

Part C – Decision Under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Poverty Reduction (“ministry”) dated June 28, 2022, in which the ministry found the appellant ineligible for designation as a person with disabilities (“PWD”) under the Employment and Assistance for Persons with Disabilities Act (“EAPWDA”). The ministry found that the appellant met the requirements for age and duration (impairment to continue for at least 2 years) but was not satisfied that:

- the appellant had a severe mental or physical impairment;
- the appellant’s impairment significantly restricted his ability to perform daily living activities; and
- the appellant required significant help or supervision of another person to perform daily living activities restricted by his impairment.

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 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

Full text of the legislation is provided in the Schedule after these Reasons.

Part E – Summary of Facts

The hearing took place by teleconference. The appellant attended the hearing with a legal advocate, who was in the same location.

Evidence Before the Ministry at Reconsideration:

The appellant applied for PWD designation on February 28, 2022.

The appellant is over 18 years of age. In support of his application, he submitted a medical report and an assessor report, both completed by the appellant's family physician. He did not submit a self-report at that time.

For the reconsideration, the appellant's legal advocate provided an additional letter from the family physician, answering questions put to them by the legal advocate. The appellant also provided a 9 page self-report, and the legal advocate provided a written submission.

Medical Report:

The doctor states that the appellant has been their patient for 2 years, and they have seen the appellant 11 or more times in the past 12 months.

Diagnoses:

In Section A, the doctor lists diagnoses of Attention Deficit Disorder ("ADD") (date of onset "several years"), bilateral carpal tunnel syndrome with bilateral wrist and forearm pain (date of onset more than 5 years ago), chronic low back and right knee pain (date of onset more than 5 years ago) and mood disorder – anxiety (date of onset not given).

Health History:

In Section B, the doctor states:

- Bilateral carpal tunnel syndrome affects strength and sensation in both hands and causes chronic pain. His symptoms worsened with repetitive hard physical labour over the years, so that now, despite physiotherapy, he is unable to carry a 5 pound shopping bag without worsening pain and paresthesia. Cortisone injections in his wrists did not help. He has had wrist surgery recently, but it is too soon to know the outcome.
- In the doctor's opinion, the appellant's impairment due to chronic myofascial pain affecting the appellant's hands, forearms, lower back, and right knee has worsened over the past 5 years to the point where he will not be able to work without adversely affecting his health.
- The appellant has underlying mental health conditions, especially Attention Deficit Hyperactivity Disorder ("ADHD"), for which he is on medications. "Chronic pain, inability to lift weights and walk for long distances make it difficult to self-manage ADHD and are causing him a great deal of anxiety."

In answer to the question “Does the applicant require any prostheses or aids for his/her impairment?” the doctor stated, “Yes rails and holds onto walls when his chronic low back and knee pain are worse.”

Degree and Course of Impairment

In Section C the doctor indicates that the impairments listed are likely permanent, subject to the longer term outcome of the wrist surgery.

Functional Skills – physical impairment

In Section D (1-4) the doctor indicates that the appellant can walk 2 to 4 blocks unaided on a flat surface, can climb 5 or more stairs unaided, can lift 2 to 7 kilograms and has no limitation for remaining seated.

Functional Skills – mental impairment

In Section D (5-6) the doctor indicates that the appellant has no difficulties with communication but has significant deficits with cognitive and emotional function, in particular: executive (planning, organizing, sequencing, calculations, judgement), emotional disturbance (e.g. depression, anxiety), motivation (loss of initiative or interest) and attention or sustained concentration, all due to anxiety and ADHD.

Additional Comments

In Section F the doctor states: “Underlying mental health conditions and chronic myofascial pain in lower back, R knee and both upper extremities with significant functional impairment from it (unable to care for self, unable to lift shopping bags/carry weights, walk for > 2 - 4 blocks) have made it really difficult for him to manage life without supports.”

Assessor Report:

Physical Impairment

The doctor notes the appellant’s chronic myofascial pain of lower back, right knee and both upper extremities. They indicate that the appellant is independent but uses an assistive device when walking indoors and outdoors, in that the appellant holds onto rails and walls. When climbing stairs, the appellant must stop often due to right knee pain. The appellant needs continuous assistance for lifting, carrying, and holding, as the appellant is unable to carry more than 2 to 5 kilograms “due to pain and paresthesia in both upper extremities and motor weakness secondary to severe R carpal tunnel syndrome.”

Mental Impairment

The doctor indicates that the appellant has good communication ability for all areas listed on the form: speaking, reading, writing and hearing.

