

Part C – Decision Under Appeal

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the Ministry) Reconsideration Decision (RD) dated September 9, 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), signed by the Appellant on June 15, 2022; a Medical Report (MR) dated June 15, 2022 and completed by a General Practitioner (GP) who indicates that they took over as the Appellant's primary care provider on June 15, 2022, and who has not seen the Appellant previously; and an Assessor Report (AR) also dated June 15, 2022 and also completed by the GP.

The evidence available to the Ministry at the time of the RD also included:

- A one-page note, dated August 30, 2022 (the Note). The author of the Note is not identified and refers to the Appellant in the third person. Details of the information contained in the Note are provided in the appropriate sections of the discussion below;
- A Request for Reconsideration form (RFR), signed by the Appellant on August 31, 2022, in which the Appellant gives the reasons why he is asking the Ministry to reconsider its decision. Those reasons are detailed in the appropriate sections of the discussion below;
- The results of an August 16, 2013 examination of the Appellant at a walk-in medical clinic in a community in another Province (the August 2013 Medical Exam);
- The results of a July 3, 2014 examination of the Appellant at the same walk-in clinic referred to above (the July 2014 Medical Exam);
- The results of seven medical examinations of the Appellant, conducted by an Orthopaedic Surgeon between May 30, 2014 and June 22, 2015 (the Orthopaedic Surgeon Exams);
- A diagnostic imaging report of the Appellant's spine, conducted on July 2, 2013;
- A diagnostic imaging report ("Diagnostic Radiology") of the Appellant's right shoulder, conducted on August 6, 2013;
- A diagnostic imaging report ("Ultrasound") of the Appellant's right shoulder, also conducted on August 6, 2013; and
- An application for classification as a person with persistent multiple barriers (PPMB) in the name of the Appellant and signed by the Appellant on June 15, 2022 (the PPMB Application). Next to two of a number of barriers listed on the form, the Appellant has ticked "Less than Grade 12 Education", and "Other severe barriers to employment", where "*osteoarthritis bilateral shoulders chronic lumbago*" is written.

Diagnoses

In the MR, the GP has diagnosed the Appellant with Arthritis (bilateral shoulders and hands and lumbar spine) with a date of onset of approximately 1980, and Degenerative Disc Disease (DDD) with a date of onset of approximately 2013.

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's) ability to ... lift, write, use hands and arms and bend is impaired by pain caused by chronic osteoarthritis bilateral shoulders and hands and lumbar spine. (Appellant) has previous rotator cuff injuries bilateral shoulders and previous surgeries - reports attached and previous radiology reports attached. Recent x-rays shoulders, hands and lumbar spine requested (June 15, 2022). Appellant has limited range of movement bilateral shoulders and weakness arms and stiffness/pain bilateral hands and lower back"*. With respect to functional skills, the GP reports that the Appellant can walk 2 to 4 blocks unaided on a flat surface, climb 2 – 5 steps unaided, lift 2 – 7 kg, and can remain seated for less than 1 hour.

In the section of the AR where the assessor is asked to indicate the assistance required related to impairments that directly restrict the applicant's management of mobility and physical abilities, the GP indicates that the Appellant is independent with walking indoors, climbing stairs and standing, but requires continuous assistance from another person or is unable to lift, carry or hold. No explanations or comments are made in the spaces provided.

The August 2013 Medical Exam results list the Appellant's "Active Problems" to include Lumbago and Osteoarthritis of the right shoulder. The July 2014 Medical Exam results indicated that the Appellant has Osteoarthritis of the left and right shoulders and *"Rotator cuff syndrome of shoulder"*.

