Part C – Decision Under Appeal

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the Ministry) Reconsideration Decision (RD) dated July 22, 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 applicant information and self report (SR), completed by the Appellant on March 15, 2022, a Medical Report (MR) dated February 11, 2022 completed by the Appellant's General Practitioner (GP) who has known the Appellant for 10 years and who has seen the Appellant 11 or more times in the past year, and an Assessor Report (the First AR) completed by a Registered Nurse (the RN), who had known the Appellant for 29 years, and has seen the Appellant 11 or more times in the past year, adding "*I have taken (the Appellant) around to appointments, etc.*".

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 July 5, 2022 in which the Appellant has written "*See the Psychological Report (PR) attached …*". The PR is a 33 page document completed by a Registered Psychologist (the Psychologist) and signed by the Psychologist on June 26, 2022. While the PR was designed as a "*vocational assessment in order to explore realistic training and employment options*" for the Appellant, it does provide some information on the nature and severity of the Appellant's impairments. That information is summarized in the relevant sections below; and,
- An eight-page laboratory analysis report, dated November 26, 2021, and prepared by a laboratory that diagnoses tick-borne diseases.

Diagnoses

In the MR, the GP diagnosed the Appellant with Depression, Anxiety and Insomnia, all with a date of onset of 2000, and Tremor and Neuro Symptoms, both with a date of onset of 2016.

The Psychologist provided a diagnosis in the PR, which was based on an assessment resulting from a day of tests that the Psychologist undertook with the Appellant. The Psychologist diagnosed the Appellant with Posttraumatic Stress Disorder (PTSD), Personality Disorder with borderline and paranoid features (PD), Major Depressive Disorder (MDD), and recurrent, moderate to severe Generalized Anxiety Disorder (GAD). The Psychologist also said that the Appellant *"appeared to put in a sustained effort on the testing and she provided valid profiles on the personality inventories. She became quite fatigued toward the end of the day. Her test results appeared to be a reliable estimate of her functioning at the time of the assessment."*

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 experiences "*shaking*", reduced grip strength and handwriting, muscle spasms, light-headedness and an inability to use computer, adding "*typing, touch screens*".

With respect to functional skills, the GP reports that the Appellant can walk more than four blocks unaided on a flat surface, climb more than five stairs unaided, has no limitations with lifting and carrying, and can remain seated for less than one hour.

In the section of the First AR where the assessor is asked to indicate the assistance required related to impairments that directly restrict the applicant's management of mobility and physical abilities, the RN indicates (with comments in *italics*) that the Appellant uses an assistive device while walking indoors (*leans against walls and furniture*), requires periodic assistance from another person when walking outdoors, takes significantly longer that typical when climbing stairs (*2-3 times a normal person*), uses an assistive device when standing (*leans on someone*), is independent with lifting, and does not carry or hold anything "*unless absolutely necessary*". In the comments section of this part of the First AR, the RN has written "*Does not spend a lot of time outside. No stairs in home. Can lift but drops items.*"

In the PR, the Psychologist said that the Appellant *"has some problems grasping things and balance when she experiences tremor".*

In the SR, the Appellant states that a neurologist has diagnosed her with Tremor, adding "*Even taking two different medications daily, I shake until the point that my muscles twitch, then spasm and cramp. This occurs all over my body including my back and legs. I have fallen due to this. When this occurs, I need to increase my medications, sometimes daily … Twitching is bad enough that I have broken six teeth. The next health issue that I have is exhaustion and depression. I'm on the third medication without making any difference. I'm not just tired. I've been tired in my life. … This is "walk into walls" exhaustion.*

The Appellant also writes "*Due to not getting a firm answer from my physician, I have seen a naturopath. Through (the naturopath) I have had bloodwork processed at (a Laboratory in a foreign Country). The results show that I have a long-term bacterial infection. Unfortunately, my physician is unwilling to work with the lab physician and naturopath to try to eradicate the infection. Due to longstanding bacterial infection, my immune system is so depleted that I am unable to recharge and give the energy needed to function in my day-to-day life. Consequently, anything I do takes all of the energy I have, and I spend days recovering.*"

Severe Mental 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 reduced energy, concentration, ability to sleep and mood, fewer social contacts, and increased anxiety.

