Part C – Decision Under Appeal

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the Ministry) Reconsideration Decision (RD) dated June 16, 2022, 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 undated and unsigned applicant information and self report (SR), completed by the Appellant in March 2022, an undated Medical Report (MR) completed by the Appellant's General Practitioner (GP) who has known the Appellant for 13 years and who has seen the Appellant 2 – 10 times in the past year, and an undated Assessor Report (AR) also completed by the GP.

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 June 2, 2022 in which the Appellant does not complete the section of the RFR that asks why he is asking for a reconsideration of the Ministry's decision;
- An undated one-page hand-written document titled "History" (the History) in which the Appellant lists events that occurred in his life between 1987 and 2021;
- An undated one-page hand-written document (the Permanent Symptoms Document) listing parts of the Appellant's body and including the comment "*These are my permanent symptoms – Tingling pins and needles left; toe, heel outer calf, Left Thigh (cramps)*";
- A two-page undated document (the Pain Profile), the first page of which is titled "*Describing Your Pain*" in which the Appellant has written two numbers beside each pain description, one signifying "acute symptoms" and the other "chronic symptoms", and assigned numbers according to a scale provided on the document from "0" (No Pain) to "5" (Excruciating). The second page of the document is titled "*Preparing Your Pain Profile*" in which the Appellant has written responses to 15 questions such as: "When did your pain start?" [*1987*], and "Is it intermittent or constant?" [*intermittent (almost daily)*)]; and,
- A copy of 16 pages from a daily journal (the Daily Journal) with daily entries for the period from April 4, 2022 to May 29, 2022 (a total of 56 entries), and in which the Appellant has written the symptoms of his impairment on each date, the distance he walked on each date (and other physical activities he undertook on some of the dates), and the amount of time he spent on a forklift at his place of work during workdays. For example, on April 5, 2022 he wrote "*band across low back – Right Rib- Left toe + Left knee – pins and needles in both feet – bad spot on Left upper hip around back – deep inside the front of both hips – weakness, shaky legs – mid-back pain (especially on the left) – pelvic tilt - shin splints - walk 9,100 steps – 4.5 carpel tunnel – 6 hour forklift 10:45 – 17:00*".

Diagnoses

In the MR, the GP diagnosed the Appellant with degenerative disk disease (DDD) in the L5 spine with a date of onset of September 2012, osteoarthritis in the L5 spine with a date of onset of September 2012, mechanical low back pain with a date of onset of September, 2012, and a

"*longstanding*" personality disorder. The Appellant has added "*three bulging disks and scoliosis in the mid back*" to the GP's diagnosis on the MR.

Severe Physical Impairment

In the MR, under Health History, where asked to indicate the severity of the applicant's medical conditions and how they impair the applicant, the GP wrote that the Appellant has "*Chronic mechanical low back pain. He has episodes of low back lumbar spasm, 2 to 3 times per year, where he is debilitated for 2 – 3 week periods. He cannot stand still for very long, i.e. 5 minutes, before he feels low back pain, and must move. On walking, he can walk 2 blocks before (he) must stop to take a break and rest*". The Appellant has changed the GP's comment that the Appellant's low back lumbar spasms occur 2 – 3 times a year to "*4 to 5*" times a year.

With respect to functional skills, the GP reports that the Appellant can walk 1 to 2 blocks unaided on a flat surface, climb more than 5 stairs unaided, lift 2 – 7 kg, and has no limitation in the amount of time he can remain seated, adding "*But must move and adjust body positions from time to time*".

In the section of the AR where the assessor is asked to indicate the assistance required related to impairments that directly restrict the applicant's management of mobility and physical abilities, the GP indicates (*with comments in italics*) that the Appellant is independent with all listed mobility and physical abilities [walking indoors and walking outdoors (*must rest after 1 – 2 blocks*), standing (*must move after 5 minutes*), climbing stairs, and lifting, carrying and holding (*no more than 15 lbs.*)].

