Part C – Decision Under Appeal

The decision under appeal is the Ministry of Social Development and Poverty Reduction's ("ministry") reconsideration decision dated October 19, 2022, in which the ministry found the appellant was not eligible for designation as a Person with Disabilities ("PWD") under section 2 of the *Employment and Assistance for Persons with Disabilities Act* ("EAPWDA"). The ministry found that the appellant met the age requirement and the requirement for the impairment to continue for at least 2 years but was not satisfied that:

- the appellant has a severe mental or physical impairment;
- the impairment, in the opinion of a prescribed professional, directly and significantly restricts the ability to perform daily living activities ("DLA") either continuously or periodically for extended periods; and
- as a result of restrictions caused by the impairment, the appellant requires an assistive device, the significant help or supervision of another person, or the services of an assistance animal to perform DLA.

The ministry also found that the appellant was not one of the prescribed classes of persons who may be eligible for PWD designation on the alternative grounds set out in section 2.1 of the Employment and Assistance for Persons with Disabilities Regulation ("EAPWDR"). As there was no information or argument provided for PWD designation on alternative grounds, the panel considers that matter not to be at issue in this appeal.

Part D – Relevant Legislation

The ministry based the reconsideration decision on the following legislation:

Employment and Assistance for Persons with Disabilities Act - EAPWDA - section 2

Employment and Assistance for Persons with Disabilities Regulation - EAPWDR - section 2

The full text is available in the Schedule after the decision.

Part E – Summary of Facts

The evidence and documentation before the minister at the reconsideration consisted of:

1. Information from the ministry's record of decision indicating that the PWD application was submitted on August 22, 2022, and denied on September 15, 2022 with *Decision denial summary* explaining the criteria that were not met. On October 4, 2022, the appellant submitted a *Request for Reconsideration* ("RFR"). On October 19, 2022, the ministry completed the review of the RFR and found that the eligibility requirements for PWD designation were still not met.

2. The PWD application comprised of:

- the *Applicant Information* (self-report - "SR") signed by the appellant on August 2, 2022;
- a *Medical Report* ("MR") dated August 18, 2022, signed by the appellant's doctor, a General Practitioner ("Dr. A") who has known the appellant since January 2022 and has seen her 2-10 times in the past 12 months;
- an *Assessor Report* ("AR") dated August 18, 2022, also completed by Dr. A who indicates they based the assessment on an office interview with the appellant, and file/chart information (comment, "old records from 2013").

Summary of relevant evidence from the application

Diagnoses

In the MR, the appellant is diagnosed with anxiety and depression (date of onset 2013), and C5-C6 bilateral severe foraminal stenosis (date of onset 2018). In Section B - *Health History*, in regard to the appellant's mental health, Dr. A says that the appellant "is going through a stressful time." In section F – *Additional comments*, the doctor describes the appellant's anxiety and depression as "moderate to severe." Regarding the physical impairment, Dr. A says in Section B, that the appellant "has chronic neck and back pain."

Functional skills

Self-report

The appellant says she has Post Traumatic Stress Disorder ("PTSD") and severe depression and anxiety that makes her sad and hopeless, and constantly fearful and afraid to leave her home. The appellant says she has difficulty coping with confrontation and gets "triggered very easily and either cries uncontrollably or get very angry." The appellant also says she has recently lost weight "due to lack of appetite."

Medical Report

In section D - *Functional Skills*, Dr. A indicates the appellant can walk 2-4 blocks unaided; climb 2-5 steps unaided; and lift 15-35 pounds. The appellant can remain seated for 2-3 hours.

Regarding mental functions (questions D-5 and D-6), Dr. A indicates no, the appellant does not have any difficulties with communication. Dr. A checked that the appellant has significant deficits with cognitive and emotional function in 4 of the 12 areas listed: *Executive*, *Memory*, *Emotional disturbance*, and *Motivation*. The section for comments was left blank.

Assessor Report

Under Section B-2, *Ability to Communicate*, Dr. A indicates a *good* ability for all 4 areas: *Speaking*, *Reading*, *Writing* and *Hearing*.

Under section B-3, *Mobility and Physical Ability*, Dr. A indicates the appellant is independent with 5 of the 6 functions: listed on the form

- *Walking indoors*:
- *Walking outdoors*:
- *Climbing stairs*:
- *Standing*:
- *Carrying and holding*.

For *Lifting*, Dr. A checked *periodic assistance from another person*. The space for an explanation was left blank.

In section B-4, *Cognitive and Emotional Functioning*, the assessor is asked to indicate what impacts the appellant's impairments have on various cognitive and emotional functions. For the 14 areas listed, Dr. A indicated impacts in 7 areas:

- Minimal impact for *Insight* and judgment, *Executive*, and *Motor activity*;
- Moderate impact for *Attention/concentration*, *Memory*, and *Motivation*;
- Major impact for *Emotion*.