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, executive functioning, motivation, language, memory, and attention or sustained concentration.

In the section of the AR where the assessor is asked to indicate the level of ability to communicate, the RN indicates (with comments in *italics*) that the Appellant's abilities are satisfactory in speaking (*does have trouble in word finding and writing sentences*) and reading

ability (*has trouble if suffering from a migraine*), poor writing ability (*due to tremor difficulty signing name*) and good ability with hearing (*trouble processing at times*). The RN has written "*N/*A" at the beginning of the section of the First AR where the assessor is asked to indicate the degree to which the applicant's mental impairment restricts or impacts functioning and has otherwise not completed this section. Similarly, the RN has not completed the section of the First AP that deals with social functioning.

In the PR, the Psychologist says that the Appellant "*uses avoidance as a prime coping strategy … She has difficulty communication effectively including both receptive and expressive communication and this becomes more difficult when stressed … (The Appellant's) test results and clinical presentation indicate that she is extremely emotionally sensitive and is prone to feelings of anger, depression and anxiety. She feels very vulnerable and self-conscious when she is in social settings or the focus of attention. She was experiencing a moderate to high level of depressive symptoms and a high level of anxiety symptoms at the time of assessment … She is emotionally cut off from others. She has difficulty forming close attachments … She can be easily provoked and has difficulty managing feelings of anger … She has difficulty with attention and focus and she has problems with self-regulation and can act impulsively*". Regarding the Appellant's attentiveness, the Psychologist wrote "*(The Appellant's) scores on a simple sustained attention task were in the extremely low range for speed*", and for learning and memory "*(The Appellant's) ability to learn and retain auditory information presented in story format was in the very low to low average range*". Regarding executive functioning, "*(The Appellant's) ability to generate words based on a letter of the alphabet was in the very low to low average range … her hypothesis testing was … very low to average initial abstraction. This is in line with her personality testing which suggested that she lacks a sense of imagination and flexibility when it comes to approaching problem solving*". Most of the other areas of the Appellant's cognitive and emotional functioning were assessed by the Psychologist to be in the average range, the high average range, or higher.

In the SR, the Appellant has written "*I've been diagnosed since 2000 with depression … At present I can't seem to do more than one thing without being so exhausted after that it will be days before I can do something again. I'm so exhausted that I can't find my words (or the correct word). In a seven day week, four of the days I will have a migraine. Silent migraine (all symptoms of a migraine without the pain) or full migraine. This increases the difficulty of doing things. I am on the third migraine medication to try to control both silent and full blown migraines. Unfortunately (I have just suffered an) allergic reaction to (a) third medication and (I) am now swollen and itchy … My disabilities of exhaustion, depression, shaking and twitching, along with daily stress is making my quality of life awful.*"

Restrictions in the Ability to Perform DLA

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 has written that the Appellant has a reduced "*ability to shop, bank, (or) look after (her) home [cleaning etc.] independently*".

In the MR, the GP indicates that the Appellant has not been prescribed any medications or treatments that interfere with her ability to perform DLA, and has provided the comment "*Multiple ongoing prescriptions to improve (her) ability to perform DLA*".

In the section of the MP where the prescribed professional is asked if the applicant's impairment directly restricts their ability to perform DLA, the GP has ticked "yes" and indicated that the Appellant has periodic restrictions in her ability to perform basic housework and to do daily shopping, adding the comment "*Good days – bad days, needs help to recover after some activities … ↓ (illegible)*".

In the First AR, the RN indicates that the Appellant is independent with respect to all listed DLA tasks, adding the general comments "*Very slow to do activities, uses cart to get items to vehicle. Does ask for help loading stuff into vehicle. Makes decisions daily whether capable of driving or not – depends on tremor or headache*" and regarding transportation: "*Has a vehicle at this time … whether to drive or not depends on tremor, headaches and general feeling. Will ask friends for rides*".

In the PR, the Psychologist says that the Appellant has difficulty with many DLA tasks with regard to her ability to stand and walk, and she has difficulty not letting her emotions affect the completion of DLA, adding "*She has memory concerns that interfere with her day to day (life). She finds basic (housekeeping) difficult*".

