

### **PART C – DECISION UNDER APPEAL**

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the Ministry) Reconsideration Decision dated February 19, 2019, which found that the Appellant did not meet three of the five statutory requirements of Section 2 of the *Employment and Assistance for Persons with Disabilities Act* (EAPWDA) for designation as a person with disabilities (PWD). While the Ministry found that the Appellant met the age requirement and had an impairment which was likely to continue for at least two years, it was not satisfied that the evidence establishes that:

- The Appellant has a severe physical or mental impairment;
- The Appellant's daily living activities (DLA) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and,
- As a result of these restrictions, the Appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

### **PART D – RELEVANT LEGISLATION**

EAPWDA, Section 2

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR), Section 2

## **PART E – SUMMARY OF FACTS**

The evidence before the Ministry at the time of the Reconsideration Decision included the PWD Application comprised of an undated Self Report (SR), a Medical Report (MR) dated December 10, 2018 and completed by the Appellant's General Practitioner (GP) who has known the Appellant since 2012 and who has seen the Appellant 2 - 10 times in the past year, and an Assessor Report (AR) dated December 10, 2018 completed by the GP.

The evidence also included the following documents:

1. Request for Reconsideration (RFR) signed on February 5, 2019 in which the Appellant states that:
  - Her anxiety is a disability that she has struggled with for years and which is only getting worse;
  - She is unable to take anxiety medication because she is breast feeding and a doctor told her that if she took medication it would go into her breast milk;
  - She thinks things that aren't true and can't go places because she thinks that people are always thinking things about her and her anxiety is so bad she can't talk to people;
  - She hates going out because she gets sweaty, has panic attacks and "(comes) up with different scenarios in (her) head";
  - Her anxiety got worse when she saw a family member dead in front of her and a friend have a seizure; and,
  - She has an appointment with a psychiatrist on March 12, 2019.

### ***Diagnoses***

In the MR, the GP diagnosed the Appellant with a generalized anxiety disorder and a panic disorder, both without an identified date of onset.

### ***Physical Impairment***

Neither the GP nor the Appellant identified any physical impairments.

### ***Mental Impairment***

In the section of the MR where he is asked to indicate the severity of the Appellant's medical conditions relevant to her impairment, the GP writes "*Patient experiences severe debilitating panic attacks. She experiences severe debilitating generalized anxiety and social anxiety*". With respect to functional skills, the GP reports that the Appellant can walk 4 or more blocks unaided on a flat surface, climb 5 or more steps unaided, lift 2 to 7 kg. (5 to 15 lbs.), and can remain seated for less than one hour adding the note "*restless*". Where asked if the Appellant has any significant deficits with cognitive and emotional functioning, the GP has ticked "Yes" and added the comment "*Poor memory – unable to retain information*".

In the AR, regarding ability to communicate, the GP indicates (*with comments in parentheses*) that the Appellant's ability to speak is satisfactory (*difficult putting thoughts into words*), her ability to read is poor

to satisfactory (*simple words*), her ability to write is poor to satisfactory (*limited*) and her ability to hear is good. Where asked to indicate the degree to which the Appellant's mental impairment restricts her functioning, the GP indicates a moderate impact on bodily functions (eating problems, sleeping problems, etc.) and emotion (e.g. excessive anxiety), language (expression or comprehension problems), a moderate to major impact on other emotional or mental problems, a minimal impact on attention/concentration, memory and motivation, and no impact on seven other items. In the section of the AR asking for additional information that might be relevant to understanding the nature and extent of the Appellant's impairment, the GP wrote "*Patient has flashbacks of (a family member dying or dead) and the paramedics not being able to revive (that family member). Experiences social anxiety. Often does not leave her house. Needs a plan and schedule to avoid being overwhelmed. Poor memory. Lacks social and verbal cues*".

In the SR, the Appellant writes that she has really bad anxiety and at times she wants to be alone with her baby and not leave her house. She states that it gets really bad where she can't talk to people or be in a group. She says that she gets panic attacks and her anxiety stops her from going places. She explains that she can't be around people because she starts panicking and often thinks people are talking about her and that she gets stressed out and starts breathing heavily when plans change.

