

APPEAL NUMBER:

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

The decision under appeal is the Ministry of Social Development and Poverty Reduction’s (“ministry”) reconsideration decision dated June 19, 2019, in which the ministry found that the appellant was not eligible for designation as a Person with Disabilities (“PWD”) under section 2 of the *Employment and Assistance for Persons with Disabilities Act* (“EAPWDA”). The ministry found that the appellant meets the age and duration requirements, but was not satisfied that:

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

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

### **PART D – RELEVANT LEGISLATION**

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

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

**PART E – SUMMARY OF FACTS**

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

1. Information from the ministry's record of decision indicating that the PWD application was received by the ministry on March 27, 2019 and denied on April 16, 2019. On June 13, 2019, the ministry received the appellant's Request for Reconsideration ("RFR") and on June 19, 2019, the ministry reviewed the RFR.
2. An RFR, signed by the appellant on June 13, 2019 with attached letter from the appellant's counsellor dated June 13, 2019, and copies of depression and anxiety assessment questionnaires completed by the appellant between December 2018 and May 2019. The counsellor indicates that the appellant was referred for counselling by her family physician for longstanding anxiety and depression. The counsellor states that she met with the appellant 18 times since December 2018.

The letter from the counsellor states:

- Despite full engagement with counselling there have been minimal shifts in the appellant's capacity to move forward in life. The appellant experienced childhood trauma including abuse and neglect; her anxiety increased to the degree that she could no longer work.
- The appellant demonstrates average intelligence as well as resilience but she continues to face "a distinct challenge engaging with the world at large."
- Due to longstanding issues, it will take the appellant a number of years to "develop the capacity to make her way in the world at large." The appellant requires ongoing support for the process.
- The questionnaires completed by the appellant are depression and anxiety assessment tools with repeat testing, months apart. The questionnaires provide a snapshot of the appellant's symptoms and indicate the appellant experienced a brief improvement in depressive symptoms which have now increased since the most recent testing in May 2019. The appellant's anxiety score reflects an increased level of anxiety from the initial testing in December 2018.

The questionnaires the appellant completed include the *Beck Depression Inventory-II* ("BDI-II"), the *Burns Anxiety Inventory* ("BAI"), and the *Adverse Childhood Experience* ("ACE") questionnaire. The questionnaires contain the following information:

#### *Depression*

BDI-II, December 6, 2018:

- The appellant's score of 32 indicates *severe* depression. Points are based on self-ratings for 21 items describing symptoms of depression, with more points awarded for the most severe symptoms.
- The appellant reports milder symptoms for 11 of the 21 items including *sadness, self-criticism, indecisiveness, changes in sleeping pattern, changes in appetite, and concentration difficulty*.
- The appellant reports moderate symptoms for 5 items including *self-dislike, agitation, and loss of interest* (in people/things).
- The appellant reports severe symptoms for 5 items including *past failure, loss of energy, and tiredness or fatigue*.

BDI-II, May 8, 2019:

- The appellant's score of 21 indicates *moderate-severe* depression.
- The appellant reports milder symptoms for 13 items including the same items that were rated as mild in December 2018 as well as *tiredness or fatigue*.
- The appellant reports moderate symptoms for 6 items including the same items that were rated as moderate in December as well as *loss of energy*.
- The appellant reports severe symptoms for 1 item: *past failure*.

*Anxiety*

BAI, December 6, 2018:

- The appellant's score of 53 indicates *extreme anxiety or panic*. Points are based on self-ratings for 33 items describing symptoms of anxiety, with more points awarded for the most severe symptoms.
- The appellant reports milder or no symptoms for 17 items including *feeling detached from all or part of your body, sudden expected panic spells, feeling that something terrible is about to happen, and tight tense muscles*.
- The appellant reports moderate symptoms for 7 items including *difficulty concentrating, feeling dizzy, lightheaded or off balance, and headaches or pains in the neck or back*.
- The appellant reports severe symptoms for 9 items including *anxiety, nervousness, worry or fear, feelings of tense, stress, "uptight" or on edge; fears of being alone, isolated or abandoned; pain, pressure or tightness in the chest, and feeling tired, weak or easily exhausted*.

BAI, April 24, 2019:

- The appellant's score of 62 indicates *extreme anxiety or panic*.
- The appellant reports milder or no symptoms for 16 items including most of the same items that were rated as mild/no symptom in December 2018.
- The appellant reports moderate symptoms for one item: *choking or smothering sensations or difficulty breathing*.
- The appellant reports severe symptoms for 16 items including the same items that were rated as severe in December, as well as *apprehension or a sense of impending doom; feeling that you're on the verge of losing control; skipping or racing or pounding of the heart, and tight tense muscles, difficulty concentrating*.

ACE, (undated):

- The appellant endorses 7 out of 10 descriptions of abuse or family dysfunction, for an ACE score of 7.

3. The ministry's *Decision Summary* with attached letter dated April 16, 2019, indicating the appellant does not meet all of the criteria for PWD designation.

