Appeal Number 2023-0040

**Part C – Decision Under Appeal**

The decision under appeal is the Ministry of Social Development and Poverty Reduction's ("ministry") reconsideration decision dated January 26, 2023, 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* ("Act"). 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 found that the appellant is not one of the prescribed classes of persons eligible for PWD designation on the alternative grounds set out in section 2.1 of the Employment and Assistance for Persons with Disabilities Regulation ("Regulation"). As there was no information or argument on this point, the panel considers it 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* - sections 2, 2.1

Employment and Assistance for Persons with Disabilities Regulation - section 2

*Employment and Assistance Act* - section 22(4)

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

**Part E – Summary of Facts**

The information the ministry had at the time of the reconsideration decision included:

**1.** The record of decision indicating that the PWD application was submitted on September 26, 2022, and denied on October 22, 2022, with *Decision denial summary* explaining the criteria that were not met. On January 13, 2023, the appellant submitted a *Request for Reconsideration*. On January 26, 2023, 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 with 3 parts:

- the *Applicant Information* (self-report) dated August 7, 2022.,
- a *Medical Report* dated September 14, 2022, signed by the appellant's doctor, a General Practitioner ("Dr. A") who has known the appellant since February 2019, and has seen her 2-10 times in the past 12 months,
- an *Assessor Report* dated September 14, 2022, also completed by Dr. A who based the assessment on an office interview with the appellant, file/chart information, and information from an orthopedic surgeon and Sports medicine doctor.

*Summary of relevant evidence from the application*

***Diagnoses***

In the Medical Report, the appellant is diagnosed with Osteoarthritis ("moderate-severe bilateral shoulder"), date of onset 2017; Severe right hip ("total replacement"), date of onset 2019, and Pain syndrome (right side of body). In Section B-*Health History*, Dr. A explains that the appellant was injured in a fall in 2017 and "has struggled severely since then" with ongoing pain "including her neck, right shoulder, right hip, and right knee."

The appellant has seen numerous specialists and therapists during the past 5 years and has "severe osteoarthritis" in her right shoulder and right hip (with hip replacement in 2019), and minuscular injury and repair in right knee. The impairment has changed little over the past 5 years.

In Section F-*Additional comments*, Dr. A says the appellant has spent a lot of time in hospital for treatment of pain. Despite following all treatment plans, the appellant "still struggles with daily pain."

*Additional information from the self-report*

The appellant reports extensive surgeries over the past 10 years and was recovering from knee replacement surgery at the time of her fall in May 2017. The appellant reports having further knee surgery, hip replacement surgery, and an injury to her right shoulder as a result of the fall. The appellant says that her shoulder injury is being assessed by an orthopedic surgeon for a possible shoulder replacement at a later date.

The appellant reports chronic pain in her hip, right shoulder, and upper back that has continued post-surgery. The appellant reports neck, shoulder, and upper back pain that is consistent, resulting in "very painful" spasms in the back of her head and upper regions. The appellant says that the spasms occur "anywhere from 1-5 times per week" with intense pain that then subsides. The appellant describes headaches which are not constant, but cause "straining and throbbing" in her eyes.

***Functional skills***

Self-report

The appellant reports tingling down her right arm which causes her hand to go numb when performing any activity, and also while inactive. The appellant reports taking narcotic medication "on and off" which causes problems with her cognitive function.

The appellant says that her hip pain prevents her from being in certain positions (especially sitting and bending) for long periods. The appellant says she requires nightly medication to fall asleep. The appellant says she has gained weight due to not being able to exercise as she did in the past.

Medical Report

In Section B-*Health History*, Dr. A says that the appellant has reported being unable to sit for longer than 4 hours due to right hip pain. The appellant "struggles to sleep and focus due to the constant pain." The appellant has pain with walking, and severe pain when standing; she is unable to stand for more than an hour.

Dr. A reports that the appellant's right shoulder "bothers her tremendously which limits the use of her right arm." The appellant is unable to perform work duties due to pain and tingling in her right arm.

In Section D-*Functional skills*, Dr. A indicates the appellant can walk 1-2 blocks unaided on a flat surface; climb 2-5 steps unaided; and lift under 5 pounds. Dr. A indicates 2-3 hours for *remain seated*. Regarding mental functions (questions D-5 and D-6), Dr. A checked that the appellant has no difficulties with communication, and no significant deficits with cognitive and emotional function.

Assessor Report

Under Section B-2, *Ability to Communicate*, Dr. A checked *good* for *Speaking* and *Hearing*; and *satisfactory* for *Reading* and *Writing*.

Under section B-3, *Mobility and Physical Ability*, Dr. A indicates the appellant requires periodic assistance from another person with 5 of 6 functions listed:

- *Walking outdoors*
- *Climbing stairs*
- *Standing*
- *Lifting*
- *Carrying and holding*

The space for *Comments* was left blank. Dr. A checked that the appellant is independent with *Walking indoors*.

In section B-4, *Cognitive and Emotional Functioning*, the assessor is asked to indicate what impacts the appellant's *mental impairment* has on various cognitive and emotional functions. For the 14 areas listed, Dr. A indicates impacts in 6 areas:

- Minimal impact for *Emotion*, *Executive*, *Motivation*, and *Motor activity*,
- Moderate impact for *Bodily functions*, and *Attention/concentration*

No impact is indicated for:

- *Consciousness*
- *Impulse control*
- *Insight and judgment*
- *Memory*
- *Language*
- *Psychotic symptoms*
- *Other neuropsychological problems*
- *Other emotional or mental problems*

***Daily Living Activities***

In the opinion of a prescribed professional, Dr. A provides the following information:

Medical Report
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.