#### ***Restrictions in the Ability to Perform DLA***

In the MR, the GP indicated that the Appellant had not been prescribed any medications or treatments that interfere with her DLA.

In the AR, the GP states that the Appellant is independent with respect to all listed DLA in the areas of personal care, shopping, meals, payment of rent and bills, and medications. The GP indicates that the Appellant does not require assistance with basic housekeeping, but indicates that housekeeping tasks take significantly longer than typical, adding "*cleans excessively*". The GP also indicates that the Appellant requires continuous assistance from another person in using public transit (*Avoids. Causes anxiety*). With respect to social functioning, the GP indicates that the Appellant is independent in making appropriate social decisions, in developing and maintaining relationships, and in her ability to secure assistance from others, but that she requires continuous support and supervision in interacting appropriately with others (*Severe anxiety. Feels watched and judged*) and in dealing appropriately with unexpected demands (*Causes anxiety. Needs schedule to avoid being overwhelmed*). The GP indicates that the Appellant has marginal to good functioning with respect to her immediate social networks and marginal functioning regarding extended social networks, and adds the comment "*Severe social anxiety and anxious around unfamiliar things*".

In the SR, the Appellant stated that "*anxiety affects (her) daily living to do a lot of things because of being around people and thinking that people are looking at (her and) saying things when (they are) actually not*".

#### ***Need for Help***

In the MR the GP indicates that the Appellant does not require any prostheses or aids for her impairment.

In the AR, the GP states that the Appellant lives with family, friends or a caregiver, adding "*cares for her 6 month old (child)*". In the section of the AR which asks who provides the help required for DLA, the GP identifies family, health authority professionals and community service agencies. The GP does not identify any assistance provided to the Appellant through the use of assistive devices, and indicates that she does not have an assistance animal.

The Appellant did not identify any help she required in performing DLA in the SR.

#### ***Additional Information Submitted after Reconsideration***

In her Notice of Appeal (NOA) dated February 22, 2019, the Appellant states that she has really bad anxiety and depression, and that she has post-traumatic stress disorder (PTSD) from a family member dying and that "*(she) can't get it out of her head and (she gets) bad panic attacks*". She also states that she has low iron, that she is anemic and that she has an appointment with a psychiatrist on March 12, 2019 and "*can provide more doctor info if required*".

At the hearing, the Appellant explained that her anxiety is so bad that she can't go out in public and that she suffers from panic attacks which her GP "*talks her through*". She also explained that she has regular visits about once every two weeks with a community health social worker who provides her with advice on caring for her baby and who also helps her manage her anxiety. She stated that the trauma she suffered from seeing her family member dead was manageable after a time but that a couple of years ago she witnessed her partner having three consecutive seizures which brought the trauma back and which has had a lasting impression. She said that she thinks about it every day and it stops her from sleeping properly.

The Appellant explained that she had recently attended an appointment with a psychiatrist who recommended that she arrange for trauma counselling and start taking fatty acid (Omega 3) supplements. He also asked her to come back for a follow-up appointment in a couple of months. She said that he did not prescribe her any medications and she also stated that she had not been taking any medications before her child was born. In response to a question from the Panel, the Appellant said that she was not present to answer questions or to review the GP's responses when he completed the MR and the AR, but rather that she had dropped the forms off at his office and picked them up later. She said that she had told him about her fear of going out in public and how that made it difficult or sometimes impossible to go shopping or to go out in public but that it was too late to indicate this in the AR because he had already completed the forms.

At the hearing, the Ministry relied on its Reconsideration Decision and emphasized that the legislation specified the criteria which must be met for PWD eligibility. The Ministry stated that it relies on the written information submitted with the PWD application as it does not have the opportunity to interview applicants. In response to a question from the Panel, the Ministry stated that the information in the SR is taken into account in the Ministry's evaluation of whether an applicant meets the requirements for a PWD designation and that it will also consider any additional information submitted with the application, such as psychiatric reports and medical exam results. In response to another question from the Panel relating to completion of the cognitive and emotional functioning section of the AR, the Ministry stated that there are not a specific number of functions for which the impact on daily functioning must be "moderate" or

"major" but that the Ministry would require a significant number of functions to be moderately or majorly impacted for a mental impairment to be considered severe.

