

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of June 27, 2016, which found that the appellant did not meet three of 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”). The ministry found that the appellant met the age requirement and that in the opinion of a medical practitioner the appellant’s impairment is likely to continue for at least two years. However, the ministry 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 that
- as a result of those restrictions, the appellant requires the significant help or supervision of another person, an assistive device, or the services of an assistance animal.

## PART D – Relevant Legislation

EAPWDA, section 2

*Employment and Assistance for Persons with Disabilities Regulation* (“EAPWDR”), section 2

## PART E – Summary of Facts

The information before the ministry at the time of reconsideration included the following:

- The appellant's PWD application form consisting of the appellant's self-report form dated January 21, 2016 ("SR"), a physician's report ("PR") and an assessor's report ("AR"), both completed by the appellant's psychiatrist (the "physician") on January 16, 2016.
- The appellant's Request for Reconsideration ("RFR") form dated June 14, 2016.
- Letter from the appellant's psychiatrist dated June 17, 2016 (the "Physician's Letter").
- Letter from the appellant dated June 20, 2016 (the "Appellant's Letter") asking the ministry to reconsider its decision denying her PWD application. She states that she is disabled due to sleep apnea, chronic fatigue syndrome and fibromyalgia and suffered a stroke sometime in the last five years based on results from a CT scan of approximately two months ago.
- Letter from a community outreach program (the "Advocate's Letter"), undated.

### Diagnoses

- In the PR the physician diagnosed the appellant with chronic fatigue syndrome and fibromyalgia with a date of onset of approximately 2005. The physician also diagnoses the appellant with hypothyroidism, suspected sleep apnea with polysomnogram pending, and mixed mood disorder with anxiety and depression with an uncertain date of onset but all likely present greater than two years. The physician also indicates that the appellant has asthma. The physician indicates that the appellant has been his patient since October 2014 and he has seen her 2 to 10 times in the past 12 months, but comments that he initially saw her on a conjoint basis with her boyfriend who was his patient.
- For Section B – Mental or Physical Impairment in the AR, the physician indicates that the appellant's mental or physical impairments that impact her ability to manage DLA are low energy, impaired concentration and memory, generalized myalgia, anxiety and depression. In the AR the physician indicates that he has known the appellant since June 2015 and has seen her 2 to 10 times in the last year. The physician indicates that he provided a medical assessment and that trials of medications targeting her principle symptoms have had a poor response. He also indicates that he has offered supportive psychotherapy and referred her to a sleep disorders clinic.
- In the Physician's Letter, he states that the appellant is severely disabled due to chronic fatigue syndrome, fibromyalgia, suspected sleep apnea and mixed mood disorder with anxiety and depression. The physician indicates that a CT scan also indicated that the appellant had likely suffered a stroke sometime in the last five years.

### Physical Impairment

- In the Health History portion of the PR, the physician states that the appellant has severe anergia with impaired concentration and secondary memory impairment which forced her to give up her accounting practice and declare bankruptcy in 2014. She has significant sleep disorder and is presently being assessed at a sleep disorders clinic. The physician also states that the appellant has generalized myalgia and her clinical picture is consistent with chronic fatigue syndrome and fibromyalgia. The physician indicates that the appellant is 5'5" and weighs 200 pounds.

- 
- In terms of physical functioning the physician reported in the PR that the appellant can walk 4+ blocks on a flat surface unaided, can climb 5+ steps unaided, can lift 5 to 15 pounds and can remain seated 1 to 2 hours.
  - In the AR the physician reports that the appellant independently manages walking indoors, walking outdoors, and standing but requires periodic assistance from another person with climbing stairs, lifting and carrying and holding, explaining it takes her 5-10 minutes longer with climbing stairs.
  - In the SR the appellant states that she takes many baths, walks very slowly to keep her body from stiffening and must rest a lot. She describes her pain as roving, moving from one part of the body to the next, and varying in severity on a day-to-day basis. She reports that she has 1-2 days per week of minor pain, 1-2 days per week of extreme pain and the rest being somewhere in the middle. She reports fatigue and a lack of available energy to do things. She states that most days she takes a nap for 2-3 hours in the afternoon, has insomnia and it takes her a lot longer to walk, stating that she walks like an “old lady”.

