APPEAL #

PART C – Decision under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Social Innovation (the ministry) dated 08 June 2015 denying the appellant designation as a person with disabilities (PWD). The ministry determined that the appellant did not meet all of the required criteria for PWD designation set out in the *Employment and Assistance for Persons with Disabilities Act*, section 2. Specifically, the ministry determined that the information provided did not establish that the appellant has a severe mental or physical impairment that in the opinion of a prescribed professional

(i) directly and significantly restricts her ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and,

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

The ministry determined that the appellant satisfied the other 2 criteria: she has reached 18 years of age and her impairment in the opinion of a medical practitioner is likely to continue for at least 2 years.

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

APPEAL #

PART E – Summary of Facts

At the request of the appellant and with the consent of the ministry, the hearing, originally scheduled for 06 July 2015, was adjourned awaiting additional information in support of the appellant's appeal.

The evidence before the ministry at reconsideration consisted of the following:

1. The appellant's PWD Designation Application dated 26 January 2015. The Application contained:
   - A Physician Report (PR) dated 13 February 2015, completed by the appellant's general practitioner (GP) who has known the appellant for 1 year and has seen her 2 – 10 times in the past 12 months.
   - An Assessor Report (AR) dated 13 February 2015, completed by the same GP.
   - A Self Report (SR) completed by the appellant.

2. The appellant's Request for Reconsideration, dated 11 May 2015, to which was attached numerous letters of support and medical reports (see below).

In the PR, the GP lists the following diagnoses related to the appellant's impairment: anxiety disorder/stress++ (onset about 2010); brain tumor, lymphoma (onset November 2000), and asthma. The GP reports that the appellant's impairment will likely continue for 2 years or more.

The panel will first summarize the evidence from the PR and AR relating to the appellant's impairments as it relates to the PWD criteria at issue.

Severity/health history

Physical impairment

PR:
Under health history, the GP writes:

> "[The appellant] had brain tumor in 2000 and was operated. Since last year her headaches are getting worse, especially at work. Progressively worse and now feels unable to work because of headaches & dizziness and being forgetful.
> "[She] also advises of having arthritis. [She] advises of having lots of pain, especially in her joints and hands."

Under additional comments, the GP writes:

> "[The appellant] has a history of non-Hodgkin's lymphoma in 2000, which was operated. Lately [she] has developed symptoms related to her previous lymphoma. [illegible] Severe headaches, dizziness, forgetfulness. Feels same like when she had the [non-Hodgkin's lymphoma]. [She] is unable to continue work because of her symptoms, as she is unable to concentrate and focus and becomes dizzy."

The GP indicates that the appellant's height and weight are relevant to her impairment: 165 cm and 170 lbs.

The GP indicates that the appellant has not been prescribed medication and/or treatments that

interfere with her ability to perform DLA and that she does not require any prostheses or aids for her impairment.

As to functional skills, the GP reports that the appellant can walk 4+ blocks unaided, climb 5+ steps unaided, is limited to lifting 5-15 lbs. and has no limitations remaining seated.

Mental impairment

PR:
The GP indicates that the appellant has no difficulties with communication.

The GP indicates that the appellant has significant deficits with cognitive and/or emotional function in the areas of executive, memory, emotional disturbance, motivation, and attention or sustained concentration.

AR:
The GP assesses the appellant's ability as good for speaking and as satisfactory for reading, writing and hearing.

With regard to cognitive and emotional functioning, the GP assesses the appellant's mental impairment as having the following impacts in the listed areas of daily functioning:

- Major impact: emotion, attention/concentration, memory.
- Moderate impact: motivation, other emotional or mental problems
- Minimal impact; impulse control, executive, and motor activity.
- No impact: bodily functions, consciousness, insight and judgment, language, psychotic symptoms, other neuropsychological problems.

The GP comments; "[The appellant] has a progressive decline in her functioning, because of her brain tumor history."

Under additional comments, the GP writes:

> "Patient was sent home from work many a time because of headache & dizziness. Also because of forgetfulness. She could not focus and could not remember the new job description. Her pain symptoms were also getting worse @ work and was unable to walk back home."

Ability to perform DLA

AR:
The GP reports that the appellant lives alone.

Regarding mobility and physical ability, the GP assesses assistance required as follows:

- Walking indoors and climbing stairs – independent.
- Walking outdoors, standing, lifting, carrying and holding – periodic assistance from another person.

The GP assesses the assistance required for managing DLA as follows:

- Personal care – independent in all aspects.