Assessor Report
In Section B-1, Dr. A indicates that "pain on the right side of her body including her right shoulder, right hip and right knee" are the impairments that impact the appellant's ability to manage DLA.

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

- *Shopping*: independent with *going to and from stores*, *reading prices and labels making appropriate choices, paying for purchases*, and *carrying purchases home*.
- *Pay Rent and Bills*: independent with *banking*, *budgeting*, and *pay rent and bills*,
- *Medications*: independent with *filling/refilling prescriptions*, *taking as directed*, and *safe handling and storage*.
- *Transportation*: independent with *getting in and out of a vehicle*, *using public transit* and *using transit schedules and arranging transportation*.
- *Social Functioning*: independent with *appropriate social decisions*; *able to develop and maintain relationships*, *interacts appropriately with others*, a*ble to deal appropriately with unexpected demands*, and *able to secure assistance from others*.

Additional information for *Social Functioning* includes Dr. A's assessment of *good functioning* when asked to describe how a mental impairment affects the appellant's relationships with her immediate and extended social networks. The doctor did not indicate that support is needed for the appellant to be maintained in the community. *Additional comments* including any safety issues was left blank.

*Restricted DLA*

Dr. A indicates that the appellant needs periodic assistance from another person with the following areas of 3 DLA:

- ***Personal Care***:: needs periodic assistance with *grooming*

Dr. A assessed the appellant as independent with the remaining areas of Personal Care: *dressing*, bathing, *toileting*, f*eeding self*, *regulating diet*, and *transfers* (bed and chair).

- ***Basic Housekeeping***:: needs periodic assistance with *laundry* and *basic housekeeping*.

Under *Additional comments* for the above DLA the doctor wrote, "due to her shoulder pain she struggles with grooming herself and is not able to do it on bad days."

- ***Meals***: needs periodic assistance with *food preparation*, and *cooking.*

Dr. A left the spaces for explanations and comments blank. The doctor assessed the appellant as independent with the remaining areas of Meals: *meal planning*, and *safe storage of food*.

In Section E of the AR (*Additional Information*), Dr. A says the appellant "struggles with daily activities due to pain on the right side of her body…She is working well with all of her doctors and therapists but still struggles on a daily basis."

*Appellant's information on restrictions to DLA*

In the self-report, the appellant indicates that she has difficulty with cleaning, and hair washing/styling as she has difficulty reaching and is unable to lift her shoulders past a centre point for any length of time. The appellant says she has to adjust how she does things by going more slowly and not doing things the way she used to.

***Need for help***

<u>Self-Report</u>
The appellant states that prior to her hip replacement she used a cane, but it affected her left shoulder.

Medical Report

In Section B-4, Dr. A checked *no* when asked if the applicant requires any protheses or aids for the impairment.

Assessor Report

In Section A-1, Dr. A checked that the appellant lives alone. In Section D-*Assistance provided by other people,* the doctor indicates that family and friends assist the appellant with DLA. Section D-*Assistance provided through the use of assistive devices*, was left blank. The doctor checked *no* the appellant does not have an assistance animal.

**3.** A *Request for Reconsideration* signed by the appellant on January 12, 2023, with documents attached:

-A hand-written submission in which the appellant explains that after she was denied PWD designation, she received a report from a psychiatrist ("Dr. B") who evaluated the issues she has suffered as a result of her slip and fall accident 6 years ago. The appellant indicates a diagnosis of Major depressive disorder. She will be starting a treatment plan with her family doctor and provides an updated letter from Dr. A in response to the psychiatric assessment.

-A letter from Dr. A dated January 9, 2023, stating that while treating the appellant's physical impairment, they have spoken on occasion about mental health, "but it has never registered as a major contributor to her disability." Dr. A acknowledges that the appellant saw Dr. B earlier this year and is diagnosed with MDD, "moderate severity with anxious distress." Dr. A. states that MDD is likely "a major contributor to her current disability." Dr. A's opinion is that "this patient is significantly disabled by the combination of her physical and mental health problems."

-An Independent Medical Examination ("psych. assessment") report, dated October 28, 2022, and completed by the psychiatrist, Dr. B.

The report provides the following additional information:

***Background***

- the assessment took place in July 2022, through two appointments. Dr. B reviewed an IME report from an orthopedic surgeon and other medical-legal reports regarding the appellant's physical impairment.
- the appellant currently lives with family members (since August 2021) and worries about becoming homeless.

**Symptoms and functional skills**

Dr. B commented on both the physical and mental impairment and considered the relationship between them:

*Physical impairment*

- since the slip and fall accident, the appellant has struggled with "constant pain on the right side of her neck, into her head and shoulder," despite treatment with physiotherapy, massage therapy, and chiropractic therapy.
- the appellant has been assessed by various doctors who agree that she suffered a shoulder/upper back and neck injury. Most of the doctors acknowledge that the appellant will continue to suffer chronic pain.
- the medical reports indicate that the appellant's left shoulder has recently become more symptomatic, as she has had to use her left side more for activities. Dr. A, and the orthopedic surgeon suggest that a total shoulder replacement (both shoulders) will be required in the future. Up until the 2017 accident, the appellant believed that the knee replacement would be her last surgery.
- the medical reports also acknowledge continuing knee problems, and right arm/hand numbness from Carpal tunnel syndrome.