The Orthopaedic Surgeon Exams include the following comments:

- May 30, 2014 - *"On examination gross Supraspinatus wasting bilaterally and a midrange painful arc with a catch bilaterally ... Radiographs of the right shoulder show evidence of chronic subacromial impingement, superior positioning of the humeral head in keeping with a rotator cuff tear ... (The Appellant) has ... massive rotator cuff tears almost certainly secondary to bilateral os acromiale and chronic attritional rupture. These are almost certainly massive and irreparable, however I think we have a good chance of improving his pain and allowing his function to progress. I have counseled (the Appellant) regarding ... surgery ... and he has given informed consent for this left side first for which I will do this for him in due course";*

- November 3, 2014 – *“I reviewed (the Appellant) on account of his left shoulder which is now significantly improved ... and he says that his range of motion is better than it has been for 30 years ... I have adjusted his cuff exercises to try and optimize his function. His right shoulder is now the most troublesome for him ... I will therefore (operate on his right shoulder) in due course”;*
- January 13, 2015 – *“I reviewed (the Appellant) today six weeks following arthroscopic debridement right shoulder. He hasn’t seen a lot of improvement with this and he tells me his left shoulder is worsening”;*
- January 19, 2014 (sic) – *“I ... reassessed (the Appellant’s) exercises which he had been doing and it would appear that his technique really is not ideal. I have shown him the correct manner of doing (the exercises) ... and will see him back in three weeks time”;*
- March 30, 2015 – *“(The Appellant’s) left shoulder is definitely improving although he is having continuing issues with his right ... I have given him further reinforcement in the correct way to do his exercises”;*
- April 27, 2015 – *“(The Appellant) is doing well, demonstrates excellent range of motion, his pain is greatly improving and indeed his strength is improving ... (His right shoulder is) definitely very weak ... His left shoulder is doing excellent”;*
- June 22, 2015 – *“I reviewed (the Appellant) on account of his shoulder and performed his subacromial steroid injection ... he knows to commence his ... cuff protocol in 7 to 10 days”.*

The three diagnostic imaging reports from July and August 2013 report that the Appellant’s *“bones are osteopenic”, “there is minimal disc space narrowing ... in keeping with early DDD”, “degenerative changes are noted in the AC joint”, “there is (a cortical irregularity) which is ... found in an association with a chronic rotator cuff tendonitis”, “underlying cortical irregularity is present”, and “a full thickness tear of the supraspinatus is present associated with a calcific rotator cuff tendonitis”.*

In the SR, the Appellant writes *“My shoulders, arms, hands and back hurt when doing activities as well as being still (arthritis)”.*

In the RFR, the Appellant has noted that his *“condition is physical, not mental”,* and that he is unable to prepare his own meals, shop for personal needs, perform housework to maintain his place of residence in acceptable sanitary condition, and perform personal hygiene and self care. The Note reads, in part *“... Patient has bilateral shoulder arthritis as well as in his hands and lumbar spine. He also has DDD. This greatly impairs his ability to work due to limited use of his hands, arms and back. Unfortunately (the Appellant) is unable to purchase his pain medications due to the high cost.”*

Severe Mental Impairment

The Appellant has not been diagnosed with any mental impairments. 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 "no".

In the section of the AR where the assessor is asked to indicate the level of ability to communicate, the GP indicates that the Appellant's speaking ability is good, that his reading and writing abilities are poor, and that his ability to hear is satisfactory. In the section of the AR where the assessor is asked to indicate to what degree the applicant's mental impairment restricts or impacts functioning, the GP has indicated a major impact to motor activity and no impacts in any of the other listed areas (emotion, attention/concentration, bodily functions, executive functioning, memory, motivation, consciousness, impulse control, insight and judgment, language, psychotic symptoms, other neuropsychological problems, and other emotional or mental problems).

With respect to social functioning, the GP indicates in the AR that the Appellant is independent in all listed activities (making appropriate social decisions, developing and maintaining relationships, interacting appropriately with others, and ability to secure assistance from others). The GP also indicates that the Appellant has good functioning with his immediate and extended social networks.

In the RFR, as noted above, the Appellant says that he does not have a mental impairment.

Restrictions in the Ability to Perform DLA

In the MR, the GP indicates that the Appellant has not been prescribed any medications or treatments that interfere with his ability to perform DLA. Where asked to provide any additional information that might be considered relevant in understanding the impact of the Appellant's medical condition on daily functioning, the GP has written "*The Appellant's arthritic pain is quite severe if doing activities. Even basic (DLA) exacerbates (his) pain*".

