility

The appellant did not attend the hearing but authorized the advocate to present the case and make any decisions on the appellant's behalf. At the hearing, the advocate consented to the ministry's request for an observer who attended for training purposes. In addition to argument, both parties provided detailed information that the panel admits under section 22(4) of the EAA as evidence reasonably required for a full and fair disclosure of all matters related to the decision under appeal.

Appellant (advocate)

The advocate gave concrete examples of the appellant's cognitive and memory difficulties. In response to questions, the advocate provided explanations about the appellant's interactions with medical professionals.

The advocate explained that:

- the appellant is able to speak for himself but has a lot of difficulty using the phone and is unable to coordinate appointments on his own. The appellant lives with family members who assist him despite having their own serious limitations with memory or communication due to their health conditions. An occupational therapist ("OT") came to assess a family member and saw the appellant's problems. The family member would not agree to see the OT again so an assessment for the appellant was never set up.
- the onset of memory problems in Country X not only caused the appellant to lose his job but also severed his relationship with family who reside there.
- the appellant has so much difficulty with coordinating tasks that he was unable to obtain all his medical records from Country X. Family and friends are still working on obtaining the records on the appellant's behalf.
- the appellant had lived in country X for many years and once he returned to Canada, it took a long time to connect him with the medical system here. Dr. A. is the appellant's new family doctor and had only seen the appellant once (at the appointment to fill out the PWD medical forms). Dr. A. has seen the appellant since then, "in short bursts of about 15 minutes."
- Dr. A. has referred the appellant for blood tests and a surgical consult regarding the pituitary mass. To the advocate's knowledge the tests have not been done yet and the appellant is still in line to see the surgeon. Sometimes the appellant does not remember if he has gone to an appointment, or he says that he went when he actually didn't go. The advocate said that the appellant "really can't maintain appointments unless [a family member] takes him there."
- the appellant is not competent to keep driving because "he cannot do rote things needed for driving." The appellant was frequently getting lost; unable to find his parked car; or creating a hazard to himself and others.
- on an average day, the appellant needs someone with him the entire time because he loses things every day and would be a danger at a work site due to his difficulty with following directions.
- the appellant would not be safe with kitchen activities. A family member does all the cooking and they "order in a lot" because the appellant cannot remember a sequence or cannot complete all the steps once he starts making something; for example, "the tea never gets made."
- the appellant has a lot of trouble communicating by phone and the family has paid a lot of money to have an "IT guy" help the appellant with the phone. The IT guy also set up a sequence for the appellant's musical instrument which the appellant still plays, although he was unable to maintain the set up.

Ministry

The ministry was familiar with the memory tests that Dr. B. administered to the appellant. The ministry provided the following information for interpreting the test scores:

- The MOCA has a score from 0-30. A score of 26 or higher indicates normal memory [the appellant's score was 15].
- The MOCA Index is a rapid screening test for memory with a score from 0-15 [the appellant's score was 4].
- The MMSE is a mental status test that focuses on the current moment.

The panel accepts the ministry's interpretation of the test results as reasonable.

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 the requirements regarding 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

Arguments

The appellant argues that a severe mental impairment is established on the evidence. The appellant made no submissions on physical impairment but maintains that PWD support should be justified by the diagnosis of early onset dementia in 2 countries and the focus on trials of an experimental drug for memory problems.

In the RFR submission, F. describes the impact of the appellant's impairment as a "recurring crescendo of frustrated anger which disorients the whole household." F. said that family members are constantly called on to assist the appellant in looking for misplaced items. F. described the appellant experiencing "an anxious freeze" when getting lost in one of many similar corridors. F. argues that all of the events around losing items and getting lost "occur manifold times…as part of a whole disability which needs to be treated as a reality."

The advocate explained that the appellant tends to minimize, or lacks awareness of, the severity of his impairment because he wants to present himself in a favourable light and has difficulty communicating with his doctors due to his cognitive problems. The advocate argued that the appellant needs to be supported based on the diagnosis of early Alzheimer's and the "massive memory issues" which impact every aspect of his life.

Ministry argument at the Reconsideration

The ministry argued there was insufficient evidence to establish a severe impairment of physical or mental functioning. The ministry noted that all physical functions were rated with the lowest level of restriction in the MR. The appellant was also assessed as independent with all physical functions in the AR.

Regarding a mental impairment, the ministry accepted that the appellant is experiencing a cognitive decline but argued that the information showed mostly minimal or no impacts on cognitive and mental functioning. The ministry argued that a severe mental impairment was not established because the appellant was assessed as independent with all DLA involving communication and decisions about personal activities, care, or finances.

Ministry position at the hearing

Regarding a severe impairment, the ministry maintained that the reconsideration decision was reasonably supported by the evidence but the new documentary evidence and the advocate's submissions at the hearing would "turn the decision in favour of an approval." The ministry accepted that the new information demonstrates a severe mental impairment.