No impact was indicated for:

- *Bodily functions*
- *Consciousness*
- *Impulse control*
- *Language*

- *Psychotic symptoms*
- *Other neuropsychological problems*
- *Other emotional or mental problems*

Part E – *Additional Information* was left blank.

Daily Living Activities

Self-report

The appellant comments on her social functioning, stating that she has difficulty trusting others and being around people she doesn't know. The appellant says that her relationships with friends and family "are fading because I want to be by myself because I feel safer that way."

Medical Report

In Section B-1 – *Health History*, Dr. A says that the appellant "is unable to be social and keeps to herself…Always isolated."

In Section B-3, Dr. A checked *no*, the appellant has not been prescribed medications or treatments that interfere with the ability to perform DLA.

In Section E – *Daily Living Activities*, the doctor checked yes, the impairment directly restricts the appellant's ability to perform DLA. Dr. A checked that 8 of the 10 activities are continuously restricted:

- *Personal self care*
- *Meal preparation*
- *Basic housework*
- *Daily shopping*
- *Mobility outside the home*
- *Use of transportation*
- *Management of finances*
- *Social functioning* (comment, "isolated, stays to herself"…Improving")

Dr. A checked that 2 activities are not restricted:

- *Management of medications*
- *Mobility inside the home*

Assessor Report

In Section C - *Daily Living Activities*, Dr. A indicates that the appellant is independent with all areas of 5 of the 8 DLA listed on the form:

- *Personal Care*: the appellant was assessed as independent with *dressing*, *grooming*, *bathing*, *toileting*, *feeding self*, *regulating diet*, *transfers* (*bed*), and *transfers* (*chair*);
- *Basic Housekeeping*: the appellant is independent with l*aundry* and *basic housekeeping*;
- *Meals*: the appellant is independent with *meal planning*, *food preparation*, *cooking*, and safe *storage of food*;
- *Pay Rent and Bills*: the appellant is independent with *banking*, *budgeting*, and *pay rent and bills*;
- *Medications*: the appellant is independent with *filling/refilling prescriptions*, *taking as directed*, and *safe handling and storage*.

Restricted activities

Dr. A indicated restrictions for 3 DLA:

- ***Shopping***: the appellant needs *periodic assistance from another person* for 2 areas: *going to and from stores*, and *making appropriate choices*. The space for *Additional comments* including any safety issues was left blank.

  The appellant was assessed as independent with the remaining areas of *Shopping*: *reading prices and labels*, *paying* for purchases, and *carrying purchases home*.

- ***Transportation***: the appellant needs periodic assistance with 1 area: *using public transit*. The space for *Additional comments* including any safety issues was left blank.

  The appellant was assessed as independent with the remaining areas of *Transportation*: *getting in/out of a vehicle*, and *using transit schedules and arranging transportation*.

- ***Social Functioning***: the appellant was assessed as needing support or supervision for 4 out of 5 areas (comment, “socially isolated, anxiety and depression”):
  -needs continuous support/supervision with *able to develop and maintain relationships*, and *interacts appropriately with others*.
  -needs periodic support/supervision with *able to deal appropriately with unexpected demands*, and *able to secure assistance from others.*

The appellant was assessed as independent with the remaining area: *appropriate social decisions*

Dr. A checked *marginal functioning* when asked to describe how a mental impairment affects the appellant's relationship with her immediate and extended social networks. No support/supervision was indicated to maintain the appellant in the community and no safety issues were reported or additional comments added in the spaces provided.

Need for help

Self-report
The appellant did not provide any information in this report about her need for assistance with DLA.

Medical Report
In Section B-1 - *Health History,* Dr. A reported that he appellant is seeking help and treatment for her anxiety and depression. In Section B-4, the doctor checked *no*, the appellant does not require any prostheses or aids for her impairments. The doctor left Section E blank when asked what assistance the appellant needs with DLA.

Assessor Report
In Section A-1, Dr. A indicates that the appellant lives alone. In Section D – *Assistance provided by other people*, the doctor checked *family*, and *friends*. Dr. A did not fill in Section D - *Assistance provided through the use of Assistive Devices.* The doctor checked *no* the appellant does not have an assistance animal.

2. An RFR signed by the appellant on October 4, 2022, with a typed submission in which the appellant states that she has "complex PTSD due to childhood trauma" that began in early childhood. The appellant says that "I suffer daily with severe depression and anxiety. I now have agoraphobia and have become fearful to leave my home."

Additional evidence

Subsequent to the reconsideration decision the appellant submitted additional self-report information and medical evidence requiring an admissibility determination by the panel under section 24(2) of the *Employment and Assistance Act* ("EAA").