The Physician’s Letter states that the sections regarding the plaintiff’s functional skills reported in the original PWD application indicated that the appellant could walk four or more blocks unaided but after further discussion with the appellant she has shared that her consistent feeling of exhaustion regularly prevents her from leaving her home and she is very unlikely to walk anywhere at all, relying heavily on her boyfriend to get anywhere.

In the Appellant’s Letter, the appellant states that she is severely disabled due to her multiple health conditions including sleep apnea, chronic fatigue syndrome, fibromyalgia and a stroke suffered sometime in the last 5 years.

The Advocate’s Letter states that the appellant is severely and continuously limited by her physical health conditions making it impossible for her to care for herself without assistance.

### *Mental Impairment*

- In the Health History portion of the PR, the physician indicates that there are difficulties with communication other than a lack of fluency in English due to cognitive issues, commenting that the appellant has impaired concentration and memory, poor organizational abilities with a tendency to procrastinate.
- In the Health History portion of the PR the physician did not check off the box indicating that the appellant has significant deficits with cognitive and emotional function but checked off the boxes indicating that there are deficits evident in the areas of executive, memory, emotional disturbance, motivation and attention or sustained concentration. He comments that the disturbances are severe enough to force abandoning her career in accounting.
- In the AR the physician indicates that the appellant’s ability to communicate with speaking, reading, writing, and hearing are satisfactory. He explains that these areas are impaired by chronic sleep deprivation, decreased attention and poor memory.
- In the AR the physician indicates that the appellant’ has major impact to four areas of cognitive and emotional functioning being bodily function, attention/concentration, executive and motivation, moderate impacts to six areas being consciousness, emotion, insight and judgment, memory, motor activity and other emotional or mental problems. The physician indicates that she has minimal impact to the areas of impulse control and language and no

impacts in the areas of psychotic symptoms and other neuropsychological problems. The physician comments that the appellant has significant sleep disorder, moderate depression, anxiety and frustration largely reactive to decreased functional capacity.

- In the SR the appellant states that she has tiredness and incredible brain fog, that her anxiety causes her to worry a lot, depression causing a constant feeling of apathy, “really, really bad” short term memory to the point that she has to ask the same questions over and over and difficulty with concentration and focus.

In the RFR the appellant states that she is significantly disabled by extreme fatigue and brain fog.

In the Appellant’s Letter, she states that her cognitive functioning and memory are significantly impaired and finds it difficult to read, has memory and focus difficulties, with assistance needed from an advocate to compose her letter.

In the Physician’s Letter, the physician indicates that the appellant has cognitive deficits related to communications, frequent dissociative states where she reports “feeling in a daze” and is unable to comprehend what others are saying and is unable to properly express herself.

The Advocate’s Letter states that the appellant is severely and continuously limited by her mental health conditions making it impossible for her to care for herself without assistance.

#### DLA

- In the PR, the physician indicates that the appellant has not been prescribed any medication and/or treatments that interfere with her ability perform DLA.
- In the AR the physician indicates that the appellant is independent with all aspects of personal care except that she requires periodic assistance from another person with transfers on/off of chair. The physician indicates that the appellant is independent with laundry and basic housekeeping. With shopping, the appellant is independent with going to and from stores, reading prices and labels, making appropriate choices, paying for purchases but needs periodic assistance from another person with carrying purchases home. For meals, the appellant is independent with safe storage of food but needs periodic assistance from another person with meal planning, food preparation and cooking noting that exhaustion impairs these aspects of DLA. The physician indicates that the appellant is independent with banking, budgeting and paying rent and bills. She is independent with filling/refilling prescriptions and safe handling and storage of medications but requires continuous assistance from another person with taking medications as directed as she tends to forget and needs reminders. The appellant is independent with all aspects of transportation.
- With respect to social functioning the physician indicates that the appellant is independent with all aspects except that she requires periodic supervision with dealing appropriately with unexpected demands as she has a tendency to freeze or procrastinate in these situations. The physician indicates that the appellant has marginal functioning with her immediate and extended social networks.