The Appellant provides details of his impairments in both the SR and in a separate two-paged typed document titled "*Self Report – (Name of Appellant)*" (the Second SR). In the SR, the Appellant states that his first back injury occurred in 1987, from which he has "*suffered greatly from cyclical reoccurrences every year*". He references 3 other injuries suffered in 2002, 2007 and 2012, adding "*But in the past 4 – 5 years I have experienced re-injury symptoms that are as much or more debilitating than the first injury, more frequently (3 to 4 times per year) and I am often not able to do things for myself as much as I could before*", adding "*The way I see it I have suffered 35 to 40 back injuries in my life. The 'pattern' of injury seems to centre around leaning forward*". In the SR, the Appellant also identifies pain he experiences with functional skills ["*a build up of pain if I sit for more than 30 minutes or if I stand or walk for more than 30 minutes. I also have a lot of pain when I first sit down (for approximately 2 minutes) and when I first stand up (for about 1 minute)*"]. The Appellant states in the SR that he visits his chiropractor (the Chiropractor) "*on severe days*", which he experiences 3 to 4 times per month. He concludes his description of his impairments in the SR by stating "*To a greater or lessor degree I am in pain all the time now and between 3 bad disks, scoliosis, arthritis and sciatica I am forced to take pain killers more + more often just to get through the day*". No new additional information regarding the Appellant's severity of impairment is provided in the Second SR.

The Appellant also references the other documents he has submitted with his application (the Permanent Symptoms Document and the Pain Profile) and explains what some of the comments in those documents mean.

The Appellant has written his own comments in the MR and the AR, including in the Health History Section of the MR where he wrote:

"*Bulging disks (L3, L4 and L5) diagnosed in 1987*

- *severe lower level back pain*
- *upper right hip, left knee and big toe pain*
- *… radiating tingling in legs and feet*
- *symptoms tend to progress gradually*
- *does walking therapy and Epsom salt baths*
- *sciatica (sharp shooting pain that extends from the buttocks down the back of my legs)*
- *Arthritis – severe joint pain and stiffness (neck, shoulders, mid back, low back, wrists, thumbs and fingers) – severe back pain*
- *Scoliosis – strain on mid back muscles – pain in the back – inability to stand upright – can't stand for more than 5 minutes*".

In the Second SR, the Appellant says that his movements are limited and he can only lift up to 15 lbs. because of low back and joint pain. He also says that it takes him 2 times longer than typical to walk indoors, and that his severe back pain means that he can only walk 1 – 2 blocks outside before having to sit down, he is not able to stand for more than 5 minutes, he can climb only 2 – 5 stairs, and he can't sit for more than an hour.

Severe Mental Impairment

In the section of the MR where the prescribed professional is asked if there are any significant deficits with cognitive and emotional function, the GP has ticked "yes" for the areas of emotional disturbance and motivation, adding the comment "*Can become impatient and tired of the chronic low back pain. Makes it harder to want to move. Can be some sadness about having chronic low back pain*".

In the section of the AR where the assessor is asked to indicate the level of ability to communicate, the GP indicates that the Appellant's abilities are good in all listed areas (writing, speaking, reading ability and hearing) and does not provide any comments or explanations in the spaces provided. In the section of the AR where the assessor is asked to indicate to what degree the applicant's mental impairment restricts or impacts functioning, the GP has indicated no major impacts; a moderate impact on emotion, motivation, motor activity, and other emotional or mental problems (specifically "*can be frustrated, irritated with low back pain*"); no minimal impacts; and no impacts in any of the other areas (bodily functions, consciousness, impulse control, insight and judgment, attention/concentration, executive functioning, memory, language, psychotic symptoms, and other neuropsychological problems). The Appellant has challenged several of these assessments in the comments he added to the AR after it was

completed by the GP, including adding other areas of impact, and changed some of the assessments from no impact, minimal impact, and moderate impact to a higher impact level.

With respect to social functioning, the GP indicates in the AR that the Appellant is independent in the areas of making appropriate social decisions, interacting appropriately with others, dealing appropriately with unexpected demands, and ability to secure assistance from others. The GP has indicated that the Appellant does not need periodic support or supervision in any areas, but that he does need continuous support or supervision in developing and maintaining relationships with others, adding "*not many social relationships. Not motivated to be mobile.*" The GP indicates that Appellant has marginal functioning with both his immediate and his extended social networks.

