APPEAL #

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development (the ministry) reconsideration decision of March 28, 2012, which found that the appellant did not meet three of five statutory requirements of section 2 *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 her impairment is likely to continue for at least two years. However, the ministry was not satisfied that the evidence establishes that she has a severe physical or mental impairment. The ministry was also not satisfied that 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. As the ministry found that the appellant is not significantly restricted with DLA, it could not be determined that she requires help as defined in section 2(3)(b) of the EAPWDA.

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

- The appellant's application for designation as a PWD, date-stamped by the ministry on September 15, 2011. The application included a physician report (PR) signed by the appellant's anesthesiologist on July 24, 2011, and an assessor report (AR) signed by a physician and dated September 14, 2011.
- A letter from the ministry to the appellant, dated November 1, 2011 advising the appellant that she had been found ineligible for designation as a PWD.
- The appellant's Request for Reconsideration form signed by the appellant on September 16, 2011.
- A four page statement of prescription costs incurred by the appellant between January 1, 2004 and April 8, 2011. The most recent medications were ibuprofen and naproxen.
- A neurology consultation report dated December 18, 2007. The appellant was injured in a car accident in 2004. The neurologist reports a normal cranial nerve exam, but noted a history of chronic posterior cervical pain and an area of numbness in the appellant's right shin.
- An MRI report dated June 1, 2008 indicating a spinal disc herniation that touches the spinal cord but does not significantly flatten it or cause stenosis. A "very mild" disc bulge was also present.
- A letter from the appellant's neurologist dated August 5, 2008 recommending that the appellant would be a good candidate for Botox and possibly a transforaminal nerve root block.
- A letter dated October 2, 2008 from a physician specializing in anesthesiology and chronic pain management noting a musculoligamentous injury of the neck that was "having a significant effect" on the appellant's function.
- A report from the appellant's anesthesiologist dated July 14, 2011 describing the results of a cryoanalgesia procedure that he performed on the appellant. The anesthesiologist reported that "Excellent analgesia was achieved with the local anaesthetic response. I anticipate that the cryoanalgesia should provide further relief of pain."
- A letter from the appellant's advocate to the ministry, dated March 4, 2012, with attachments including an undated one-page handwritten self-assessment prepared by the appellant and a letter from the appellant's family physician dated March 3, 2012.
- A reconsideration submission from the appellant's advocate date-stamped by the ministry on March 7, 2012, substantially reiterating evidence that was otherwise before the ministry. The advocate explained that the appellant suffers from vertigo, chronic pain, headaches, neck pain, and that her hands cramp up after 5 minutes of use.

In the PR the anesthesiologist diagnosed the appellant with cervicogenic headaches –occipital

neuralgia, chronic myofascial pain, diffuse axial-skeletal pain, and disk disease C5-6. He noted that the appellant had been his patient for about 8 months, that he'd seen her 2-10 times and that the appellant had not been prescribed any medication or treatments that interfere with the ability to perform DLA. In response to the question as to whether the appellant requires prostheses or aids for her impairment the anesthesiologist replied "No". In response to a question about the estimated duration of the impairment he wrote "Has not improved over 6 years. Unable to work – physical impairments, cognitive difficulties." Functionally the anesthesiologist reported that that the appellant can walk 2-4 blocks unaided on a flat surface, can climb 5+ steps unaided, can lift less than 5 lbs, and can remain seated less than 1 hour. He reported difficulties with communication caused by impaired memory and motor function. With respect to cognitive and emotional function, the anesthesiologist identified significant deficits in memory, motivation, and attention/sustained concentration, noting that the appellant would benefit from a "neuropsych" assessment. In the section of the form dealing with DLAs, the anesthesiologist answered the question "Does the impairment directly restrict the person's ability to perform Daily Living Activities?" by ticking the "No" box. Of a list of 10 DLAs he reported that 6 were not restricted, and that he did not know whether meal preparation was restricted. He reported basic housework, daily shopping, and mobility outside the home as being periodically restricted, with no narrative indicating the frequency or duration of the periodic restrictions.