In the RFR the appellant states that her extreme fatigue and brain fog significantly affects her abilities to perform many DLA including grocery shopping, house cleaning, ironing, dishes, bill paying and other normal activities.

In the Appellant's Letter she states that her boyfriend does all the cooking and DLA are frequently left undone because of constant fatigue and inability to concentrate. She states that she is completely laid up for two days afterwards and unable to leave her bed. She states that she requires 10 to 20 hours of sleep per day in order to function at all and there are some days when she is only up for 2 hours out of the day.

In the Physician's Letter, the physician states that in part C of the PWD application he had indicated that the appellant was independent with DLA related to personal care but upon further discussion he has come to realize that she is more significantly impaired in this area than he was originally aware. He states that the appellant requires significant prompting, continuous assistance with housework and that her partner provides continuous assistance and does all the shopping. The physician states that he had previously indicated that she required periodic assistance with activities related to meal planning, preparation, cooking and food storage, after further discussion the appellant shared that she requires continuous assistance from her partner, and has left the stove on unattended and burnt items.

The Advocate's Letter states that the appellant is often unable to perform DLA such as housework and meal preparation due to physical exhaustion, that she is consistently drowsy and confused, and has difficulty focusing which affects her ability to complete any tasks.

#### Help

- In the PR the physician reports that the appellant may need a CPAP machine if the polysomnogram reveals sleep apnea. In Part F, Additional Comments, the physician indicates that the appellant relies on her boyfriend for assistance with many DLA's.
- In the AR the physician indicates that the appellant is presently receiving considerable help from her boyfriend. The physician indicates that the appellant is being assessed for possible sleep apnea and may benefit from a CPAP if required.

The Advocate's Letter states that the appellant requires consistent prompting and reminders from others in order to stay on task.

The Physician's Letter indicates that the appellant reports that she requires continuous assistance with housework, that her partner assists her with brushing her hair because she forgets to do so, that her boyfriend helps with shopping, and meal planning and cooking.

In the RFR, the appellant states that she currently receives significant help from a family friend in preparing meals, doing dishes and other housework.

#### **Additional information provided**

In her Notice of Appeal the appellant states that she disagrees with the ministry's interpretation of the physician's report.

Prior to the hearing the appellant provided a letter from the physician dated July 18, 2016 (the "Physician's July Letter") stating that although ministry adjudicator comments that his opinion was more a self-report by the appellant rather than a medical opinion from the physician he points out that medical opinions are, to some extent, based on a patient's description of their symptoms and

functional capacities and as such it does represent his medical opinion of the appellant who has been his patient for approximately five years now. The physician indicates that if helpful, he would be happy to provide any additional information needed to further adjudicate the appellant's case.

The appellant also provided a letter from the advocate (the "Submission"), undated stating that although the ministry has stated that because no supporting medical documentation has been provided they are unable to determine the validity of the appellant's application, no medical reports and results of medical tests are required when applying for PWD application. The advocate states that the information provided by the physician is given as the physician's medical opinion and clearly outlines the appellant's disabilities and severe impact on her life and ability to perform DLA, based on his knowledge of her over 5 years, numerous interviews and assessments, and on the deterioration of her health that he has witnessed over this time. The advocate states that it is not reasonable to discredit the physician's opinion as a medical doctor based only on the fact that the information he provided has been obtained in part from the appellant herself as it is routine for any doctor to obtain information from a patient in this manner.

The ministry provided an email dated August 5, 2016 indicating that the ministry's submission will be the reconsideration summary provided in the Record of Ministry Decision.

#### **Admissibility of New Information**

The ministry did not object to information in the Notice of Appeal, the Physician's July Letter, or the Submission. The panel has accepted the Physician's July Letter as it is evidence in support of information and records that were before the ministry at the time of reconsideration, in accordance with section 22(4) of the *Employment and Assistance Act*. In particular, the new information provides further explanation about the physician's medical opinion regarding the appellant's impairments and her ability to perform DLA.

The panel has accepted the information in the appellant's Notice of Appeal and the Submission as argument.

With the consent of both parties, the hearing was conducted as a written hearing pursuant to section 22(3)(b) of the *Employment and Assistance Act*.