The ministry noted that in the tele-medicine call with Dr. B. the appellant denied any significant changes in cognition or new symptoms and the documents from Country X only confirmed the diagnosis. However, the recent memory test scores are "borderline low" and the ministry accepts that the scores "are enough to show a severe impairment of mental functioning" in light of the progressive nature of the appellant's condition and the concrete details from the advocate on how the appellant's memory problems impact daily functioning.

Legislative requirement

To be eligible for PWD designation, the legislation requires several criteria to be met including the minister being satisfied that the applicant has a severe mental or physical impairment. "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 functioning. To assess the severity of an impairment, the ministry considers the extent of any impact on daily functioning as shown by limitations/restrictions with physical abilities, and mental functions and emotion.

The ministry explained that a medical practitioner's comment that the condition is "severe" is not enough to establish a severe impairment. The ministry said it considers the impact on functional skills and abilities in conjunction with the medical assessments of DLA. The panel finds that an assessment of severity based on physical, cognitive, and social functioning and restrictions to "mental DLA" is a reasonable interpretation of the legislation.

Panel's decision - severe mental or physical impairment

Regarding a mental impairment, the panel finds that the reconsideration decision was reasonably supported by the evidence in the original application and RFR. Despite Dr. A. indicating significant deficits with *Executive*, *Memory*, *Emotion*, and *Attention/concentration* (MR), the doctor's information about the impact of dementia on functioning was not in support of the appellant's information (SR and RFR submission) because the doctor indicated only a minimal impact for *Attention* and *Emotion* and no impact for *Executive.*

On the other hand, the appellant's information detailed frequent problems with memory and coordinating tasks and emphasized serious consequences such as getting fired from jobs. The panel gives more weight to the information in the MR which the appellant's examples corroborate. At the same time the panel cannot overlook the evidence in the AR which indicated only a moderate impact for memory, and a limited impact or no impact at all for areas that would logically be affected by memory loss; for example, *Executive*, *Attention* and *Language* (communication).

In light of the new evidence submitted on appeal, the panel finds that the ministry was not reasonable in its decision. The panel finds that the information in the original PWD application, considered together with the new information from the doctors and detailed elaboration from the advocate, establishes a severe impairment of mental functioning. In the MR, Dr. A. indicated significant deficits in cognition/emotion that are expected to be impacted by dementia. The panel finds that the results of the recent memory tests (as interpreted by the ministry) together with consistent examples of memory and cognitive problems across all of the self-reports/advocate submissions establish a severe impairment of mental functioning in areas such as memory, executive planning, attention, and insight/judgment.

The recent letters from Dr. A. and Dr. B. indicate cognitive decline due to a pituitary lesion that is still being investigated. The documents from Country X confirm a diagnosis of early-onset Alzheimer's disease for which the appellant had to have his medication increased (in Canada) to stabilize his memory loss. Although his condition appears to be staying the same, the appellant scored higher on only one of the recent memory tests (24/30 on the MMSE) which the ministry explained is a mental status exam to indicate functioning in the current moment.

The appellant's score on the MOCA was 15/30 where 26 or higher is considered normal. The appellant lost points for visuo-spatial and delayed recall, which combined with his lack of orientation to year and his inability to draw a clock face, indicates a severe impairment of mental functioning that is supported by the many examples of losing items, getting lost in malls and parking lots, not remembering if he has had an appointment for bloodwork, and not being able to carry out the sequences needed for safe and effective driving. The appellant reported a recent car accident to Dr. B.

Regarding a physical impairment, the panel finds that the reconsideration decision was reasonable because the appellant provided no information or argument for a physical impairment and the evidence in the MR and AR did not indicate any restrictions to physical functioning. The recent examination by Dr. B. also confirmed that the appellant's gait and reflexes, and other physical functions, remain normal.

The panel finds the ministry was reasonable to conclude that a severe physical impairment was not established under section 2(2) of the EAPWDA. However, the appellant meets the legislative requirement because of his severe mental impairment as described in the submissions as a whole.

Restrictions to DLA

Arguments

The appellant argues that his DLA are significantly restricted, especially shopping and transportation (driving) as well as cooking and social functioning (meeting friends) because of his problems with memory and difficulty following a sequence and keeping his bearings without getting lost. In the RFR submission, F. summed up the appellant's difficulties: "exiting through a different mall entrance or trying to find a parked car increases [the appellant's] panic and frustration with fruitless walking down endless rows of cars." The narrative acknowledges that failing to recall a mall entrance or find one's car "can throw a shopper off" but with memory loss making it happen frequently, the situation is compounded for the appellant.

The advocate argues that every day activities are challenging for the appellant because he will forget to finish the task he has started ("the tea never gets made") or he won't remember if he has attended an appointment. The advocate reported safety issues for cooking and driving and said the appellant is no longer competent to drive. The advocate described the appellant as "kind of like a computer that is stuck with the little circle spinning round and round."