*Mental impairment*

- the appellant reported an upbeat and positive mood prior to the slip and fall accident in 2017. Her attitude was "get up and keep going" in difficult times as well.
- the appellant noticed an "immediate decline in her mood following the accident…she felt that this setback was worse than [any others she had experienced] as she had difficulty seeing a path forward." In addition to chronic pain, the appellant faced barriers to work and financial limitations which further impacted her mood.
- the pain affected the appellant's social and family life. She was unable to swim/participate in other recreation with her family. The appellant was used to being independent, and now felt limited and worried that she was a burden to her family and would have no one to take care of her. The appellant stated that she felt "worthless," and "in limbo" regarding her future.
- the appellant experienced "daily low mood" including frequent tearfulness, and decreased motivation. She noted difficulty with concentration and memory, also related to her medication use. The depression symptoms improved for a short time, but her mood declined in 2018 and again in 2020 due to worsening hip pain and further barriers to employment after her right hip replacement.
- the appellant reported a "prominent increase in her anxiety level" in 2020. She became very worried about her physical limitations and how they would impact her

life and financial situation. Anxiety caused "concentration issues, irritability, restlessness, tremulousness, tensions, feelings of vulnerability."

- the appellant reported significant sleep issues due to anxiety regarding her finances. She required nightly medication to sleep and felt unrested and more jittery. The appellant reported that her energy was low, "it was hard to do anything." The appellant was suffering from poor concentration as she felt "easily overwhelmed." The appellant experienced low appetite but would also overeat to try and deal with her stress.
- the appellant reported a "daily passive death wish, which is still occurring." While the appellant feels that she has recovered "about 85% of her physical functionality", she experienced the accident as a "traumatic, embarrassing event", and "continuously thinks about how her left knee could have been really damaged" if she had fallen on that side while recovering from surgery. The appellant is anxious about walking, "…does not feel strong anymore, feels unable to look after herself and feels less safe in the world."
- the appellant reports "ups and downs" with lows that "still come over her quite strongly, are physically and mentally draining, and she feels no hope." The appellant reports that her energy is a bit better due to her physical recovery but her "concentration is still poor and all over the place." Her anxiety has improved since moving in with family as she feels safer and more supported, but still worries about her uncertain future.
- Dr. B describes some issues with communication. The appellant had difficulty giving direct answers and needed questions repeated a number of times. Dr. B attributes these difficulties to "disorganization and concentration issues." The appellant's cognitive symptoms require a referral to neurology to determine the impact of hitting her head in the accident.
- the appellant is diagnosed with "Major Depressive Disorder, moderate severity, in partial remission, with anxious distress." She meets the diagnostic criteria for MDD because she has a history of "persistent low mood more days than not, poor self-esteem, decreased interest in activities, less enjoyment in activities, social withdrawal, low daytime energy level, increased appetite, weight gain, diminished ability to concentrate, insomnia, and passive death wish."
- Dr. B notes that the current mental health symptoms are consistent with previously documented observations by other doctors and the appellant's self-reports. Dr. B concludes that the appellant's physical pain issues and limitations following the 2017 accident, contribute to her depression and anxiety by adversely affecting her self-esteem and ability to participate in her regular recreational and social activities. Further, "her MDD has likely negatively impacted her experience of physical pain, which has likely further exacerbated her MDD symptoms in an adversely reinforcing cycle."

**Daily living activities**

- in reviewing reports from the appellant's doctors, Dr. B notes in agreement that right side pain causes restrictions to DLA including "difficulties with washing her hair and household tasks." One of the reports said that chronic neck and upper back pain "does not cause her any disability" but the doctor agreed that the appellant experiences "disability in terms of household activities and deep cleaning activities" due to her right-side pain. With worsening shoulder problems after 2020, the appellant "could not clean around her home or maintain her personal hygiene properly because of her shoulder issue and relied on her family for assistance."
- social functioning is impacted. The appellant reported that pain affects her ability to be with family members and socialize with others. The appellant was no longer able to swim and go to the beach with family members, which she enjoyed before the 2017 accident. The appellant "went inwards, decreased socializing, distanced herself from others." She stopped going on social outings as she did not feel good about herself and was easily agitated from dealing with her problems. Although her family and church involvement have always been protective factors, the appellant shared less "as she did not want to be seen as a victim."
- despite her cognitive issues with concentration and memory, the appellant denied any difficulty with managing her finances.

**Need for help**

- Dr. B reports that the appellant did not seek formal counselling as she was focused on trying to improve her physical health, using physical health treatments to improve her mental health. The appellant felt that she could recover on her own after the 2017 accident, with the support of her family, friends, and church community. She felt that her mental health issues were caused by her physical impairment and would improve as she recovered physically.
- in 2018-2019, the appellant spoke with family doctors about her mental health issues and was prescribed anti-depressant medication as recently as 2021. Some of the medications were for short-term use, and others were not continued due to the appellant's concern about side effects and allergies. The appellant stopped using her strongest narcotic pain medication in 2020 as the medication (in addition to stress) was exacerbating her cognitive symptoms. The appellant is willing to consider psychotherapeutic and pharmacological treatment recommendations.
- since moving to live with family, the appellant has felt safer and more supported, with reduced financial stress. Dr. B indicates that the appellant requires mental health treatment and support over the next year, to improve her MDD and anxiety

symptoms and reduce the likelihood of future exacerbation of symptoms or relapse. The appellant will also likely require longer-term treatment "given the chronicity of her mental health issues, severity of her symptoms and given that she has concurrent MDD, anxiety, and various physical pain issues."
- in addition to first-line antidepressant medication for MDD and anxiety, Dr. B recommends Cognitive-Behavioural therapy ("CBT"), group psychotherapy, and support from a mental health professional to help with appellant "with her perception of her physical pain symptoms and physical limitations." Dr. B recommends behavioural interventions for sleep, and restarting regular exercise, recreation, and social engagement to assist in the appellant's recovery and stabilization of her condition.

**Additional evidence – written hearing**

With the consent of both parties the appeal format was a written hearing pursuant to section 22(3)(b) of the *Employment and Assistance Act*. The appellant filed a *Notice of Appeal* with a statement that the panel accepts as argument. The appellant also provided a letter from her legal advocate (February 17, 2023) which the panel considers to be argument.

