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PART C – Decision under Appeal

The Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated 13 February 2015 determined that the appellant did not meet 3 of the 5 statutory requirements of section 2 of the Employment and Assistance for Persons with Disabilities Act for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement and that her impairment was likely to continue for at least 2 years. However, the ministry was not satisfied that the appellant had a severe mental or physical impairment and that the appellant's mental or physical impairment, in the opinion of a prescribed professional, directly and significantly restricted her daily living activities (DLA) either continuously or periodically for extended periods. The ministry was also not satisfied that as a result of those restrictions, in the opinion of a prescribed professional, the appellant required help to perform DLA.

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

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PART E – Summary of Facts

The appellant was not in attendance at the hearing. After confirming that the appellant was notified, the hearing proceeded under s. 86(b) of the Employment and Assistance Regulation.

The following evidence was before the ministry at the time of reconsideration:

- A 3 page PWD Application – Applicant Information dated 21 August 2014, signed by the appellant and a witness, appellant indicated that she needed help to complete this application "Witness needed". The appellant chose not to complete the self-report.
- A 8 page Physician Report (PR) dated 22 August 2014 completed and signed by the appellant's physician indicated the following:
    - Specific diagnosis: Motor vehicle accident (MVA or MVC) fractured rib / facial bones / musculo-skeletal (MSK) injuries, onset June 2014; osteoarthritis (OA) knee, onset March 2010 and presbyopia/strabismus amblyopia.
    - Health history: the appellant was involved in a MVA resulting in multiple fractures to face and chest areas; she also suffered from soft tissue injuries to shoulders. The physician indicated the appellant was limited from work due to pain and difficulty with ambulation. She also suffers from ongoing vision defects related to fracture in her face.
    - No medication or treatments interfere with the appellant's ability to perform daily activities.
    - The appellant requires a cane/walker for her impairment.
    - The impairment was likely to continue for 2 years or more from that date and the physician explained "ongoing rehab of joint but given pre-existing [osteoarthritis] likely to be a slow recovery".
    - In terms of functional skills, the physician indicated that the appellant could walk 1 to 2 blocks unaided on a flat surface but she did not know how many stairs the appellant could climb unaided, whether she had any limitations in lifting and how long she could remain seated. The physician indicated no difficulties with communication.
    - In terms of significant deficits with cognitive and emotional functions, the physician identified 1 area: attention or sustained concentration and commented "head injury from MVC".
    - In terms of daily living activities, the physician did not answer the question "Does the impairment directly restrict the person's ability to perform Daily Living Activities?" but identified 4 activities that were restricted continuously: personal self care, basic housework, mobility outside the home and use of transportation. He indicated 1 other activity that was restricted, daily shopping but did not indicate whether it was continuous or periodic. The 5 other activities (meal preparation, management of medications, mobility inside the home, management of finances and social functioning) were not restricted. The physician did not add any comment and did not provide any more information about the degree of restriction and the assistance that the appellant needed to perform her daily living activities.
    - In terms of general additional comments, the physician reiterated that the appellant suffered significant injuries from a MVC and that it was unclear if full recovery to baseline is possible.
    - The appellant had been her patient for 4 years and she had seen her 2 to 10 times during the previous 12 months.
- An 11 page Assessor Report (AR) dated 19 September 2014, completed and signed by a registered psychiatric nurse indicated the following:

- The appellant lives with family of 5, including 3 children.
- The appellant has greatly reduced physical abilities in walking, lifting, stamina, eyesight, chronic severe pain and some “brain fog due to MVA”.
- The appellant’s ability to communicate is good in terms of speaking and hearing but poor in terms of reading and writing, tiring quickly and eyestrain also quickly from reading and torn tendon in right arm (MVA). She also comments that her vision is compromised due to facial fractures from MVA.
- In terms of mobility and physical ability, she needs periodic assistance from another person for standing (comment: limited due to pain); continuous assistance from another person or unable for lifting and carrying & holding (comment: unable, torn tendons, broken ribs MVA); takes significantly longer than typical for walking indoors and outdoors and climbing stairs (comments: stairs very difficult, 1 ½ blocks maximum, tires, pain in leg). Additional comments: Arthritis in left leg worsened due to MVA; when she walks, she gets pain from foot to hip, left side; walks with a limp now and a cane since MVA.
- In terms of cognitive and emotional functioning, her mental impairment impacted her daily functioning as follows: a major impact for bodily functions, consciousness, emotion, motivation, motor activity and other neurological problems; moderate impact for memory; minimal impact for impulse control and attention concentration; no impact for insight & judgment, executive, language and psychotic symptoms. She added that the appellant was up about every 2 hours because of pain, “twitching” and flashbacks; she is unable to pay for prescribed painkillers but she feels sleepy from the pain medication; she is wearing very dark glasses because brightness bothers her eyes; she feels depressed because of her loss of physical abilities and being dependent on others; former alcohol abuse but not since MVA because non compatibility with pain medication; when she is tired, the right side of her head is hurting very much; had “DT’s” and hallucinations.
- In terms of daily living activities, she is described as “independent” for the vast majority but takes significantly longer than typical for most:
    - personal care (dressing: “Buttons difficult” and transfers in/out of bed: “Rolls out of bed – leg is asleep”);
    - basic housekeeping except for laundry where she needs continuous assistance (family member does it);
    - shopping except going to and from stores and carrying purchases home (her son takes her and he carries her purchases) and a general comment to the effect that when she goes shopping with her son, she uses a walker – she cannot carry anything;
    - meals except for meal planning, preparation and cooking she takes significantly longer than typical and a comment that she burned a pot that nearly caused a fire;
    - pay rent and bills except for banking where she needs continuous assistance as her son takes her to the bank;
    - medications except for filling prescriptions and taking as directed when she needs continuous assistance from another person because she can’t get her pain medications that she requires because she cannot afford them;
    - transportation except getting in and out of a vehicle where she takes significantly longer than typical as she does it very slowly; (there is a general comment to the effect that she tends to forget things as a result of her pain medications that also distort time for her)

        - social functioning except for the ability to develop and maintain relationships and the ability to deal appropriately with unexpected demands where she is described as needing continuous support or supervision, with a comment to the effect that she started lately to “snap”, get angry and frustrated.
    - Her functioning is good in terms of her immediate and extended social networks.
    - The nurse comments that the appellant finds transportation a big issue, in particular to go to doctors’ appointments, go to the pharmacy for medications and physiotherapy appointments – she stated that the appellant needed community transportation.
    - The help she required for her daily living activities is provided by her family, with the comment that the appellant is trying to maintain her health by going to her many appointments given that she needs transportation. In terms of what assistance the appellant required, the nurse indicates that she lost 25 lbs, that she feels hindered by the lack of help, that she just got a bus pass for her appointments and that ICBC is very slow to help her getting the medications she requires and cannot afford.
    - In terms of assistive devices, the nurse indicated that the appellant uses a cane and a walker and needs a seat for the bathtub and a rail for the bathtub and the toilet. She does not have an assistance animal.
    - The nurse provided a list of 6 medications she needs to take.
    - The nurse based her assessment on an office interview with the appellant and the doctor’s assessment. This was her first and only contact with the appellant.
- A request for reconsideration dated 29 January 2015 and signed by the appellant stated that she had constant migraines on the right side of her head and that the doctor did not mention she suffered from a hernia in her stomach causing bad acid reflux. She was taking morphine for her pain in particular in her knees and hands. She suffered from 5 old fractures that have not healed, 3 prior fractured ribs as a result of a fall in 2014. She was unable to open jars and medication bottles due to arthritis and she hurt her left leg in another accident. She was to see the neurologist in January and has hip problems affecting her gait. She stated it took her longer to walk up a hill, 25 minutes instead of 15 and she is short of breath. She also wrote: “Basically need to ride bus to get around to my appointments I cannot walk as far as I used to I now need a cane to help me walk. My hip down to my left foot is worse since the accident. I’ve lost considerable amount of weight, my appetite is quite affected by my pills I take. Suffer migraine headaches broken biggest bone in my head doctors says”. With her request for reconsideration, the appellant provided the following documents:
    - A Medical Report – Employability dated 27 May 2013 completed and signed by a physician who indicated she suffered from osteoarthritis onset 2009 and rib fracture in February 2013 and her medical condition was assessed as “Moderate”. It also mentioned her condition would last more than 2 years but that it was episodic in nature as “fracture rib may bother for 2-3 more months”. She should not do any heavy labour or lifting and she should only do sedentary work.
    - A letter dated 13 November 2013 by her family physician who completed the PR and who stated that the appellant suffered from arthritis in knees and hands.
    - A 2-page Operative and Procedural Documentation dated 10 June 2014 completed by the surgeon who did the procedure with a diagnosis: “Bilateral multiple rib fractures with flail segments” and a description of the procedure he conducted.
    - A document dated 25 November 2014 by a CT scan physician indicating that on that day, a "CT facial bones" of the appellant was done as a result of facial pain, right side as a result

of a MVA while she was “inebriated”. It compared with a CT done in June 2014 and concluded that the facial bones appeared healed without significant deformity. The final impression: “Healed right side facial fractures as described”.