The advocate submits that the assessments in the AR (where all DLA were independent) is "simply not accurate" because the appellant is unable to live on his own. The advocate explained that the appellant may have been feeling upbeat when Dr. A. filled out the form, "talking positive, saying, "I can do that" even though he has difficulty. The advocate noted that the appellant had been away from Canada for so long that he had lost any connection with the medical profession and had to enter the system all over again as a new patient of Dr. A.

Ministry argument at the Reconsideration

The ministry argued there was not enough evidence from prescribed professionals (Dr. A.) to confirm that the impairment directly and significantly restricts the appellant's DLA either continuously or periodically for extended periods. The ministry noted that the RFR submission referenced information from a neurologist in Country X but the ministry was not given the report and only had Dr. A.'s assessments to go by.

Ministry position at the hearing

The ministry maintained that the reconsideration decision was reasonably supported by the evidence because of the lack of information from Dr. A. on restrictions to DLA. However, the ministry said it was getting a completely different picture of DLA from the current information as opposed to when the PWD application was made. The ministry accepted that the new information from Dr. B., with additional details from the advocate, establishes that DLA are significantly restricted because the appellant "seems to have no insight into his illness" and the severe impairment of mental functioning (evidenced by test scores and additional details from Dr. B. about cognitive deficits) would obviously impact the appellant's DLA.

When asked how they would reconcile the assessments in the AR with the information from Dr. B. which does not talk about the specific DLA that are listed in the EAPWDR, the ministry explained that concrete examples of restrictions (for shopping, cooking, transportation, etc.) were provided by the advocate and those examples are consistent with Dr. B.'s information on cognitive deficits The ministry said they would give more weight to the cognitive assessments by Dr. B. because the letters demonstrate more than one meeting as well as an evolving relationship between doctor and patient. The ministry noted that Dr. A. only met with the appellant one time to fill out the PWD reports, and the appellant had been a patient for only 2 months at the time of the AR.

When asked how they would view the doctor's information about the appellant's memory problems impacting employment when the ministry notes in the decision that employability is not a criterion for PWD designation, the ministry explained that it can look at employment restrictions that would extend to other domains. The ministry

argued that misplacing items at work and being unable to follow a schedule or sequence would reasonably affect shopping, cooking, transportation, and other activities as detailed by the advocate. The ministry concluded that the reconsideration decision was reasonable based on the evidence the ministry had at the time, but if the supplementary information had been received with the original reports, the ministry would have had enough evidence to approve the PWD application.

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 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.

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. **It is important to note that under the legislation, the inability to work or manage job or training duties, is not considered a DLA restriction.**

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] 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.

Panel's decision - restrictions to DLA

The panel has considered the evidence from Dr. A. in the MR and AR and finds that the reconsideration decision was reasonably supported by the evidence they had at the reconsideration. In the MR, the doctor indicates that the appellant's medications interfere with the ability to perform DLA but in the AR, all areas of all DLA were marked as independent even though the appellant described how his memory problems impact transportation (driving), and social functioning (meeting friends) when he can't remember how to get to a familiar place.

The RFR submission provided concrete examples of significant restrictions with shopping and transportation, describing how the appellant often frequents the Lost and Found at the mall because he can't remember where he left things. The appellant also gets "stuck" when trying to drive places and frustrated and anxious when he cannot find his parked car or figure out the schedule of an express bus. Despite these examples, no additional information from a doctor was provided at the reconsideration to fulfill the legislative requirement that says restrictions to DLA must be "in the opinion of a prescribed professional."

In light of the new evidence submitted on appeal, the panel finds that there is enough information from the appellant's doctors to establish direct and significant restrictions to DLA and restrictions that are also continuous. For the reasons that follow, the panel finds that the reconsideration decision, which found that DLA are not restricted, is no longer supported by the evidence:

- Both Dr. A. and Dr. B. indicate significant cognitive deficits including problems with memory, attention/concentration, and executive function. Dr. A. explained that the appellant lost his job due to "memory" (MR). Dr. B. detailed the appellant's experience with losing things at work, not bringing the right

materials, and having difficulty with schedules and planning. The additional details from the advocate and F. indicate the appellant loses things every day and has a lot of difficulty coordinating and sequencing activities not only in the context of employment but while shopping, driving, or trying to make a cup of tea or meet a friend. The panel finds that the information from the doctors substantiates the appellant's reports of restrictions for specific DLA.

- The appellant's scores on the MACA tests and his difficulties with visuo-spatial exercises, administered and described in detail by Dr. B., indicate significant cognitive deficits that are reasonably expected to impact DLA. The advocate and F. gave concrete examples of difficulties with shopping, cooking, and managing appointments and sequential tasks due to cognitive impairment. The panel finds that there is enough linkage between the medical information on cognitive functioning and the appellant's information about specific activities to establish that DLA are significantly restricted in the opinion of a prescribed professional as required by the legislation.