In the MR, the GP says that the Appellant's activity is periodically restricted for the DLA of personal self care and basic housework, adding the comment "*pain with shaving, brushing hair and dressing ... unable to wash dishes*". Regarding the DLA of using transportation, the GP has indicated that the Appellant requires continuous assistance, adding "*pain when driving a distance or sitting too long in transportation*". The GP has indicated that the Appellant's activity is not restricted with respect to any of the other listed DLA (meal preparation, management of medications, daily shopping, mobility inside and outside the home, management of finances, and social functioning).

In the AR, the GP indicates that the Appellant is independent with most tasks for the DLA of personal care except for grooming, which the GP says he cannot do, and transfers on and off a chair, for which the GP says the Appellant must "*take 5 steps to get straight up*".

The GP has also indicated, with no further explanation, that while the Appellant is independent with dressing and bathing, he struggles with those activities. Regarding basic housekeeping and shopping, the GP indicates that the Appellant is independent except for carrying purchases home, for which the Appellant needs periodic assistance. With respect to meals, the GP has indicated that the Appellant requires periodic assistance with food preparation and cooking, and that the Appellant is independent with all aspects of paying rent and bills and taking medications. Regarding getting in and out of a vehicle, the GP indicates that the Appellant takes significantly longer than typical (adding "slow"). No further comments or explanations are provided for any of the activities for which the Appellant is not considered independent.

In the SR, the Appellant writes "*due to arthritis in shoulders, hands, lower back I can't perform (DLA)*".

In the Note, an unidentified person writes, in part, "*The patient has stated that he has great difficulty with his DLA, which includes personal care, cooking, shopping, basic housework as well as transportation*".

Need for Help

In the MR, the GP indicates that the Appellant does not require any prostheses or aids for his impairment. Where asked what help the applicant needs with DLA, the GP has written "*No help required as yet. His children assist him and his friends and (Appellant) does modified duties*", but no details regarding the nature and extent of assistance required are provided.

In the section of the AR that asks who provides the help required for DLA, the GP has ticked "Family" and "Friends". The GP has not indicated that any assistive devices are required. The GP also indicates that the Appellant does not have an assistance animal.

In the SR, the Appellant does not indicate who helps him with the DLA for which he is not independent.

In the Note, an unidentified person says "*The Appellant) does not feel like he would be able to perform any of those (DLA) if he lived alone*".

Evidence Presented at the Hearing

The Appellant was supported at the hearing by an advocate (the Advocate).

At the hearing, the Appellant said that he started getting sore shoulders and arms in the early 1980's. He said that he first experienced shoulder pain when he was helping a friend construct a fence. He pushed on the fence and felt something pop in his shoulder. He felt the pain immediately and was hardly able to move his arm. He made an appointment with a doctor and was sent for an ultrasound. Shortly after that he had appointments with

doctors and chiropractors about his shoulders, including a family physician he first visited in 2005. They all told him that there was nothing they could do. The Appellant said that there are two muscles on each shoulder; one on the top and one on the bottom. He said that since the injury the top muscles on each shoulder have *"been moving over sharp bones"*, which is why he has been in so much shoulder pain. The Appellant said that he visited a physiotherapist two or three years ago and was told that there was little chance of improvement.

The Appellant said that he also developed a sore back and problems with his fingers about nine months ago. Regarding his back problems, the Appellant said that just recently he has found that he can't straighten his knees, and when he stands he has to bend over forwards. He is unable to lift his feet more than a few inches off the ground and has to shuffle his feet when he walks. He said that he borrowed some crutches a few days ago and they helped, as with the crutches he was able to walk indoors the full length of a 30 foot hallway in his home. He thought he might have been able to walk further than that, but has not had an opportunity to try because he is now only able to walk indoors. He said that he was going to *"try to get some crutches"*, adding *"The big problem right now is my back"*. He said he last saw his physiotherapist on November 25, 2022 and he has his next appointment with the physiotherapist on December 2, 2022. He also said that *"In the past, I walk a little better than before"* immediately after physiotherapy treatment.