The Appellant has added to the information provided by the GP in the MR by adding language, memory and sustained concentration to the list of his cognitive and emotional functioning difficulties, indicating that he has "*difficulty speaking, can become very angry and can lose concentration*". In the AR, the Appellant has also added comments to the GP's assessments by changing the information about his communication abilities from "good" to "satisfactory" or "poor" and the level of impact of his mental impairment on most of the items listed.

The Appellant does not provide any information about a mental impairment in the SR, but in the Second SR he says that he has difficulty speaking to others due to his severe back pain, he has few friends because he has little motivation to socialize also due to his back pain, and that he has a hard time interacting with strangers, cooperating with others, and forming and maintaining relationships.

The Appellant does not identify any mental impairments in any of the other documents included with the appeal materials (the History, the Permanent Symptoms Document, the Pain Profile, or the Daily Journal).

Restrictions in the Ability to Perform DLA

In the MR, the GP indicates that the Appellant has not been prescribed any medications or treatments that interfere with his ability to perform DLA, and has not included any DLA impacts 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 impact of the Appellant's medical condition on daily functioning.

In the AR, the GP states that the Appellant is independent with respect to all tasks for the DLA of personal care except for toileting, where no assessment is provided, and bathing, where the GP has added the comment "*shower bench, 2 x as long to shower*". Regarding basic housekeeping, the GP also indicates that the Appellant is independent. With respect to the DLA of shopping, the GP indicates that the Appellant is independent with all tasks except going to and from stores and carrying purchases home, and writes that the Appellant takes three times as long as typical with these latter two activities. Regarding the other listed DLA, the GP indicates that the Appellant is independent with all aspects of meal preparation, cooking and food storage, paying rent and bills, and taking medication and filling prescriptions. With the

transportation DLA tasks, the GP indicates that the Appellant is independent with arranging transportation but takes significantly longer than typical with getting in and out of a vehicle ("*takes a little longer*") and using public transit ("*must be careful with his stiff and achy low back*").

In the SR, the Appellant writes that he has had many episodes of sciatica that have left him unable to do "*simple chores*", such as vacuuming, washing floors, sweeping, and preparing his meals. He lists a number of activities that his impairments impede, including peeling carrots, flushing the toilet, washing his hands in the sink, leaning over a drawer, emptying the dishwasher, washing food in preparation for cooking, sitting in a car, and washing the bathtub. He also says that showering takes 3 to 5 times longer than typical.

In the Second SR the Appellant says that he has severe and ongoing impairments that restrict his ability to perform DLA regarding the following activities:

- **Personal Care**
  - It takes him three times longer than typical to dress because of joint pain;
  - Basic personal hygiene takes five times longer due to back pain;
  - Getting out of bed takes three times longer because of back pain; and,
  - He has a hard time taking a shower, which he often skips, due to pain in his back and legs.
- **Meal Preparation**
  - It takes him three times longer to cook because of pain in his legs, back and feet; and.,
  - He needs help opening cans and jars or peeling carrots because of pain in his fingers.
- **Performing Housework**
  - He lacks motivation to do basic housekeeping and relies on his roommate to help; and,
  - It takes him three times as long to do his laundry due to severe back pain.
- **Shopping**
  - He avoids shopping when there are many people because his awkward walking embarrasses him;
  - He has difficulty making decisions about what to buy. He just picks up what he needs and leaves as soon as possible;
  - It takes him three times longer to walk to the store from the parking lot due to joint pain; and,
  - He has difficulty getting in and out of his car because of back and leg pain.
- **Taking Public Transit**
  - He has to have a seat on the bus due to severe back pain.

Need for Help

In the MR the GP indicates that the Appellant requires a shower bench and "*low back support*" as aids for his impairment. After the GP completed the MR, the Appellant wrote in the MR that he uses the shower bench all the time and the low back support when working or lifting and that he "*needs ongoing help with housework, management of finances, meal preparation, chores around the house and shopping*."

In the section of the AR that asks who provides the help required for DLA, the GP written "*Lives with one other person. Not family.* " In the section of the AR where the prescribed professional is asked what assistance is provided by other people, the GP has written "*None*". In the section of the AR where the prescribed professional is asked what assistance is provided through the use of any of a list of assistive devices, the GP has ticked "Bathing aids" and written "*shower bench*". In the section of the AR where the prescribed professional is asked to provide details of any equipment or devices used by the applicant, the GP has written "*low back support*". The GP also indicates that the Appellant does not have an assistance animal.