## PART F – Reasons for Panel Decision

The issue on this appeal is whether the ministry's decision to deny the appellant designation as a PWD was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. In particular, was the ministry reasonable in determining that the appellant does not have a severe physical or mental impairment, and that in the opinion of a prescribed professional the appellant's impairments do not directly and significantly restrict her from performing DLA either continuously or periodically for extended periods, and that as a result of those restrictions the appellant does not require help to perform DLA?

The relevant legislation is as follows:

### 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 has a severe mental or physical impairment that

(a) in the opinion of a medical 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.

## **EAPWDR section 2(1):**

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.

\*\*\*\*\*

### **Severe Physical Impairment**

The ministry's position, as set out in its reconsideration decision, is that the information provided is not evidence of a severe physical impairment. The ministry's position is that a diagnosis of serious medical conditions does not in itself determine PWD eligibility or establish a severe impairment. The ministry states that in order to assess the severity of a physical impairment the ministry must consider the nature of the impairment and the extent of its impact on daily functioning as evidenced by limitations/restrictions in mobility/physical ability/functional skills. The ministry's position is that the functional limitations reported by the physician demonstrate that the appellant experiences limitations to her physical functioning due to her medical conditions but that the assessments provided by the physician are not considered indicative of a severe impairment of physical functioning.

The ministry also states that the information in the Physician's Letter is based on the appellant's self-assessments as opposed to the medical assessments of the physician. In addition the ministry states that while the physician indicates that the appellant is "unlikely to walk anywhere" the statement does not establish that the appellant is unable to walk outside due to physical impairment.

The appellant's position is that the information provided by the physician establishes that she has a severe physical impairment. The appellant's position is that her chronic fatigue syndrome, fibromyalgia, hypothyroidism, sleep disorder and past stroke have all had a severe impact on her life and her ability to perform DLA.

The appellant's position is that the ministry was not reasonable in discrediting the physician's information even though it was obtained in part from herself. The appellant's position is that the physician's medical opinion clearly states that she is permanently and significantly disabled and



requires continuous and ongoing assistance with a number of DLA.

*Panel Decision*

A diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a severe impairment. An “impairment” is a medical condition that results in restrictions to a person’s ability to function independently or effectively. Likewise the use of the word “severe” in and of itself does not establish a severe impairment.

To assess the severity of an impairment one must consider the nature of the impairment and the extent of its impact on daily functioning as evidenced by functional skill limitations and the degree to which performing DLA is restricted. The legislation makes it clear that the determination of severity is at the discretion of the minister, taking into account all of the evidence. However, the legislation is also clear that the fundamental basis for the analysis is the evidence from a prescribed professional.

The panel finds that the ministry reasonably determined that the information provided in the PR which indicates that the appellant is able to walk 4+blocks unaided on a flat surface, climb 5+ steps unaided, can lift 5 to 15 pounds and can remain seated 1 to 2 hours is not indicative of a severe physical impairment.

The panel notes that in the Physician’s Letter, the physician states that he finds the appellant to be severely disabled due to chronic fatigue syndrome, fibromyalgia and suspected sleep apnea but as noted above the use of the word “severe” is not sufficient alone to establish a severe impairment. In the Physician’s Letter he states that after further discussion with the appellant, he now understands that the information provided in the PR was not entirely accurate and that the appellant shared that her consistent feeling of exhaustion regularly prevents her from leaving her home and she is very unlikely to walk anywhere at all. However the panel finds that the ministry was reasonable in determining that while the physician indicates that the appellant states that she is unlikely to walk anywhere at all due to exhaustion the physician has not indicated that she is unable to walk outside due to a physical impairment. In the AR the physician indicates that the appellant requires periodic assistance with lifting and carrying and holding but he does not provide any further information on the frequency or duration of the assistance required. While the appellant states that she struggles to amble down stairs, the PR indicates that she can climb 5+ steps unaided but the AR indicates that it takes her significantly longer with climbing stairs, explaining that it takes 5-10 minutes longer than typical. In the Physician’s Letter, the physician does not provide any further information regarding the appellant’s ability with climbing stairs, lifting or remaining seated. Although the Physician’s Letter provided further information with respect to the appellant’s ability to walk outdoors he did not provide further information with respect to her ability to walk indoors, clarification regarding her ability with climbing stairs or functional skills of lifting or remaining seated which indicates that the appellant is still quite independent with respect to these functional skills.