In the SR, the Appellant writes "*The shaking and twitching make it extremely difficult to work on a computer or touch a screen tablet, do the dishes, walk for any distance or duration. Basically, DLA … Some days just having a bath is all I can do. Going and picking up groceries will take me four days to recover … My disability affects every aspect of my life. The severity of my symptoms change daily. The more I do, the worse the tremor, exhaustion and migraines get. Some days doing the dishes is too much. Other days I can find myself doing two or three things, only to end up feeling I've been hit by a Mac Truck in the next few days. The added stress of trying to meet rent, hydro and gas adds an additional tiredness to my already exhausted day*".

Need for Help

In the MR the GP indicates that the Appellant does not require any prostheses or aids for her impairment. Where asked what aids the applicant needs with her impairment, the GP has written "*Managing with minimal assistance at present*".

In the section of the First AR that asks who provides the help required for DLA, the RN has ticked "Friends", and where asked what assistance would be necessary if the applicant requires help but none is available, the RN has written "*Assistance provided in form of being driven to appointments when has headaches, tremors or visual disturbances. Will plan appointments around availability of friends*". In the section of the First AR where the prescribed professional is asked what assistance is provided through the use of any of a list of assistive devices, the RN has not identified any, but has written "*Uses walls for support when walking in home*". The RN has also indicated that the Appellant has an assistance animal, adding "*Unregistered untrained cat that will pull applicant out of night tremor*".

Where asked to provide any more information that might be relevant in understanding the nature and extent of the applicant's impairment and its effect on DLA, the RN wrote "*(The Appellant) is still at home on her own but uses the walls and furniture to move about*".

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, including admitted new evidence.

In the section of the Notice of Appeal (NOA) that asks why the Appellant disagrees with the Ministry's RD, the Appellant summarized the assessments of her medical condition as set out in the PR, and wrote:

"*As these were tested and observed by (the) Psychologist …and stated in the (PR); no longer is it just me telling people that I cannot work full time … To be able to concentrate on my mental/emotional health without the additional stress and panic attacks (anxiety) of being out looking for and dealing with the public daily would also help my physical health. I am under constant care (of the GP); have tried a multitude of different drug combinations.*

In the past few years … Covid became a problem, I have had 8 family deaths, almost bled to death in my stomach, totalled my truck, lost my home, 1 death of a close friend, caught my long time boyfriend cheating. As each thing happened my panic attacks have increased exponentially … Medications were changed but with each stressor my anxiety skyrockets so that I seclude myself at home … I had just stopped working multiple jobs while looking after my Mom and had gone back to university when I fell ill. Then my Mom … died. I have gone through most of this on my own as my previous support system slowly died way."

On August 22, 2022, the Appellant provided a submission (the Appellant Submission) comprising:

- A cover e-mail message from the Appellant, dated August 21, 2022, stating that the RN would be out of the Province on the date of the hearing and that the person who provided the RN with the Questionnaire referred to below would also not be available to attend the hearing. As a result, the Appellant would be unaccompanied at the hearing;
- A new AR (the Second AR) completed by the RN and dated August 17, 2022. While the Second AR was completed by the same RN who completed the First AR, the information contained in the Second AR was significantly different from what was in the First AR. The detailed assessments from the Second AR are provided below; and
- An eight-page questionnaire completed by the RN (the Questionnaire). The Questionnaire provides the RN's answers to ten questions regarding the Appellant's need

for help. The information contained in the Questionnaire is provided on the "Need for Help" section below.

Severe Physical Impairment

In the section of the Second AR where the assessor is asked to indicate the assistance required related to impairments that directly restrict the applicant's management of mobility and physical abilities, the RN indicates (with comments in *italics*) that the Appellant uses an assistive device while walking indoors (*should have a cane*) and walking outdoors (*should have a walker*), takes significantly longer that typical when climbing stairs, needs an assistive device when standing, and needs assistance from another person with lifting and carrying or holding. In the comments section of this part of the Second AR, the RN has written "*Uses walls in her home for stability when indoors, very slow outside as is concerned about falling. (Needs) intermittent help with standing to get balance, as long as bags are light … she can move them but usually … (sentence incomplete)*".