The ministry did not submit any new evidence or argument. In an email to the Tribunal, the ministry states that the reconsideration summary is the ministry's submission on appeal. The panel will consider both parties' arguments in Part F-*Reasons*.

In addition to argument for the appeal, the appellant submitted medical reports requiring an admissibility determination under section 22(4) of the *Employment and Assistance Act*. The reports contain the following information:

*Received at the Tribunal on February 7, 2023 (with the Notice of Appeal)*

**1.** An Independent Medical Examination ("orthopedic assessment") report, dated October 27, 2022, and completed by an orthopedic surgeon ("Dr. C").

The report provides the following additional information:

***Background***
- the assessment took place on August 19, 2022. Dr. C reviewed hospital records, X-ray reports, clinical records (chiropractor), and consultation reports regarding the appellant's knee pain; shoulder/neck/upper back issues, right hand numbness, and right hip issues.
- the appellant has been experiencing health issues and surgeries since 2010. She had knee surgery in 2011 with good recovery within a few weeks. She had further

knee surgery in 2012 (with a difficult recovery) followed by ACL surgery in 2013 and a total left knee replacement in 2016. The appellant recovered well and was able to walk 3 miles per day.

- in May 2017, the appellant had the accident in which she fell onto her right side. The appellant was recovering from knee replacement surgery at the time of the accident and hit her head and right hip while trying to protect her left knee. She denied losing consciousness but felt dazed and disoriented. The appellant was diagnosed with a mild concussion, whiplash, and a permanent visual defect as the result of the accident. The appellant suffered frequent headaches, as well as neck/shoulder pain spasms and tightness.
- after the accident, the appellant was able to walk, but attended a family medicine clinic, then hospital over the next few days, due to right-sided pain and concussion symptoms. X-rays revealed that the appellant's left knee (recent arthroplasty surgery) was well-seated and well aligned. The appellant was diagnosed with soft tissue injuries.
- X-rays of the cervical spine (May 2017) revealed mild-moderate degenerative disc disease. An MRI (July 2017) indicated a complete tear in the right knee. A consultation report indicated a history of right knee pain. Following surgery on her right knee in 2017, the appellant's knee problems are "95% improved" 5.5 years after the accident.
- in 2018, a chiropractor noted that the appellant's "right side lower back and hip is out of alignment causing whole right side of her body to really tense up and ache."
- while the appellant continued to experience right hip pain (attributed to bursitis) following a hip replacement in 2019, her right hip today "is about 85% with some residual discomfort in the right hip area."
- the right shoulder and right knee problems were determined to be from osteoarthritis. The tingling in her right hand (Carpal tunnel syndrome) was made worse by the accident. Dr. C suggests that osteoarthritis is accelerated due to the accident.
- the appellant's current issues pertain to ongoing right-sided shoulder, neck, and upper back pain "that has worsened over the last few years." She has also developed left shoulder pain and describes the pain in her shoulders as a "constant dull ache."
- the appellant has had brief chiropractic and physiotherapy treatments for her right shoulder and neck pain. Dr. C recommends non-surgical treatment options for soft tissue injuries including intramuscular stimulation, trigger point or Botox injections, active release therapy deep tissue massage, and active rehabilitation under the supervision of a certified kinesiologist. The appellant had some injections in the past which provided temporary relief but found that physiotherapy was not beneficial.

**Symptoms and functional skills**

*Physical impairment*

- Dr. C notes conflicting opinions on how much activity the appellant could handle. One of the consult reports recommended avoidance of significant amounts of walking to decrease further stress on the knee. Another report recommended as much walking as the appellant could tolerate "as there is no medical contraindication for her walking."
- the appellant reports her (upper body) function to be only 50% due to right-side pain. She rates her shoulder pain at an intensity of 8/10 with activity, and she is unable to lie on her right side at night without pain. Aggravating activities include "reaching, exercise, swimming, cleaning, lifting, or any use requiring repetitive movement." Pain medications, activity modification, heat, and massage offer temporary relief.
- Dr. C reports that the appellant can walk "for up to 2 miles" at 5 years post-surgery (right knee and right hip). The appellant is able to walk with a normal gait and acknowledges going for walks and being able to perform movement exercises in the water. She is no longer able to swim due to her shoulder symptoms.
- Dr. C recommends low impact activity such as walking, swimming, and biking.

**Daily living activities and need for help**

- the report notes the chiropractor's clinical notes, stating that "pain seems to get worse if she is too active around the house cleaning, or trying too hard to exercise."
- Dr. C reports that the appellant is able to perform activities of daily living, including "self-hygiene care, independent grooming, and dressing," but she has difficulty with hair-washing and can only do it herself with accommodations. Regarding home chores, the appellant "cannot perform any reaching activities to do any deep cleaning." She is "able to perform cooking and laundry activities; albeit accommodated."
- Dr. C comments on the appellant's social history, indicating she has lived with different relatives, moving again in 2022 with concerns about becoming homeless.

*Received at the Tribunal on February 7, 2023*

**2.** A letter from Dr. A (family doctor) dated October 12, 2021**.** The letter notes "daily pain" involving the right neck, shoulder, hip, and knee "which affects her ability to complete tasks which she previously completed with ease." The appellant has myofascial pain of the neck and hip, with advanced osteoarthritis in her right shoulder, and degenerative joint disease in her right knee. The accident in 2017 also resulted in a permanent visual defect

with a smaller field of vision as well as clouded vision in the right eye. The appellant experiences pain with movement, and a reduced range of motion in her right arm.

Dr. A suggests that decreased function in the joints is likely to be permanent, and the appellant will need ongoing physical and occupational therapy "several times a month in an ongoing manner, and in the long-term." The appellant continues to struggle with washing or styling her hair (tasks that she was previously able to compete). The appellant "struggles with household tasks such as vacuuming or mopping the floor; again, as a result of pain and decreased range of motion in her right shoulder."