In section B-4 the doctor checked that the appellant's mental impairment has minimal impact in 2 areas:

- *Emotion (e.g. excessive or inappropriate anxiety; depression, etc.)*
- *Motivation (e.g. lack of initiative; loss of interest)*

and moderate impact in 2 areas:

- *Attention/concentration (e.g. distractible; unable to maintain concentration; poor short term memory)*
- *Executive (e.g. planning; organizing; sequencing; abstract thinking; problem-solving; calculations)*

Daily Living Activities

In Part C, the doctor checked *independent* for all areas of the DLA listed under *Personal Care, Basic Housekeeping* and *Shopping* on the form except *Carrying purchases home*, where they stated that the appellant is unable to carry more than 5 pounds in both hands. Under *Additional comments* for those listed DLA the doctor states that the appellant "lives alone and has to manage all activities. He has nobody to help. Chronic pain, motor weakness in hands from carpal tunnel syndrome and mental health conditions are affecting his ability to carry on with [Activities of Daily Living] significantly."

The doctor checked *independent* for all areas of the DLA listed under *Meals, Pay Rent and Bills, Medications* and *Transportation*, but noted for all areas that the appellant "lives alone and has no choice in terms of seeking help" and "doesn't have anyone to help him with [those DLAs]."

Under *Social Functioning* the doctor checked *Periodic Support/Supervision* required for:

- *Interacts appropriately with others (e.g. understands and responds to social cues; problem solves in social context)*
- *Able to deal appropriately with unexpected demands*
- *Able to secure assistance from others*

and noted for all those areas that "social functioning is affected from ADHD but [patient] doesn't have family or other supports."

For the DLA area described as *Able to develop and maintain relationships* the doctor did not indicate if the appellant is independent or needs support or supervision, but wrote "lives alone and doesn't have family or friends."

The doctor states that the appellant has "*marginal functioning – little significant participation/communication; relationships often minimal and fluctuate in quality*" with his immediate social network and "*very disrupted functioning – overly disruptive behavior; major social isolation*" with his extended social networks.

Under *Assistance provided by other people* the doctor indicates "none"; under *Assistance provided through the use of assistive devices* the doctor notes "holds onto rails or walls while walking."

Assessor's Additional Information dated May 31, 2022:

In answer to written questions posed by the legal advocate, the doctor provided additional information, supplementary to the assessor report.

Daily Living Activities:

Regarding *Shopping*, the doctor stated that the inability to carry home purchases over 5 pounds did not impact or restrict other aspects of the appellant's DLAs.

Regarding the doctor's comments in the assessor report that the appellant is independent in the categories of *Personal Care*, *Basic Housekeeping* and *Shopping*, and also that the appellant lives alone, has no one to help him and has no choice in terms of seeking help, the legal advocate asked if that independence is continuous or periodic. The doctor stated that the appellant's independence is periodic, "flare up of pain leads to dependence" about 50% of the time, and "any day to day activities requiring use of strength of forearms and hands are periodically restricted." The doctor adds, "As he has no one to help, either he does it while suffering pain or avoids doing those activities." The legal advocate asked if the appellant's independence in those DLAs would change if there was someone to help in performing DLAs, and the doctor noted "Yes. If there was somebody to help, he might be able to delegate certain tasks that flare up his pain."

Regarding social functioning, the doctor says the marginal and very disrupted functioning are continuous, and the disrupted functioning significantly restricts his ability to relate to, communicate or interact effectively with others. The doctor states: "His underlying mental health conditions like anxiety, depression and ADHD limit his ability to communicate/interact with others significantly." In summary, the doctor says that "on the whole, and cumulatively" those conditions "accumulate to a "severe" impact on [the appellant's] Daily Living Activities."

Appellant's Self-Report

The appellant provided a 9 page typed Self-Report, in which he provided extensive details about his medical conditions and the impact on his life.

ADHD:

The appellant states that he did not complete the *Self-Report* section of the PWD application because he had not understood the instructions, which he says is an example of the effects of ADHD on his daily life. He explains the difficulty he had in drafting his self-report, which he put together from many copies of notes over many weeks.

His ADHD is characterized by both hyperactivity and inattentiveness. He hears a constant negative background noise and concurrent sensory input that he understands people who do not suffer from ADHD do not experience. His symptoms are not entirely managed by medication, which varies in how long it lasts and how effective it is, depending on the amount of physical activity, stress or mental effort required at any time.

He explains that it is difficult for him to define the nature and extent of the deficits in his social functioning because ADHD affects his personal insight, so that he cannot have a clear and complete picture of the effects of the condition. He often cannot understand cause and effect in a situation. His mind goes blank, and he ends or avoids social interaction because he wants to avoid conflict or negative interaction by seeming to waste time as he tries to remember or put information together.