1. A *Notice of Appeal* with a typed submission in which the appellant provides the following information about her mental and physical impairments:

- she has continued suicidal thoughts (which Dr. A was informed of) and "extreme

difficulty leaving my home or being socially connected to anyone." The appellant says that when she is "forced to leave home" (due to a lack of help from anyone), her anxiety and fear increase;
- she has great difficulty "maintaining consistent and adequate personal care." She depends on an emotional support animal.
- she is seeking treatment for childhood trauma which she has great difficulty talking about. She doesn't think Dr. A is aware of it. She has only been able to speak to a psychiatrist once for a change in her medication. She has not been booked for a follow up with the psychiatrist but speaks to a counsellor every 2 weeks with 3 appointments to date;
- her DLA have been "severely restricted" for over 4 years. She has lost relationships with friends and family and is unable to work due to severe anxiety and depression and continued thoughts of suicide;
- she has "severe carpal tunnel" which now requires surgery. The carpal tunnel as well as "significant spinal issues" impact her physical ability and independence;
- she has sleep apnea that requires a CPAP machine, and hearing loss that requires hearing aids.

Admissibility – appeal submission

The panel finds that the additional self-report details what the appellant considers the impacts of her impairments to be, including activities with specific restrictions. The appellant also reports additional impairments (sleep apnea and hearing loss) and suicidal ideation that weren't mentioned in the original PWD application. The panel admits the testimony under section 24(2) of the EAA as evidence that is reasonably required for a full and fair disclosure of all matters related to the decision under appeal.

The appeal submission also contains argument. The panel will consider the arguments of both parties in Part F – *Reasons*.

2. A report for a comprehensive whole body scan ("MRI") from a doctor ("Dr. B") dated September 3, 2021. The findings include:
- no worrisome lesions, masses, or other abnormalities for the brain, sinuses, pharynx, thyroid, cervical lymph node chain, lungs, heart, breasts, esophagus, stomach, gall bladder, pancreas, spleen, adrenals, bladder, uterus, or ovaries;
- the liver showed a simple cyst and mild fat disposition; the kidneys showed a 0.5 cm lesion with no other abnormalities within the limits of the scan; the bowel showed evidence of diverticulosis with no evidence of inflammatory changes involving the large bowel and no inguinal hernia.
- The spine and Musculo-skeleton scan showed:

-abnormal curvature of the cervical spine;
-C3/C4: mild narrowing/mild degenerative changes;
-C4/C5: mild/moderate degenerative changes;
-C5/C6: severe narrowing in many of the structures including right and left "neural foramina", and mild stenosis and degenerative changes in other structures;
-C6/C7: small and mild abnormalities with normal lateral recesses and normal spinal canal;
-mild "degenerative spondyloarthropathic changes" throughout the thoracic spine;
-moderate "degenerative spondyloarthropathic changes" in the lumbar spine;
-normal appearance/no abnormal findings for the sacroiliac joints, shoulders, pelvis, hips, knees, ankles, bony skeleton, and soft tissues;

- Dr. B's final impression included:
  -"changes of mild chronic small vessel disease are seen in the brain;"
  -"fatty infiltration of the liver is identified;"
  -"liver, right renal and cervical cysts are present;"
  -"uncomplicated diverticular disease is seen in the sigmoid and descending colon;"
  -"degenerative changes are identified in the spine as described above."
- Dr. B recommends a follow-up scan in 24 months for proactive health monitoring unless clinically indicated sooner.

3. A consultation report from a physical therapist ("PT") dated November 25, 2021. The report indicates that the appellant was referred to the integrated spine clinic upon visiting the hospital emergency room for neck pain.

The report contains the following information:

- the appellant described a history of chronic neck pain with tingling into her hands. She was previously seen at the spine clinic in 2018 where it was felt that her hand symptoms were caused by carpal tunnel syndrome;
- in October 2021, the appellant had a flare up of acute and chronic neck pain, radiating down her right arm; into her hand and fingers; and progressively worsening since onset. The appellant reported numbness as well.
- the appellant described constant arm pain that is generally worse at the end of the day and can awaken her at night. She reported the same symptoms in her left arm and hand but to a lesser degree;
- the appellant rated her right arm pain as "12/10 in intensity. She has neck and upper back pain which she rates at 8/10 in intensity."
- the appellant reported no bowel/bladder incontinence; "saddle anaesthesia", fevers, infections, or drastic unexplained weight loss."
- the appellant reported issues with fine motor dexterity (right hand) but "no significant decrease bilaterally;"