Severe Mental Impairment

In the section of the Second AR where the assessor is asked to indicate the level of ability to communicate, the RN indicates that the Appellant's abilities are satisfactory in speaking, reading and hearing, and poor in writing, adding the comment "*Does have some word finding issues, does not always retain what is read, due to tremor handwriting can be illegible*".

In the section of the Second AR where the assessor is asked to indicate the degree to which the applicant's mental impairment restricts or impacts functioning, the RN has indicated that the Appellant's impairments have a major impact on bodily functions, emotion, attention/concentration, memory, motivation, motor activity, and other neuropsychological problems; a moderate impact on consciousness, impulse control, insight and judgment, executive functioning, language, and other emotional or mental problems; and a minimal impact on psychotic symptoms.

In the section of the Second AR where the assessor is asked to indicate the support or supervision required relating to restrictions in several areas of social functioning, the RN has indicated (with comments in *italics*) that the Appellant is independent in the areas of making appropriate social decisions (*Does not trust anyone, takes long time to build trust. Does not go out into public a lot*), ability to develop and maintain relationships (*Difficulty developing friendships/relationships*), and ability to secure assistance from others (*Has not been easy but has reached out for help*); that she requires periodic assistance in dealing appropriately with others (*Tendency to be very blunt and opinionated. Does feel that she misses some social cues*); and that she is not independent in her ability to deal with unexpected demands (*This will cause a breakdown immediately*). The RN also indicates that the Appellant has very disrupted functioning with both her immediate and his extended social networks, adding "*Needs a lot of encouragement to go out and do things. Can be very distrustful of others*" and "*Does not go outside of comfort zone. Very cautious around others*".

Restrictions in the Ability to Perform DLA

In the Second AR, the RN indicates that the Appellant is independent with respect to the following DLA: dressing, toileting, regulating diet, safe storage of food, taking medications, and safe handling of medications; that she requires periodic assistance from another person (with comments in *italics*) with grooming (*can go as long as 4 days without*), bathing (*needs grab bar in tub*), feeding herself (*needs adaptive devices, will go without (eating)*), all aspects of shopping, paying rent and bills (*financial assist from family*), and filling and refilling prescriptions (*friend picks up and deals with this*). The RN also indicates that the Appellant uses an assistive device for food preparation (*use instapot & air fryer as they have timer*), cooking (*does not use stove*), and banking (*uses calendar with alarms*), and that she takes significantly longer than typical with transfers in and out of bed and chairs (*needs adaptive devices*), laundry (*2-3 days for a complete load*), basic housekeeping (*totally depends on energy and pain*), budgeting (*attention span issues*), getting in and out of a vehicle (*uses vehicle grab bars*), using public transit (*unable to get to bus stop, unable to walk … (incomplete)*), and using transit schedules and arranging transportation (*would need some help*).

Need for Help

In the section of the Second AR that asks who provides the help required for DLA, the RN has ticked “Friends” and “Family”, and where asked what assistance would be necessary if the applicant requires help but none is available, the RN has written “*If she had the adaptive devices then she would be mostly independent. If there is no help available she will wait until there is help.*”

Where asked to provide any more information that might be relevant in understanding the nature and extent of the applicant’s impairment and its effect on DLA, the RN wrote “*(The Appellant) is still at home on her own but uses the walls and furniture to move about*”.

The RN also provides the following additional comments regarding the Appellants need for help in performing DLA:

> “*Due to balance issues moves very slow. Should have a rail on bed, as well as a walker for stability. Rails should be in tub and around toilet to assist in standing. Uses instapot and air fryer for meal preparation as they have a timer to help her remember what she is doing. Has burned a few pots on the stove due to inattention. Requires assistance getting to stores as has vision issues if she has had a migraine recently. Does not drive unless very well.*
>
> *Uses scissors to cut up food as has tendency to cut self with knife due to the tremors. Does not use stove for cooking as has forgotten items on stove and burned them. Utilizes instapot and air fryer as they have timers to alert her. Has friends and family that will take her out and about if she is unable to drive.*”

Where asked in the Second AR to provide any additional information that may be relevant to understanding the nature and extent of the applicant's impairment and its effect on DLA, the RN summarized some of the information contained in the PR.