He says that “personal relationships have become so confusing and complicated that the process of being involved with people is often overwhelming to the point of exhaustion.” He notes that he has no family connections, no spouse (or ex-spouse) and no children. He has no emergency contact person and no one whom he speaks to or interacts with on a daily basis. “I can go for weeks, or even months without interactions of any type.”

Inattentiveness due to ADHD has caused serious impacts in his life, such as missing important dates and appointments and forgetting important information, or more dangerous situations such as car accidents and kitchen fires. Time mismanagement (being late) is a constant and significant issue for him.

ADHD makes him very distractible, and once interrupted, it can be extremely hard to re-establish concentration. He also notes short term memory deficits. He can keep his house clean, but it is very cluttered. Tasks such as laundry take extra effort and attention. The difficulty of switching between tasks means that he either over-focuses on one task or avoids tasks to his detriment.

Regarding executive function and motivation, the appellant gives the example of prioritizing. He says he has never finished a trade certification or higher education, for this reason.

One of the ways he managed his ADHD in the past was by riding a bicycle, which he can no longer do because of chronic pain in both knees. As a result, his ADHD symptoms increased.

Anxiety and depression:

The appellant says that anxiety and depression sometimes are so bad that he cannot get out of bed in the morning and can barely function enough to eat or take care of his personal needs, or he may be so anxious that he cannot sleep due to racing thoughts. He may be awake for as long as 36 hours at a time – that has happened twice a week for 2 weeks out of the last 4 months.

Physical Impairment:

The appellant explains that he can no longer ride a bicycle or use a manual transmission vehicle because of pain and tightness in his left knee. He can only run for short distances (less than a city block) and even that will cause pain and stiffness in the knee. Climbing stairs over 5 floors causes pain and tightness. These physical restrictions have a negative impact on his ability to pursue employment.

Regarding his right knee, the appellant says that running causes locking, swelling, pain and tightness and his knee will often hyper-extend when walking quickly and stepping up onto a curb. He cannot kneel on that knee. He cannot walk downstairs without using a handrail. He cannot walk up more than 4 flights of stairs without having to stop due to pain. He cannot change direction when moving at more than a walking pace

He must carry a folding stool with him when he goes out, in case he has to stop and sit because of knee pain and locking.

The appellant describes neck strain and pain in certain positions and grinding and popping when he turns his head. He attributes these symptoms to a previous car accident.

He has intermittent sacroiliac joint issues that affect mobility where he may miss a step down. At the end of 2020 he had a 3 week episode of low back pain when he could not sit or lay down without excruciating pain, he could not sleep more than 3 hours a night and he had to “walk to exhaustion” to get any rest. Medication was not effective to relieve the pain. He has a permanent calcium mass on the left side of the back of his hip which causes some discomfort when sitting for over 30 minutes. He has mid-back discomfort if he has to stand straight for more than 5 minutes or if he has to lean forward from the waist.

The cumulative effect of all the spinal issues causes him to have pain and discomfort immediately on waking at least 3 times a week. The pain limits or prevents social activities such as exercise and other social situations.

Regarding the injuries to his elbows, wrists and forearms, the appellant says that if he strains his arm, it takes up to 3 days before he can use his arm again. He is still recovering from surgery on his right wrist in February 2022. He has stiffness from extended use of his hands. He cannot use a computer mouse for more than 10 minutes before his right hand stiffens up. Typing causes both hands to seize up and he cannot write a letter. If his arms are bent at 90 degrees, his hands get progressively colder and painful, and that lasts for 15 minutes of full body movement afterwards.

Additional Evidence:

At the hearing, the appellant stated:

- He was shaking with anxiety as he was speaking and was having a hard time focusing and concentrating because he could hear traffic noise, and with ADHD he cannot filter out extraneous noise.
- He finds it hard to follow personal interactions; he realizes that because of his ADHD he has a different perception of social interactions, and the cumulative effect is that he does not have interactions with people.
- He cannot see the responses of other people when an interaction is happening. He gave an example of being unable to resolve what he perceived to be consistent errors with a prescription refill at a pharmacy. He was not able to get the problem corrected at the

pharmacy. He “expressed frustration” and he sees that now the pharmacist avoids him and will not talk to him.