- the appellant reported some dizziness but "otherwise no change to her balance or gait quality."
- the neck and arm pain "are aggravated by neck movements, lying down, and looking up. The appellant has not found any position of significant relief."
- the appellant is "independent for ambulation without aid. She is independent for Activities of Daily Living ["ADL"]. She denies history of unprovoked falls."
- past medical history includes anxiety, depression, and bilateral pain episodes following surgery in 2020;
- medications include Tylenol and anti-depressant medication;
- a whole body MRI was completed in August 2021. The MRI revealed "bilateral severe foraminal and lateral recess stenosis at C5-6." There was "no severe spinal canal stenosis in the cervical spine. No level of cord suppression or pathological finding in the thoracic or lumbar spine."
- the PT observed "no acute distress…Gait: independent unaided and on turns. Able to heel/toe/tandem walk independently without issue."
- the appellant had some diminished reflex on the right side ("biceps and brachioradialis reflexes"). Her strength testing was "5/5 all myotomes C4-T1 bilaterally. Grips strong, slightly decreased grip on the right as compared to the left."
- there was some diminished range of motion: "limited right-sided cervical rotation, cervical extension and flexion. Slightly limited left-sided cervical rotation." The appellant had full, active shoulder rotation.
- various physical tests indicated "worsening numbness and tingling into the hands bilaterally" as well as "peripheral nerve involvement."
- the appellant was "observed to tie and untie shoelaces at clinic today without issue."
- nerve conduction studies were recommended (via a referral to neurology by the family doctor). The PT will refer the appellant to a spine surgeon "for further assessment and management recommendations…given progressive worsening of her arm pain."
- The PT encourages the appellant to "maintain activity as tolerated within the limits of her symptoms, her neck pain should be treated conservatively." The appellant was advised to "avoid periods of prolonged hyper extension or flexion of the cervical spine" and to follow up with her family doctor for medical management of pain.

The appellant submitted an email to the Tribunal with the PT report, in which she states that she had a nerve conductivity test performed by a neurologist. The appellant says that the test shows "severe carpal tunnel. He said I have nerve damage in my thumb, ring and

middle fingers and am losing muscle at the base of my thumb (where it is fat – on the inside). I am booked for surgery asap…first right wrist, then left wrist."

Admissibility – appellant's additional documents

The ministry had no objections to the additional medical reports and email from the appellant. The panel finds that these documents provide additional detail about the appellant's physical impairments including symptoms, findings from medical tests, and additional information about function in the PT report. The panel admits the submissions under section 24(2) of the EAA as evidence that is reasonably required for a full and fair disclosure of all matters related to the decision under appeal.

Additional evidence at the hearing

Both parties stated their arguments and the ministry did not submit any new evidence.

In her oral testimony and response to questions from the panel, the appellant provided the following information:

- she started seeing Dr. A this year after her long term doctor retired;
- she did not have an office interview with Dr. A. She talked to them on the phone for prescription renewals and a referral to a psychiatrist;
- she had an appointment with a neurologist who told her that she has arthritis in her spine as well as muscle loss and nerve damage in 3 fingers on her right hand. She also has psoriasis so needs to find out if she has psoriatic arthritis;
- she does not have the neurologist's report because it takes 3 months to get a copy. She is also waiting for a neurosurgery consult;
- she cannot turn her head or shoulder check when she drives. She uses mirrors to drive even though it's not safe;
- she has to go out every 2 weeks to get groceries because she doesn't have anyone to help her. Sometimes she gives another person her bank card to buy things for her. She is "afraid to go out without smoking pot" [to be able to go out at all];
- her arms are weak and she has no strength to hold things due to carpal tunnel. Things slip out of her hands;
- her physical ability has decreased over the years and her condition is worsening;
- she is new to her community and doesn't know her neighbours and finds it hard to ask for help;
- she is scheduled for surgery on her right wrist in December 2022. She is worried about her neck but her wrist surgery will be done first;
- she needs wrist braces and she does have an assistance animal ("emotional support animal" which she mentioned to Dr. A);

- she has suicidal thoughts and was taken advantage of because she was not able to recognize threats and "was doing high risk behaviours;"
- she only had a 10-minute telephone appointment with Dr. A for the PWD forms. She cannot lift over 20 pounds;
- Dr. A referred her to a psychiatrist but there is a 6 month wait and she has not yet had a psychiatric assessment. She spoke to a psychiatrist once but just had her medication changed and has not been on the new medication long enough to tell if it is helping;
- she was supposed to have a recent appointment but the psychiatric nurse never called her and she doesn't know if the referral is still good;
- she sees a counsellor every 2 weeks. She was referred by a crisis clinic;
- regarding the PT's report, the appellant is not sure why the PT talked about tying shoes because the appellant was not wearing shoes with laces that day;
- she was diagnosed with complex PTSD when she lived in another country ("Country X").

Admissibility – oral testimony

The panel finds that the oral submissions provide a broader picture of the appellant's circumstances with additional details about her physical and mental impairments and the communications she had with her doctors and other health professionals. The panel admits the testimony under section 24(2) of the EAA as evidence that is reasonably required for a full and fair disclosure of all matters related to the decision under appeal.