In the Physician’s Letter, he states that due to her exhaustion she is more significantly impacted with respect to personal care and housework than he previously realized. The ministry’s position is that the information in the Physician’s Letter is based on the appellant’s self-report rather than medical assessments but in the Physician’s July Letter the physician states that medical opinions are, to some extent, based on the patient’s descriptions of their symptoms and functional capacities and as such, it does represent his medical opinion of the appellant who has been his patient for

approximately five years.

The panel accepts that the physician may well form his medical opinion based on the appellant's descriptions of her symptoms and that there does not have to be separate medical assessments confirming the severity of the appellant's impairment. The appellant argues that the information provided by the physician clearly outlines the appellant's disability based on his knowledge of the appellant as her physician for over five years, but it is not clear to the panel why, if the medical opinion provided was based on his knowledge of her for over five years, he would not have had this information and provided this information in the original PWD application, particularly as his treatment has included supportive psychotherapy which one would expect to have included some discussion about the appellant's ability to function outside the physician's office. If the appellant had not provided this information prior to seeking the physician's assistance in the reconsideration process then it does call into question how well the physician knows the appellant's ability to function outside his office. In addition, if the physician's opinion is based on his knowledge of the appellant over five years it would be reasonable to expect he might have included some description of his observations of the appellant. For example, in the SR the appellant states that she walks like an "old lady" but the physician does not at any point report his observations of the appellant's ability to walk to support her statement in this regard.

In addition the Submission states that the physician's opinion is also based on the deterioration of the appellant's health that he has witnessed over the 5 years that he has treated her but the physician has not provided further information regarding the deterioration over time; rather the physician has provided information based on further conversation for the reconsideration process.

Furthermore, while the advocate and the Physicians' July Letter indicate that the appellant has been a patient for five years, the PR indicates that the appellant has been a patient since October 2014 but explains that the appellant was initially seen on a conjoint basis with her boyfriend who was his primary patient, and the AR indicates that the appellant has been a patient since June 2015. The information provided has given three different time frames for the length of time that the appellant has been the physician's patient and there is no further explanation to clarify which one of these is in fact accurate.

The panel also notes that in the PR the physician indicates that the appellant has suspected sleep apnea and that a polysomnogram is pending and in the AR the physician indicates that she has significant sleep disorder. The appellant describes that she has insomnia, has to nap 2-3 hours in the afternoon and experiences incredible brain fog. However, it remains unclear how much of the appellant's sleep disorder and exhaustion are due to her diagnoses of chronic fatigue syndrome, fibromyalgia and/or mixed mood disorder as opposed to her suspected sleep apnea, and how that might change if the appellant is in fact diagnosed with sleep apnea and obtains a CPAP machine to treat that condition.

Taking all of the foregoing into account the panel finds that the ministry was reasonable in determining that the physical limitations reported speak to a moderate rather than severe physical impairment.

### **Severe Mental Impairment**

The ministry's position is that the information provided does not establish that the appellant has a severe mental impairment. The ministry notes that in the AR, the physician indicates that the appellant has developed moderate anxiety and depressive symptoms likely secondary to impaired concentration and secondary memory impairment that forced the appellant to give up her accounting practice. The ministry states that for the purposes of determining eligibility for the PWD designation an applicant's employability or ability to work is not taken into consideration. The ministry also notes that in the PR the physician indicates that the appellant has memory impairment but in the AR the physician indicates that the appellant has moderate impacts to cognitive and emotional functioning in the area of memory. The ministry notes that while the physician indicates that the appellant has difficulties with communication, in the AR he indicates that the appellant's ability with all listed areas of communication is satisfactory and while he states that she has poor organizational skills with tendency to procrastinate he does not describe how that impacts her ability to communicate. While the physician indicates that the appellant experiences cognitive deficits related to communications as she frequently experiences dissociative states where she reports feeling 'in a daze' and is unable to comprehend what others are saying and is unable to properly express herself, the physician does not describe the frequency or duration of dissociative states impacting the appellant's ability to communicate.