The AR was completed by a physician who is in practice with the appellant's family physician as the family physician was unavailable at the time. He described the appellant's impairments as being "debilitating headaches and chronic myofascial pain with major impact on mood and motivation", subsequently noting that the appellant has ongoing vertigo, an unsteady gait, poor neck flexion/extension, and debilitating pain causing significant impact on DLAs and mood. He noted the appellant's ability to communicate as being "good". Regarding mobility and physical ability, the physician noted that with respect to walking indoors and outdoors, climbing stairs, lifting, and carrying/holding the appellant takes at least 5 times longer than a person without disability. He described the appellant as independent with most aspects of personal care, basic housekeeping, and shopping, noting that in other aspects of those DLAs the appellant takes 3 to 5 times longer than a person without disability due to limited range of motion and neck pain. Regarding payment of rent and bills, medications, and using transit schedules/arranging transportation the appellant is described as independent, though she takes 3 to 5 times longer than a person without disability in getting in and out of a vehicle and using public transit. Section B4 of the AR reports on cognitive and emotional functioning, and is to be completed for "an Applicant with an identified mental impairment or brain injury". The physician completed section B4 indicating no impact on 11 of 14 categories of cognitive/emotional functioning. For two categories – emotion (excessive or inappropriate anxiety, depression etc.) and motivation (lack of initiative; loss of interest) – the physician indicated a moderate impact. Asked to describe "other emotional or mental problems" the physician wrote "Recurrent debilitating neck pain has a major impact on mood and motivation. Given into bouts of depression. Frustrated by inability to perform activities of daily living in a timely manner." Regarding social functioning the physician described the appellant as functioning marginally in terms of immediate and extended social networks, indicating that she is largely independent though requiring periodic support with developing/maintaining relationships and dealing appropriately with unexpected demands. In response to the question asking for a description of the support/supervision the physician wrote that the appellant "requires re-assurance/encouragement. Level of interaction dependent on pain tolerance and mood/motivation". In section D of the AR titled "Assistance Provided for Applicant" the physician struck a line through the areas for describing "Assistance

provided by other people" and "Assistance provided through the use of Assistive Devices", and answered "no" under "Assistance provided by Assistance Animals".

In her self-assessment the appellant stated that her friends and family do most of her daily chores, and that standing or sitting for 25 minutes causes pain. She wrote that her vertigo is most severe when she approaches stairs or closes her eyes, and that she must have assistance showering if there isn't a tub available. The appellant reported that pain interrupts her train of thought, artificial light affects her vision and causes headaches, and writing is very difficult. The appellant's advocate wrote at the bottom of the self-assessment "trouble holding small objects".

In her May 3, 2012 letter the appellant's family physician explained that she has known the appellant for about 10 years, that the appellant's condition has changed since her motor vehicle accident in 2004, that in the family physician's opinion the appellant's PWD application should be approved, and that the family physician agreed with the findings of the anesthesiologist and the physician as reported in the PR and AR respectively.

Prior to the appeal hearing the appellant submitted the following documents for this panel's consideration:

- A submission from the appellant's advocate, date stamped by the ministry May 3, 2012 reporting that the appellant had been in a car accident and that within the past few weeks two men had stumbled and fallen on the appellant, negatively impacting her vertigo and her ability to walk. She identified medications being taken by the appellant, and explained that the appellant has trouble with coordination between her hands and feet and that she has ringing and a sound like running water in her ears. The advocate wrote that the appellant would be having an assessment done for a walker, and that the appellant is applying for in home care support services. The advocate also included information downloaded from the internet regarding a condition called benign paroxysmal positional vertigo (BPPV).

- Two hand drawn outlines of a human figure, one identifying in pictorial form the appellant's previous injuries and the other her "new" injuries.

- A prescription/referral form completed by the appellant's family physician, dated May 1, 2012, requesting an occupational therapist's (OT) assessment of the appellant.

- The OT assessment date-stamped as being received by the local hospital administration on May 9, 2012. The OT reported the appellant as having limited range of motion in her neck, limited strength in her major joints, numbness in various parts of her body, vertigo, and constant pain. The OT described the appellant as being independent in terms of managing finances, managing medications, using a telephone, transfers from bed to chair (though done cautiously due to pain), dressing (with adaptations such as open front blouses), personal hygiene/toilet (though slowly because of pain), bathing (but cautiously with the help of a grab bar), eating (though has difficulty with swallowing pills), stair climbing (with difficulty). The OT implied that the appellant is independent with meal preparation by reporting that the appellant has to sit to prepare meals. The appellant can walk less than 5 feet without a mobility aid (currently using a 2-wheeled walker on loan from the Red Cross) and needs help to do grocery shopping and heavy housework. The OT recommended provision of a 4-wheeled walker for

the appellant's use outside and inside the home.

When asked, the ministry did not object to admission of the new documentation into evidence. The panel finds that the new information provides further detail with respect to the information and records that were before the minister at the time of reconsideration, and admits it into evidence in accordance with section 22(4) of the *Employment and Assistance Act*.