Part F – Reasons for Panel Decision

The issue on appeal is whether the ministry's decision that found the appellant ineligible for PWD designation was reasonably supported by the evidence or was a reasonable application of the legislation in the circumstances of the appellant. The panel's role is to determine whether the ministry was reasonable in finding that the following eligibility criteria in section 2 of the EAPWDA were not met:

- the appellant has a severe mental or physical impairment;
- the impairment, in the opinion of a prescribed professional, directly and significantly restricts the ability to perform DLA either continuously or periodically for extended periods; and
- as a result of restrictions caused by the impairment, the appellant requires an assistive device, the significant help or supervision of another person, or the services of an assistance animal to perform DLA.

Analysis

Severe mental or physical impairment

Arguments - Appellant

The appellant's position is that Dr. A has not provided an accurate picture regarding the severity of her impairments. The appellant expressed that she has "fallen through the cracks" since her long-term family doctor retired. The appellant suggested that Dr. A was rushed in filling out the forms because some of the information is inaccurate and some sections were not filled out at all. The appellant argues that the ministry did not have complete and accurate information when they assessed the PWD application.

The appellant argues that her mental impairment is severe because she is suffering a lot with anxiety, depression, agoraphobia, PTSD and suicidal thoughts despite seeing a counsellor every 2 weeks. The appellant expressed confusion over what Dr. A said about her ability to communicate because the doctor indicated no difficulty with communication but at the same time said that the appellant has significant cognitive deficits.

The appellant maintains that what she told Dr. A over the phone is not consistent with what the doctor wrote on the forms. The appellant argues that the assessments for impulse control, and insight/judgment should be "major impact." The appellant says in the appeal submission that her "mental health is declining as time and stress continue."

The appellant argues that Dr. A did not understand her physical limitations when he said that she can lift 15-35 pounds and walk 2-4 blocks. The appellant argues that the lower end of these ranges is more accurate, she can "lift 15 pounds if lucky" but her arms are weak and she has no strength to hold onto things due to carpal tunnel.

As for walking, the appellant says she can "walk 2 blocks maximum, not 4 [blocks]." The appellant argues that the deterioration of her physical functioning is not reflected in Dr. A's assessments. The appellant argues that her impairments have gotten worse since the PT's report in November 2021.

Arguments – Ministry

The ministry argues that the functional skills described by Dr. A "do not demonstrate a severe degree of physical impairment" because the appellant is assessed as independent with all activities of mobility and physical ability except lifting for which periodic assistance was not explained.

Regarding a mental impairment, the ministry acknowledged the deficits to emotional and cognitive functioning that Dr. A indicated in the MR. However, in the ministry's view, a severe mental impairment was not established on the evidence because the information from Dr. A indicated a moderate to minimal impact, or no impact for most areas (AR), and no difficulties with communication were reported.

At the hearing, when asked how the ministry would view the additional medical reports (MRI scan, and PT assessment), the ministry noted that the information [from the summer and fall of 2021] is not current. The ministry noted that the MRI scan indicated mainly mild and moderate spine problems and despite the findings of severe stenosis in one area of the spine, and the PT's descriptions of the appellant's significant pain, the appellant remained independent and functional with walking and other movement. The ministry argued that the additional reports "do not contain anything compelling that establishes a severe physical impairment."

Legislative requirement

To be eligible for PWD designation, the legislation (EAPWDA section 2) requires several criteria to be met including the minister being satisfied that the applicant has a severe mental or physical impairment. The ministry found the appellant was not eligible for PWD because not all five criteria were met.

"Severe" is not defined in the legislation but an impairment is defined in the PWD application as a "loss or abnormality of psychological, anatomical, or physiological structure or function causing a restriction in the ability to function independently, effectively, appropriately, or for a reasonable duration."

In the ministry's view, the diagnosis of a serious medical condition does not in itself establish a severe impairment of mental or physical functioning. The PWD medical reports ask for information on functional skills and abilities and the panel finds that the ministry's assessment of severity based on daily function is a reasonable interpretation of the legislation.

Mental and physical impairment - specific considerations

To assess the severity of a mental impairment, the ministry considers the extent of any impact on daily functioning as evidenced by limitations/restrictions with mental functions and emotion. The ministry does not only look at the diagnosis or a medical practitioner's comment that the condition is "severe" but considers functional abilities and whether there are restrictions to DLA requiring mental/social functioning including any safety issues. The panel finds that an assessment of severity based on cognitive, emotional, and social functioning is a reasonable interpretation of the legislation.

To assess whether the applicant has a severe physical impairment, the ministry considers information on the degree of restrictions to physical functioning and whether the applicant requires significant help or any assistive devices to manage physical tasks. The panel finds that the assessment of severity based on daily physical functioning is a reasonable interpretation of the legislation.

Panel's decision - mental impairment

The panel finds that the ministry was reasonable to conclude that a severe mental impairment was not established by the information provided. In the MR, Dr. A indicates significant deficits with *Executive*, *Memory*, *Emotional disturbance*, and *Motivation*, but in the AR, the impact of the appellant's mental impairment on *Executive* is minimal, and there is a *moderate impact* for *Memory* and *Motivation*. Furthermore, no significant deficits were reported in the MR for most cognitive and emotional functions despite the doctor writing that the appellant is going through a stressful time with moderate to severe depression and anxiety.