In response to a question from the Panel, the Appellant said that, while he was bent over when walking when he completed his PWD application, he used to be able to push himself up into a standing position using the coffee table and *"could be walking straight after four or five steps"*. But in the past few days he can no longer do that.

The Appellant also said that the X-rays arranged by his GP on June 15, 2022 were taken five months ago, but that he doesn't know why they have not been provided to him by the GP, nor how they might affect his PWD application. He said that his most recent appointment with the GP was on November 24, 2022, but that the GP didn't provide any more information about his impairments, adding *"(The GP) didn't examine me much"*. When asked by the Panel why he had not talked to his GP on his most recent visit about his inability to walk, the Appellant said *"She can't help me. All she would do is prescribed more pain killers"*. He said he would not take any prescription medications for pain because they were too expensive and he didn't want to take prescription medications and so he relied on acetaminophen for his shoulder pain because it was the only non-prescription medication that worked, although he had to take it in large quantities for it to be effective.

Regarding the impact of the Appellant's physical impairments on his ability to perform DLA, the Appellant said, *"I can't do anything"*. He explained that under his current living arrangements he shares a home with two roommates at a reduced rent on the expectation that he does his share of the housework. He said that he is no longer able to

do any sweeping, he is not able to cook because he can't put a pot on the stove, open a can with a can opener, or take a lid off a jar due to his arthritis. He also said that he is right-handed but must sign his name with his left hand, he is unable to brush his teeth or comb his hair without experiencing pain, and he uses his roommate's shower chair when he showers because he can't stand up in the shower. One of his roommates does all the shopping, though the Appellant will sometimes be able to carry bags in from the car using crutches. He also said that his daughter-in-law will sometimes drive him to appointments. The Appellant explained that one of his roommates is visited by "*a regular nurse*" four times a week and that the nurse does some DLA, such as cleaning the bathtub, driving, and housework, which none of the three residents can do by themselves.

When asked to describe a normal day, the Appellant said that he gets up at 4:00 am and puts coffee on that was programmed the night before, adding that he is able to heat it up if he uses both hands. Then he sits in a chair for an hour or two watching TV, and sometimes does exercises on his bed.

In response to another question from the Panel, the Appellant said he doesn't know who wrote the Note from the unidentified person .

At the hearing, the Ministry relied on the RD.

In response to a question from the Panel, the Ministry said that the Appellant could apply again for the PWD designation if his appeal was not successful, and could submit a new MR and AR in support of his application. The Ministry also confirmed that a physiotherapist, who is a prescribed professional as defined in the EAPWDR, could complete a new AR, and that the cost charged by the physiotherapist could be billed directly to the Ministry, up to the maximum amount permitted. (The Panel notes that the AR says that the maximum rate for a prescribed professional other than a physician is \$75.) The Advocate said that the actual fee charged by many physiotherapists for completing an AR is \$1,000, and the Appellant said that was the fee that the Appellant's physiotherapist said he would charge. The Ministry said that the Appellant could ask his physiotherapist to provide the service for a lower fee, on the basis that the physiotherapist might be prepared to do a less comprehensive assessment.

Additional Information Submitted after Reconsideration

Section 22(4) of the EAA says that a panel may consider evidence that is not part of the record that the panel considers to be reasonably required for a full and fair disclosure of all matters related to the decision under appeal. Once a panel has determined which additional evidence, if any, is admitted under EAA Section 22(4), instead of asking whether the decision under appeal was reasonable at the time it was made, a panel must determine whether the decision under appeal was reasonable based the requirements set out in the legislation and on all admissible evidence.

The section of the Notice of Appeal (NOA) asking why the appellant disagrees with the Ministry's RD, the Appellant has written "*I cannot do DLA*". As no other information is contained in the NOA, the Panel finds that there is no new evidence contained in the NOA.

New verbal evidence presented at the hearing is that the Appellant comprises the following verbal evidence:

- The Appellant's back problem is recently worse than it was when he applied for the PWD designation;
- The GP has not provided him with copies of the X-rays taken five months ago;
- He lives with two roommates who help with his DLA;
- Additional details were provided regarding his difficulties with DLA, and who helps him with them; and,
- He doesn't know who wrote the Note.