In the SR, the Appellant says that he has trouble taking care of himself. In the Second SR he says that he needs help from others with personal care, meal preparation, housework, shopping, taking public transit, managing finances, communication, and social functioning, and that his roommate helps him with the housework.

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 am not able to take care of myself + my environment + I need help w/ chores. I am forwarding some supplemental documents to support this in a few days.*"

On June 29, 2022, the Appellant provided a two-page letter dated June 27, 2022, signed by the Chiropractor and addressed "To whom it may concern" (the Appellant Submission). In the Appellant Submission, the Chiropractor says:

- The Appellant has been coming to the Chiropractor's office for just under 10 years for treatment of *"various aches and pains*";
- The Appellant averaged between 12 and 18 visits per year over that time and there has been a gradual increase in symptoms over the years;

- The Appellant has a very bad back and most of his joints are arthritic and painful. "*The intensity of the pain varies daily but (the Appellant) is always in pain*". "*His x-rays and MRI on file all confirm the disk and degeneration at various areas of the spine*";
- "*Having a number of disk issues and degenerative changes that are moderate to severe in nature … affects (the Appellant's) DLA every single day. He is constantly mentioning difficulty with making meals, simple chores like washing dishes and even self care.*"; and,
- "*The Appellant has been keeping a Daily Journal, which helps (the Chiropractor) figure out what (the Appellant) may be doing to exacerbate his symptoms and to determine further course of care*".

Evidence Presented at the Hearing

At the hearing, the Appellant said that he feels he can definitely qualify for the criteria for which the Ministry determined that there is insufficient evidence (i.e., a severe impairment which directly and significantly restricts his DLA and for which assistance required). He said that he has lots of information regarding what he can and can't do. He explained that he can't do the simplest of DLA, providing a few examples: a shower takes 50 to 60 minutes, a therapeutic salt bath takes 2 hours because he has to clean the tub first and do stretching exercises before getting in, he has trouble leaning over (even experiencing pain when he reaches for a brush, for example), he often uses an ice pack to treat his lower back pain, and he can only sit at a computer for half an hour before having to stand, as he gets pins and needles in his feet, lower back, thighs, left ankle and toes.

Regarding assistive devices, the Appellant said that he uses an infra-red heating pad and a vibrating pillow to sit on for 20 minutes at a time. He also said that is constantly having to stretch, flex and use an ice pack when he is reading or lying down, he is constantly having to get up to stretch and walk, and that he must do exercises every morning and "*doesn't feel normal till lunch*".

Regarding help from other people, the Appellant explained that he rents a house with his brother who does a lot for him, including all the vacuuming, shopping for the Appellant's supplies, and preparing about 70% of the Appellant's meals. The Appellant also said that he has difficulty reaching for items on high shelves and his brother takes them down for him. In response to a question from the Panel, the Appellant clarified that, while there is another person who rents a suite in his house, the "roommate" referred to in the appeal documents who helps him is his brother, and the renter "*doesn't help a lot*". The Appellant also said that his brother also lends him money when he is short of funds. In response to another question from the panel, the Appellant said that when he said in the Second SR that he requires help with managing finances he meant that he sometimes had to borrow money from his brother to pay his bills.

In response to another question from the Panel, the Appellant said that the GP was not with him when the GP completed the MR and the AR. The Appellant said that the GP took the MR and the AR forms from him, completed both without the Appellant's input, and sent them to the

Ministry directly. The Appellant also said that the GP got the information about the "roommate" wrong, and that it was his brother who helped him with his DLA.

In response to another question from the Panel, the Appellant said that the GP's reference to a *low back support*" assistive device was a lumbar support device, which he also referred to as a back brace. The Appellant said he had learned it can weaken the back if worn too often, so he only wears in when absolutely necessary.

In response to another question from the Panel, the Appellant said that he had first applied for Income Assistance (IA) in December 2021 and has been receiving it since. The Appellant also said that he is on call for work as a forklift driver, and that in busy times he works about 20 days a month, but there are times when there is no work available, and he hasn't had any work since June 2022. He said that he did work some time ago as a houseman at the facility at which he works but that the job involves strenuous tasks like moving tables and he is unable to do hard work, so he hasn't had that job for about a year.