The ministry's position is that as the AR indicates major impacts to four areas of cognitive and emotional functioning, moderate impacts to six area, minimal impacts to two areas and no impacts to two areas, this is indicative of a moderate as opposed to a severe impairment of mental functioning. The ministry also notes that the physician indicates that the appellant is independent with four of the five listed areas of social functioning and that while the physician indicates that she requires periodic support/supervision with being able to deal appropriately with unexpected demands, the physician has not described the frequency or duration of the periodic support/supervision required. The ministry's position is that although the physician states that he finds the appellant to be severely disabled because of chronic fatigue syndrome, fibromyalgia, suspected sleep apnea and mixed mood disorder with anxiety and depression, the actual functional impacts noted indicate a moderate as opposed to severe impairment of mental functioning.

The ministry also notes that in the AR, the physician indicated that the appellant was independent with making appropriate social decision, being able to develop/maintain relationships, interacting appropriately with others, and being able to secure assistance from others but that in the Physician's Letter, the physician indicates that the appellant reports that she used to be a very social person who was involved in many activities but in recent years has withdrawn from these activities and become socially isolated. The ministry's position is that the physician's use of the term "she reports" suggests that the statement is based on self-assessment as opposed to medical assessment of the physician and that it is difficult to establish a severe impairment of mental functioning based on the Physician's Letter included with the RFR.

The appellant's position is that the information provided establishes that she has a severe mental impairment from her mixed mood disorder with anxiety and depression. The appellant's position is that she has tiredness and incredible brain fog, that her anxiety causes her to worry a lot, depression causing a constant feeling of apathy, "really, really bad" short term memory to the point that she has to ask the same questions over and over and difficulty with concentration and focus. The appellant's position is that her cognitive functioning and memory seems to significantly impaired.

The appellant's position is that the ministry was not reasonable in discrediting the physician's information even though it was obtained in part from herself. The appellant's position is that the physician's medical opinion clearly states that she is permanently and significantly disabled and requires continuous and ongoing assistance with a number of DLA.

*Panel Decision*

While the ministry notes that the physician did not, in the PR, check off the box to indicate that the appellant has significant deficits with cognitive and emotional function, it is clear that the physician has checked off the boxes to indicate that the appellant has significant deficits with cognitive and emotional functioning in the areas of executive, memory, emotional disturbance, motivation and attention or sustained concentration. While the physician indicates that the appellant's disturbances are severe enough to force abandoning her career in accounting the panel notes that employability is not a criterion for determination of a person's PWD eligibility.

While the appellant states that she has "really, really bad" memory and the PR indicates that the appellant has significant deficits in the area of memory, the AR indicates that she has moderate impact to her memory. In the PR, the physician indicates that the appellant has significant deficits in the area of emotional disturbance, but in the AR the physician indicates that the appellant has moderate depression and anxiety.

While the appellant argues that the information provided by the physician clearly outlines the appellant's disability based on his knowledge of the appellant as her physician for over five years, it is not clear why the physician did not have this information prior to further discussion with the appellant given his reported treatment and assessments of her over the past five years. The inconsistent information regarding the length of time that the appellant has been the physician's patient makes it difficult to reconcile the information provided in order to determine how well the physician knows the patient and the strength of the medical opinion in the Physician's Letter. The panel accepts that much information from a physician comes from his patient, but if the medical opinion provided was based on his knowledge of her for over five years he would have had this information prior to completing the initial PR and AR. As noted above, if the appellant had not provided this information prior to seeking the physician's assistance in the reconsideration process then it does call into question how well the physician knows the appellant's ability to function outside his office. This is particularly so when the nature of treatment included supportive psychotherapy which one would expect would include some discussion about the impact of the appellant's impairment on her functional skills.

As noted above, the Submission states that the physician's opinion is also based on the deterioration of the appellant's health that he has witnessed over the 5 years that he has treated her but the physician has not provided further information regarding the deterioration over time; rather the physician has provided information based on further conversation for the reconsideration process.