Admissibility of New Evidence

All the new verbal information provided by the Appellant at the hearing is admitted by the Panel as it is reasonably required for a full and fair disclosure of all matters related to the decision under appeal.

However, the Panel assigns little weight to the new information about his recent back problems, his difficulty with the DLA of meal preparation, daily shopping and mobility inside and outside the home, and the help he receives with DLA. The Panel assigns little weight to this evidence because the new information is largely inconsistent with the evidence provided by the GP in the MR and the AR (as detailed above), the legislation requires that this information be confirmed by a prescribed professional, and no evidence has been provided by a prescribed professional to confirm these details.

Regarding the Note, as it is unsigned and Appellant does not know who prepared it, the Panel is unable to determine whether a prescribed professional wrote the Note, and consequently, the Panel assigns no weight to the information in the Note.

In addition, as the recent X-rays are not available, there is no additional evidence available to shed further light on the severity and extent of the Appellant's impairments to his shoulders, hands or lumbar spine.

Part F – Reasons for Panel Decision

The issue under appeal is whether the Ministry's RD, which found that the Appellant is not eligible for designation as a PWD, was reasonably supported by the evidence or was a reasonable application of the legislation in the circumstances of the Appellant. In other words, was it reasonable for the Ministry to determine that the evidence does not establish that the Appellant has a severe mental or physical impairment, and that the Appellant's DLA are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods? Was it reasonable for the Ministry to determine that because of any direct and significant restrictions it could not be determined that the Appellant requires the help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA?

ANALYSIS

Severity of Impairment

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

The Ministry has determined both the duration of the impairment criterion and the Appellant's age criterion to have been met.

Physical Functioning

The Ministry's position is that, based on the assessments provided by the GP in the Appellant's PWD application, the medical reports submitted in his original application, and the additional information submitted with his RFR, the Appellant's physical impairments are more in keeping with a moderate than a severe physical impairment.

The Appellant's position is that he has severe physical impairments as a result of injuries to his shoulders, his rheumatoid arthritis and more recently, his newly-developed back problems that further restrict his mobility.

Panel Decision

In assessing the severity of an applicant's impairment, 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 professional regarding both the length of time that the severe impairment is likely to continue, and the impact on the appellant's DLA and their need for help.

The purpose of the physical functioning assessment is to determine whether the appellant's impairments have a significant impact on an applicant's ability to function physically based primarily on the information provided by a prescribed professional, as mentioned above. In this appeal, the Appellant's GP, who completed the AR and who is a prescribed professional as defined in the legislation, has indicated that the Appellant is independent with all physical and mobility activities, except for carrying, holding and lifting. However, the GP has not completed the part of the AR where the prescribed professional is asked to explain why continuous assistance is required and to specify what assistive device or devices are required. At the hearing, the Appellant said that he needs to use a shower chair when he takes a shower and that he would benefit from the use of crutches, but the GP has not confirmed this in the AR.

In the RD, the Ministry noted that GP does not describe the degree of the Appellant's impairments, citing by way of example the fact that the GP does not describe how often the Appellant requires assistance with carrying purchases, food preparation or cooking. The Ministry also notes that the medical reports submitted with the Appellant's original application and with his RFR were dated from seven to nine years ago and do not clearly indicate his current physical condition. In addition, the Ministry says that there is no information to indicate that the information in the Note is confirmed by a medical practitioner.

The Panel finds that the Ministry reasonably concluded that the degree of the Appellant's impairments was not described in adequate detail for the Ministry to confirm the severity of the Appellant's impairments. In addition, the Panel notes that the medical reports,

provided seven to nine years ago, indicate that the Orthopedic Surgeon Exams describe significant improvement in the Appellant's left shoulder following surgery. For example, the April 27, 2015 examination report says, in part, "*(The Appellant) is doing well, demonstrates excellent range of motion, his pain is greatly improving and indeed his strength is improving*". The Panel finds that the Ministry was reasonable in determining that it would require more recent medical reports to confirm that some of the Appellant's impairments were still severe, as required under the legislation. And, as explained above, the Panel gives no weight to the evidence in the Note, as its authorship cannot be determined.