At the hearing the appellant said that her physicians all agree that she is disabled, and that she can live on her own only because her residence is small so she can lean on the furniture to help her navigate, she receives significant help from her landlords/friends/neighbours, and because she has learned to accommodate her disability through adaptations such as open front blouses and having all drawers and no upper cupboards in her kitchen. Even the OT report only details problems that the appellant was experiencing prior to her recent accident and things are worse since then. In response to a question from the ministry, the appellant said that she has seen a doctor about her new injuries but that he is "not prepared to commit" at this time.

When asked about the results of her July, 2011 cryoanalgesia surgery, the appellant said that some symptoms are reduced and some are worse. When asked what had improved the appellant replied that nothing had improved – just changed. Her anesthesiologist would like her to go back to be assessed by a neurologist. The appellant said that her vision and her vertigo are getting worse. When asked how often she takes pain medication, the appellant replied that when she gets severe pain in the back of her skull she takes ibuprofen first and if her jaw is involved she takes naproxen. She was prescribed morphine after her recent accident but returned much of it because she doesn't like drugs. Sleeping pills make her nauseous and she is allergic to codeine.

The appellant was asked by the panel to describe the help that she receives with respect to her DLA. She replied that she lives on soups and salads. Until her son recently moved away he did a lot of cooking for her, now her meals are mostly pre-prepared by friends. She does not require supervision with respect to her personal finances. With respect to shopping the appellant has a hard time with heavy doors and normally goes shopping with a friend. Store personnel carry her purchases, and she has a hard time in unfamiliar places. The appellant makes her own decisions about when are where to go shopping, and about her personal care and finances. She has trouble getting in and out of vehicles. With respect to social functioning the appellant said that she has a "short fuse" when she doesn't understand something, and that she tends to withdraw in those circumstances.

The panel finds that the appellant's oral testimony provides further detail with respect to the information and records that were before the minister at the time of reconsideration, and accepts it as evidence in accordance with section 22(4) of the *Employment and Assistance Act*.

The ministry relied on its reconsideration decision.

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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 in the opinion of medical practitioner 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 for extended periods, and that as a result of those restrictions the appellant does not require help to perform those activities?

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 Mental Impairment

With respect to mental impairment, the appellant's advocate, in her March 7, 2012 reconsideration submission, stated that the appellant's cognitive difficulties make it hard for her to understand the process involved in granting or reconsidering PWD status. The appellant has stated that her train of thought is interrupted by pain, and that she often feels unheard by other people so that she tends to withdraw socially.

The ministry's position as expressed in the reconsideration decision is that despite cognitive and emotional deficits identified in the PR, and moderate impacts to cognitive and emotional functioning noted in the AR, no mental health disorder was identified in the diagnosis section of the forms. The ministry representative stated at the appeal hearing that it doesn't say there is no impairment, simply that it is not a severe impairment.

In the PR the anesthesiologist identified significant deficits in 3 of 11 categories of cognitive and emotional functioning (memory, motivation, attention/sustained concentration), and commented that the appellant would benefit from a "neuropsych" assessment. With respect to social functioning the anesthesiologist simply noted that the appellant "cannot be employed". In the AR, despite noting in section E (Additional Information) that "debilitating pain" has a "significant impact" on the appellant's mood, the physician noted "no impact" in 11 of 13 categories of cognitive and emotional functioning, and "moderate impact" in 2 categories. Despite indicating at most moderate impacts to specific categories, the physician wrote in the comments section that "...neck pain has a major impact on mood and motivation" and "given to bouts of depression". The physician reported that the appellant is marginally functional with respect to her immediate and extended social networks. In her evidence at the appeal hearing, the appellant acknowledged that she is independent in terms of making decisions about her personal activities (such as shopping), her personal care and her finance.

Based on the lack of a specific diagnosis, the moderate degree of impacts noted in the PR and AR, and the appellant's evidence of her independence with respect to decision making, the panel finds that the ministry's decision that there is no severe mental impairment is reasonably supported by the evidence.

Severe Physical Impairment

The appellant's position was that she suffers from debilitating pain and vertigo, and that all of her physicians support her application for disability benefits. She said that she used to be an active person and that she can no longer pursue her previous recreational pursuits and can no longer work. The appellant's advocate argued that the ministry takes too restrictive a view of what constitutes severe impairment and that any ambiguity in the legislation should be resolved in favour of the appellant.