- He sees that people are upset by his behavior, but he does not understand why.
- He loses the ability to speak in social interactions.
- The world does not react to him as if he is normal.
- He tends to report to his doctor that he is better than he is, and he tends not to acknowledge pain problems.
- The medication he takes for ADHD works for a limited time but wears off; the effects wore off part way through the hearing even though he had taken the whole day’s allotment before the hearing began.
- The legal advocate was helping him stay on task and focused during the hearing, holding up flash cards with behavior cues that the appellant had made for himself.
- He was not able to follow most of the information given by the ministry during the hearing, or keep it in his working memory, because of his ADHD, but he relied on his legal advocate to represent him.
- He finds it overwhelming to try to be concise as he is speaking.
- He does not have support; he had a therapist who eventually retired, but that was his only social contact and now he has none.
- The legal advocate is the only person he has spoken to for months.
- He wakes up 3 to 4 times a week with pain in his back and hips, and ‘trigger finger’ hands; it takes him 15 to 20 minutes to get out of bed. He cannot bend over and he uses a hand extension ‘grabber’ to pick up items from the floor.
- His low back and knee pain are constant.
- He walked to reduce obesity and to deal with symptoms of anxiety and depression, he cannot do that any more because of his physical disabilities.
- If he has to stop and sit on the stool when walking, it might be half an hour before he can walk again.
- He forces himself to get out of his home once a day, but that is in part because his home is in an unpleasant location, and he wants to escape the clutter in his home that is a symptom of his ADHD. However, some days he cannot leave his home because his anxiety may mean he cannot sleep for 2 - 3 days; then he will sleep for a day or a day and a half. The ADHD will not let his brain shut off.
- Describing the support he was receiving from the legal advocate for the Request for Reconsideration and the appeal, the appellant said that he gets overwhelmed with the quantity and emotional content of the information required, and he would start to stutter and shake. The legal advocate gives him time to recover so he can continue and “I don’t get that in the real world.”
- When he was able, he used exercise to manage the ADHD; he also used videogames to sharpen his mind and increase his attentiveness but cannot do that activity anymore because of the injuries to his wrists and forearms.
- The pain of his physical conditions is an additional distraction that makes it hard to manage his ADHD; he gets irritable, cannot focus, and gets overwhelmed.
- The doctor does not know he uses the hand extension “grabber” device; when he sees the doctor, he tends to say he is doing well even if he is not.

Admissibility of Additional Evidence:

The ministry did not object to the additional oral evidence of the appellant at the hearing.

The panel finds the additional evidence to be admissible under section 22(4) of the Employment and Assistance Act. The evidence provides additional information about the appellant's condition and the extent of impairment, and therefore is reasonably necessary for the full and fair disclosure of all matters relating to the decision under appeal.

Part F – Reasons for Panel Decision

The issue on appeal is whether the ministry's reconsideration decision, in which the ministry found the appellant to be ineligible for PWD designation under the EAPWDA, was reasonably supported by the evidence or was a reasonable application of the legislation in the appellant's circumstances. That is, was the ministry reasonable in determining that the criteria in the EAPWDA section 2 were not met because:

- the appellant did not have a severe mental or physical impairment;
- the appellant's impairment did not significantly restrict his ability to perform daily living activities; and
- the appellant did not require significant help or supervision of another person to perform daily living activities restricted by his impairment.

Appellant's Position:*Severe Mental or Physical Impairment*

The appellant maintains that the cumulative effects of ADHD, anxiety, and depression, which are exacerbated by the effects of his physical impairment, meet the requirement of a severe mental impairment.

The appellant relies on the reports of the family doctor, including the assessor's additional information (May 31, 2022). In those reports, the doctor has identified very disrupted functioning in the appellant's extended social networks, which cannot be interpreted as anything other than "severe" – nowhere does the doctor use the words "mild" or "moderate" in describing the combined effects of anxiety, depression and ADHD. The appellant also points out that the doctor has confirmed that the appellant's physical and mental diagnoses are "chronic, life-long and underlying" and "likely permanent."

The appellant points out that the term "impairment" is not defined in the EAPWDA. He maintains that the term should be read broadly to include the cumulative impact of the appellant's mental and physical impairment on his DLAs. He says that the ministry has assessed each area of impairment individually, and while each part may not be a severe impairment on its own, taken together, the appellant's whole condition amounts to a severe impairment.

The appellant relies on the decision in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 (SCC), in which the court considered the Employment Standards Amendment Act, 1981, and stated that, as benefits-conferring legislation, it "ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant." The appellant draws a parallel with the EAPWDA, and says that, if there are any doubts arising from the language and information submitted in the appellant's PWD application, they should be resolved in favour of approving the application. He maintains that, by choosing to follow a narrow definition of "impairment", the ministry is going against the intention of the benefit-conferring design of the legislation.

Restrictions on DLAs:

The appellant says that the appellant has met the criteria in EAPWDA, section 2(2)(b). The doctor has identified “very disrupted functioning” of extended social networks and stated that the underlying mental conditions disrupt social functioning continuously and have a “severe” impact on DLAs. The appellant says that he is unable to have social interactions or connections because of the combined symptoms of his ADHD, anxiety and depression.