In the AR, Dr. A reported a *moderate impact* for *Attention/concentration*, and a *minimal impact* for *Insight/judgment* and *Motor activity*. However, no significant deficits were indicated for these functions in the MR.

While the appellant states that her mental health conditions have a major impact on her insight and impulse control and also affect her ability to communicate, these impacts are not reflected in the information from Dr. A. It is therefore difficult to get a fulsome picture of the appellant's mental functioning due to contradictory evidence between the self-reports and the doctor's reports, and inconsistent evidence between the information in the MR and AR as well.

The panel notes that the information for *Emotion*, and communication (no reported deficits) is the only consistency between the MR and AR in terms of cognitive and emotional functioning. The appellant's suicidal thoughts (which she says Dr. A is aware of) are very concerning, but she did not submit a letter or any updated assessment from Dr. A despite indicating that she found the doctor's assessments confusing or inaccurate.

Dr. A has also not confirmed the diagnoses of PTSD, agoraphobia, and hearing loss which the appellant says she suffers from. The appellant says that she was diagnosed with complex PTSD in Country X, but she did not submit a report from that diagnosis. No psychiatric report was submitted and it is unclear to the panel how the appellant was able to have her medication changed by a psychiatrist without some type of assessment, by phone or otherwise.

The panel appreciates that the appellant is still trying to follow up on the referral to a psychiatrist but her evidence is that she has recently seen a counsellor for several sessions. Nevertheless, there was no letter or information from the counsellor to corroborate the appellant's reports of her worsening mental functioning.

Based on the totality of the evidence on cognitive and emotional functioning, the appellant is clearly suffering from anxiety and depression. However, the panel finds that the ministry was reasonable to find that a severe impairment was not established on the evidence because the information provided does not give a consistent picture for most cognitive and emotional functions, and there is no updated medical opinion, or information from the counsellor on the appellant's current functioning. The panel therefore finds that the ministry was reasonable to conclude that the requirement for a severe impairment under section 2(2) of the EAPWDA was not met on the basis of mental functioning.

Panel's decision - physical impairment

The panel has considered the evidence in its entirety and finds that the ministry was reasonable to conclude the appellant does not have a severe physical impairment. The appellant suffers from a severe back problem in one area of her spine (bilateral severe foraminal stenosis – C5/C6) and the PT report confirms that the appellant is also diagnosed with carpal tunnel syndrome. The evidence from the appellant, Dr. A. and the PT is consistent in terms of the appellant's experience with chronic pain, especially neck, back, and arm pain which could reach "12/10" in severity.

Nevertheless, Dr. A assessed the appellant's physical functions as moderately impaired, but not severely impacted by pain. Specifically, Dr. A checked the middle range of function on the rating scales in the MR for walking, climbing stairs, and lifting (able to walk 2-4 blocks unaided, climb 2-5 steps unaided, and lift 15-35 pounds). In the AR, the appellant was assessed as independent with all areas of mobility and physical ability except for lifting which requires only periodic assistance.

The appellant says that she can lift 15 -20 pounds (maximum, and only sometimes), and that she can walk no more than 2 blocks. The panel notes that these self-assessments are still within the moderate range of impairment on the MR scales.

The appellant says that her hands are weak from carpal tunnel and she has difficulty holding anything and drops things as a result. However, Dr. A checked that the appellant is independent with *carrying and holding* (AR). The doctor did not note any impacts due to carpal tunnel syndrome in either of the PWD medical reports.

While the PT report contains older assessments from 2021, the appellant, at that time, was able to ambulate without aid, including on turns. The appellant was able to "heel/toe/tandem walk independently without issue." The appellant's grip was reported as strong despite a slight decrease on the right side as compared to the left. The appellant had "full, active shoulder rotation" despite her arm pain, numbness, and some diminished range of motion. The appellant was advised to mobilize as much as possible within the limits of her pain.

The information from Dr. A did not indicate any worsening of function since the 2021 PT assessment and the appellant's evidence is that she is scheduled for wrist surgery to treat (and presumably improve) her carpal tunnel syndrome. In addition, the MRI report indicated mainly mild to moderate spinal issues, and there was no information about the impact of any of the findings on the appellant's physical functioning,

The panel finds that the reconsideration decision was reasonable with regard to a physical impairment and neither a severe mental or physical impairment has been established on the evidence, including the additional medical reports that the panel admitted. The panel finds that the ministry was reasonable to conclude that the requirement for a severe impairment under section 2(2) of the EAPWDA is not met on the basis of a mental or a physical impairment.

Restrictions to daily living activities

Arguments - Appellant

The appellant's position is that her DLA have been severely restricted for more than 4 years due to severe anxiety and depression, carpal tunnel syndrome, and significant spinal issues. The appellant argues that her social functioning is significantly restricted due to issues with trust, and self-isolation. She argues that personal care and other activities are restricted by the downward spiral in her mental health that was the result of an incident at work.