While the Appellant provided verbal evidence at the hearing that addresses some of the information missing from the PWD application, the legislation requires that the presence of a severe physical impairment be "*in the opinion of a medical practitioner or nurse practitioner*", which has not been confirmed by the GP in this instance.

The Panel finds that the Ministry was reasonable in determining that there was not sufficient evidence from a prescribed professional for it to be satisfied that the Appellant has a severe physical impairment.

Mental Functioning

The Ministry's position is that, based on the information provided in the Appellant's original Application and RFR, he does not have a severe mental impairment.

The Appellant's position is that he does not have a mental impairment.

Panel Decision

The Appellant has not provided any evidence to suggest that he has a mental impairment.

Based on the available evidence, the Panel finds that the Ministry reasonably determined that the Appellant does not have a severe mental impairment.

Restrictions in the Ability to Perform DLA

The Ministry's position is that the GP has provided no information to show how often the Appellant needs help from another person to complete DLA or for how long. Therefore, the Ministry is unable to establish that the Appellant's restrictions are either continuous or periodic for extended periods, as required by legislation.

The Appellant's position is that he is unable to perform a substantial number of DLA. As a result, he either has to rely on his roommates to do them for him, or, for some aspects of personal grooming, he simply doesn't do them at all.

Panel Decision

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. 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 the AR. For example, the DLA of “*prepare own meals*” in EAPWDR Section 2(1) appears in the AR as “*meal planning*”, “*food preparation*”, “*cooking*” and “*safe storage of food*”.

Section 2(2)(b) of the EAPWDA requires that the Ministry be satisfied that a prescribed professional has provided an opinion that an applicant’s severe impairment directly and significantly restricts their DLA, either continuously or periodically for extended periods. The term DLA appears in EAPWDA Section 2(2)(b) in the plural (“*daily living activities*”), which means that at least two of the activities listed in Section 2(1) must be significantly restricted for this legislative criterion to be met.

Section 2(2)(a) of the EAPWDR defines “*prescribed professional*” to include a “*medical practitioner*”. Therefore, the GP and is considered a prescribed professional 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 and 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.

The Panel notes that there are significant differences between the information provided by the Appellant at the hearing regarding his ability to perform DLA and the GP’s assessment of those abilities in the AR. For example, the GP has indicated that the Appellant does not require any assistance with daily shopping, meal preparation or mobility outside the home, whereas the Appellant said at the hearing that he cannot do any of these things. As there is no evidence presented to indicate that the GP has re-assessed the Appellant’s DLA capabilities, the Panel is unable to give substantial weight to the information provided by the Appellant at the hearing.

Regarding the evidence provided in the Appellant’s PWD application, the Ministry says in the RD that, in the AR, the GP reported that the Appellant can manage all DLA independently, including personal grooming and basic housekeeping, that he only requires periodic assistance from another person with carrying purchases home, food preparation and cooking and that it “*takes five steps to get straight up*” for transfers on or off a chair. The Ministry also says that it relies on the medical opinion and expertise from

prescribed professionals to determine whether his impairments significantly restrict his ability to perform DLA either continuously or periodically for extended periods. The Panel finds, as was noted by the Ministry in the RD, that there is insufficient evidence from a prescribed professional to confirm that the Appellant's impairments directly and significantly restrict his ability to perform DLA.

Based on all of the admissible evidence, the Panel finds that the Ministry reasonably determined that a prescribed professional has not confirmed that the Appellant's DLA restrictions are either continuous or periodic for extended periods, as required by legislation.

Help with DLA

The Ministry's position is that, due to inconsistencies in the information reported by the GP in the MR and the AR, and because the frequency and duration of the periodic assistance required by the Appellant is not identified in the PWD application and the RFR, it cannot be determined that significant help is required from other persons or device.

The Appellant's position is that he needs the help of his roommates to perform several DLA, and he requires assistive devices, including a shower seat and crutches, to perform some of his other DLA.