Dr. A reports that shoulder replacement surgery is unlikely to result in full, pain-free function in the right arm, and the appellant will continue to suffer pain and decreased function in her right knee due to significant osteoarthritis which may require further surgery. Dr. A opines that "with therapy and perhaps surgical intervention, [the appellant] may function better than she does at present, but her function will be objectively impaired for the foreseeable future."

**3.** The appellant provided additional copies of the assessment reports by Dr. B and Dr. C.

*Admissibility: orthopedic assessment report, and letter from Dr. A*

The ministry made no comments on the submissions and had no objections to the documents being accepted as evidence. The panel finds that the orthopedic assessment report and the letter from Dr. A add information regarding the appellant's physical impairment including the history of her medical problems, current physical abilities including walking and lifting, and restrictions to DLA due to pain and reduced right-side function.

The reports include evidence on treatment and prognosis which the panel finds is relevant to understanding the appellant physical limitations. The panel admits these documents under section 22(4) of the *Employment and Assistance Act* 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**

*PWD designation - generally*

The legislation provides the Minister with the discretion to designate someone as a PWD if all the requirements are met. In the ministry's view, PWD designation is for persons who have significant difficulty in performing regular self-care activities including social interaction and making decisions about personal activities, where a mental impairment is shown.

Some requirements must have an opinion from a professional, so it is reasonable to place significant weight on those opinions. The ministry found that 2 of the 5 requirements were met because the appellant is at least 18 years of age, and a medical practitioner has given the opinion that the appellant's impairment is likely to continue for at least 2 years.

The application form includes a self-report so it is appropriate to place significant weight on evidence from the appellant unless there is a legitimate reason not to do so. The panel will review the reasonableness of the ministry's determinations and exercise of discretion.

*Severe impairment*

"Severe" and "impairment" are not defined in the legislation. The ministry considers the extent of any impact on daily functioning as shown by limitations with or restrictions on physical abilities and/or mental functions. The panel finds that an assessment of severity

based on physical and mental functioning including any restrictions, is a reasonable interpretation of the legislation. A medical practitioner's description of a condition as "severe" is not determinative on its own. The ministry must make this determination considering the relevant evidence and legal principles.

*Restrictions to Daily Living Activities (DLA)*

A prescribed professional must provide an opinion that the applicant's impairment restricts the ability to perform DLA. The BC Supreme Court decision in *Hudson* v. *Employment and Assistance Appeal Tribunal* [2009 BCSC 1461] determined that at least 2 DLA must be restricted in a way that meets the requirements of the Act. Not all activities need to be restricted.

The restrictions to DLA must be significant and caused by the impairment. This means that the restriction must be to a great extent and that not being able to do daily activities without a lot of help or support will have a large impact on the person's life.

The restrictions also must be continuous or periodic. Continuous means the activity is generally restricted all the time. A periodic restriction must be for extended periods, meaning frequent 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. To figure out if a periodic restriction is for extended periods, it is reasonable to look for information on the duration or frequency of the restriction.

The requirements for restrictions to DLA are set out in subsection 2(2)(b)(i) of the Act. Specific aactivities are listed in section 2(1) of the Regulation. The Medical Report and Assessor Report also list activities, and though they do not match the DLA in the Regulation exactly, they generally cover the same activities. The Medical Report and Assessor Report give the professional the opportunity to provide additional details on the applicant's restrictions. **The inability to work and financial need are not listed as DLA and are only relevant to the extent they impact the listed activities.**

*Help Required*

A prescribed professional must provide an opinion that the person needs help to perform the restricted DLA. This requirement is set out in subsection 2(2)(b)(ii) of the Act. Under subsection 3, "help" means needing an assistive device, the significant help or supervision of another person, or an assistance animal to perform DLA. An assistance device, defined in section 2(1) of the Act**, is something designed to let the person perform the restricted DLA.**

**Severe mental or physical impairment**

*Arguments - Appellant*

The appellant's position is that her physical impairments are severe because she experiences daily right-sided pain and a reduced range of motion which makes her physical functions difficult and slow. The appellant argues that she has longstanding impacts from the accident that prevent her from doing the activities she previously enjoyed, especially exercise and recreation with her family.

Regarding the diagnosis of depression, the appellant explains in her submission for the reconsideration, that until she underwent the assessment with Dr. B, she did not realize the full extent of her condition. The appellant says she knew that "my life and physical abilities had changed drastically, but I did not fully comprehend the extent all that I have been through, took on my mental health."

The legal advocate argues that the appellant will continue to have "major depression and anxiety symptoms as long as she continues to struggle physically." The advocate argues that the medical information confirms that the appellant's history of surgeries and injuries from the accident "has developed into a chronic pain condition that will not recover."

The advocate notes that the appellant's right shoulder functions at only 30-40%, and the appellant requires daily medication for pain as well nightly medication to fall asleep. The advocate argues that "given her poor prognosis for physical recovery [the appellant's] psychiatric prognosis is also poor."

*Arguments – Ministry*

The ministry's position is that the assessments provided by Dr. A, and the information in the self-report indicate a moderate rather than severe physical impairment. The ministry acknowledges that the appellant experiences limitations to her physical functioning due to right side body pain, but argues that it could not determine whether restrictions for walking outdoors, standing, lifting, etc. are significant because Dr. A did not describe how often the appellant needs help to manage these functions.