The appellant agrees that employability is not one of the considerations for PWD designation.

Help with Daily Living Activities

The appellant said that handrails on stairs should be considered as “assistive devices”, because they are installed as needed for people with disabilities, in bathrooms, beside toilets and tubs. He must use handrails on stairs constantly. He had the support of a therapist at one time, until that person retired, and now his support has been the legal advocate, but otherwise, there is no one to help him, so he avoids DLAs that involve interacting with other people.

Ministry’s Position:

Severe Mental or Physical Impairment

The ministry argued that the information provided did not establish a severe impairment. The ministry noted that employability or ability to work were not taken into consideration for the purpose of determining PWD designation.

The ministry says that the information in the PWD application shows that the appellant has limitations to physical functioning due to pain in wrists, lower back and right knee. However, the ministry maintains that those limitations amount to a moderate, rather than a severe, impairment.

The ministry says that it cannot determine that the appellant has a severe mental impairment based on the information provided. It acknowledges that the appellant has marginal functioning with his immediate social network but says that the level of independence that the doctor reports in the assessor report is not indicative of a *severe* mental impairment. The ministry contends that the appellant is independent with DLAs that would typically be difficult for someone who experiences significant restrictions to their mental functioning, such as making decisions about personal activities, care or finances, as well as having no difficulties with communication. The ministry also noted that, in the assessor report about cognitive and emotional functioning, the doctor did not indicate a major impact in any of the areas of functioning listed.

While the doctor has said that the appellant’s mental and physical impairments cumulatively amount to a “severe” impact on the appellant’s DLAs, the ministry must look at the DLAs themselves. The ministry acknowledged that the appellant experiences limitations in social functioning because of anxiety, depression and ADHD. However, where no major impact on cognitive or emotional functioning is identified, the information does not confirm a severe mental impairment.

Restrictions on DLAs

The ministry points out that, according to the assessor report, the appellant is independent in all but one of the DLAs listed under *Personal Care, Basic Housekeeping and Shopping*, the exception being *Carrying purchases home*. At the hearing, the ministry said that it was unclear why the appellant was unable to carry purchases home, yet apparently was able to carry a range of other items.

While noting that the doctor indicated the appellant requires an assistive device, i.e. rails or walls, when walking indoors and outdoors, the ministry says that handrails and walls are not “assistive devices” as defined in the EAPWDA section 2(1). In answer to a question from the panel, the ministry acknowledged that they would consider a hand extension “grabber” device to be an “assistive device.”

The ministry argues that the doctor’s statement in the assessor’s additional information that the appellant is independent in DLAs in the categories of *Personal Care, Basic Housekeeping and Shopping* only 50% of the time does not meet the threshold of being restricted “frequently or for extended periods of time.” The ministry says that avoiding DLAs or doing them, but with pain, does not mean that the appellant needs assistance with DLAs.

With respect to DLAs under the category of *Social Functioning*, the ministry says that the doctor “does not describe the support/supervision [the appellant requires] in order to maintain in the community.” The ministry also points out that, in the assessor report, the doctor indicates that no help is provided to the appellant for DLAs. Therefore, the ministry says that it cannot determine that the appellant needs help to perform those activities. The ministry says that the evidence is that the appellant avoids DLAs, or does DLAs with pain, which does not amount to needing assistance.

Further, the ministry says that it is not clear why the appellant’s level of functioning with immediate and social networks is marginal or very disrupted, given the information in the assessor report, section B – 4 about Cognitive and Emotional Functioning, which indicates no major impact for any of the items listed.

Help with DLAs

In the reconsideration decision, the ministry concluded that, as it had not been established that DLAs were significantly restricted either continuously or periodically for extended periods, it could not be determined that significant help was required from other persons.

Panel Decision

To find a person eligible for PWD designation under the EAPWDA, the ministry must be satisfied that the appellant has met all the requirements in section 2. In this case, the ministry was not satisfied:

1. that the appellant had a severe mental or physical impairment;
2. that, in the opinion of a prescribed professional, the impairment directly and significantly restricted the appellant’s ability to perform daily living activities;

3. as a result of those restrictions, the appellant requires help to perform those activities.

Severe Mental or Physical Impairment

In the written submission on reconsideration, and at the hearing, the legal advocate focused on severe mental impairment, rather than severe physical impairment. The panel finds that the ministry was reasonable in its determination that the physical impairment described by the doctor and the appellant is consistent with a moderate, rather than a severe, level of impairment. However, the panel finds that the ministry's determination that there was no severe mental impairment is not reasonably supported by the evidence.