As mentioned above, the information provided in the Questionnaire comprised ten questions and answers relating to the Appellant's need for help as follows:

1. How often does the applicant require assistance with these personal care activities? - *Four days a week*
2. What assistance does the applicant require with grooming? - *Another person for physical help and supervision with balance*
3. Does the applicant require assistance with Activities of Daily Living related to Basic Housekeeping? - *Yes - another person (physical help, counselling, or life-skills coaching)*
4. If yes, how often does the applicant require assistance with these (basic housekeeping) activities? – *Three days a week*
5. What assistance is required with Activities of Daily Living related to Shopping? - *Financial*
6. How often is assistance is required with Activities of Daily Living related to Shopping? – *Two days a week*
7. How often does the applicant require assistance with Activities of Daily Living related to Meals? – *Seven days a week (air fryer and instapot)*
8. How often does (the Appellant) require support to pay rent and bills? – *One day a month*
9. How often does (the Appellant) require support to fill and refill prescriptions? – *Two days a month (Every time the Dr orders or changes prescriptions)*
10. How often does (the Appellant) require support with Social Functioning activities, specifically to interact appropriately with others? - *Has tendency to isolate. Needs a support person whenever she needs to go out in society*

Evidence Presented at the Hearing

At the hearing, the Panel noted that the Appellant Submission says that she was not able to be represented at the hearing by either the RN or the person who had provided the Questionnaire to the RN for completion and asked the Appellant if she wished to ask for an adjournment so that she could be represented by a witness or an advocate at the hearing. The Appellant declined to request an adjournment.

At the hearing, the Appellant explained that the RN had completed the Second AR because she had never completed one before and "*the first time she filled out the form she didn't know what to say*". She also said that at the time that the First AR was completed, the Appellant "*wasn't truthful*" in saying how sick she was, and that she had "*downplayed*" her illness. When she asked the RN to complete the Second AR she told the RN "*not to pull any punches*", and the

second time the Appellant said she was "*totally honest*". The Appellant said that the GP had refused to complete the AR and that she had been unable to find anyone at a local medical clinic to complete the AR because someone there told her that they would have to first see her for three months before being able to complete it.

The Appellant provided a summary of events that had occurred over the previous few years, including the death of her mother three years ago, who she was looking after at the time, and the trauma she suffered as a result. She also stated that she was suffering from a silent migraine at the time of the hearing. She explained that, while the symptoms of her silent migraines did not involve any pain, the condition made her tired, dizzy, nauseous and affected her vision. In response to a question form the Panel, the Appellant said that her migraines, which were sometimes silent migraines and sometimes full migraines, occurred an average of once a week and typically lasted for four days. She said that the pain from her full migraines caused her so much pain that "*even my skin and hair hurts*", and the only effective treatment for that was to float in a warm bath.

The Appellant said that she "*will be starting to walk"* with a cane around the house and a walker when she has to walk outside and that her impairment has been getting worse over the past six or seven years.

Regarding her medications, the Appellant explained that some of them were designed as treatments for other ailments, "*not what I have*". The medication she took for her tremors, for example, was designed to treat high blood pressure, which she didn't have. She said that the medication caused unpleasant side effects, including diarrhea, which she found embarrassing. She also said that some medications had not been effective – she was now on her 5th or 6th antidepressant – and that she was only getting three or four hours sleep a night due to the antidepressant's side effects. She also said that her GP had told her that the antidepressant might be contributing to her migraines.

In response to a question from the Panel regarding the RN's assessment of the Appellant's social functioning capabilities in the Second AR, the Appellant said that she does have very disruptive functioning with her immediate social network, despite the help she receives from the RN, stating that she will often lash out to the RN or other friends or family, "*crying or yelling because (her) patience has worn thin*".