Regarding a mental impairment, the ministry acknowledges that the appellant experiences some impacts to her cognitive and emotional functioning but found that a *severe* mental impairment was not established on the evidence. The ministry argues that the information from Dr. A indicates only a minimal-moderate impact on emotional and

cognitive functioning because no significant deficits and no difficulties with communication are indicated. The ministry argues that the impairment is not severe because the appellant is independent with social functioning and other DLA that would typically be difficult for someone who experiences significant restrictions with mental functioning.

The ministry acknowledges Dr. B's diagnoses of Major Depressive Disorder with impacts that include persistent low mood, low self-esteem, decreased interest in activities, social withdrawal, poor sleep quality, and other issues. The ministry acknowledges Dr. A's endorsement of the psych. assessment but argues that the additional information does not demonstrate a severe impairment because Dr. B "does not describe the degree of these impacts."

The ministry acknowledges that the doctors report the appellant is unable to function in a work environment, but notes that the ability to work is not a factor when determining PWD designation. The ministry refers the appellant to the *Persons with Persistent Multiple Barriers* to employment program ("PPMB") for clients who are unable to work but can otherwise function.

***Panel's decision - mental impairment***

The panel finds that the ministry's decision is not reasonable because the evidence from all sources combined, establishes a severe mental impairment. Dr. A does not diagnose depression and anxiety in the Medical Report or Assessor Report, but the appellant's medical conditions include "Pain syndrome (right side of body)" which has caused her to "struggle severely" since the accident in 2017, due to "constant pain."

The appellant and her doctors explain that the appellant has overlooked the impact of pain and physical restrictions on her mental health because of her "get up and keep going attitude" and the focus on her physical recovery. The panel finds that the focus on her physical function does not diminish the relationship between pain and mental functioning which is elaborated on by Dr. A, and the psychiatrist, Dr. B.

The narrative in the Medical Report identifies impacts on cognition and bodily functions that are clearly due to the appellant's experience with chronic pain. The appellant "struggles to sleep and focus due to constant pain from her physical impairments." The check marks indicate a less significant degree of restriction than the doctor's comments, but in the self-report, the appellant describes chronic neck, shoulder, and upper back pain that is "consistent." The appellant reports "very painful spasms" that occur unpredictably

up to 5 times per week and affect her ability to sleep at night and concentrate in the daytime.

The panel prefers the narrative comments over the check marks on the forms because the comments are more consistent with the appellant's subjective experience of "daily pain" as described in the self-report and in the interviews with her other doctors (psychiatrist, Dr. B, and orthopedic surgeon, Dr. C). Both doctors describe the appellant's struggles with "constant pain on the right side of her neck, into her head and shoulder" that has not resolved despite treatment with medication and various physical therapies which have offered only temporary relief.

Dr. B diagnosed the appellant with Major Depressive Disorder, noting significant effects on function including "persistent low mood more days than not." Dr. B concludes that the appellant's experience with daily physical pain adversely affects her self-esteem, social interactions, concentration/memory, and sleep patterns.

Dr. B describes a vicious circle in which the appellant's depression and experience with physical pain exacerbate each other "in an adversely reinforcing cycle." Dr. B notes "a daily passive death wish, which is still occurring." In the letter submitted for the reconsideration, Dr. A endorses the psych. assessment and concludes that the appellant is "significantly disabled" by the combination of her physical and mental health problems."

The ministry acknowledges the MDD diagnosis, but focuses on "moderate severity, in partial remission" and does not give much weight to the functional restrictions described by Dr. B. The ministry says that Dr. B "does not describe the degree of [the] impact" on self-esteem, social withdrawal, poor sleep quality, and other issues. The panel finds the ministry's conclusion unreasonable because despite the label of "moderate severity," Dr. B notes significant impacts including poor self-esteem, social withdrawal, sleep disturbance and cognitive difficulties due to daily pain, and low mood most days.

These issues have caused the appellant to feel vulnerable and "worthless" because of her dependency on family; to withdraw from social and recreational activities (no longer goes out with friends or to the beach with relatives); to require nightly medication in order to sleep; and to have a persistent death wish. Furthermore, the appellant continues to suffer from anxiety due to her financial worries and the uncertainty about her physical health. The appellant's anxiety is increased given a high likelihood of further surgeries (for her shoulder problem).

The submissions for the reconsideration and appeal are very detailed and comprehensive in their descriptions of the appellant's ongoing struggles with chronic pain, and the

impacts of pain on her daily life. The psych. assessment and additional letters from Dr. A explain the relationship between physical pain and the appellant's mental functioning, indicating a long-term impact on mood, concentration, and sleep.

The appellant requires long-term physical therapy, psychiatric medication, cognitive-behavioural intervention, and counselling to help her manage her pain, low mood, and anxious distress. The panel finds that the totality of evidence establishes a severe mental impairment. The requirement for a severe impairment under the Act is therefore met based on restrictions with mental and social functioning.

***Panel's decision - physical impairment***

The panel has considered the evidence in its entirety and finds that the ministry's decision is reasonable. Although the appellant is diagnosed with moderate to severe osteoarthritis in her shoulder and a pain syndrome on the right side of her body, the evidence in the Medical Report and Assessor Report indicates a moderate impairment in her physical functions.

In these reports, the appellant is able to walk a short distance (1-2 blocks) and climb 2-5 steps unaided despite pain when walking. The appellant is able lift a small amount of weight (under 5 pounds). While Dr. A describes a permanent visual defect as a result of the accident, the appellant's ability to read remains satisfactory.

Despite "severe pain when standing," the appellant is able to stand for up to an hour with only periodic assistance. The appellant is able to sit for a long period (2-3 hours) despite right hip pain.

While the appellant needs periodic assistance with all physical functions except w*alking indoors* (Assessor Report), the frequency and duration of assistance is not described, and the appellant does not need an assistive device. Based on Dr. A's assessments of specific physical functions and the lack of detail on the extent of help required, the panel finds that the ministry was reasonable to find that the appellant has a moderate, rather than severe, physical impairment.