The panel has taken a cumulative view of the evidence and finds that the documents submitted on reconsideration, together with the appellant's oral evidence at the hearing, add further detailed and direct evidence of the appellant's impairment and restrictions on DLAs. Therefore, the panel gives significant weight to the additional information.

Severe Mental or Physical Impairment

The panel notes that the term "severe mental or physical impairment" is not defined in the legislation, and that "the Tribunal should interpret the [EAPWDA] with a benevolent purpose in mind" (*Hudson v. British Columbia (Employment and Assistance Appeal Tribunal)*, 2009 BCSC 1461).

In the medical report and the assessor report, the doctor provides the diagnoses of ADHD, anxiety, and depression. (While depression is not listed as a diagnosis in section A of the medical report, the doctor includes that diagnosis in the assessor's additional information, and in its reconsideration decision the ministry accepts depression as one of the appellant's mental health conditions.) The doctor indicates that the appellant has "significant deficits" with cognitive and emotional function, in particular executive function, emotional disturbance, motivation and attention or sustained concentration, all due to anxiety and ADHD. The doctor also indicates that the appellant has very disrupted functioning with extended social networks and only marginal functioning with his immediate social network. However, the doctor indicates, and the appellant confirmed at the hearing, that it does not appear that the appellant has any "immediate social network." The appellant described, and the doctor confirmed, his extreme social isolation – he has no friends, no emergency contact, and the only person he has spoken to for months is the legal advocate who has been assisting in this appeal. According to the doctor, this isolation is due to the appellant's ADHD symptoms. There is no indication that his extreme isolation is a matter of choice or circumstance. As the appellant describes his social interactions, he is aware that, due to ADHD, he cannot understand the responses of other people to his behavior, although he will see the effects, such as people avoiding him.

Although the appellant said he tries to get out of his home every day, he also described as many as 3 days of being unable to sleep due to combined anxiety and ADHD, followed by a full day or day and a half of sleep.

The ministry was not satisfied that the appellant had a severe mental impairment, based on the ministry's assessment that the appellant is independent in certain activities listed on the

assessor report form under *Daily Living Activities* that, according to the ministry, “would typically be difficult for someone who experiences *significant* restrictions to their mental functioning.” The ministry highlights the only area of *Social Functioning* that the doctor indicates is not affected by ADHD. The ministry goes on to list the areas where the doctor says the appellant needs support and supervision, and the marginal and very disrupted functioning with immediate and extended social networks and notes the doctor’s opinion that the appellant’s mental health condition has a severe impact on DLAs. However, the ministry does not explain its reasons for not giving weight to that evidence. In addition, the appellant’s evidence at the hearing provided further details about the extent of the appellant’s social isolation, and the impact of the appellant’s severely limited functioning with social networks.

The doctor and the appellant described in detail the extent of the appellant’s physical impairment. The appellant has bilateral carpal tunnel syndrome causing chronic pain, paresthesia and weakness in the wrists, forearms, and hands. He has chronic myofascial pain in his hands, forearms, lower back, and right knee. Carrying even a 5 pound shopping bag worsens his symptoms and he is unable to carry more than 2 to 5 kilograms due to pain and paresthesia. He carries a folding stool when he walks, because knee and back pain may mean that he must stop and sit for up to half an hour before he can continue. He uses handrails and walls for support when walking indoors and outdoors and must stop often due to pain.

Nevertheless, in the medical report the doctor indicates that the appellant can walk 2 to 4 blocks unaided on a flat surface, climb 5 or more steps unaided and remain seated without restriction. The appellant reports that his physical limitations affect his ability to obtain and keep employment, and to engage in heavy labour, but as the legal advocate acknowledged, employability is not one of the criteria for PWD designation. The appellant’s evidence in his self-report and at the hearing is consistent with the doctor’s assessment. The panel finds that the ministry was reasonable in its determination that the appellant’s physical limitations, while significant, represent a moderate, rather than a severe, physical impairment.

However, the panel notes the evidence of the doctor and the appellant, that chronic pain and disability affects his ability to manage ADHD, which severely impacts his level of social functioning. In his evidence at the hearing, the appellant gave several examples of physical activities, such as bike riding, that would help him manage his mental health conditions, and which he cannot do anymore. The appellant also spoke of the effect of chronic pain causing irritability, and the way that irritation exacerbates difficulties he has with social interactions. The appellant’s moderate physical impairment is an aggravating factor in his mental impairment.