4. The PWD application comprised of:

- the applicant information (self-report - "SR") dated March 22, 2019;
- a Medical Report ("MR") dated March 20, 2019, completed by a psychiatrist who has known the appellant for one month and has seen her once in the past 12 months; and an
- Assessor Report ("AR") dated March 20, 2019, also completed by the psychiatrist who indicates the assessment is based on an office interview with the appellant, file/chart information (comment, "referral from family physician with collateral information"), and information from family/friends/caregivers (comment, "collateral" from a family member). The psychiatrist notes that the services he provides to the appellant include pharmacological treatment, and psychological treatment (comment, "she is seeing a counsellor on a regular basis"). The psychiatrist states that he will "follow up regularly for review of symptoms and treatment."

*Summary of relevant evidence from the application:*

*Diagnoses*

In the MR, the appellant is diagnosed with Major Depressive Disorder, Generalized Anxiety Disorder, and Panic disorder, onset of all conditions in 2014.

Under *Health History* in the MR, the psychiatrist reports that the appellant currently presents with "severe" depression and anxiety symptoms including low mood, poor motivation, low energy, anhedonia, insomnia, and frequent panic attacks.

Functional skillsSelf-report

The appellant states that she struggles with depression and anxiety and had a crisis in 2014 that resulted in leaving work and being unable to return.

Medical Report

Under *Health History*, the psychiatrist states that due to mental illness, the appellant has a “decreased level of functioning in social, interpersonal, and occupational level.”

Under section D, *Functional Skills*, the psychiatrist indicates the appellant can walk 4 or more blocks unaided on a flat surface and climb 5 or more steps unaided. The appellant has no limitations with lifting or remaining seated and she has no difficulties with communication.

The psychiatrist indicates the appellant has significant deficits with cognitive and emotional function in 3 of the 12 areas listed on the form: *Executive*, *Emotional disturbance*, and *Motivation*. The space for *Comments* is left blank. Under *Additional Comments*, the psychiatrist writes that due to the appellant’s severe depression and anxiety, she has a “decreased level of functioning in work, social, and interpersonal level.”

Assessor Report

Under section B-2, *Ability to Communicate*, the psychiatrist assesses the appellant’s ability in all areas of communication as *Good* (speaking, reading, writing, and hearing).

Under section B-3, *Mobility and Physical Ability*, the psychiatrist marks the appellant as independent with all of the listed skills: *Walking indoors*, *Walking Outdoors*, *Climbing stairs*, *Standing*, *Lifting*, and *Carrying/holding*.

For section B-4, *Cognitive and Emotional Functioning*, the psychiatrist indicates that the appellant’s mental impairment restricts or impacts the appellant’s functioning in the following areas:

- *Impulse control*, *Attention/concentration*, *Executive*, *Memory*, and *Motor activity* - **minimal impact**;
- *Insight and judgment*, and *Motivation* - **moderate impact**;
- *Emotion* - **major impact**.

The psychiatrist indicates **no impact** for the remaining 6 areas: *Bodily functions*, *Consciousness*, *Language*, *Psychotic symptoms*, *Other neuro-psychological problems*, and *Other emotional or mental problems*.

Daily Living ActivitiesSelf-report

The appellant states that she has difficulty getting out of bed “because when I go to make breakfast I have a panic attack.”

Medical Report

Under *Health History* and *Additional Comments*, the psychiatrist states that the appellant is currently unable to work due to her mental illness. The psychiatrist indicates the appellant has decreased social functioning and difficulty in interpersonal relationships due to depression and anxiety.

The psychiatrist indicates *No*, the appellant has not been prescribed medications or treatments that interfere with her ability to perform DLA.

### Assessor Report

The psychiatrist indicates that depression, anxiety, and panic attacks are the impairments that impact the appellant's ability to manage DLA. In section C of the AR, the psychiatrist provides the following information for specific DLA:

- The appellant is independent with all areas of *Personal Care, Basic housekeeping, Pay Rent and Bills, and Transportation*.
- The appellant is independent with 4 of the 5 areas listed for *Shopping: going to and from stores, reading prices and labels, paying for purchases, and carrying purchases home*. The appellant requires periodic assistance from another person with *making appropriate choices*.
- The appellant is independent with one area of *Meals: safe storage of food*. The appellant requires periodic assistance with *meal planning, food preparation, and cooking*.
- The appellant is independent with 2 of the 3 areas listed for *Medications: filling/refilling prescriptions and safe handling and storage*. She requires periodic assistance with *taking as directed*.
- The sections for *Additional comments* are left blank (including a description of the assistance required and identification of any safety issues).

### *Social Functioning*

- The appellant requires periodic support/supervision with all areas: *appropriate social decisions; able to develop and maintain relationships; interacts appropriately with others; able to deal appropriately with unexpected demands, and able to secure assistance from others*.
- The psychiatrist check marks that the appellant has *very disrupted functioning* with her immediate and extended social networks. The psychiatrist states that the appellant requires support to ensure compliance with her medications and regular follow-up appointments. The psychiatrist does not provide any additional comments to identify any safety issues.

### *Need for help*

In the MR, the psychiatrist check marks *No*, the appellant does not require any prostheses or aids for her impairment. Under *Additional Comments*, the psychiatrist writes that the appellant needs to remain compliant with treatment and follow-up regularly for review.

In the AR, section D, the psychiatrist indicates the appellant lives with a family member ("X") who provides assistance with DLA. The psychiatrist states that X also suffers from mental illness and the appellant "needs extra assistance "in ensuring compliance and regular follow up" as she cannot fully rely on X. The psychiatrist put a strike mark through the section on *Assistance provided through the use of assistive devices, and Assistance provided by assistance animals*.