- Dr. A. indicates that anxiety has also impacted the appellant's performance at work (MR) and the appellant's information corroborates how anxious and stressed he feels when he gets lost or off track while trying to manage daily activities such as shopping or meeting a friend. The panel finds that the evidence from the doctor indicates that the appellant's memory problems are exacerbated by anxiety which further reduces his ability to perform daily tasks independently.

- The panel accepts the ministry and advocate's observations about the appellant's lack of insight into his illness. The panel finds it reasonable that the appellant did not provide a fulsome picture to the doctors about his ability to manage DLA. Dr. A. assessed all DLA as independent upon meeting the appellant for the first time at one appointment. Dr. B. remarks in the letter of September 27, 2021, that the appellant "continues to be independent for his ADLs and IADLs" and continues to drive a car despite difficulties in finding his destination.

In summary, the panel finds that the information from the appellant and F. along with the new evidence from the doctors and advocate, which are given more weight by the panel, provide sufficient evidence that DLA are restricted notwithstanding the information in the MR and AR. The panel finds that the information from the doctors and appellant, viewed in its entirety, establishes that DLA are directly and significantly restricted continuously by the appellant's dementia and cognitive decline.

Specifically, the information from the appellant's doctors, with detailed examples from the appellant and his advocates, shows that the appellant is significantly restricted with *Shopping*, *Meals*, *Transportation*, and *Social Functioning*. 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

Arguments

The advocate stressed that the appellant is unable to live alone and must rely on family members for assistance with everyday tasks. The advocate noted that so far, the family has not been able to secure home help for the appellant other than an "IT guy" who helps him work the phone. The advocate submits that the appellant needs ongoing support especially since the family members he lives with have their own serious health issues and will not be able to assist the appellant long term.

Ministry argument at the Reconsideration

- The ministry acknowledged that the appellant receives assistance from family as indicated in the AR. However, the ministry took the position that it cannot be determined that significant help was required as it had not been established that DLA were significantly restricted.

Ministry position at the hearing

The ministry maintained that the reconsideration decision was reasonably supported by the evidence the ministry had before it. However, based on the information submitted on appeal, the ministry said there is now enough evidence to confirm that the appellant needs significant help and support because the new evidence establishes that DLA are significantly restricted.

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.

Panel's decision - help with daily living activities

The panel finds that the ministry's decision was reasonably supported by the evidence that was available at the reconsideration. That evidence did not confirm significant restrictions to DLA and the corresponding need for help with DLA. Under the legislation, confirmation of direct and significant restrictions to DLA is a precondition for needing help to perform DLA. In light of the new evidence. which in the panel's view established that DLA are significantly restricted continuously, the appellant cannot manage DLA independently and the ministry decision is therefore unreasonable.

In the AR, Dr. A. indicated that the appellant receives help from family and that friends and neighbours are available if needed. The submissions from the advocate and F. describe how much the appellant needs to rely on family to manage appointments, shopping, and cooking, In the SR, the appellant described needing help from his family, and even police officers, when he gets lost in familiar/unfamiliar places. Dr. B. noted in the letter from December 2021 that having F. accompany the appellant to the appointment was very helpful for getting information about the appellant's situation.

On review of the evidence from the doctors, with additional details from the appellant and his advocates, the panel finds that the record confirms a need for significant help or supervision from another person as required by the legislation, The appellant has suffered serious consequences and safety concerns from trying to manage DLA on his own. He regularly gets lost; he reported a recent car accident; and he was fired from jobs and experienced a breakdown in family relationships due to his memory problems and cognitive decline. The panel therefore finds that the ministry's conclusion, that the criteria for help under subsection 2(2)(b)(ii) of the EAPWDA were not met, was not a reasonable application of the legislation.

Conclusion

Based on all of the admissible evidence which indicates a severe impairment of mental functioning and significant restrictions in at least 2 DLA, the panel finds that the ministry was not reasonable in its decision. The EAPWDA states that 5 criteria need to be met, including a severe impairment that significantly restricts DLA to such a large degree that the person requires significant help or support from another person to perform DLA. The evidence indicates the appellant is not able to manage DLA without extensive family support.

Now that all 5 criteria under section 2 of the EAPWDA are established on the evidence, the panel rescinds the ministry's decision and refers the decision back to the minister for determination on amount of disability assistance. The appellant is 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 Margaret Koren	
	Date (Year/Month/Day) 2022/05/05

Print Name John Pickford	
Signature of Member	Date (Year/Month/Day) 2022/05/02
Print Name Erin Rennison	
Signature of Member	Date (Year/Month/Day) 2022/05/03