Regarding the discrepancy between the GP's information about the number of back spasms the Appellant experiences a year (2 – 3 times) and the Appellant's (4 – 5 times), the Appellant said that he only visited the GP 2 or 3 times a year, but in addition the Appellant sees the Chiropractor a couple of times a year when he has his back spasms as the Chiropractor is his "*go to guy*". The Appellant also said that his back pain has been getting worse and he now sees a physiotherapist from time-to-time, and a massage therapist "*every three or four months, whenever I can afford it*".

Asked by the Panel whether he takes any prescription medication, the Appellant said that he takes a nonsteroidal anti-inflammatory drug (NSAID), but only when he's "*in real trouble*", adding that several years ago he was prescribed an opioid, but he became dependent on it so he will not take it again.

In response to a question from the Panel about why the Appellant had self-diagnosed scoliosis while the GP hadn't included that diagnosis in the MR, the Appellant said that scoliosis was diagnosed by a specialist he had been referred to in 2021, and that he didn't know why the GP hadn't included that diagnosis in the MR. He did not know whether this had been confirmed by radiography or MRI.

At the hearing, the Ministry summarized the information in the RD, including that the GP had indicated in the MR that the date of onset for the Appellant's physical impairments was September 2012, and that the GP's diagnosis included a personality disorder. The Appellant challenged both of these statements. He said the onset of his physical impairments was many years earlier, and that there were workers' compensation claims he had been paid in 1987 as a result of an injury that resulted in some of his symptoms, which the GP did not have, and that he could provide to the Ministry if necessary. The Appellant also said that this was the first he'd been told that he had a personality disorder. He speculated that this opinion was held by his GP "*because I argue with him all the time*".

The Ministry also said that the legislation requires that the Ministry must rely primarily on the opinion of a prescribed professional, in this case the GP, and that "*it's not clear why the (GP's) DLA assessments vary so significantly from what the Appellant has provided*".

In response to a question from the Panel, the Ministry said that the legislation requires that the MR be completed by a medical practitioner, which incudes a medical practitioner and a nurse practitioner, and the AR can be completed by any of the following: a medical practitioner, a registered psychologist, a registered nurse or registered psychiatric nurse, an occupational therapist, a physical therapist, a social worker, a chiropractor, or a nurse practitioner; and that the professional who completes the MR does not have to be the one who competes the AR. The Ministry also said that an applicant whose PWD designation request is denied can apply again with a new set of application forms. In response to a question from the Appellant, the Ministry said that it did not have a doctor it could refer the Appellant to so that a different doctor could complete a new MR.

Admissibility of New Evidence

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 physical or mental impairment that directly and significantly restricts DLA, either continuously or periodically for extended periods, and that as a result of any direct and significant restrictions the Appellant requires the help to perform DLA.

The Panel finds that there is no new evidence in the NOA.

New evidence contained in the Appellant Submission includes the average number of times the Appellant has visited the Chiropractor over the past 10 years, the value of the Daily Journal in helping the Chiropractor "*figure out what (the Appellant) may be doing to exacerbate his symptoms and determine (a) further course of care*', and that the Appellant "*is constantly mentioning difficulty with (several DLA)*". The Panel considers the new written evidence in the Appellant Submission 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.

The Panel finds most of the new information in the Appellant Submission to be of high probative value as it directly addresses the criteria set out in the legislation, the sole exception being the information about the Appellant's difficulties in performing DLA. The Panel finds this information to be of low probative value because the information does not represent the direct observations of a prescribed professional, rather it is described by the Chiropractor as being claims made by the Appellant ("*He is constantly mentioning difficulty with …*"), which the Chiropractor has not personally observed.

The Panel finds the information in the Appellant Submission about the average number of visits the Appellant makes to the Chiropractor each year and the value of the Daily Journal in determining a course of treatment to be highly credible as they represent the level of knowledge the Chiropractor has about the Appellant's physical impairments and the opinion of a prescribed

professional respectively. The Panel finds the information to be of relatively high probative value because the Chiropractor indicates that they were using the information in the Daily Journal to allow them to "*consistently (try) methods to minimize symptomology by discussing (the Appellant's) daily routines at work and home*."