There are also inconsistencies between the appellant's information and the information from the physician. For example, in the SR the appellant states that she takes prescribed medication to help with sleeping but finds it exacerbates her cognitive symptoms, but in the PR the physician indicates that the appellant has not been prescribed any medication that interferes with her ability to perform DLA.

Taking all of the foregoing into account the panel finds that the ministry was reasonable in determining that the information provided does not establish that the appellant has a severe mental impairment.

### **Significant Restrictions to DLA**

The ministry's position is that it relies on the medical opinion and expertise of the appellant's physician and finds that there is not enough evidence to establish that the appellant's impairments directly and significantly restrict his DLA either continuously or periodically for extended periods. The ministry notes that while the legislation does not specifically require the frequency and duration of restrictions to be explained, the minister finds this information valuable in determining the significance of the appellant's restrictions.

The ministry's position is that while the appellant requires periodic assistance from another person with transferring on/off chairs, she is independent with the remaining seven listed areas of personal care. The ministry notes that in the AR, the physician indicates that the appellant is independent with laundry and basic housekeeping and that she requires periodic assistance from another person with carrying purchases home, but is independent with the remaining four listed areas of shopping. The AR indicates that the appellant requires periodic assistance from another person with meal planning, food preparation, and cooking but is independent with safe storage of food and all listed areas of paying rent/bills and all listed areas of transportation. While the AR indicates that the appellant requires continuous assistance from another person with taking medication as directed she is independent with filling prescriptions and safe handling/storage of medications. The ministry notes that the physician has not described the frequency or duration of the periodic assistance provided by another person with transferring on/off chairs, carrying purchases home, meal planning, food preparation, and cooking. The ministry's position is that while the Physician's Letter indicates that the appellant's medical condition have more impact on her DLA than he previously advised, his use of the terms "she reports", "she shares" and other similar terms suggest that the statements pertaining to restrictions with housework, shopping, meals, management of finances, medications and transportation are based on the appellant's self-assessments and as a severe impairment has not been established, it is difficult to establish significant restrictions to DLA based on the Physician's Letter.

The appellant's position is that the information provided by the physician establishes that she has a severe physical and mental impairment that cause significant restrictions to her DLA. In the SR the appellant states that she has a lack of available energy to do things, experiences incredible brain fog, walks like an "old lady" and must rest a lot. She states that due to insomnia she must stay in bed at least 10-12 hours per night before she is able to feel good. She states that she makes mistakes when completing paperwork and is fearful of the implications this could have, forgets things all the time, including taking her medications, that shopping is often put off because she is too tired to do it, and that her cooking ability is limited because of her fatigue. She states that she may cook for herself every 3-4 days but the meals are very simple. She states that she now cleans her house once every 3 months or so when it becomes unbearable and that the dishes will pile up for 3-4 weeks before she can get to them.

*Panel Decision*

The legislation – s. 2(2)(b)(i) of the EAPWDA – requires that the minister be satisfied that in the opinion of a prescribed professional, a severe mental or physical impairment directly and significantly restricts the appellant’s ability to perform DLA either continuously or periodically for extended periods. 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. Finally, there is a component related to time or duration. The direct and significant restriction may be either continuous or periodic. If it is periodic it must be for extended periods. Inherently, any analysis of periodicity must also include consideration of the frequency. All other things being equal, a restriction that only arises once a year is less likely to be significant than one, which occurs several times a week. Accordingly, in circumstances where the evidence indicates that a restriction arises periodically, it is appropriate for the ministry to require evidence of the duration and frequency of the restriction in order to be “satisfied” that this legislative criterion is met.

The AR indicates that while the appellant requires periodic assistance provided by another person with transferring on/off chairs, carrying purchases home, meal planning, food preparation, and cooking, the physician has not described the frequency or duration of assistance needed and it is difficult for the ministry to determine whether the noted restrictions represent a significant restriction to the appellant’s overall level of functioning. At the same time, the remaining information in the AR indicates that the appellant is independent with the majority of listed DLA.