### **Additional information**

The appellant filed a *Notice of Appeal* with a hand-written statement which the panel accepts as argument. Subsequent to the reconsideration decision, the appellant provided a submission requiring an admissibility determination in accordance with section 22(4) of the *Employment and Assistance Act*. The submission, received by the Tribunal on September 12, 2019, consists of two documents:

1. A letter from the psychiatrist dated July 14, 2019. The psychiatrist indicates that he first consulted with the appellant on February 27, 2019 and is currently her treating psychiatrist. The letter, addressed to the appellant's legal advocate, describes the following conditions, symptoms, and functional restrictions:

- The appellant is diagnosed with "persistent depressive disorder" with intermittent major depressive episodes as well as Generalized Anxiety Disorder and Panic Disorder. Due to these diagnoses, the appellant has a decreased level of social, interpersonal, and occupational functioning.

- While the appellant “is definitely capable of performing basic activities of daily living (“ADL”) “such as bathing, hygiene, making basic food, etc.”, she is impaired with “complex activities of daily living.” Specifically, due to disabling anxiety, the appellant “struggles to go to shops and buy things without [X] present.” The appellant’s anxiety has responded poorly to medication thus far and she is unable to work at this time. The appellant has “impaired social and interpersonal functioning” due to her mood and anxiety disorders and finds it “difficult to interact with other people due to anxiety, withdrawn, isolates herself...has poor motivation and energy that is typical of depression.”
- The appellant’s conditions were “severe” when the psychiatrist first started treating her and remain “significant” because she has not made any real progress since starting treatment and “disabling anxiety is still a major contributing factor to her functional decline.”

The letter also includes argument: the psychiatrist submits that “other forms” should be completed in assessing PWD eligibility for mentally ill patients as “most of the current booklet is not applicable to patients with mental health problems.

**2. A World Health Organization Disability Assessment Schedule 2.0** self-assessment questionnaire (“WHODAS”) completed by the appellant (undated). The questionnaire *asks about difficulties due to health conditions* (including illnesses, injuries, and mental or emotional problems) experienced over the past 30 days. Thirty-six mental and physical tasks are rated on a scale from *none* (no difficulty) to *extreme or cannot do*. Scoring is based on the total number of days that difficulties were present. The results indicate the appellant experienced difficulties for all 30 days; was “totally unable” to carry out her usual activities for all 30 days because of her health conditions, and also “cut back or reduced” her usual activities for all 30 days.

The questionnaire contains the following specific information:

#### *Understanding and communicating*

- The appellant reports mild difficulty with problem solving.
- The appellant reports moderate difficulty with concentration, memory, learning a new task, and generally understanding what people say.
- The appellant reports that she finds it extremely difficult or is unable to start and maintain a conversation.

#### *Getting around*

- The appellant reports severe difficulty with standing for longer periods (e.g., 30 minutes), standing up from sitting down, and moving around inside her home.
- The appellant reports that she finds it extremely difficult or is unable to go out, and walk longer distances (e.g., one kilometre).

#### *Self-care*

- The appellant reports mild difficulty with bathing, getting dressed, and eating.
- The appellant reports that she finds it extremely difficult or is unable to stay by herself for a few days.

#### *Getting along with people*

- The appellant reports moderate difficulty with getting along with people who are close to her.
- The appellant reports severe difficulty with sexual activities.
- The appellant reports that she finds it extremely difficult or is unable to deal with people she doesn’t know, maintain a friendship, and make new friends.

#### *Life activities*

- The appellant reports mild difficulty with doing the most important household tasks well.
- The appellant reports severe difficulty with taking care of household responsibilities.
- The appellant reports that she finds it extremely difficult or is unable to get all housework done that she needed to do, and to get housework done as quickly as necessary.

#### *Work or school*

- The appellant marked this section “N/A.”

*Participating in society*

- The appellant reports severe difficulty with barriers/hindrances in the world around her and being able to live with dignity due to the attitudes/actions of others. The appellant reports that her impairments cause severe problems in her family.
- The appellant reports that she finds it extremely difficult or is unable to join community activities, spend time dealing with her health condition, and do things by herself for relaxation or pleasure. The appellant reports that her impairments have an extreme emotional impact on her and on her family's financial resources.

The psychiatrist has signed the first page of the WHODAS (comment, "I concur with the self-assessment" completed by the appellant).

*Admissibility of additional evidence*

The panel finds that the letter from the psychiatrist is in support of the information that was before the minister at the reconsideration because it clarifies the information in the PWD medical reports and elaborates on the same diagnoses and functional restrictions that are described in the reconsideration decision. Similarly, the panel finds that the WHODAS questionnaire, endorsed by the psychiatrist, addresses the same type of DLA as the PWD legislation and expands on the information that was before the minister at the reconsideration by providing additional details on restrictions to DLA.

The ministry did not raise any objections to the panel admitting the letter and questionnaire, but states that there has been no new assessment of the appellant's application for PWD designation as a result of the additional information. The panel admits the letter and questionnaire under section 22(4) of the *Employment and Assistance Act* ("EAA") as evidence in support of the information and records that were before the minister when the decision being appealed was made.