The panel finds that the ministry failed to give sufficient weight to the cumulative evidence of impaired social functioning, and the doctor’s opinion that the impact is severe, when assessing the appellant’s mental impairment. Taken together with the appellant’s evidence, both in his self-report and at the additional evidence at the hearing, about the effect of ADHD, anxiety and depression on his daily life, the panel finds that a severe mental impairment is established on the evidence and the reconsideration decision is therefore not reasonable under section 2(2) of the EAPWDA.

Restrictions to DLA

Under the EAPWDA section 2(2), if it is established that a person has a severe mental or physical impairment, the minister may designate them as a PWD if, in the opinion of a prescribed professional, that severe impairment directly and significantly restricts the person's ability to perform daily living activities either continuously, or periodically for extended periods.

Under the EAPWDR section 2(1)(b), for a person who has a severe physical or mental impairment, "daily living activities" means:

- prepare own meals;
- manage personal finances;
- shop for personal needs;
- use public or personal transportation facilities;
- perform housework to maintain the persons place of residence unacceptable sanitary conditions; move about indoors and outdoors;
- perform personal hygiene and self-care;
- manage personal medication.

For a person with a severe mental impairment, the definition of "daily living activities" includes:

- make decisions about personal activities, care or finances; and
- relate to, communicate or interact with others effectively.

The panel notes that, in the additional assessor report, the doctor states that the appellant's impairment of social functioning with his immediate and extended social networks is "continuous", and his mental health conditions "limit his ability to communicate/interact with others significantly." In his evidence at the hearing, the appellant provided further details of those limitations, which have resulted in the absence of any social interaction beyond appointments with his doctor and meetings with his legal advocate to prepare for this hearing. In his self-report, the appellant stated, "I can go for weeks or even months without interactions of any type" – in fact, at the hearing, the appellant indicated that the legal advocate was the only person he had spoken to for months. The appellant explained that he loses the ability to speak in social interactions; he stutters and shakes; he struggles to focus, gets overwhelmed and finds it hard to follow or retain what he hears.

The panel notes that the appellant needed the legal advocate to use behavioral cue cards, and also frequent verbal cues, to manage his participation at the hearing. The panel observed that the appellant frequently lost focus, went on verbal tangents, and would cut himself off and stop talking while attempting to give his evidence. While an appeal hearing may be a more stressful situation than most social interactions, the panel considers its observations of the appellant during the appeal, in assessing the whole of the evidence.

The panel notes that, in the reconsideration decision, under the heading *Daily Living Activities* and the sub-heading *Analysis* the ministry notes and discusses only restrictions to DLAs relating to the appellant's physical impairment. The ministry states that "In Section C of the Assessor Report, your medical practitioner notes you are able to manage all aspects of your daily living activities with the exception of requiring continuous assistance with carrying purchases home." This statement is simply incorrect, in that it omits the *Social Functioning* section of Section C,

where the doctor notes 4 specific areas where the appellant is not able to manage DLAs independently, and marginal and very disrupted functioning with social networks.

The reconsideration decision says that the ministry has reviewed “all aspects” of the medical report and the assessor report and mentions the physical limitations the doctor explains in the assessor’s additional information. However, given the incorrect summary of the assessor report and the failure to mention in the analysis any DLAs relating to the appellant’s mental impairment, the panel finds that the ministry was not reasonable in its determination that the appellant’s impairment did not significantly restrict his ability to perform DLAs continuously or periodically for extended periods.

The panel places significant weight on the doctor’s opinion that the appellant has “very disrupted functioning” with his extended social network, which includes “shopkeepers, public officials, etc.” The doctor had the option of selecting “marginal functioning – little more than minimal acts to fulfill basic needs”, but instead indicated the most severe impact. This opinion is consistent with the appellant’s description of his daily life and his inability to interact effectively with others.

While the doctor initially indicated the appellant was “independent” for DLAs such as personal care, housekeeping and shopping, the doctor changed and explained that opinion in the additional assessor information. The additional assessor information clarifies that, in both the assessor report and the additional assessor information, the doctor was stating that opinion in relation to restrictions due to physical impairment. The doctor’s opinion with respect to restrictions due to mental impairment is found in the portion of the assessor report that deals with social functioning, and in the additional assessor information, where the doctor indicates that the mental impairments “accumulate to a “severe” impact on [the appellant’s] Daily Living Activities.”

Based on the doctor’s opinion that the appellant has very disrupted functioning with extended social networks, the panel finds that the appellant’s severe mental impairment significantly restricts the aspects of the DLAs listed in the EAPWDR section 2(1)(b) that involve relating to, communicating or interacting with anyone in an extended social network. The panel notes that this restriction would apply, for example, to shopping for personal needs. While it is often possible to shop without ever speaking to anyone including a cashier, the inability to interact effectively with store staff, ever, is a significant restriction. Similar restrictions would arise in managing personal finances, using public transportation facilities, and managing personal medication (as, for example, the appellant has described his inability to resolve a problem with a prescription). Personal interactions may be a small part of each of those DLAs, taken individually, but they are essential, and being unable to interact effectively, to the extent established by the evidence, is a significant restriction to DLAs, when DLAs are viewed as a whole.