In the panel's view, the additional information for the reconsideration and appeal do not establish a severe impairment of physical functioning. In the interview with Dr. B, the appellant felt that she has recovered "about 85% of her physical functionality" despite the accident's mental toll and her anxiety around walking.

The orthopedic assessment describes the appellant's right knee problems as "95% improved 5.5 years after the accident." Following the hip replacement in 2019, the appellant's right hip is now "about 85% with some residual discomfort in the right hip area."

Dr. C reports that the appellant can "walk for up to 2 miles" with a "normal gait" at 5-years post-surgery (right knee and right hip). The appellant is no longer able to swim due to her shoulder symptoms, but she is able to walk for recreation and perform some movement exercises in the water. The panel finds that this level of ability does not demonstrate a *severe* physical impairment.

The doctors agree that the appellant's shoulder problems and right-side pain are her most significant physical impairments. The appellant's upper body function is only 50% (orthopedic assessment), and her Carpal Tunnel Syndrome and right shoulder osteoarthritis are accelerated due to the accident. The letter from Dr. A, submitted on appeal, indicates worsening osteoarthritis and "objectively impaired" function for the foreseeable future.

Despite these observations, the appellant is able to walk for recreation; sit and stand for a reasonable length of time despite pain, and lift and carry a small amount of weight. Dr. C recommended an assessment by an Occupational therapist, and active rehabilitation with a Certified kinesiologist. No assessment of physical abilities from these professionals was provided for the appeal.

The panel finds that the ministry reasonably determined that the requirement for a severe impairment under the Act is not met based on physical impairment because the totality of evidence demonstrates a moderate rather than severe impact on physical functioning. However, as noted earlier, the legislative requirement is met because a severe mental impairment is shown based on the appellant's subjective experience with pain and disability.

**Restrictions to daily living activities**

*Arguments - Appellant*

The appellant's position is that her DLA are significantly restricted by right side pain and a restricted range of motion. In the appeal submission, the appellant says that she is "able to function for daily activities" but with limited ability.

In the self-report, the appellant expresses distress over not being able to participate in exercise and family recreation like she did before the accident. In her interview with the psychiatrist, the appellant reports a significant decrease in her social functioning as a result of low mood, poor self-esteem, and feeling like a burden to family and friends.

The advocate argues that the appellant's injuries do not only prevent her from working. The advocate submits that "apart from work, [the appellant] often requires assistance with self-grooming, laundry, basic housekeeping, food preparation and cooking. She cannot live independent in all her activities of daily living." In her self-report, the appellant agrees that grooming and cleaning have become very difficult since the accident, especially with constant shoulder and right-side pain that is made worse with activity.

*Arguments - Ministry*

The ministry's position is that there is not enough evidence from the prescribed professional (Dr. A) to confirm that the appellant's impairments significantly restrict DLA continuously or periodically for extended periods as required by the legislation. The ministry acknowledges that the appellant has limitations from right-sided pain and requires periodic assistance with several DLA, but argues that significant restrictions are not established because Dr. A did not describe "the frequency and duration of these periods or bad days…to your *overall* level of functioning."

The ministry acknowledges Dr. A's narrative (Assessor Report) which confirms the appellant's struggles with daily activities. However, the ministry concludes that the information from the doctor indicates a moderate level of restriction. Regarding DLA, the ministry does not provide any comment or analysis on the information in the psych. assessment and Dr. A's letter.

***Panel's decision - restrictions to DLA***

The panel finds that the ministry's decision is not reasonable. The panel concluded that a severe mental impairment is established on the evidence. The panel further finds that there is enough evidence from prescribed professionals to confirm that DLA are directly and significantly restricted for extended periods of time by the appellant's mood disorder, compounded by a co-morbid "Pain syndrome."

The panel acknowledges that the appellant's medications no longer interfere with DLA as she stopped taking the strongest narcotic pain medication in 2020. However, she still requires daily medication for pain and sleep, and has difficulty with concentration and

memory due to anxiety and insomnia. To date, these symptoms have not been fully or effectively treated according to the psych. assessment.

In the Assessor Report, Dr. A indicates that the appellant is periodically restricted with personal care, housekeeping, and meal preparation due to right-side shoulder, hip, and knee pain. Due to shoulder pain, the appellant is not able to wash or style her hair "on bad days." Dr. A did not attribute the restrictions to DLA to a mental impairment in the Assessor Report. However, Dr. A subsequently supported Dr. B's assessment of a mood disorder as the source of these restrictions.

The frequency of "bad days" is explained and detailed in the psych. assessment in which Dr. B explains how mental health symptoms are limiting function on an ongoing basis. Mental health symptoms are identified as low mood, fatigue, cognitive difficulties, poor sleep and chronic pain. Dr. B identifies chronic pain as a major component of the appellant's mood disorder causing her to struggle with "daily activities" on a "daily basis" despite working well with her doctors and therapists. The panel is satisfied that daily struggles with DLA due to the mental impairment, indicate periodic restrictions for extended periods as required by the Act.

In the orthopedic assessment, Dr. C notes that the pain gets worse if the appellant is too active with house cleaning, and she requires accommodations to manage DLA such as grooming, dressing, cooking, and laundry on her own. The panel finds that the need for accommodations (all the time, as indicated by Dr. C) indicates a significant restriction. The letter from Dr. A (submitted on appeal) states that prior to the accident, the appellant managed her DLA with ease, but now she experiences pain with movement, and "struggles with household tasks such as vacuuming or mopping the floor."

Dr. B endorses the restrictions that were reported by the other doctors, agreeing that chronic pain is a major contributor. Dr. B provides diagnostic clarity by establishing that the chronic pain is a component of the appellant's mental health struggles, diagnosed as MDD. The panel gives weight to Dr. B's fulsome analysis because the restrictions to personal care and other DLA are based in multiple mental health symptoms including chronic pain.