***Admissibility of Additional Information***

Section 22(4) of the *Employment and Assistance Act* (EAA) provides that panels may admit as evidence (i.e. take into account in making its decision) the information and records that were before the Ministry when the decision being appealed was made and "oral and written testimony in support of the information and records" before the Ministry when the decision being appealed was made – i.e. information that substantiates or corroborates the information that was before the Ministry at reconsideration. Because a panel can accept oral and written testimony in support of the information and records before the Ministry when the decision was made, there is limited discretion for a panel to admit new evidence in limited circumstances. Accordingly, instead of asking whether the decision under appeal was reasonable at the time it was made, panels must determine whether the decision under appeal was reasonable based on all admissible evidence, including any new evidence admitted under EAPWDA Section 22(4).

The Panel considered the written information in the NOA and the verbal evidence presented at the hearing relating to the Appellant's anxiety, depression and panic attacks, together with the further details provided by the Appellant at the hearing regarding the help her mother, GP and community health social worker provide her, to be evidence in support of the information and records that were before the Ministry at reconsideration and therefore admitted the additional information in accordance with Section 22(4)(b) of the EAA.

The Panel considered the Appellant's evidence in the NOA relating to her iron deficiency and anemia to be information that the Ministry did not have at reconsideration and therefore did not admit that evidence.

## **PART F – REASONS FOR PANEL DECISION**

The issue on appeal is whether the Ministry's Reconsideration Decision, which found that the Appellant is not eligible for designation as a PWD, was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the Appellant. The Ministry found that the evidence does not establish that the Appellant has a severe mental or physical impairment and that her DLA are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods. Also, the Ministry found that as a result of those restrictions, it could not be determined that the Appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

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

### **Persons with disabilities**

2 (1) In this section:

"assistive device" means a device designed to enable a person to perform a daily living activity that, because of a severe mental or physical impairment, the person is unable to perform;

"daily living activity" has the prescribed meaning;

"prescribed professional" has the prescribed meaning.

(2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act if the minister is satisfied that the person is in a prescribed class of persons or that the person has a severe mental or physical impairment that

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

(b) in the opinion of a prescribed professional

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

(A) continuously, or

(B) periodically for extended periods, and

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

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

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

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

(i) an assistive device,

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

(iii) the services of an assistance animal.

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

The EAPWDR provides as follows:

**Definitions for Act**

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

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

- (i) prepare own meals;
- (ii) manage personal finances;
- (iii) shop for personal needs;
- (iv) use public or personal transportation facilities;
- (v) perform housework to maintain the person's place of residence in acceptable sanitary condition;
- (vi) move about indoors and outdoors;
- (vii) perform personal hygiene and self care;
- (viii) manage personal medication, and

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

- (i) make decisions about personal activities, care or finances;
- (ii) relate to, communicate or interact with others effectively.

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

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

- (i) medical practitioner,
- (ii) registered psychologist,
- (iii) registered nurse or registered psychiatric nurse,
- (iv) occupational therapist,
- (v) physical therapist,
- (vi) social worker,
- (vii) chiropractor, or
- (viii) nurse practitioner ...

**Part 1.1 — Persons with Disabilities**

**Alternative grounds for designation under section 2 of Act**

2.1 The following classes of persons are prescribed for the purposes of section 2 (2) [persons with disabilities] of the Act:

- (a) a person who is enrolled in Plan P (Palliative Care) under the Drug Plans Regulation, B.C. Reg. 73/2015;
- (b) a person who has at any time been determined to be eligible to be the subject of payments made through the Ministry of Children and Family Development's At Home Program;

- (c) a person who has at any time been determined by Community Living British Columbia to be eligible to receive community living support under the *Community Living Authority Act*;
- (d) a person whose family has at any time been determined by Community Living British Columbia to be eligible to receive community living support under the *Community Living Authority Act* to assist that family in caring for the person;
- (e) a person who is considered to be disabled under section 42 (2) of the Canada Pension Plan (Canada).