*Procedural matters*

The hearing was adjourned from the original date of August 9, 2019 due to scheduling conflicts for the appellant's counsellor. Both the legal advocate and the counsellor attended the hearing to act as the appellant's "co-advocates." The appellant's family member, X also attended the hearing in the capacity of a support person for the appellant. The ministry and the panel chair attended the hearing by telephone.

The advocates gave the panel copies of written submissions which the panel accepts as argument. The advocates summarized the appellant's arguments and the appellant provided oral evidence in response to questions from the panel. The counsellor assisted the appellant in communicating her evidence.

*Appellant's evidence at the hearing*

The appellant states that due to her extreme anxiety, she is unable to leave home without X accompanying her. The appellant describes feeling very anxious even when she goes outside to let the dog out and the counsellor adds that "it goes against her better good" if the appellant needs to leave the house, ask for help, or return an item to a store.

The appellant states that she is unable to go grocery shopping alone due to anxiety and she has a hard time getting ready to go out ("it takes an extra hour") due to low energy from her mood disorders. The counsellor adds that the appellant "experiences nervousness and embarrassment in stores, walks fast, and is aware that she is using a shopping cart even if she only needs to get a few items."

The appellant states that she lacks energy and motivation to do housework and her usual day involves "waking up...eat breakfast, sit around to try and distract myself...only go out if needed...play video games and watch TV to try and keep myself calm." The appellant reports that she experiences anxiety and low energy every day and although she takes care of finances she is unable to go to the bank or to appointments without X accompanying her.

APPEAL NUMBER:

In response to questions about her answers on the WHODAS, the appellant explains that she reports difficulty with physical functions such as standing for 30 minutes, moving around inside, and walking short distances because she tires easily and has severe fatigue from her depression and anxiety. The appellant states that the symptoms she reports on the WHODAS continue for “30 out of 30 days, month after month, for 4 years now.”

When asked whether she reported the physical symptoms to the psychiatrist for the PWD application, the appellant states that she did not think she did but the appointment was only 20 minutes long, it was her first time seeing the psychiatrist, and X was in the waiting room. The counsellor added that the psychiatrist was very new to the country and the appellant’s application was his first experience with PWD forms.

*Admissibility of oral evidence*

The panel finds that the oral submissions provide additional details and elaboration on the appellant’s restrictions to DLA which were before the minister at the reconsideration. The ministry did not raise any objections to the panel admitting the information and the panel admits the appellant’s testimony under section 22(4) of the EAA as evidence in support of the information and records that were before the minister when the decision being appealed was made.

The ministry relied on the reconsideration decision and provided argument at the hearing.



## PART F – REASONS FOR PANEL DECISION

The issue on appeal is whether the ministry's decision that found the appellant ineligible for PWD designation is reasonably supported by the evidence or is 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 appellant's impairment, in the opinion of a prescribed professional, directly and significantly restricts her 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.

The ministry based the reconsideration decision on the following 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.

**Analysis***Severe mental or physical impairment*

To be eligible for the PWD designation, the legislation requires several criteria to be met including the minister being satisfied that the applicant has a severe mental or physical impairment. The ministry found the appellant was not eligible for PWD because not all criteria were met. "Severe" is not defined in the legislation but the diagnosis of a serious medical condition does not in itself establish a severe impairment of mental or physical functioning.

**Mental impairment**

To assess the severity of a mental impairment, the ministry considers the extent of any impact on daily functioning as evidenced by limitations/restrictions with mental functions and emotion. The ministry does not only look at the diagnosis or the medical practitioner's comment that the condition is "severe" but considers the bigger picture including whether there are restrictions with DLA requiring mental/social functioning and whether significant help is required to manage DLA.

*Arguments - mental impairment**Appellant*

In her *Notice of Appeal*, the appellant argues the reconsideration decision does not adequately take into consideration the severity of her mental disability and "how its diagnostic determinants create a significant inability for me to function on a day-to-day basis." The appellant argues there is a nexus between "significant" as used in the EAPWDA and the *Diagnostic and Statistical Manual, 5th Edition* ("DSM-5"). The appellant notes that the DSM-5 is the accepted diagnostic standard of the psychiatric profession.

*Legal advocate for appellant*

In the submission for the hearing, the legal advocate argues that the panel should consider the meaning of "severe" in its legal sense under the EAPWDA and in the psychological/therapeutic sense. The advocate states there is an "apparent gulf" between how medical professionals define 'severity' and how legal professionals may be asked to define that term. The advocate argues that a medical professional's diagnosis "must be given pre-eminence in such matters for not to do so elevates legal interpretation over that of professionals" and "diminishes diagnostic facts."

The legal advocate acknowledges apparent inconsistencies in the PWD medical reports, "especially with regard to what was deemed 'moderate' and 'severe'." The legal advocate suggests that the "therapeutically-oriented letter" provided by the counsellor for the reconsideration should have been given more weight. The advocate argues that neither the counsellor nor the psychiatrist are literate "in the arcane forms" required for the PWD application and the forms are "not necessarily well-suited for the evaluation of psychological issues."