The Appellant also provided more details about her relationship with the RN, who has known the Appellant for 29 years. The Appellant said that the RN has helped her quite a bit over the past several years, and had witnessed a lot of the Appellant's symptoms. The Appellant said that she had suffered a severe concussion as a child and that the RN has had a lot of experience dealing with patients who have experienced head trauma. The Appellant also said that she lived with the RN from 2017 until earlier this year when the Appellant moved into her own home. In response to questions from the Panel, the Appellant said that the RN accompanies the Appellant to all her doctor appointments, picks up the Appellant's medications for her and researches the side effects of medications on the Appellant's behalf. The Appellant said that she texts the RN and the RN helps her whenever the RN is available with personal

care activities (help required an average of four days a week), basic housekeeping (three days a week), shopping (2 days a week), and filling and refilling prescriptions (two days a month). The Appellant confirmed that the financial help she needs with shopping and paying rent and bills is often provided by the RN who gives the Appellant money sometimes when the Appellant is short of funds. The Appellant also said that the RN has helped her remember to pay her rent and bills every month by adding reminders to the Appellant's smart phone and calling or texting the Appellant when the rent or bills are due to be paid.

In response to another question from the Panel about her need for help with food preparation, which the RN had indicated in the Questionnaire was necessary seven days a week, the Appellant explained that she didn't have the help of another person in preparing meals, but relied on "assistive devices" (specifically the instapot and air fryer) because she forgets about food on the stovetop or in the oven and the "assistive devices" have timers that act as reminders.

At the hearing, the Ministry relied on the RD, emphasizing that in the original AR the RN had not completed several sections of the form, noting that the original AR indicated that the Appellant was independent with all DLA. The Ministry also said that many of the "assistive devices" identified in the AR were not assistive devices as defined in the legislation. Regarding the information provided by the GP in the MR, the Ministry said that, while the GP had said that the Appellant was periodically restricted in some of her DLA, the details (specifically the frequency and duration of those periodic restrictions), were not provided.

The Ministry also expressed concern about the relationship between the Appellant and the RN. The Ministry said that there might been a conflict of interest in the RN's assessment as expressed in the Second AR because the Appellant had lived with the RN for several years and had received both financial support and physical help from the RN. The Ministry said that the Appellant could re-submit an AR if it was completed by another prescribed professional who did not have a close relationship with the Appellant, and that the list of prescribed professionals who were authorized by the legislation to complete the AR also included nurse practitioners, social workers and physical or occupational therapists.

Admissibility of New Evidence

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), it must assign weight to the new evidence. Once the weight has been assigned to the new evidence, 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 Panel found no new evidence in the NOA.

The information in the Second AR is new evidence because it represents a new assessment of the Appellant's impairment, the impact of those impairments on the Appellant's DLA and her need for help. The challenge for the Panel in assigning weight to the new evidence in the Second AR is that, while the evidence is provided by the same prescribed professional that prepared the AR, it is significantly different from the first assessment, no explanation by the RN for the new assessment is provided in the Appellant Submission, and the RN did not attend the hearing and therefore could not answer the Panel's questions about the reasons for the new assessment.

New evidence presented at the hearing included the Appellant's comment that she "was not truthful" with the RN at the time that the AR was completed and downplayed the nature of her impairments, and that the RN had not previously completed an AR for anyone else and didn't know how to fill out the form. This information might help explain the reasons for the significant differences between the information in the First AR and the Second AR.

Additional new evidence presented at the hearing by the Appellant comprises the statements made by the Appellant about the nature of the Appellant's relationship with the RN.

The Panel admits the information in the Second AR and the statements made by the Appellant at the hearing as the new information is reasonably required for a full and fair disclosure of all matters related to the decision under appeal.

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

At the hearing, the Ministry expressed a concern that the RN might have a conflict of interest in her role as a prescribed professional (who should be providing an objective assessment of the impacts of the Appellant's impairment on her DLA) given the RN's relationship with the Appellant.

The RN was not available for the hearing and is arguably best placed to comment on the impact of the Appellant's impairments on her DLA, and the Panel has no reason to doubt the nature and extent of the relationship between the Appellant and the RN. In addition, the RN is a professional who must adhere to a prescribed code of ethics. However, the RN had provided both the first and Second AR which contained significant differences in information. Because the Panel had no opportunity to hear directly from the RN at the hearing to confirm why the Second AR varies so significantly from the original one, the Panel assigns minimal weight to this 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 the lack 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 RN 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 accepted that the information provided in the Appellant's PWD application demonstrates that she experiences limitations to her physical functioning due to low energy, grip strength, muscle spasms and shaking, but the Ministry's position is that the assessments provided by her GP and RN do not establish that she has a severe physical impairment.