- A letter dated 28 November 2014 by a doctor in otolaryngology referred to the CT scan and indicated that it “showed her fractures to the face have healed. There is no significant sinus pathology. She should see a neurologist to determine if she has post concussion headaches”.
- A referral letter dated 22 December 2014 from the appellant’s physician to neurologist requesting that she be examined: “Although no previous mention of head injury, is attempting to get disability and would like to be assessed for head injury by neurology”.
- A letter dated 7 January 2015 by the appellant’s physician stated: The appellant “has been my patient over the last year. I previously saw her for a period of a few years prior to that. She has had long standing difficulties with osteoarthritis in her knees reducing her ability to work. This past summer was involved in a motor vehicle accident that resulted in a month long hospital stay. She has worsening pain from her osteoarthritis as well as shoulder and back pain relating to the accident. She is currently also being investigated for a head injury related to that same accident. In my opinion at present she would be unable to work.”

In her Notice of Appeal dated 5 March 2015, the appellant provided some additional information. The pain in her body has not improved and she had just suffered from the flu for the previous 5 weeks as she takes much longer than other people to get well. She does not smoke but the hernia in her stomach makes it hard for her to take pain medication. She lost her teeth in the accident and she is unable to chew properly as her dentures no longer fit correctly, which resulted in weight loss. She won’t be able to see a neurologist for another year as it takes 6 to 12 months to have an appointment with a specialist. She was working with her doctor to get another CAT scan, as her forgetfulness tends to increase. She experienced severe trauma in some situations as well as post-traumatic stress disorder (PTSD) that affects her whole life.

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PART F – Reasons for Panel Decision

The issue under appeal is whether the ministry's determination that the appellant has not met all of the eligibility criteria for designation as a PWD because it was not satisfied that the appellant had a severe physical and/or mental impairment that, in the opinion of a prescribed professional, directly and significantly restricts her ability to perform DLA either continuously or periodically for extended periods resulting in the need for help to perform DLA was either a reasonable application of the legislation or reasonably supported by the evidence. The ministry determined that the age requirement and that her impairment was likely to continue for at least 2 years had been met.

The criteria for being designated as a person with disabilities are set out in s. 2 of the EAPWDA and s. 2 of the EAPWDR. Section 2 of the EAPWDA states:

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;
"health professional" repealed
"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.

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

Section 2 of the EAPWDR provides further clarification:
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, or
(b) acting in the course of the person's employment as a school psychologist by
(i) an authority, as that term is defined in section 1 (1) of the *Independent School Act*, or
(ii) a board or a francophone education authority, as those terms are defined in section 1 (1) of the *School Act*, if qualifications in psychology are a condition of such employment.

The ministry acknowledged that the appellant meets 2 of the conditions for PWD designation in that she is at least 18 years of age and that her impairment is likely to continue for at least 2 years. However, the ministry argued that she did not meet the other 3 criteria.

The physician and the assessor reports:

The ministry argued that the AR was completed by a prescribed professional, a nurse, who had met the appellant only once and relied on that interview and therefore was not giving that report much weight but was relying mostly on the PR. The appellant did not provide any argument in that respect.

The panel notes that at page 1 of the AR form, it is mentioned: "This section should be completed by a prescribed professional having a history of contact and recent experience with the applicant. Please complete this section based on your knowledge of the Applicant, observations, clinical data and experience". Unfortunately in this matter the prescribed professional had never previously met the appellant as it was her first contact with her and did not know her from previous experience – she relied entirely on that one interview and on the PR's assessment. The panel finds the ministry reasonably determined that the AR should not be given as much weight as the PR as it was more in the nature of a self-report, that was mostly provided by the appellant's rendition of her condition and marginally based on the opinion of the prescribed professional since the nurse had no previous experience with or knowledge of her.

Severe physical impairment:

The ministry argued that the evidence is not sufficient to determine a severe physical impairment since the PR did not provide any assessment of the appellant's ability to climb stairs, limitations with lifting or ability to remain seated. Further, the PR identified a number of limitations with mobility

without providing any information about the degree of restriction or assistance required. While the AR indicated that the appellant took significantly longer for walking and climbing stairs, the ministry argued that it did not provide any information on how much longer, as requested in the form and there is no detailed assessment of her physical functioning on a daily basis.