The ministry acknowledged that the appellant has a physical disability, but said it is not a severe disability since the appellant doesn't satisfy the legislative criteria as she doesn't require the help of another person. While acknowledging that the appellant takes significantly longer to perform many DLA, the ministry argued that since the appellant can still perform most DLA independently the impairment cannot be described as severe. The ministry said that the appellant relies on minimal medications, and that the anesthesiologist and physician in the PR and AR respectively reported no use of prostheses or aids and no assistance provided by assistance animals. The ministry argued that the OT assessment was completed after the appellant's most recent accident, and that there is no evidence as to whether any impacts of the most recent accident will be temporary or long term. The ministry said that the lack of coordination between hands and feet mentioned in the advocate's May 3, 2012 submission is not supported by a physician, and that the vertigo has not been identified by a physician as being either continuous or periodic for extended periods of time. Finally, the ministry argued that the OT assessment indicates the appellant is mostly independent with respect to her DLA.

In assessing the reasonableness of the ministry's decision regarding the severity of the appellant's physical impairment the panel has considered the appellant's ability to perform the 8 DLA identified in EAPWDR s. 2(1)(a). The anesthetist in the PR indicated that the appellant was restricted in 3 DLA (shopping, housework, mobility) but he also indicated that no DLA were "directly" restricted by the appellant's impairment. The physician in the AR indicated that 5 DLA were directly restricted (shopping, transportation, housework, mobility, and self-care) by taking 3 to 5 times longer than normal. He did not specify whether the restrictions were continuous or periodic for extended periods of time, but did note that the appellant's pain is continuous. The panel has noted the terminology used by the physician in referring to "debilitating headaches", "constant...chronic pain", "recurrent, debilitating neck pain". The OT indicated that the appellant is restricted to some degree in 5 DLA (meal preparation, shopping, housework, mobility, and self-care), with the implication that the restrictions are directly caused by the appellant's physical impairment, but did not specify whether the restrictions are continuous or periodic for extended periods. The anesthesiologist, the physician, and the OT are all prescribed professionals. Despite inconsistencies in the evidence provided by these professionals, the panel has concluded that taking 3 to 5 times longer to complete the majority of DLA indicates a severe impairment. Accordingly, the panel finds that the ministry's decision that the appellant does not have a severe physical impairment is unreasonable.

Direct and Significant Restrictions

Based on the evidence referred to above in the discussion of severe physical impairment, the direct restrictions in a majority of the appellant's DLA have been confirmed by the opinion of a prescribed professional. In the panel's view "restricted" means "limited", not "precluded". Are the restrictions significant? The appellant did not expressly make submissions on the significance of the restrictions. In its reconsideration decision the ministry concluded that the majority of DLA are performed independently and only 3 DLA are periodically restricted, so the restrictions are not significant. Based on the evidence of the physician that 5 of 8 DLA take 3 to 5 times longer to perform due to "continuous", "debilitating" pain, the panel finds that the ministry's decision with respect to direct and significant restrictions was unreasonable.

Help to Perform DLA

The legislation requires that the need for help be confirmed by the opinion of a prescribed professional.

The anesthesiologist in the PR made no reference to the appellant needing help, except to indicate that the appellant requires no prostheses or aids. The physician drew a line through the sections of the AR dealing with "Assistance provided by other people" and "Assistance provided through the use of Assistive Devices", and confirmed that the appellant does not have an assistance animal.

The evidence of the OT - which the panel acknowledges was not before the ministry at the time of reconsideration - is that the appellant does rely on an "assistive device" - a 2 wheel walker – for mobility indoors and outdoors, and the OT has recommended that the appellant obtain a 4 wheel walker. The OT indicates that the appellant needs help from others for 2 other DLA - grocery shopping and doing housework. Does the assistance that the appellant receives from others constitute "significant help or supervision" as required by EAPWDA s. 2(3)(b)(ii)? The evidence is that the appellant can plan her shopping needs, but that she needs assistance from friends to get to the shops and she needs the assistance from store staff to carry her purchases. With respect to the housework, the OT's evidence that the appellant requires assistance with "heavy" housework implies that the appellant can do other housework independently. The appellant said that she also depends on the assistance of friends for the DLA of meal preparation. This assertion is not supported by the evidence of any of the prescribed professionals...the OT indicated only that the appellant has to sit to prepare meals.

On balance, the evidence paints a picture of a person who is largely independent with respect to her DLA. The panel feels the help she receives from others doesn't meet the threshold of "significant help or supervision". The appellant's condition does appear to be worsening and it is possible that in time she will require "help" as defined in the legislation. However, the panel must base its decision on the appellant's current circumstances.

The panel finds that the ministry's decision that the appellant does not require help to perform DLA is reasonably supported by the evidence.

Accordingly, the panel concludes that the ministry's decision to deny designation as a PWD was reasonably supported by the evidence and confirms that decision.