The Appellant's position is that both the GP and the Psychologist have diagnosed her with Tremor, and that even after taking medication she shakes to the point that her muscles twitch, then spasm and cramp. This has caused her to fall often, including on one occasion when she broke six teeth.

Panel Decision

In the RD, the Ministry notes significant differences between the assessments of the Appellant's mobility and physical ability provided by the GP in the MR and the RN in the First and Second ARs, with the RN indicating that the Appellant is much more restricted than the GP's assessment of her basic functional skills, making it difficult for the Ministry to get a clear picture of the Appellant's limitations or restrictions.

On a review of the Appellant's functional skills, the Panel notes, for example, that the GP reports that the Appellant can walk more than four blocks unaided on a flat surface whereas the RN reports that the Appellant uses furniture and walls (which the RN identifies as assistive devices) while walking indoors. Regarding lifting and carrying ability, the GP says that the Appellant has no limitations, whereas the RN indicates that the Appellant can lift things but drops them, and does not carry or hold anything unless it's absolutely necessary. (As explained in the "Need for Help" section below, the Panel also notes that furniture and walls are not assistive devices as defined in the legislation.)

Because of the significant inconsistencies in the assessments of the Appellant's physical functioning between prescribed professionals, the Panel finds that the Ministry reasonably determined that available evidence does not confirm that the Appellant has a severe physical impairment.

Mental Functioning

The Ministry's position is that, while the GP indicates in the MR that the Appellant has significant deficits with her cognitive and emotional functioning in six of the listed areas, there are notable inconsistencies in the assessment of the Appellant's cognitive and emotional functioning as provided by the RN in the First and Second ARs. In addition, there are inconsistencies in those two assessments of the Appellant's ability to communicate and her social functioning capabilities.

The Appellant's position is that she is unable to do more than one thing without being exhausted, that she suffers from debilitating migraines every week that last for four days every week, and that her exhaustion, depression and daily stress makes her quality of life awful.

Panel Decision

The Panel notes that the RN did not complete two key sections of the First AR that deal with mental impairments. However, the GP has provided an assessment of severe cognitive and emotional functioning impairments in six areas (emotional disturbance, executive functioning, motivation, language, memory, and attention or sustained concentration). In addition, the GP has written in the "Health History" section of the MR that the Appellant has reduced energy, concentration, ability to sleep, mood swings, fewer social contacts, and increased anxiety (presumably representing the effects of the GP's diagnoses of insomnia, depression, and anxiety).

The Panel also notes that the evidence includes a detailed report from a registered psychologist, who is a prescribed professional (i.e., the PR). In the RD, the Ministry acknowledged receipt of the PR in which the Psychologist provides additional diagnoses that may impact her mental functioning, but the Ministry does not take this assessment into account because the information provided "*is related to a vocational assessment for the purposes of exploring training and employment options*". The purpose of the PR notwithstanding, the Panel notes that the Psychologist reported on the Appellant's mental impairments after completing a full day of extensive tests, the results of which confirm the GP's reporting in the MR. The assessment of the Psychologist, includes, for example, the statements "*(The Appellant) is extremely emotionally sensitive and is prone to feelings of anger, depression and anxiety*" and "*She was experiencing a moderate to high level of depressive symptoms and a high level of anxiety symptoms at the time of assessment*". Regardless of the purpose of the PR, the Panel finds it is not reasonable to assume that these severe mental impairments might not also have an impact on the Appellant's ability to perform DLA, particularly in light of the GP's confirming opinion.

Based on all of the evidence of the GP and Psychologist (without need to rely on any evidence from the RN although it is consistent with that provided by the GP and the Psychologist) the Panel finds that the Ministry was not reasonable in finding that the Appellant does not have a severe mental impairment.

Restrictions in the Ability to Perform DLA

The Ministry's position is that, while it acknowledges that the Appellant has certain limitations resulting from Tremor and headaches and requires some periodic assistance with basic housekeeping and shopping, the frequency and duration of these periods are not described, which the Ministry must know in order to determine if they represent a significant restriction to her overall level of functioning.