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### **Severity of Impairment**

Neither the terms “*impairment*” nor “*severe*” are defined in the EAPWDA. The Cambridge Dictionary defines “*impairment*” in the medical context to be “*a medical condition which results in restrictions to a person’s ability to function independently or effectively*” and defines “*severe*” as “*causing very great pain, difficulty, worry, damage, etc.; very serious*”. A diagnosis of a severe impairment does not in itself determine PWD eligibility. Section 2(2) of the EAPWDA requires that in determining whether a person may be designated as a PWD, the Ministry must be satisfied that the individual has a severe physical or mental impairment with two additional characteristics: in the opinion of a prescribed professional, it must be both likely to continue for at least two years [EAPWDA 2(2)(a)] and it must significantly restrict a person’s ability to perform DLA continuously or periodically for extended periods, resulting in the need for the person to require assistance in performing those activities [EAPWDA 2(2)(b)]. Therefore, in determining PWD eligibility, *after* assessing the severity of an impairment the Ministry must consider how long the severe impairment is likely to last and the degree to which the ability to perform DLA is restricted and help in performing DLA is required. In making its determination the Ministry must consider all the relevant evidence, including that of the Appellant. However, the legislation is clear that the fundamental basis for the analysis is the evidence from a prescribed professional – in this case the Appellant’s GP.

### **Physical Functioning**

Neither party has argued that the Appellant has a severe physical impairment.

#### *Panel Decision*

The Panel finds that the Ministry reasonably determined that the Appellant did not have a severe physical impairment.

### **Mental Functioning**

The Ministry’s position is that the Appellant’s GP has either provided contradictory evidence or he has not provided sufficient details as to the nature of the impairment and the extent of its impact on her daily functioning. In particular, the Ministry determined that an insufficient number of cognitive and emotional functions were considered by the GP to be moderately or majorly impacted. The Appellant’s position is that her anxiety is a severe disability that she has struggled with for years and which is getting worse, and that she hates leaving her home because she has panic attacks and thinks that people are thinking about her.



### *Panel Decision*

In its Reconsideration Decision, after summarizing the GP's diagnosis of the Appellant's mental functioning from the MR, the Ministry states "*The ministry notes that a diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a severe impairment*". Therefore the Ministry implicitly acknowledges that the GP has described a diagnosis of a serious medical condition, but argues that a severe impairment of the Appellant's mental functioning has not been established.

The Panel further notes that EAPWDA Section 2(3)(a) says that a person who has a severe mental impairment includes a person with a mental disorder. "Mental disorder" is not a defined term in the EAPWDA, but the World Health Organization considers mental disorders to *comprise a broad range of problems, with different symptoms (which are) generally characterized by some combination of abnormal thoughts, emotions, behaviour and relationships with others*". The Appellant has described her disorder to be severe anxiety characterized by panic attacks which keep her in her home for fear of having to deal with strangers. Her GP agrees, indicating in the AR that she has severe social anxiety and becomes anxious around unfamiliar things. He states that she feels she is being watched and judged and avoids public transit because it causes anxiety.

The Panel has reviewed all the evidence and finds that the Ministry's argument that an unspecified number of cognitive or emotional functions have to be significantly impacted for a PWD applicant to be considered to have a severe mental disorder is not reasonable, as a single significant impact can indicate the presence of a severe mental disorder. The GP has indicated that the Appellant's neuropsychological problems have a moderate to major impact on her daily functioning. He also states that she has frequent panic attacks. Accordingly, the Panel finds that evidence shows that the Ministry was not reasonable in determining that the Appellant did not have a severe mental impairment.