The legal advocate argues that the recent letter from the psychiatrist, submitted on appeal, should be accepted as evidence of a severe mental impairment (as opposed to a moderate impairment as determined by the ministry). The advocate explains that the diagnosis of Major Depressive Disorder is made according to DSM-5 criteria and the DSM-5 states that this diagnosis results in a "severe impact" on its sufferers. The advocate notes that the psychiatrist also characterizes the appellant's diagnosis as "severe."

The legal advocate explains that the meaning of "severe" according to *Black's Law Dictionary* includes *intense with potentially disastrous consequences*, and the diagnostic continuum in the DSM-5 indicates that "severe" depression is only exceeded by "severe accompanied by psychotic features." The legal advocate adopts the psychiatrist's position that the PWD assessment tools are inadequate for mental disorders. The advocate argues that a "different approach to the assessment of psychological disorders would yield a more accurate understanding of applicants' issues and more clearly serve the intent of the legislation."

Finally, the legal advocate argues that the WHODAS assessment confirms that the appellant has a severe mental impairment. The advocate notes that the WHODAS is endorsed by the psychiatrist (who states that he concurs with the assessment) and the appellant's score indicates she has "severe or extreme" difficulty with leaving her home, staying by herself, dealing with strangers, making new friends, and doing household chores due to her psychological disability.

#### *Counsellor for appellant*

The counsellor explains that the appellant completed the WHODAS assessment twice but the appellant did not submit the initial questionnaire to the ministry because she was concerned that it provided information that was contradictory to the psychiatrist's PWD medical reports. The appellant completed the assessment more recently for the purpose of her appeal to the Tribunal and the psychiatrist endorses the appellant's current self-assessment. The counsellor notes that the WHODAS was deemed by DSM editors to be a "good measurement tool" to replace the *Global Assessment of Functioning* which was removed from the DSM-5.

The counsellor argues that the most recent WHODAS completed by the appellant indicates that the appellant's capacities "remain restricted" as most of her responses are in the mid to severe range. The counsellor reiterates that the appellant is unable to leave her home "for any reason" without being accompanied and supported by X.

The counsellor explains that her therapeutic role includes a "bio-psycho-social assessment" of the appellant's functional abilities as well as providing treatment. The counsellor explains that the depression and anxiety assessment questionnaires (BDI and BAI) were included with the RFR "to support the fact that despite participating fully in treatment, [the appellant] was showing no sign of experiencing any sustained lessening of symptoms of anxiety or improvement in her overall function."

The counsellor notes that she has been seeing the appellant for nine months and while the appellant has complied with treatment and "demonstrated some evidence of sustained change", she will require long term therapy to address and potentially resolve the factors that are impacting her capacity to function optimally. At the hearing, the counsellor, explains that she is seeing the appellant in the context of childhood trauma which led to depression and anxiety. The counsellor states that when she started seeing the appellant, the appellant was "hunched over, voice soft...very little inflection." The counsellor argues that the appellant needs continued therapy because the appellant retreated from the world for 4 years and only recently went to the doctor for help (referral to the psychiatrist).

#### *Ministry*

The ministry argues that the information provided in the PWD application demonstrates a moderate rather than severe impairment of mental functioning. While the psychiatrist and the appellant make several references to the appellant not being able to work, the ministry notes that employability or the ability to work is not taken into consideration in determining eligibility for PWD designation.

The ministry argues that the information provided by the psychiatrist does not establish a severe mental impairment because of inconsistencies in the MR and AR in the areas of motivation, energy level, and bodily functions (sleep disturbance). In the MR in particular, the ministry notes that the psychiatrist describes poor motivation, low energy, and insomnia but in the AR, the psychiatrist indicates only a moderate impact for motivation and no impacts to consciousness (alertness) and bodily functions (sleep disturbance). In addition, the ministry notes that the psychiatrist indicates significant deficits for executive function in the MR but minimal impacts in the AR.

The ministry was also not satisfied that a severe impairment was established on the evidence because no difficulties with communication are reported and impacts to various areas of cognitive and emotional functioning (in the AR) are assessed mostly as *minimal* or *no impact*. The ministry argues that the "cumulative impact to cognitive and emotional functioning" as indicated in the AR, "is not considered indicative of a severe impairment of mental functioning."

Regarding the appellant's social function, the ministry argues that there is insufficient detail about the frequency or duration of the periodic support the appellant requires as well as the nature of the support/supervision. The ministry acknowledges the appellant is experiencing limitations to her cognitive and emotional functioning due to her mental health conditions but finds that the information in the MR, AR, self-reports (including the BDI and BAI questionnaires), and letter from the counsellor describe a moderate mental impairment.

#### *Evidence for mental impairment*

The ministry summarizes all of the evidence in the reconsideration decision but highlights inconsistencies in the MR and AR (tick boxes) as well as the low number of check marks for significant deficits and major impacts to cognitive and emotional functioning to find that a severe mental impairment is not established on the evidence. However, considering the psychiatrist's narrative comments in the MR and AR, the evidence indicates the appellant has severe mental health conditions (including major depression and "frequent" panic attacks) that clearly decrease her social and interpersonal functioning to the extent that she has "very disrupted functioning" with all of her social networks.

The panel gives more weight to narrative descriptions as they contain more detail than the tick boxes on the forms, but finds that the ministry reasonably determined that the MR and AR on their face provide insufficient evidence of a severe mental impairment. The psychiatrist indicates that the appellant is a new patient whom he will follow up with regularly and he notes that the appellant is also seeing a counsellor on a regular basis.