The panel wants to emphasize that it is **not** finding that, whenever a severe mental impairment directly and significantly restricts an individual’s ability to relate to, communicate or interact with others effectively, all other DLAs are necessarily directly and significantly restricted if they require communication or interaction. The panel limits its finding to the facts of the appellant’s

situation, where the doctor's opinion is that the appellant is not able to manage even "minimal acts to fulfill basic needs".

The panel does note the doctor's statements in the medical and assessor reports, about the appellant's ability to communicate. The doctor stated that the appellant did not have cognitive, motor or sensory difficulty with communication, and his ability to speak, read, write and hear was good. The panel also notes that classification of complex mental health issues does not always fit into neat boxes. While the appellant may have the physical and mental ability to speak, for example, the effect of the severe mental impairment means that he is not able to do so effectively when interacting with others. The panel heard the difference in the appellant's explanation of his condition at the hearing, which is supported by the doctor's opinion in the additional assessor's information. Therefore, the panel gives greater weight to the doctor's more detailed opinion arising from the specific diagnoses of ADHD, anxiety and depression, and the specific impact of those diagnoses on the appellant's DLAs.

Considering the whole of the evidence, including the additional evidence provided by the appellant at the hearing, the panel finds that the evidence establishes that the appellant's ability to perform DLAs is directly and significantly affected by severe mental impairment, either continuously or periodically for extended periods.

Help with Daily Living Activities

Under the EAPWDA section 2(2), confirmation of direct and significant restrictions to DLAs is a precondition for the determination that, because of direct and significant restrictions to DLAs, the person requires help to perform those activities. In its reconsideration decision, the ministry stated that it could not be determined if the appellant needed help to perform DLAs because it had not been established that the appellant's DLAs were significantly restricted.

The panel has found that the appellant's DLAs are significantly restricted by severe mental impairment, and therefore goes on to consider whether, in the doctor's opinion, the appellant requires help to perform those activities as a result.

Under the EAPWDA section 2(3), a person requires help to perform a DLA if they need an assistive device or significant help from another person to perform it. While the appellant uses an assistive device for reaching and picking up objects, the doctor was not aware of it, and has not confirmed that the appellant needs that device to perform a DLA that is restricted due to a severe physical impairment.

In the assessor report, in the section describing support needed for social functioning, the doctor indicates that the appellant has no family, friends "or other supports." It would have been helpful for the doctor to provide more information about the nature of the help that friends and family could provide to someone who has severely impacted social functioning in his daily living activities. However, the doctor has indicated clearly that the appellant needs help and support from family and friends for social functioning, including interacting with an extended social network such as storekeepers and public officials, in the course of his other DLAs. In the absence of that support, the appellant is left in almost total social isolation.

The panel also notes the appellant's description of the benefit of the limited help and support he has received. He describes the help of the legal advocate, that in their interactions the appellant would get overwhelmed and start to stutter and shake. The legal advocate would give him time to recover, and "I don't get that in the real world." That interaction, and the behavioral cue cards, were examples of the help that the appellant needs, and were part of evidence before the panel in the appeal.

The doctor says that the appellant "has no choice in terms of seeking help." The panel notes the legislative requirement that, in the opinion of the prescribed professional, the person requires help to perform the activities, and finds that the evidence establishes the need for that help. The availability of that help is another matter.

Conclusion:

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

The panel rescinds the reconsideration decision. The appellant is successful in his appeal.

Schedule – Relevant Legislation

Employment and Assistance for Persons with Disabilities Act

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).

Employment and Assistance for Persons with Disabilities Regulation

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, or

(b) acting in the course of the person's employment as a school psychologist by

(i) an authority, as that term is defined in section 1 (1) of the *Independent School Act*, or

(ii) a board or a francophone education authority, as those terms are defined in section 1 (1) of the *School Act*,

if qualifications in psychology are a condition of such employment.

(3) The definition of "parent" in section 1 (1) applies for the purposes of the definition of "dependent child" in section 1 (1) of the Act.

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
Susan Ferguson

Signature of Chair

Date (Year/Month/Day)
2022/08/17

Print Name
Joseph Rodgers

Signature of Member

Date (Year/Month/Day)
2022/08/10

Print Name
Connie Simonsen

Signature of Member

Date (Year/Month/Day)
2022/08/17