Panel Decision

Section 2(2)(b)(ii) of the EAPWDA requires that, because of direct and significant restrictions in the ability to perform DLA, a person requires help to perform those activities. Help is defined in subsection (3) as the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal to perform one or more DLA.

In the RD, the Ministry says that the information regarding help with DLA as provided by his GP in the MR is that no help is yet required, though his children and friends do assist him at times and the Appellant "*does modified duties*". The Ministry notes that this is not consistent with the information provided by the GP in the AR, where the GP reports the Appellant requires continuous assistance from another person with lifting, carrying, and holding. In addition, in the AR, the GP says the Appellant requires periodic assistance from another person with carrying purchases home, food preparation and cooking but the frequency and duration of periodic assistance is not identified.

The Panel notes the inconsistencies in the assessments of what kind of assistance the Appellant requires in the PWD application and as described at the hearing, and the lack of detail concerning the frequency and duration of periodic assistance required in the Appellant's application for the PWD designation. The Panel finds that the Ministry

reasonably determined that there was not sufficient or consistent evidence to demonstrate that the Appellant requires help to perform DLA.

Conclusion

Having reviewed all the 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 was a reasonable application of the EAPWDA in the circumstances of the Appellant, and therefore confirms the Ministry's decision. The Appellant's appeal, therefore, is not successful.

Appendix - Legislation

The criteria for being designated as a PWD are set out in Section 2 of the EAPWDA as follows:

EMPLOYMENT AND ASSISTANCE FOR PERSONS WITH DISABILITIES ACT

Persons with disabilities

2 (1) In this section:

"assistive device" means a device designed to enable a person to perform a daily living activity that, because of a

severe mental or physical impairment, the person is unable to perform;

"daily living activity" has the prescribed meaning;

"prescribed professional" has the prescribed meaning.

(2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the

purposes of this Act if the minister is satisfied that the person is in a prescribed class of persons or that the person

has a severe mental or physical impairment that

(a) in the opinion of a medical practitioner or nurse practitioner is likely to continue for at least 2 years, and

(b) in the opinion of a prescribed professional

(i) directly and significantly restricts the person's ability to perform daily living activities either

(A) continuously, or

(B) periodically for extended periods, and

(ii) as a result of those restrictions, the person requires help to perform those activities.

(3) For the purposes of subsection (2),

(a) a person who has a severe mental impairment includes a person with a mental disorder, and

(b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires

(i) an assistive device,

(ii) the significant help or supervision of another person, or

(iii) the services of an assistance animal.

(4) The minister may rescind a designation under subsection (2).

The EAPWDR provides as follows:

EMPLOYMENT AND ASSISTANCE FOR PERSONS WITH DISABILITIES REGULATION

Definitions for Act

2 (1) For the purposes of the Act and this regulation, "**daily living activities**" ,

(a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following

activities:

(i) prepare own meals;

(ii) manage personal finances;

(iii) shop for personal needs;

(iv) use public or personal transportation facilities;

(v) perform housework to maintain the person's place of residence in acceptable sanitary condition;

(vi) move about indoors and outdoors;

(vii) perform personal hygiene and self care;

(viii) manage personal medication, and

(b) in relation to a person who has a severe mental impairment, includes the following activities:

(i) make decisions about personal activities, care or finances;

(ii) relate to, communicate or interact with others effectively.

(2) For the purposes of the Act, "**prescribed professional**" means a person who is

(a) authorized under an enactment to practise the profession of

(i) medical practitioner,

(ii) registered psychologist,

(iii) registered nurse or registered psychiatric nurse,

(iv) occupational therapist,

(v) physical therapist,

(vi) social worker,

(vii) chiropractor, or

(viii) nurse practitioner ...

The EAA provides as follows:

EMPLOYMENT AND ASSISTANCE ACT

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 2022-0226

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)

2022/12/02

Print Name

Barbara Sharp

Signature of Member

Date (Year/Month/Day)

2022/12/02

Print Name

Dawn Wattie

Signature of Member

Date (Year/Month/Day)

2022/12/02