In the letter provided for the reconsideration, the counsellor indicates she has met with the appellant 18 times since December 2018. The counsellor explains that the appellant's experience with childhood trauma has "pervasive effects" on her capacity to "integrate sensory, emotional, and cognitive information into a cohesive whole." The counsellor states that the BDI and BAI assessment tools indicate that the appellant's symptoms of depression have increased since May 2019. The appellant also had an increased level of anxiety as recently as April 2019.

It follows that the earlier BDI from December 2018 and the most recent BAI from April 2019 provide the best evidence in the ministry record for assessing the severity of the appellant's impairment on her daily function. The appellant's scores on the questionnaires indicate "severe depression" and "extreme anxiety or panic." The BDI indicates the appellant has severe symptoms in areas such as self-esteem (feeling like a failure), loss of energy ("I don't have enough energy to do anything"), and tiredness or fatigue ("I am too tired or fatigued to do most of the things I need to do"). The BAI indicates the appellant experiences physical symptoms of anxiety "a lot" (racing heart, tight chest, and feeling tired or easily exhausted) as well as difficulty concentrating ("a lot"). A consistent theme in both the depression and anxiety assessments is the appellant's experience with low energy and severe fatigue which reduces her capacity to manage her daily routine.

The ministry argues that the letter from the counsellor provides "general information" only and does not speak to the appellant's current mental functioning. The ministry treats the information in the questionnaires "as a form of self-report." However, the counsellor clearly endorses the information in the BDI and BAI as a valid reflection of the appellant's current functioning and the panel gives more weight to the information provided for the reconsideration because the counsellor has a well formed therapeutic relationship with the appellant and has not just seen her one time. In addition, the counsellor is a social worker by profession and therefore a "prescribed professional" for the purposes of the legislation and her evidence can be relied upon to meet the legislative test or restrictions to daily functioning in specific areas.

Regarding the inconsistencies between the information in the BDI/BAI and the MR and AR, the panel accepts the more detailed information in the counsellor's assessment tools as a more accurate reflection of the appellant's current functioning considering the appellant's increased levels of anxiety and depression as indicated by the counsellor who knows her well. The results of the BDI/BAI re-tests are validated in ongoing therapy sessions and therefore provide a more thorough evaluation of the appellant's functioning over time as opposed to the tick box information from the psychiatrist who only met with the appellant once. Based on the evidence provided for the reconsideration combined with the psychiatrist's narrative statements, the panel finds that the ministry's conclusion that there is insufficient evidence of a severe mental impairment is not reasonable.

*Additional submissions*

The appellant argues that the MR and AR are insufficient tools for assessing mental health conditions but the panel notes that the ministry accepts other medical reports in addition to the MR and AR. For example, applicants are welcome to submit psychiatric consult reports, occupational therapy assessments, hospital records, and other relevant documents with the PWD application. There is also space in the MR and AR for the physician or assessor to provide additional detail. Applicants have a further opportunity to submit additional evidence for a reconsideration as the appellant did in this instance. If the case is appealed to the Tribunal, the panel has the statutory authority to admit new evidence that is in support of the information and records that were before the minister at the reconsideration.

The panel finds that the letter and questionnaire which the panel has admitted, as well as the appellant's oral testimony, provides further evidence of a severe mental impairment. The psychiatrist's letter of July 14, 2019 describes the appellant's function in greater detail and his comments on her difficulties with social functioning due to disabling anxiety are consistent with the MR and AR. The psychiatrist describes the appellant's poor motivation, low energy, and difficulty going out on her own. The psychiatrist endorses the appellant's severe to extreme difficulties as reported in the WHODAS: the appellant has great difficulty staying alone, dealing with other people, and managing household tasks.

The psychiatrist does not explain why he provided inconsistent information in the PWD medical reports. There is also no explanation for the psychiatrist's overall finding of mild-moderate impacts to the appellant's cognitive and emotional functioning in the original reports, despite the diagnosis of serious mental health conditions with frequent panic attacks. The psychiatrist argues that the forms are insufficient tools for assessing mental illness and the counsellor notes that the psychiatrist is new to the country and had no previous experience with PWD forms. The panel accepts these explanations as reasonable and the record indicates the psychiatrist currently has ongoing follow-up with the appellant.

The appellant indicates that anxiety and low energy reduce her capacity to function every day and she spends most of her time isolated at home, trying to calm herself down. There is also evidence of difficulties with communication or verbal expression because the appellant speaks in a low voice with little affect (counsellor's information), and she finds it extremely difficult to start and maintain a conversation (WHODAS).

*Panel's decision - mental impairment*

The panel has considered the evidence in its entirety including the submissions on appeal which the panel admitted. The panel finds that the ministry's decision on mental impairment is not reasonably supported by the record as a whole. The information from the psychiatrist (in particular the July 2019 update), the letter from the counsellor for the reconsideration, the questionnaire evidence and the appellant's oral testimony, show a consistent pattern of very restricted functioning due to depression and anxiety.