- Basic housekeeping – independent in all aspects.
- Shopping – independent for going to and from stores, reading prices and labels, making appropriate choices, and paying for purchases; periodic assistance from another person required for carrying purchases home.
- Meals – independent for meal planning, cooking and safe storage of food; periodic assistance from another person required for food preparation.
- Pay rent and bills – independent in all aspects.
- Medications – independent for taking as directed; periodic assistance from another person required for the filling/refilling prescriptions and safe handling and storage.
- Transportation – independent for getting in and out of vehicle; using public transit and using transit schedules and arranging transportation: the GP comments: “never uses public transit and unable to cope.”

With respect to social functioning the GP assesses the appellant as independent for making appropriate social decisions, developing and maintaining relationships, and securing assistance from others; he assesses the appellant as requiring periodic support/supervision for interacting appropriately with others and dealing appropriately with unexpected demands.

The GP describes the impact of the appellant's mental impairment on her immediate and extended social networks as marginal functioning.

Help provided/required

PR:
The GP indicates that the appellant does not require any prostheses or aids for her impairment

AR:
With respect to social functioning, the GP describes the support/supervision required as “no need for help to maintain her in the community.”

Self report

The appellant writes:

> “I had brain tumor in 2000. I am now experiencing similar symptoms as I had at that time. I suffer from dizziness and severe headaches. I also suffer from anxiety and depression and arthritis in my arms and legs. I have general body pain and fatigue. I am unable to work.”

Request for Reconsideration

Attached to the Request for Reconsideration are the following reports/letters:

Letters in support of the appellant’s PWD application:

- A letter dated 07 May 2015 from a case manager [credentials unspecified] of a brain injury support organization. The case manager writes that the appellant has received an intake and become a client of the organization based on her brain injury sustained from the presence and removal of a CNS lymphoma tumor and chemotherapy treatment in March 2000. The case manager goes on to write:

"From a brain injury case management perspective, it is clear that the appellant is dealing with multiple brain injury symptoms. She experiences energy crashes, sleep problems, headaches, chronic pain, changes in speech, problems with balance and coordination, weakness in the arms and legs, numbness and tingling in hands. Her cognitive abilities are compromised as well, which include difficulties focusing, memory problems, slowed thinking, flooding, and challenges with the executive function which include organizing, planning, reasoning, decision-making, problem-solving and multitasking…. She also deals with a reduced self-awareness, emotional fluctuations, depression, anxiety, stress, changes in social skills and reduced ability to work. This has been clearly shown in the past year when she worked at eight jobs but could not follow through after each attempt finally moving on from the job…. These are all indications that her brain injury symptoms are very real and prevent her from employment."

- A letter 12 May 2015 from a nurse practitioner (NP) who writes that she has assumed provision of the appellant's primary medical care following the dissolution of the therapeutic relationship between the appellant and her GP. The NP writes:

  "…it is my impression that [the appellant] suffers from symptoms of an acquired brain injury, likely as a result of her previous brain cancer. In our interactions, during the acquisition of a full history, it became clear that [the appellant] has lapses in both her short and long-term memory. Her case manager from the [brain injury support organization] attends our appointments, and has been able to fill in the gaps that [the appellant] is not able to remember. In addition she reports symptoms of recurrent headaches, fatigue, dizziness, pain, confusion, and emotional/psycho social deficits. If you refer to her MRI dated 24 February 2015, she is found to have 'Chronic changes within the right cerebellar hemisphere and a previous craniotomy site in the right occipital region. Changes seen in the right cerebral hemisphere could represent a resection cavity or an old region of infarction.'

  In my medical opinion, it is very probable that this is related to some of the symptomatology that [the appellant] is experiencing."

  The NP goes on to write that she has referred the appellant to a psychiatrist for further opinion. She has been made aware that the appellant has 90 days to submit all supporting documentation, and would appreciate consideration of referral wait times in the needed longitudinal time to gain a full and thorough cognitive assessment of the appellant.

- A letter dated 21 May 2015 from a physician at the BC Cancer Agency (BCCA), who confirms that the appellant was diagnosed approximately 15 years ago with a CNS lymphoma. She underwent high-dose intravenous methofrexate chemotherapy and had an excellent response and has been a disease free since then. Over the last 3-6 months she has developed increasing problems with fatigue, confusion, cognitive challenges and difficulty concentrating and has been unable to work effectively. She has had repeated MRIs, which have not shown recurrence of the lymphoma. The physician has seen her twice and does not find any obvious evidence of recurrent CNS lymphoma. Moreover it is certainly unusual for a patient to recur this far out from this type of malignancy. However the physician feels that patients with CNS lymphoma who undergo this form of therapy certainly can develop cognitive problems and develop problems similar to any patient who has any form of brain injury.