The ministry argues that DLA involving mental functions are not restricted on the evidence from Dr. A, but the letter from Dr. A (for the reconsideration) endorses the psych. assessment in which "mental DLA" such as personal care, and social functioning are significantly restricted as a result of the mood disorder. Dr. B indicates that social functioning is significantly restricted for extended periods because after the accident, the appellant "went inwards, decreased socializing, distanced herself from others;" and

stopped going on social outings, or participating in the swimming and beach activities she had always enjoyed. This clearly demonstrates the functional impact of the mood disorder on social activities.

The appellant continues to experience ups and downs "with lows that still come over her quite strongly." Dr. B reports that daily pain decreases the appellant's energy and motivation to do things, and she feels weak and disappointed with herself for not recovering her previous functional capacity.

*Summary*

The panel finds that the ministry's determination that DLA are moderately restricted is not reasonable because the appellant's "life and physical abilities have changed drastically" since the accident (as reported in her submission for the reconsideration). The information from several prescribed professionals (family doctor, psychiatrist, orthopedic surgeon, chiropractor, and medical consultants) consistently shows significant restrictions to DLA for extended periods, due to the appellant's mood disorder which is marked by her experience with daily and chronic pain.

The prescribed professionals confirm that at least two DLA are significantly restricted for extended periods, including *prepare own meals*, *perform housework*, *perform personal hygiene and self-care*, and *relate to, communicate, or interact with others effectively* as set out in the Regulation. Dr. A and Dr. B agree that the mood disorder directly restricts these DLA. The panel finds that the ministry's decision is not reasonable because the requirements under the Act for a severe impairment that directly and significantly restricts DLA, are established by the evidence.

**Help with daily living activities**

*Arguments - Appellant*

The appellant's position is that she depends on her family for support and assistance as she is limited in what she can do due to chronic pain and the mental impacts that go with it. By expressing her willingness to engage in medication trials for her mood disorder, as well as therapy and counselling, the appellant acknowledges that she requires support from professionals to increase her capacity to manage chronic pain and function effectively in her daily life.

*Arguments - Ministry*

The ministry's position is that the criteria for help are not met because DLA are not significantly restricted. The ministry argues that it could therefore not determine that significant help from other persons, or help from an assistive device, is required.

***Panel's decision - help with daily living activities***

The ministry is not reasonable to find that the requirement for help is not met. Dr. A indicates in the Medical Report that the appellant does not require an assistive device, but the appellant explains that she did use a cane after her surgeries; however, the device aggravated her shoulder pain. While there is no confirmation from a medical professional that an assistive device is currently required, Dr. A indicates in the Assessor Report, that the appellant needs periodic assistance with DLA and receives help from family and friends.

The record indicates that the appellant has faced a lot of stress due to financial pressures from not being able to work. The appellant has been living with different family members since 2021 and it is necessary to determine to what extent she relies on family to alleviate her financial burden, versus a need for significant help with DLA.

In reviewing the information from various doctors, Dr. B notes that the appellant's shoulder pain worsened after 2020, and she "could not clean around her home or maintain her personal hygiene properly…and relied on her family for assistance." Given the diagnosis of MDD, with associated fatigue, low energy, and experience of constant pain, the panel is satisfied that the doctor has confirmed that the appellant requires significant help from her family due to the mental impairment.

In the psych. assessment, Dr. B provides extensive recommendations regarding the need for mental health therapies, as well as counselling support to teach the appellant mental techniques for dealing with chronic pain. Dr. B indicates that long-term intervention is needed to help the appellant regain the energy, self confidence, and positive outlook that she lost after the accident. The hope is that with the support of therapists, as well as family and friends, the appellant can re-engage with people and enjoy social and recreational activities once again.

The Act requires confirmation of direct and significant restrictions to DLA, directly related to a diagnosed mental or physical impairment, as a precondition for needing help to perform DLA. The panel found that the ministry's determination that significant restrictions to DLA are not established on the evidence is unreasonable for the reasons

stated earlier.

The evidence is that the appellant needs help from family and therapists to manage her DLA. Accordingly, the panel finds that the ministry's conclusion that the help requirement is not met, is not a reasonable application of the legislation in the appellant's circumstances.

**Conclusion**

The panel finds that the reconsideration decision is not reasonably supported by the evidence. The panel overturns the decision because the appellant meets all the requirements for PWD designation.

The totality of evidence, including the additional medical reports, shows that the appellant suffers from Major Depressive Disorder that is characterized by "constant" right-side "pain syndrome." The mood symptoms which include the subjective experience of chronic pain, limit cognitive and emotional functioning and significantly restrict DLA for extended periods.

The panel has given a lot of weight to the additional reports and letters from medical professionals which are very detailed and provide a full picture of the appellant's experience with pain. The panel is satisfied that the reports corroborate or expand on the information in the Medical Report and Assessor Report.

The panel finds that the self-reports are consistent with the medical evidence to the extent that the appellant acknowledges her mental distress and need for help, after focusing on her physical recovery and struggling to remain independent for so long.

For these reasons, the panel rescinds the reconsideration decision, and sends the matter back to the Minister for a decision on the amount of disability assistance. The appellant is successful with 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<br>Margaret Koren | |
|---|---|
| Signature of Chair | Date (Year/Month/Day)<br>2023/03/21 |

| Print Name<br>Wendy Marten | |
|---|---|
| Signature of Member | Date (Year/Month/Day)<br>2023/03/21 |
| Print Name<br>Rubina Sidhu | |
| Signature of Member | Date (Year/Month/Day)<br>2023/03/21 |