The appellant's symptoms include low energy, feeling too anxious to leave the house or go out alone, and impaired social functioning. The panel is of the view that the evidence in its entirety consistently demonstrates symptoms and restrictions to functioning indicative of a severe mental impairment and that any inconsistencies noted by the ministry are minimized or explained when all of the medical reports, letters, and oral submissions are viewed together. The panel finds that the ministry's determination that a severe mental impairment under section 2(2) of the EAPWDA was not established is not reasonable based on the evidence.

*Physical impairment*

To assess whether the applicant has a severe physical impairment, the ministry considers the information on the degree of restrictions to physical functioning, restrictions to DLA involving movement, and whether the applicant requires significant help or any assistive devices to manage DLA.

*Arguments and panel's decision - physical impairment*

The appellant submits that she has severe difficulty with standing for 30 minutes, standing up from a sitting position, moving around inside her home, leaving her home, and walking a distance of one kilometer. The appellant argues that her impaired physical function stems from her low energy and chronic fatigue.

The ministry argues the appellant does not have a severe physical impairment because the psychiatrist indicates the highest level of function/ lowest level of restriction for all of the physical skills and abilities listed in the MR and AR. The ministry notes that the appellant is not diagnosed with a physical impairment.

The panel notes that the appellant is not arguing that she has a physical impairment per se, but rather that the impact of depression (low energy and chronic fatigue) makes it hard for her to stand for any length of time, move about indoors, or walk any distance. Walking is also impacted by the appellant's anxiety as she has difficulty leaving her home. There is no diagnosis of a physical impairment in the MR and AR and the psychiatrist indicates there are no restrictions to physical function. The panel therefore finds that the ministry's determination that the appellant does not have a physical impairment under section 2(2) of the EAPWDA is reasonably supported by the evidence.

*Restrictions in the ability to perform daily living activities*

Subsection 2(2)(b)(i) of the EAPWDA requires the ministry to be satisfied that, in the opinion of a prescribed professional, a severe impairment directly and significantly restricts a person's ability to perform DLA either continuously, or periodically for extended periods. In this case, the prescribed professionals are the psychiatrist, as well as the counsellor (a social worker by training) who provided supplementary information for the reconsideration.

The term "directly" means there must be a causal link between the severe impairment and the restrictions to DLA. 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 periodic, the restriction must be for extended periods.

Inherently, an analysis of periodic restrictions must also include how frequently the activity is restricted. All other things being equal, a restriction that arises twice a month is less likely to be significant than one that 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 on the duration and frequency of the restriction in order to be satisfied that this criterion is met.

DLA are defined in section 2(1) of the EAPWDR and are also listed in the MR, with additional details in the AR. Therefore, a practitioner completing these forms has the opportunity to indicate which, if any, DLA are significantly restricted by the applicant's impairments either continuously or periodically for extended periods, and to provide additional narrative. DLA, as defined in the legislation, **does not include the ability to work**.

*Arguments - DLA**Appellant*

The appellant argues that her mental disability causes significant restrictions in her ability to function on a day-to-day basis. In the SR, the appellant states that she has a hard time preparing meals because when she goes to make breakfast she has a panic attack. In the BDI, the appellant indicates she is too tired and fatigued to do anything, and her responses in the BAI indicate that anxiety also saps her energy, she is easily exhausted. The appellant reports that she is too anxious to go out on her own to shop, do errands, or attend appointments.

### *Ministry*

The ministry argues that the DLA assessments by the psychiatrist (AR) indicate the appellant is independent with the majority of DLA. Where the need for periodic assistance is indicated for some activities, the ministry notes that the frequency and duration of assistance is not described. While the need for periodic support is indicated for all areas of social functioning, the ministry notes that the frequency and duration of the support is not described. The ministry argues that the nature of the support is also not described because the psychiatrist's comments that the appellant requires "support to ensure that she is compliant" with her medications and follow-up appointments "does not establish the nature of support/supervision required with social functioning." The ministry argues there is not enough evidence (from the psychiatrist and counsellor) to confirm that the appellant's impairments significantly restrict DLA either continuously or periodically for extended periods as required by the legislation.

### *Evidence from prescribed professionals*

In the MR narrative (*Health History and Additional Comments*), the psychiatrist indicates that the appellant's mental impairments decrease her social and interpersonal functioning. In the AR, the appellant requires periodic support/supervision with all areas of *Social Functioning* including developing and maintaining relationships, and interacting appropriately with others. The psychiatrist indicates the appellant needs support and additional assistance (beyond what X provides) to remain compliant with her treatment and therapy. The panel finds that the ministry reasonably argues that needing support to maintain compliance with treatment does not describe the nature, or level or frequency of support the appellant needs for her social functioning.

The appellant is assessed as independent with most of the DLA listed in the AR but requires periodic assistance with *Shopping* (making appropriate choices); most areas of *Meals* including food preparation and cooking; and with *Medications* (taking as directed). As noted by the ministry, the frequency and duration of the support is not described.

Based on the information in the MR and AR, the panel finds that the ministry reasonably determined there is insufficient information from the psychiatrist to confirm the legislative criteria of significant restrictions to DLA either continuously or periodically for extended periods. Turning to the letter from the counsellor, the panel notes that it does not describe restrictions to the DLA set out in the EAPWDR, but alludes to restrictions with social functioning (the appellant "has continued to demonstrate a distinct challenge engaging with the world at large").