The Appellant's position is that a number of her DLA are severely restricted as a result of her mental impairments, including personal hygiene, shopping, basic housekeeping, and the stress of having to pay rent and bills.

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 forms. 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.

Section 2(2)(a) of the EAPWDR defines "*prescribed professional*" to include a "*medical practitioner*", a "*registered psychologist*" and a "*registered nurse*". Therefore, the GP, the Psychologist and the RN are all considered prescribed professionals for the purpose of providing opinions regarding the nature of the Appellant's impairment and its impact on the performance of DLA. The term "*directly*" means that there must be a causal link between the severe impairment and the restriction. The direct restriction must also be significant. There is also a component related to time or duration - the direct and significant restriction must be either continuous or periodic. If periodic, it must be for extended periods.

In the MR and the AR, prescribed professionals are instructed to 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.

In the RD, the Ministry acknowledges that the GP has indicated that the Appellant has periodic restrictions with the DLA of basic housekeeping and shopping, but also indicated that the Appellant is managing these restrictions at the present time. The Ministry also notes that the RN has indicated that the Appellant is independent with all listed DLA, while stating that the Appellant is very slow to do DLA, uses a cart to get items to her vehicle, asks for help loading items into her vehicle, and makes decisions daily as to whether she feels capable of driving. The Ministry also notes that the frequency and duration of occasions where difficulty to perform DLA are not described, which is a basis upon which the Ministry concludes that it is unable to determine whether the restrictions represent a significant restriction to the Appellant's overall level of functioning.

In the Second AR, the RN provided more detail on the type of help the Appellant requires with DLA, including the frequency and duration periodic restrictions, but the Panel is unable to give sufficient weight to the details in the Second AR to outweigh the conflicting information in the First AR. This is, as explained above, primarily due to the absence of any explanation from the RN as to why the two assessments vary so widely.

While the GP has indicated some restrictions with two DLA, the Panel also notes that the GP has written that the Appellant has "*good days and bad days*", without explaining frequency or duration of the "*bad days*".

Having considered all of the evidence, the Panel finds that the Ministry reasonably determined that there was not sufficient evidence to confirm that the Appellant's impairments directly and significantly restrict her DLA, continuously or periodically for extended periods.

Help with DLA

The Ministry's position is that it has not been established that the Appellant's DLA are significantly restricted either continuously or periodically for extended periods and therefore it cannot be determined that significant help is required from other persons.

The Appellant's position is that she relies on furniture and the walls in her home to provide physical support when she is suffering for Tremors, and that she relies on kitchen equipment with timers so she doesn't forget that she has food cooking. In addition, she relies extensively on the RN to help with a number of DLA, and that she will soon be acquiring a cane and a walker to aid her with mobility.

Panel Decision

In the First AR, the SR and the Second AR, the Appellant and the RN argue that the Appellant must rely on a number of "assistive devices" to help her with her DLA. In the Appellant's circumstances, based on the information provided, these "assistive devices" are described as furniture, walls, an instapot and an air fryer. EAPWDA Section 2(1) defines an "assistive device" as "*a device **designed to enable a person to perform a DLA** that, because of a severe mental or physical impairment, the person is unable to perform*" (emphasis added). The Panel finds that none of these items fit within the definition of an assistive device because none of them were designed to enable a person to perform DLA.

Help is defined in EAPWDA Section 2(3)(b) 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. As noted above, the Ministry's position is that it cannot be determined that significant help is required from other persons because it has not been established that the Appellant's DLA are significantly restricted either continuously or periodically for extended periods. Regardless of whether any of the devices identified qualify as assistive devices as defined in the legislation, the Panel notes that Section 2(2)(b)(ii) of the EAPWDA says 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. Therefore, the Panel finds that the Ministry reasonably concluded that it cannot be determined that the Appellant needs significant help with DLA.

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 confirms the decision. As a result, the Appellant's appeal 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 2022-0181

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) 2022/08/29

Print Name Kent Ashby	
Signature of Member	Date (Year/Month/Day) 2022/08/30
Print Name Donald Stedeford	
Signature of Member	Date (Year/Month/Day) 2022/08/30