- A letter dated 04 June 2015 from a registered psychiatric nurse (RPN). The RPN writes that the

appellant experiences self care problems and physical needs that include disrupted sleep patterns, visual disruptions, exhaustion and fatigue, headaches, dizziness and medication monitoring for adherence. She is coping with impaired comprehension, short-term memory impairment, low mood, anxiety, disorganization, forgetfulness and an overall sense of distress related to the suspected sequelas associated with their previous CNS lymphoma. Emotional and interpersonal problems that have emerged include: indecisiveness, dependence on service providers for assistance, passive behaviors, [loneliness], in the sense of loss contributing and she can no longer maintain gainful employment. Her Global Assessment of Functioning is assessed at 50, indicating serious symptoms or serious impairment in social, occupational or school functioning. Her Montreal Cognitive Assessment revealed a score of 21/30, with a score of 26/30 or higher considered normal.

Other documents submitted

- Correspondence between a BC Cancer Agency oncologist and physician dated 22 March 2011 relating to her discharge from BCCA care at that time.
- Several reports dating from 2000/2001 relating to the appellant's diagnosis and treatment of CNS lymphoma.
- A letter dated 17 December 2014 from a neurologist to the appellant's GP. The appellant had been experiencing symptoms that she believes are very similar to what she experienced at the time of her non-Hodgkin’s lymphoma. She reports some headaches and episodes of vertigo. Symptoms have been increasing in severity to the point that she has not been working for the last few months. She has daily episodes of vertigo that can last minutes of the time. Headaches tend to recur often on a daily basis as well, and she does complain of memory loss. The examination was relatively unrevealing. As her symptoms seem to have changed since her most recent CT scan in March 2014, he will request an MRI scan.
- Imaging Report of an MRI of the appellant on 23 February 2015. Impression: no evidence of recurrence visualized. Chronic changes within the right cerebella hemisphere and a previous craniotomy site in the right occipital region. Changes seen in the right cerebral hemisphere could represent a resection cavity or an old region of infarction No enhancing lesion is apparent to suggest recurrence or metastasis.
- A letter dated 09 March 2015 from the above neurologist to the appellant's GP regarding the appellant's recent MRI. This proved to show postsurgical changes only, with nothing about the intracranial findings that would account for her recent symptoms. The appellant had been experiencing chronic daily generalized headaches, which the neurologist suspects are likely tension-type.
- An Outpatient Clinic Note dated 19 March 2015 from the same BCCA physician reporting on a visit by the appellant, covering much the same ground as the above 21 May 2015 letter.
- Imaging Report of a CT scan on 27 March 2014 – no evidence of recurrent disease. Other than for the postsurgical changes of the right posterior cranial fosse, there is no significant intracranial abnormality evident.
- A letter dated 05 May 2015 from the NP to Service Canada in support of the appellant’s request for reconsideration of her CPP disability benefits application, along the same lines as the NP’s letter of 12 May 2015 above.

APPEAL #

Information submitted after reconsideration

Notice of Appeal

The appellant's Notice of Appeal is dated 15 June 2015. Under Reasons for Appeal, the appellant writes that she disagrees with the decision. She states that the GP's report is incomplete and that she needs further testing. She is unable to be employed.

Request for Adjournment

The appellant submitted an Appeal Adjournment Request dated 02 July 2015. Attached to the Request were the following documents:

- A letter dated 13 July 2015 from the appellant's current physician in support of the appellant's PWD application. The physician writes:
  "In our opinion after to meetings, reviewing her records, interview and physical examination, she does have a documented past medical history of cerebral malignancy 15 years ago with subsequently a brain injury, Anxiety and Depression, with a significant impact on her daily activities.
  She does struggle with simple activities going from personal care, preparing meals and walking to more complex tasks. It appears that her cognitive functions declined over time resulting in challenges in organization with worsening of her anxiety; the workup for diagnosis and management is ongoing currently."

- A letter dated 22 July 2015 in support of a request by the appellant for transportation assistance for a medical appointment in another city with a physician/allergist.