New verbal information presented at the hearing by the Appellant is that the help he receives from another person with his DLA is help that his brother gives him with preparing meals, basic housework, and shopping. The Panel considered 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.

The Panel finds the new verbal information provided by the Appellant at the hearing to be of high probative value as it directly addresses the criteria set out in the legislation.

The Panel finds the new verbal information presented by the Appellant at the hearing to be moderately credible because, while it has not been corroborated, no evidence was presented to suggest that the Appellant's brother does not help him with some of his DLA.

The Ministry did not object to the Panel considering any of the new evidence.

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. In other words, was it reasonable for the Ministry to determine that the evidence does not establish that the Appellant has a severe mental or physical impairment, and that the Appellant's DLA are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods? Was it reasonable for the Ministry to determine that because of any direct and significant restrictions it could not be determined that the Appellant requires the help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA?

ANALYSIS

Severity of Impairment

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

In addition, a diagnosis of a severe impairment does not in itself determine PWD eligibility. Section 2(2) of the EAPWDA requires that in determining whether a person may be designated as a PWD, the Ministry must be satisfied that the individual has a severe physical or mental impairment with two additional characteristics: in the opinion of a medical practitioner or a nurse practitioner it must both be likely to continue for at least two years [EAPWDA 2(2)(a)], and in the opinion of a prescribed professional 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 of prescribed professionals – in

this case the GP regarding the length of time that the severe impairment is likely to continue, and the GP and the Chiropractor regarding the impact on DLA and the need for help.

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

Physical Functioning

The Ministry's position is that, while the Appellant has some limitations with his mobility and physical abilities, the evidence provided by the GP, who is the Appellant's prescribed professional, does not demonstrate that the Appellant has a severe physical impairment.

The Appellant's position is that he has several severe and ongoing physical impairments that restrict his ability to perform DLA.

Panel Decision

In the RD, the Ministry acknowledges that the Appellant has some limitations with his mobility and physical abilities, but finds that the ability to walk up to 2 blocks and climb stairs independently, and the ability to lift up to 15 pounds (as reported by the GP) is not indicative of a severe physical impairment. In addition, the Ministry determined that a requirement to shift positions periodically while seated also does not establish a severe physical impairment.

As noted above, the legislation requires that the fundamental basis for the analysis is the evidence of prescribed professionals. Therefore the Ministry must rely primarily on the opinion of prescribed professionals. The prescribed professional in this case is the GP, and the GP has reported that the Appellant has no severe limitations in his mobility and physical functioning capabilities. In addition, based on evidence presented by the Appellant at the hearing, the Panel notes that the Appellant says that he is able to work an average of 20 days per month when work is available, and that this work involves the operation of a forklift, which would be very challenging work for a person with a severe physical impairment. Clearly, the Appellant's description of his symptoms are worse than what was reported by the GP in the MR and the AR.

The Panel finds that the Ministry's determination that the Appellant does not have a severe physical impairment is reasonably supported by the evidence provided by the GP, who is the prescribed professional upon whose information the Ministry must rely.

Mental Functioning

The Ministry's position is that it is unable to determine that a severe mental impairment has been established, when the significant deficits and impacts to the Appellant's mental functioning are considered in conjunction with the GP's report on the Appellant's ability to perform DLA.

The Appellant's position is that there are two mental problems that have a major impact on his mental functioning and seven moderate ones; and that he has difficulty managing personal finances, communication, and social functioning, but he specifically denies that he has a personality disorder (as diagnosed by the GP).

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 RD the Ministry notes that, while the GP indicates that the Appellant has significant deficits in is cognitive and emotional functioning in the areas of emotional disturbance and motivation, the GP indicates that the impact to the Appellant's daily functioning is moderate. In addition, the Ministry notes a substantial difference between the GP's assessment of mental functioning and the Appellant's assessment of the same factors, and that there are no additional referrals, reports, or assessments from any mental health expert such as a psychiatrist or counsellor to support the Appellant's assessments. The Ministry also notes that the GP has indicated that the Appellant is able to independently complete the DLA typically considered difficult for an individual with a severe mental impairment (such as those related to making decisions regarding personal activities, care, and finances). In addition, the Ministry notes that the GP indicates that the Appellant is able to maintain marginal functioning within social networks but doesn't say what type of assistance is needed or that any assistance or supervision in the community is required.