### **Restrictions in the ability to perform DLA**

The Appellant's position is that her severe anxiety continuously restricts her ability to perform any DLA outside the home because when she is around people who she doesn't know she thinks that they are looking at her and saying things about her. She has to rely on her GP and her social worker to help her manage her anxiety. The Ministry's position is that, because the GP has indicated that the Appellant is independent with a large majority of DLA, the evidence provided with the Appellant's application is not sufficient to confirm that her impairment significantly restricts her ability to perform DLA either continuously or periodically for extended periods, and that therefore the legislative criteria have not been met.

### *Panel Decision*

Section 2(2)(b) of the EAPWDA requires that the Ministry be satisfied that a prescribed professional has provided an opinion that an applicant's severe impairment *directly* and *significantly* restricts his or her DLA, continuously or periodically for extended periods. In this case, the GP is the prescribed professional. DLA are defined in Section 2(1) of the EAPWDR and are also listed in the MR and, with additional details, in the AR.

The Panel notes that the GP has rated the Appellant's abilities to read and write as poor to satisfactory. He has indicated in the AR that she does not use public transit and requires continuous assistance from

another person when out of her home because being in public causes anxiety. With regard to social functioning, the GP states that she requires continuous support and supervision in interactions with others and in dealing appropriately with unexpected demands. He elaborates with several comments explaining his assessments [*severe anxiety; feels watched and judged; (dealing with unexpected demands) causes anxiety; needs schedules to avoid being overwhelmed; severe social anxiety and anxious around unfamiliar things*]. While the GP indicates that the Appellant has marginal to good functioning with respect to her immediate social network, he assesses her functioning as marginal with extended social networks (little more than minimal acts to fulfill basic needs). These assessments are reinforced by the Appellant's comments in the SR and her verbal evidence provided at the hearing.

A review of all the evidence indicates that the Appellant has a severe mental impairment that directly and significantly restricts three of her DLA, specifically: shopping for personal needs [EAPWDA 2(1)(a)(iii)], using public transportation facilities [EAPWDA 2(1)(a)(iv)], and relating to, communicating and interacting with others effectively [EAPWDA 2(1)(b)(ii)]. Accordingly, the Panel finds that evidence shows that the Ministry was not reasonable in determining that the Appellant did not have a severe impairment that significantly restricts her ability to perform her DLA continuously or periodically for extended periods.

### **Help with DLA**

The Appellant's position is that she relies on her family to help her with activities outside the home, and has the regular assistance of her GP and social worker to manage her anxiety. The Ministry's position is that, as it has not been established that the Appellant's DLA are significantly restricted, it cannot be determined that significant help is required.

### *Panel Decision*

Section 2(2)(b)(ii) of the EAPWDA requires that, *as a result of direct and significant restrictions* in the ability to perform DLA, a person requires help to perform those activities. That is, the establishment of direct and significant restrictions under section 2(2)(b)(i) is a precondition of meeting the need for help criterion. Help is defined in subsection (3) as the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform a DLA.

The Panel notes that the GP has indicated that the Appellant's family, health authority professionals and community service agencies provide the assistance she requires with DLA. The Appellant has provided further evidence regarding the help her mother, GP and community health social worker provide her.

The Panel has reviewed all the evidence and finds that the Appellant requires continuous assistance from other persons in performing several DLA as identified above, and that therefore the Ministry has unreasonably concluded that significant help was not required.

### **Conclusion**

Having reviewed and considered all of the evidence and relevant legislation, the Panel finds that the Ministry's Reconsideration Decision, which determined that the Appellant was not eligible for the PWD designation under Section 2 of the EAPWDA, was not reasonably supported by the evidence and was not a reasonable application of the EAPWDA in the circumstances of the Appellant, and therefore rescinds the decision. The Appellant's appeal, therefore, is successful.

**PARTG-ORDER**

THE PANEL DECISION IS: (Check one)

UNANIMOUS

BY MAJORITY

THE PANEL

CONFIRM THE MINISTRY DECISION

RESCIND 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)

and

Section 24(2)(a)  or Section 24(2)(b)

**PARTH-SIGNATURES**

PRINT NAME

Simon Clews

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2019/03/18

PRINT NAME

Tina Ahnert

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019/03/22

PRINT NAME

David Handelman

DATE (YEAR/MONTH/DAY)

2019/03/20