The appellant argues that her physical impairments "severely impact my physical ability and independence." The appellant argues that Dr. A's statement that her condition is "improving" is not accurate and in fact my condition is worsening."

Arguments – Ministry

The ministry's position is that is that the information from the prescribed professional (Dr. A) does not establish that the appellant's impairments significantly restrict DLA continuously or periodically for extended periods as required by the legislation. The ministry argued there was not enough evidence to satisfy the legislative criteria.

The ministry acknowledged that Dr. A checked that many DLA are continuously restricted and that some activities require periodic assistance. The ministry argued that a significant degree of restriction could not be established on the evidence because Dr. A did not explain the type, degree, or frequency of the assistance the appellant requires.

Legislative requirement

Subsection 2(2)(b)(i) of the EAPWDA requires the ministry to be satisfied that, in the opinion of a prescribed professional, a severe impairment directly and significantly restricts a person's ability to perform DLA either continuously, or periodically for extended periods. This means that restrictions to DLA must be confirmed by the appellant's doctor

or one of the practitioners named in the legislation such as a psychologist or psychiatric nurse.

The term "directly" means that the severe impairment must cause or result in restrictions to activities. The direct restriction must also be significant. This means that not being able to do DLA without a lot of help from other people, or support from an assistive device will have a large impact on the person's life.

Finally, there is a time or duration factor: the restriction may be either *continuous* or *periodic* under the legislation. Continuous means that the activity must generally be restricted all the time. The ministry views a periodic restriction as significant when it occurs frequently or for longer periods of time; for example, the activity is restricted most days of the week, or for the whole day on the days that the person cannot do the activity without help or support.

The panel views the ministry's interpretation of the legislation as reasonable. Accordingly, where the evidence indicates that the appellant needs periodic assistance to manage an activity as was indicated in the AR for several DLA, it is appropriate for the ministry to require information on they type and frequency of the help or support that is needed. With that information, the ministry can assess whether the legislative requirement is met.

DLA are defined in section 2(1) of the EAPWDR and are also listed in the MR, with additional details in the AR. Therefore, the doctor or other practitioner completing these forms has the opportunity to indicate which, if any, DLA are significantly restricted by the applicant's impairments either continuously or periodically for extended periods and to provide additional details. It is important to note that the ability to work is not considered a DLA under the legislation.

Regarding how many DLA need to be impacted for the legislative requirements to be met, the BC Supreme Court decision *Hudson* v. *Employment and Assistance Appeal Tribunal* [2009 BCSC 1461] states that there must be evidence from a prescribed professional indicating a direct and significant restriction on at least two DLA. Not all DLA need to be affected by the severe impairment.

Panel's decision - restrictions to DLA

The panel finds that the ministry was reasonable in determining that Dr. A has not confirmed significant restrictions to at least 2 DLA due to a severe mental or physical impairment. The appellant's additional evidence, submitted on appeal, also did not include any updated assessment from a doctor or other prescribed professional about the impact of the appellant's impairments on her daily activities.

While Dr. A provided the strongest evidence for restrictions to social functioning throughout the MR and AR, including comments such as "unable to be social" and "socially isolated", there was no information about the support required, only that the appellant is "seeking help and treatment." The appellant reports seeing a counsellor every 2 weeks but Dr. A. has not indicated that counselling support is needed.

Furthermore, the legislation [EAPWDR section 2(1)(b)(i)] indicates that in relation to a mental impairment, restrictions in decision-making about personal activities, care or finances are taken into consideration. However, Dr. A provided unclear information about personal care, meals, and finances (*Pay Rent and Bills*) by marking these activities *continuously restricted* in the MR, but *independent* in the AR. There was no explanation as to how the appellant is both continuously restricted and independent with activities involving mental effort and motivation.

The appellant indicated that she is continuously restricted with shopping and transportation, with safety concerns while driving, but Dr. A. indicated the need for periodic assistance only and did not note any safety concerns for any DLA. The doctor did not explain the type of assistance required, or the frequency of assistance to establish that any periodic restriction is for an extended period of time as required by the legislation.

The panel therefore finds that the ministry was reasonable to conclude that there was not enough evidence from the doctor to confirm that DLA are significantly restricted either continuously or periodically for extended periods. The panel finds that the ministry reasonably determined that the criteria in subsection 2(2)(b)(i) of the EAPWDA were not met.

Help with daily living activities

Arguments - Appellant

The appellant's position is that she needs help with DLA but is very isolated due to her mental health issues and doesn't have anyone to help her most of the time. The appellant

argues that she has to do activities such as grocery shopping on her own due to the lack of help. The appellant also expressed that it is hard to swallow her pride and ask for help.