As mentioned above, the Panel notes that the legislation requires that the fundamental basis for the analysis is the evidence of prescribed professionals – in this case the GP. The Panel also notes that the Appellant explained at the hearing that the difficulty he has with managing finances relates to his lack of sufficient income to pay all of his bills and make purchases of necessities when required, rather than any technical difficulties he has in managing his financial affairs as a result of a mental impairment. For these reasons, the Panel gives significant weight to the information provided by the GP in their assessment of the degree of the Appellant's mental impairment.

The Panel finds that the Ministry reasonably relied on the evidence provided by the GP, whose information, as provided in the MR and the AR, does not suggest that the Appellant has a *severe* mental impairment. Therefore the Panel finds that the Ministry's determination that the Appellant does not have a severe mental impairment is reasonably supported by the evidence.

Restrictions in the Ability to Perform DLA

The Ministry's position is that the legislation requires that a prescribed professional must confirm that an applicant's impairment directly and significantly restricts their ability to perform DLA either continuously or periodically for extended periods, but the Ministry is not satisfied that the information provided by the GP confirms that there are such significant restrictions.

The Appellant's position is that he has significant restrictions in his ability to perform the DLA of personal self care, housework, and shopping, all of which take 2 to 5 times longer than typical

due to his physical impairments, and the DLA of taking public transit, because he can't stand on the bus so he has to be sure of finding a seat.

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 "*chiropractor* ". As mentioned above, both the GP and the Chiropractor are considered prescribed professionals for the purpose of providing opinions regarding the nature of the Appellant's impairment and its impact on the performance of DLA. The term "*directly*" means that there must be a causal link between the severe impairment and the restriction. The direct restriction must also be significant. There is also a component related to time or duration - the direct and significant restriction must be either continuous or periodic. If periodic, it must be for extended periods.

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

In the RD, the Ministry stresses the legislation requires that a PWD applicant's ability to perform DLA must be assessed by a prescribed professional. The Ministry notes that the GP has reported that most DLA are performed by the Appellant independently, and some of them (bathing, going to and from stores and carrying purchases home, getting in/out of a vehicle and using public transit) take between "*a little*" and up to 3 times longer than typical. The Ministry concludes that this degree of limitation does not establish a significant restriction in any of these areas.

The Panel notes that, while the Appellant reports that some of his DLA take as much as 5 times longer than typical, there are discrepancies in his account of how long he can perform some physical functioning activities. For example, in the Second SR, the Appellant says that he isn't able to stand for more than 5 minutes, whereas at the hearing he said he couldn't stand for more than 2 minutes, and his ability to sit is variously represented in the Appellant's comments

to the MR, the RFR and the Second SR as limited to 5 minutes, half an hour and an hour respectively. While the Chiropractor says in the Appellant's Submission that the Appellant's impairment "*affects his (DLA) activities … every single* day", the Chiropractor does not provide an assessment of *the degree to which* those impairments affect the Appellant's ability to perform DLA; he only indicates that routines at work and home might be modified. This makes it difficult to understand how the Chiropractor might qualify the degree of restrictions to the Appellant's DLA.

Based on information provided by the GP and the Chiropractor, the Panel finds that the Ministry reasonably determined that the evidence does not suggest that the Appellant is directly and significantly restricted in the performance of his DLA, either continuously or periodically for extended periods.

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 he requires the regular help of his brother, with whom he lives, to perform many of his DLA

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.

Having found that the Ministry was reasonable in concluding that the precondition for meeting the need for help criterion was not met (i.e., resulting from direct and significant restrictions in the ability to perform DLA), the Panel also finds that the Ministry reasonably concluded that it cannot be determined that the Appellant requires help to perform specified DLA. Therefore, the Panel finds that the Ministry's conclusion that it could not be determined that the Appellant needs significant help from others is reasonable.

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 reasonably supported by the evidence and therefore confirms the decision. The Appellant's appeal, therefore, is not 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 2022-0136

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) 2022/07/24

Print Name Margarita Papenbrock	
Signature of Member	Date (Year/Month/Day) 2022/07/25
Print Name Glenn Prior	
Signature of Member	Date (Year/Month/Day) 2022/07/24