- A 4 page Appeal Guide –DLA checklist completed by the appellant [undated]. She checks aspects of DLA (set out in somewhat greater detail than in the PWD application form) for which her disability makes it difficult for her to do. She checks almost all aspects of taking medications, housework, shopping, moving around inside the home, moving around outside the home, communication, mental and emotional skills and social skills. About half the aspects of personal care, preparing meals, using transportation, managing money and paying bills and eating are checked. Against some checked aspects, some commentary is provided. The panel summarizes these entries as follows, with commentary in parenthesis:
  -Personal care: standing in the shower, reaching out to wash her body all over (dizziness), brushing her hair (arms difficult to lift overhead), having the energy to bathe every day.
  -Preparing meals: understanding recipes and labels (memory issues, as a result does not cook or bake as before), remembering she has food on the stove or in the oven (occasionally).
  -Taking medications: taking the right amount of medications, remembering to take all her medications when she is supposed to (memory issues, resort to blister packs seems to be helping, has had issues with taking too many, forgetting).
  -Housework: all aspects (energy levels, bending over, dizziness, inability to organize, dropping dishes, arthritis in hand)
  -Shopping: all aspects (confusion, memory, dizziness – walking in crowds, goes to support).

-Moving around inside the home: most aspects (dizziness affects ability to walk around, persistent headaches)
-Moving around outside the home: (needs to hold onto things to support).
-Using transportation: going up and down stairs or ramps, understanding bus schedules (not able to ride bus, depends on transportation by her worker).
-Managing money and paying bills: remembering to pay bills on time, budgeting for groceries and other things she needs (has very little money to buy groceries).
-Eating: not throwing up after a meal (acid reflux, heat burn), remembering or being motivated to eat regular meals, eating healthy foods.
-Communication: most aspects, such as being able to make herself understood, understanding what people say to her, hearing what people say to her face-to-face or on the telephone.
-Mental and emotional skills: most aspects, such as coping with anxiety and agitation, depression, stress, confusion, planning ahead, making appropriate choices completing tasks, coping with sensitivity to sound, light or motion.
-Social skills: most aspects, such as socializing without being anxious and scared, interacting with friends and family (keeps to self, doesn't go out), asking for help, being able to deal with unexpected situations (depends on family or case manager).
-Things she needs: eyeglasses, grab bars.

- A 13 page article published by the brain injury support organization entitled “Introduction to Brain Injury.”

Additional information submitted before the hearing

The appellant's advocate submitted the following documents on 28 July 2015:

- A letter dated 28 July 2015 from the NP in support of the appellant's appeal. The NP writes that she has seen the appellant for nine separate 30 minute appointments and her colleagues have seen her multiple times as well. She writes: “Through my assessments it is clear that [the appellant] suffers from significant mental impairment. Her memory and cognitive functioning are diminished, and she struggles to remember the details of conversations, organizer activities of daily living.” The NP goes on to write:

  “[The appellant] suffers from what she describes as ‘bad days.’ These days happen several days per week and are characterized by extreme fatigue, significant brain fog, pain throughout her body, confusion, significant dizziness, headaches and memory lapses. On these days she is unable to prepare her own meals. She requires accompaniment to do her shopping and is unable to take transit as she often will have dizzy spells that result in her falling or will get confused and lost. She has used volunteer driving programs for transportation for the most part, and will have friends, family and social workers accompany her to her various appointments.

  [The appellant’s] medication adherence was inconsistent and she was getting confused about when and what to take. She has since required medication blister packs, and she will call the pharmacy regularly if she is confused…..

  [The appellant] requires the aid of the social worker to make decisions about her personal activities, her health care and her finances. She experiences paralyzing anxiety when she is left to make these decisions alone, as she becomes easily overwhelmed and confused.”

  The NP continues by stating that they are currently awaiting results of a recent cervical CT

scan as the appellant has hand increasingly worrisome numbness, tingling, pain and weakness to her arms and hands bilaterally. On physical exam, the findings are abnormal and following receipt of the results she will be referring to an internal medicine neurologist. The appellant is also on a waitlist to be assessed by a psychiatrist for further clarity on her diagnosis.
The NP also refers to a medical opinion by a physician colleague (see below). She and the physician found the appellant to have cognitive impairment significant enough to continually impair her activities of daily living. She writes: “this impairment is severe in nature and the appellant requires assistance and support to complete her daily activities at least 3-4 times per week. She also refers to the appellant's Global Assessment of Functioning scale at 50 and the Montreal Cognitive Assessment score of 21/30, with 26/30 or higher considered normal.