The BDI and BAI, which are endorsed by the counsellor, are more instructive regarding restrictions to DLA because the appellant reports that she does not have enough energy or is too fatigued due to depression "to do most of the things I need to do." It is clear from the evidence in these questionnaires that the appellant experiences significant restrictions to DLA because her depression robs her of the energy to manage daily tasks.

The panel finds that the additional submissions on appeal provide the strongest evidence for significant restrictions to DLA that are more or less continuous restrictions. In the recent letter from July 2019, the psychiatrist describes impairments to the appellant's social functioning in detail ("difficult to interact with other people due to anxiety, withdrawn, isolates herself") and also notes that the appellant's poor motivation and energy (typical of depression) makes it difficult for her to attend an appointment, for example. The psychiatrist assesses the appellant as capable of performing basic ADL but explains that she is impaired "in areas of complex ADL" because her disabling anxiety makes it very difficult for her to go shopping on her own, without X accompanying her.

The appellant's evidence is that due to her anxiety she cannot go anywhere without X's company and support, including stores, banks, appointments, or to refill her medications. She also finds it very difficult to do household chores due to her tiredness and low energy. The appellant's responses in the WHODAS, endorsed by the psychiatrist, confirm that the appellant finds it extremely difficult (or impossible) to leave her home, deal with other people, and complete housework. The appellant indicates that these restrictions are long term and she faces them every day.

***Panel's decision - restrictions to Daily Living Activities***

The panel has considered the evidence in its entirety including the additional information on appeal, and finds that the ministry's determination that DLA are not significantly restricted is not reasonably supported by the evidence. The ministry argues that the evidence submitted does not speak to the frequency and duration of restrictions to DLA to confirm that the appellant experiences continuous restrictions to DLA or periodic restrictions for extended periods as required by the legislation. The panel notes that the legislation requires an assessment of the DLA that are set out in the EAPWDR as opposed to any "higher level" activities as suggested by the psychiatrist and legal advocate.

The additional evidence from prescribed professionals (the psychiatrist and the counsellor) confirms that the appellant's anxiety and depression significantly restrict her ability to manage specific DLA on a continuous basis thereby satisfying the legislative test. In particular, the evidence from the professionals confirms that the appellant is continuously restricted from independently managing at least two of the DLA that are listed in section 2(1) of the EAPWDR. The appellant's mood problems continuously restrict her energy level, ability to leave the house, and social functioning and therefore she cannot complete housework, shop or use transportation alone, or communicate and interact with others effectively and these restrictions are reported to occur on a daily basis. The panel finds that the ministry's determination that the criteria in subsection 2(2)(b)(i) of the EAPWDA are not met is not reasonable based on the evidence from prescribed professionals.

***Help to perform daily living activities***

Subsection 2(2)(b)(ii) of the EAPWDA requires that, as a result of direct and significant restrictions in the ability to perform DLA, a person requires help to perform those activities. Help is defined in subsection (3) as the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform DLA. The ministry's position is that because it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required. The appellant argues that she needs daily help with DLA because depression leaves her too tired to do much and anxiety prevents her from leaving the house.

In the AR, the psychiatrist indicates that X assists the appellant with DLA but cannot always be relied on due to X's own struggles with mental illness. Throughout the ministry record and the submissions on appeal, the psychiatrist and the counsellor consistently indicate that the appellant requires continued therapy and support to achieve an optimal level of functioning.

***Panel's decision - help with Daily Living Activities***

Under the legislation, confirmation of direct and significant restrictions to DLA is a precondition for needing help to perform DLA. The panel found that the ministry's determination that significant restrictions to DLA were not established by the information provided is not reasonable. In turn the panel notes specific evidence in the record that indicates the appellant requires significant help with DLA. In particular, in the additional submissions that the panel admitted, the evidence is that due to her anxiety, the appellant never goes out without being accompanied by X. Therefore, she needs continuous support to go to the pharmacy, grocery store, bank, medical appointments, etc.



Furthermore, the evidence in the assessment tools (BDI, BAI, and WHODAS) indicate that the appellant cannot complete housework and move around inside due to her tiredness and low energy from depression; therefore she needs continuous help with housework and other household tasks. It follows that the appellant needs continuous support with social relationships because the evidence from prescribed professionals indicates she is unable to effectively communicate with people due to her severe anxiety. On review of the evidence, including the additional submissions on appeal, the panel finds that the ministry's conclusion that the criteria for help under subsection 2(2)(b)(ii) of the EAPWDA are not met is not reasonable based on the evidence.

### *Conclusion*

Considering the information in its entirety, the panel finds that the ministry's reconsideration decision that found the appellant ineligible for PWD designation is not reasonably supported by the evidence. The legislation requires all of the criteria to be met. Based on the functional skills and DLA assessments by prescribed professionals and the evidence as a whole, the panel finds that the ministry's reconsideration decision is not reasonable. In addition to the age and duration requirements, the evidence demonstrates that the appellant meets the requirements for severe impairment (mental impairment), significant restrictions to DLA, and significant help required for DLA. The panel rescinds the ministry's decision. The appellant is successful in her appeal.

**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)

and

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

**PART H – SIGNATURES**

PRINT NAME

Margaret Koren

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2019-09-16

PRINT NAME

Susan Ferguson

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019-09-16

PRINT NAME

Connie Simonsen

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019-09-16