In the Physician’s Letter he indicates that the appellant is more significantly impacted in DLA of personal care than he was originally aware and requires prompting and reminders to attend to hygiene and will frequently go three or more days without showering, either because she is unmotivated, too exhausted, or has forgotten to do so. He indicates that the appellant’s home is almost always dirty and that the appellant clarified that she requires continuous support from her partner for all tasks related to shopping and that her partner usually does all the shopping for her. The physician also states that while he indicated on the original PWD application that the appellant required periodic assistance with activities related to meal planning, preparation, cooking and food storage, the appellant shared that she receives continuous support with all activities related to meals.

While the information provided by the physician in the Physician’s Letter indicates more significant restrictions, the physician has not explained why this information was not provided originally if he has known the patient for five years. In addition while the appellant argues, in the Submission that the information from the physician is based on his knowledge of her over the five years that she has been his patient, the information regarding the length of time that the appellant has been his patient is inconsistent. Furthermore, one would expect that if the information was based on assessments over that period of time, the physician would have had the information from the appellant in his clinical records and not obtained it for the purposes of reconsideration. This is particularly so given that the physician is a psychiatrist and one would expect that at least some counseling sessions over a period of five years would have discussed issues of personal care, management of finances, management of medications, housework and social functioning.

Given the significant degree of independence initially reported, the lack of description from the physician with respect to the frequency and duration of the appellant’s restrictions initially noted, and the lack of further information from the physician explaining why it is that he did not have or did not provide the information in the Physician’s Letter at the time of the original PWD application, the panel

finds that the ministry reasonably questioned the accuracy of the information provided in the Physician's Letter. The panel finds that the ministry reasonably determined that the evidence is insufficient to show that the appellant's ability to perform her DLA is significantly restricted either continuously or periodically for extended periods as required by EAPWDR section 2(2)(b).

### **Help with DLA**

The ministry's position is that, as it has not been established that DLA are significantly restricted; therefore, it cannot be determined that significant help is required from other persons.

The appellant's position is that she is estranged from family and friends but requires help from her boyfriend with many DLA. The appellant states that she requires medications for asthma, a sleep apnea machine, sees a psychiatrist for counseling and has had to downsize the size of her home because she is unable to maintain it.

### ***Panel Decision***

The physician reports that the appellant may require a CPAP if the polysomnogram reveals sleep apnea and that the appellant relies on her boyfriend for assistance with many DLA's. The AR indicates that the appellant receives considerable help from her boyfriend. The Physician's Letter indicates that the appellant requires assistance with DLA's.

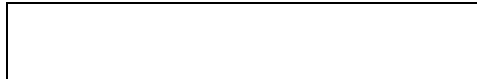
While the appellant's evidence is that she requires help from her boyfriend and the physician indicates that she requires his assistance, the information provided as between the PR, AR and the subsequent Physician's Letter has several inconsistencies. As noted above, it is not clear why the subsequent information would not have been known to the physician previously and reported with the original PWD application. In addition there are statements that are not particularly clear. For example the physician indicates that the appellant states that she requires assistance from her boyfriend with brushing her hair but the physical restrictions noted do not indicate that the appellant is unable to perform this activity. While the physician reports that the appellant needs this assistance because she will forget to do it herself it is not clear why she would not be able to perform this activity if encouraged to do so. This also applies to other activities of personal care and social activities.

In addition to the above, a finding that a severe impairment directly and significantly restricts a person's ability to manage her DLA either continuously or periodically for an extended period is a precondition to a person requiring "help" as defined by section 2(3)(b) of the EAPWDA. As the panel finds that the ministry reasonably determined that the appellant does not have a severe impairment that directly and significantly restricts the appellant's ability to manage her DLA either continuously or periodically for an extended period of time, the necessary precondition has not been satisfied in this case.

The panel finds that the ministry's decision that the appellant did not satisfy the legislative criteria of EAPWDA section 2(3)(b) was reasonable.

### **Conclusion**

The panel acknowledges that the appellant has serious medical conditions that impact her functional



limitations and makes it more difficult to complete her DLA. However, having reviewed and considered all of the evidence and the relevant legislation, the panel finds that the ministry's decision finding the appellant ineligible for PWD designation is reasonable based on the evidence and is a reasonable application of the legislation in the circumstances of the appellant. The panel therefore confirms the ministry's decision and the appellant is not successful in her appeal.