In her statements and documentation she provided, the appellant argued that she suffered from chronic pain in her knees, hips and hands and that she has migraines that she said were caused by the MVA when her skull was fractured. She also argued she suffered from chronic pain in her ribs and left hip and that she had a hernia in her stomach that make it difficult for her to take pain medication, compounding her suffering. She has lost weight as a result of mouth injuries that prevented her from eating solid food. She also argued that she was unable to open medicine bottles because of arthritis in her right hand and that it takes her much longer to walk up a hill, 25 minutes, as opposed to the 15 minutes it was taking her prior to the accident. She could not walk to her appointments but needed to take a bus and must walk with a cane. As a result, she argued she had a severe physical impairment.

The panel has no doubt that the appellant suffers from a physical impairment but when assessing the severity of the impairment, the ministry must consider the PR and AR provided by the prescribed professionals. In this case, as mentioned above, the ministry gave more weight to the PR and the panel notes the physician put more emphasis on the injuries suffered by the appellant as a result of a MVA as opposed to her chronic ailments. The ministry noted that the report was completed approximately 2 months after the accident, on 22 August 2014, and may not reflect the appellant's actual condition, in particular if the later report from the CT scan in November was considered since it showed the facial fractures seemed to have healed when scanned at that time.

The panel also notes that the PR does not provide any information about 'lifting' but that the Medical Report Employability dating back in March 2013, completed by a medical practitioner, indicated that the appellant was then unable to do heavy labour or lifting but could do sedentary work; at the time the report indicated osteoarthritis and rib fracture from a previous incident and the appellant was fit for sedentary work; the overall medical condition of the appellant was described as "moderate", not severe. The panel does not give much weight to this report as it is older, pre MVA, and was completed for the purpose of employability which is not relevant to a PWD designation but it provides some context to the chronic condition of the appellant and would tend to confirm the PR and, to some extent, the ministry's determination that her impairment could be assessed as moderate. Given the evidence submitted, the panel finds that the ministry reasonably determined the assessment provided was not sufficient to be satisfied that the appellant had a severe physical impairment.

Severe mental impairment:

The ministry acknowledged that the PR indicated the appellant had a significant deficit in terms of cognitive and emotional functioning in the area of attention or sustained concentration but noted as well that it was due to head injury from MVA that seemed to have healed when considering the CT scan report of November 2014. The ministry also noted that the AR indicated the appellant needed specialized transportation while the appellant herself had mentioned that she used public transit to go to her appointments. Further while the appellant was referred to a neurologist, at the time of reconsideration no medical diagnosis of a mental disorder or brain injury had been provided. Finally,

the ministry argued that the assessment of the appellant's cognitive and emotional functioning provided by the PR does not correlate with the impacts identified by the AR and has put more weight on the PR for the reasons stated above.

The appellant argued that she suffers from migraines and that she has been referred to a neurologist but is not likely to be able to see the specialist for a year and she would like another scan be performed to determine why she suffers from migraines. She also indicated she was more forgetful since the accident and had trouble making appointments, remembering peoples' names and must write everything down for fear of forgetting. She argued she was experiencing severe trauma in some circumstances as well as PTSD affecting her entire life.

The panel notes that the PR identified only 1 diagnosis relevant to head injury: presbyopia / strabismus amblyopia that is classified under "Conditions of the nervous system & sense organs – Sensory", not under mental disorders or neurological disorders. The panel also notes that the only evidence of possible neurological problems came from a doctor in otolaryngology in his letter of 28 November 2014 stating, "The CT scan showed her fractures to the face have healed. There is no significant sinus pathology. She should see a neurologist to determine if she has post concussion headaches." The only mention of a mental impairment in the PR is related to "attention or sustained concentration" as a result of head injury from a MVA. The same physician subsequently wrote to a doctor in neurology, in a referral letter dated 22 December 2014, "Although no previous mention of head injury is attempting to get disability and would like to be assess (sic) for head injury by neurology".

The panel also notes that the AR depicted a different picture than the PR in terms of cognitive and emotional functioning where 6 functions are described as having major impacts: bodily functions, consciousness, emotion, motivation, motor activity and "other neuropsychological problems" that are described in the comments as "flashbacks" from the MVA, sleepy from pain medication, wearing very dark glasses, depressed about losing physical abilities, headaches on the right side and hallucinations. The panel cannot give much weight to this report as, in addition to previous findings above, it has its own contradictions and identifies a medical condition, hallucinations, that had not been diagnosed by a physician or a specialist. For instance, she wrote that the appellant was unable to pay for her painkillers and then went on to mention that she felt sleepy from the pain medication. There is no medical evidence of hallucinations and perhaps this is related to flashbacks that the appellant said she experienced and her own feeling that she suffers from PTSD.