Arguments – Ministry

In the reconsideration decision, the ministry acknowledged Dr. A's information that the appellant gets help and support with DLA from family and friends. Nonetheless, the ministry argues that the criteria for help was not met because DLA are not significantly restricted, and it could therefore not be determined that significant help from other persons, or from an assistive device, is required.

Legislative requirement

Subsection 2(2)(b)(ii) of the EAPWDA requires that, as a result of direct and significant restrictions in the ability to perform DLA, a person requires help to perform those activities. Help is defined in subsection (3) as the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal to perform DLA. An "assistive device" is defined in section 2(1) of the EAPWDA as a device specifically 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.

Panel's decision - help with daily living activities

The panel finds that the ministry was reasonable in finding that the help criteria were not met. The appellant said she needs wrist braces and that she has an assistance animal, but Dr. A. did not indicate that any assistive devices are required. The doctor checked *no* the appellant does not have an assistance animal.

The legislation requires confirmation of direct and significant restrictions to DLA as a precondition for needing help to perform DLA. The panel found that the ministry's determination that significant restrictions to DLA were not established on the evidence was reasonable because the information from Dr. A did not provide a consistent account of the appellant's restrictions or detail what type of support is required. The panel therefore finds that the ministry's conclusion that the criteria for help under subsection 2(2)(b)(ii) of the EAPWDA were not met, was a reasonable application of the legislation in the appellant's circumstances.

Conclusion

The panel finds that the reconsideration decision is reasonable because not all of the criteria for PWD designation were met. The panel confirms the decision as reasonably supported by the evidence.

The appellant met the requirements for age and for the impairment to continue for at least 2 more years but in the ministry's view, the information provided did not confirm a severe impairment that significantly restricts DLA so that the appellant needs help to perform DLA. The panel finds that the ministry was reasonable to refuse the PWD application because of medical evidence that was unclear, inconsistent, or incomplete, and that did not support the degree of severity and restrictions that the appellant described. The panel finds that the new evidence for the appeal does not establish that all of the legislative criteria are met.

The panel confirms the reconsideration decision. The appellant is not successful in her appeal.

Schedule – Relevant Legislation

EAPWDA

2 (1) In this section:
"assistive device" means a device designed to enable a person to perform a daily living activity that, because of a severe mental or physical impairment, the person is unable to perform;
"daily living activity" has the prescribed meaning;
"prescribed professional" has the prescribed meaning.
(2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act if the minister is satisfied that the person is in a prescribed class of persons or that the person has a severe mental or physical impairment that
(a) in the opinion of a medical practitioner or nurse practitioner is likely to continue for at least 2 years, and
(b) in the opinion of a prescribed professional
(i) directly and significantly restricts the person's ability to perform daily living activities either
(A) continuously, or
(B) periodically for extended periods, and
(ii) as a result of those restrictions, the person requires help to perform those activities.
(3) For the purposes of subsection (2),
(a) a person who has a severe mental impairment includes a person with a mental disorder, and
(b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires

(i) an assistive device,
(ii) the significant help or supervision of another person, or
(iii) the services of an assistance animal.
(4) The minister may rescind a designation under subsection (2).

EAPWDR

Definitions for Act
2 (1) For the purposes of the Act and this regulation, "daily living activities",
(a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following activities:
(i) prepare own meals;
(ii) manage personal finances;
(iii) shop for personal needs;
(iv) use public or personal transportation facilities;
(v) perform housework to maintain the person's place of residence in acceptable sanitary condition;
(vi) move about indoors and outdoors;
(vii) perform personal hygiene and self-care;
(viii) manage personal medication, and
(b) in relation to a person who has a severe mental impairment, includes the following activities:
(i) make decisions about personal activities, care or finances;
(ii) relate to, communicate or interact with others effectively.
(2) For the purposes of the Act, "prescribed professional" means a person who is
(a) authorized under an enactment to practise the profession of
(i) medical practitioner,
(ii) registered psychologist,
(iii) registered nurse or registered psychiatric nurse,
(iv) occupational therapist,
(v) physical therapist,
(vi) social worker,
(vii) chiropractor, or
(viii) nurse practitioner,

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Part G – Order

The panel decision is: (Check one) ☒**Unanimous** ☐**By Majority**

The Panel ☒**Confirms the Ministry Decision** ☐**Rescinds the Ministry Decision**

If the ministry decision is rescinded, is the panel decision referred back to the Minister for a decision as to amount? Yes☐ No☐

Legislative Authority for the Decision:

Employment and Assistance Act

Section 24(1)(a)☒ or Section 24(1)(b) ☐
Section 24(2)(a)☒ or Section 24(2)(b) ☐

Part H – Signatures

Print Name Margaret Koren	
	Date (Year/Month/Day) 2022/11/14

Print Name Richard Franklin	
Signature of Member	Date (Year/Month/Day) 2022/11/4
Print Name Neena Keram	
Signature of Member	Date (Year/Month/Day) 2022/11/14