For all those reasons, the panel finds the ministry reasonably determined the information provided by the prescribed professionals and the appellant did not establish she had a severe impairment of her cognitive and emotional functioning.

Daily living activities:

The ministry argued that while the PR indicated a number of daily living activities that the appellant experienced continuous restrictions, it did not provide any additional information or explanation concerning the degree of restriction or the assistance required as a result. The ministry also argued that although the need for assistance with laundry and carrying purchases home from shopping as described in the AR correlated with the nurse's assessment of the appellant's need for continuous

assistance with lifting, carrying and holding the physician in the PR did not provide any such assessment. The ministry also identified an inconsistency between the fact that the appellant was said to need help from a family member with banking and mobility while the appellant indicated she was able to use public transit. The ministry saw the need for continuous assistance for filling / refilling prescriptions and taking medication as directed not related to a medical impairment but rather due to financial limitations. Further, the ministry argued that the AR indicated the appellant was taking significantly longer than typical with a number of daily living activities but did not specify how much longer it took, as requested, preventing any determination of the extra time taken and whether it was a significant restriction to her ability to perform such activities. While the ministry acknowledged the appellant's condition would reasonably impose some restrictions to her ability to perform daily living activities, particularly those involving lifting, carrying and holding, there was not enough evidence to confirm that her impairment significantly restricts her ability to perform her daily living activities continuously or periodically for extended periods.

The appellant did not address her ability to perform daily living activities but described her condition, providing an inference that it impacted her daily living activities. For instance she argued she could not open jars and bottles due to the arthritis in her right hand and that she took 25 minutes instead of 15 minutes to climb a hill. She argued that she could not walk anymore to do her errands and that she had to take the bus to get to her appointments and that she needed a cane for walking.

The panel notes that the PR indicated continuous restrictions for personal self care, basic housework, mobility outside the home and use of transportation but did not provide any information as to the degree of restriction and the nature and extent of assistance required; the PR also mentioned a restriction for daily shopping but no indication as to whether this was continuous or periodic. In terms of personal care, the AR indicated the appellant was independent but took significantly longer without explaining how much longer it took; laundry is done by a family member with no indication as to whether this assistance is required other than to mention she cannot carry anything. In terms of transportation, the indication in the AR is that a family member takes her shopping and carries purchases home but she is able to use public transit, which is corroborated by the appellant. The AR also describes some restrictions for filling / refilling prescriptions but comment that it is because she cannot afford them – which is not a direct result of her impairment.

The evidence is that the appellant's abilities are impacted by her medical condition but the panel finds that the evidence provided was reasonably determined to be insufficient/inconclusive to establish that the appellant's impairment significantly restricted her ability to perform her daily living activities continuously or periodically for extended periods and that the ministry reasonably determined the appellant had not met that legislative requirement.

As a result of those restrictions, help required to perform DLA:

The ministry argued that since daily living activities are not significantly restricted, it cannot be determined that significant help is required from other persons and that no assistive device is required.

The appellant argued that her main issue is transportation and that she needs someone to take her to her appointments. She also needs a seat for the bathtub and a rail for both the bathtub and the toilet

and she uses a cane and/or walker.

Given the evidence as described above, the panel finds that while there is evidence the appellant could benefit from the assistance of others, particularly for transportation and carrying, such assistance would facilitate her life but is not required to perform her daily activities and finds the ministry reasonably determined the appellant did not meet the legislative test for the need for help arising from significant restrictions to perform daily living activities either continuously or periodically for extended periods.

Conclusion:

The panel acknowledges the appellant's difficulties, particularly after her MVA, and that it does have an impact on her daily functioning. However, based on the above analysis and evidence, the panel comes to the conclusion that the ministry reasonably determined that the appellant does not have a severe physical or mental impairment and that a prescribed professional did not establish that an impairment directly and significantly restricted her ability to perform daily living activities either continuously or periodically for extended periods and that, as a result of those restrictions she requires help to perform those activities under s. 2(2) of the EAPWDA. Consequently, the panel finds the ministry's decision was reasonably supported by the evidence and confirms the decision.