- A Supplemental Medical Opinion dated 26 July 2015 prepared by current physician. The physician indicates that in his medical opinion the appellant is severely restricted in performing the following DLA (comments in parentheses):
  -Prepare own meals (unable on bad days – several days per week).
  -Shop for personal needs (not able, needs to be supervised).
  -Use of public or personal transportation facilities (can not, loss of balance, relies on BCCA, gets lost).
  -Move about indoors and outdoors (loss of balance, headache and getting lost).
  -Manage personal medication (uses blister packs, [unreadable]).
  -Make decisions about personal activities, care or finances (supported by a social worker).

  The physician indicates that in his professional opinion the appellant’s ability to perform these DLA are directly and significantly restricted, commenting “cognition declining, needs support daily to perform simple tasks.”
  The physician indicates that the appellant is continuously restricted in her ability to perform the restricted DLA – she is unable to cope and there are documented worsening of symptoms – headaches, cognitive impairment and anxiety.
  The physician indicates that in his professional opinion the appellant requires help to perform her daily activities, especially for outdoor activities. He indicates that this help is required 3x-4x days per week, commenting; “currently stays on her own but outdoors need supervision; needs help at home as well (3-4x/week).
  The physician indicates that in his professional opinion the appellant has a severe physical and/or mental impairment.

  A 17 page printout of the record of the appellant's visits to her medical clinic and copies of related correspondence.

The Hearing

At the hearing, the appellant's advocate presented argument as to how the new information submitted after reconsideration demonstrated that the appellant met the severe mental impairment, DLA and help required criteria (see Part F, Reasons for Panel Decision, below).

The appellant's case manager at the brain injury support organization described how she provides assistance to the appellant 3 to 4 times per week helping her organize her life by liaising with medical professionals, making appointments, reminding the appellant of appointments and arranging

transportation and making sure somebody accompanies her when she goes shopping or to appointments.

The appellant described how she felt she was badly treated by her (now former) GP. She stated that her application was the first that the GP had completed, and that this was reflected in how badly it had been prepared. She is grateful for the fresh start she has with her new clinic and access to the support provided by the brain injury support organization as well as the ongoing interest by her BCCA physician. She described how her current condition, with her memory problems, confusion and dizziness, makes her frustrated, angry and depressed in not being able to work: she had enjoyed working for the past 30 years, and misses the daily contact with others. She is also in constant pain with her arthritis, but the medication she takes has side effects, such as frequent need for urination, which she finds it difficult to handle.

The ministry stood by its position at reconsideration.

Admissibility of new Information

The ministry did not object to the admissibility of the new written information submitted before the hearing, but noted that information provided by the case manager in her testimony at the hearing on the help she provides was not available to the ministry at reconsideration. Despite the ministry's position regarding the written material, the panel is guided by section 22(4) of the *Employment and Assistance Act (EAA),* which states:

> In a hearing referred to in subsection (3), a panel may admit as evidence only
>
> (a) the information and records that were before the minister when the decision being appealed was made, and
>
> (b) oral or written testimony in support of the information and records referred to in paragraph (a).

Section 22(4)(b) is designed to strike a balance between a pure appeal on the record of the ministry decision and a hearing *de novo* (a completely new hearing). It contemplates that while a party may wish to submit additional evidence to the panel on the appeal, the panel is only empowered to admit – i.e. take into account in making its decision – "oral or written testimony in support of" the record of the ministry decision; it provides appellants with a limited opportunity to augment their evidence on appeal but it does not provide them with a hearing *de novo* or new hearing. If the additional evidence substantiates or corroborates the information and records before the minister at the reconsideration stage, the evidence should be admitted; if it does not, then it does not meet the test of admissibility under section 22(4)(b) of the *EAA* and cannot be admitted.

The panel finds that the letter of 13 July 2013 from the appellant's current physician is in support of information and records before the ministry at reconsideration: this letter provides corroboration by a medical practitioner of the statements by the NP and the appellant's case manager in their letters of support submitted at reconsideration that she suffers from what amounts to a brain injury secondary to her treatment for CNS lymphoma 15 years ago.

With respect to the appellant's DLA checklist, the NP's letter of 28 July 2015 and the current physician's Supplementary Medical Opinion, the focus of these documents is on restrictions to the appellant's ability to perform DLA and the resulting help required. In the panel's view, none of the

letters of support or other medical reports submitted by the appellant at reconsideration address ability to perform DLA in any detail – instead they describe symptoms such as dizziness, memory loss, etc. The only evidence before the ministry at reconsideration that deals specifically with ability to perform DLA and help required is that contained in the PR and AR. The panel finds that the information provided in the DLA checklist, the NP's letter and the physician's report is in essence not consistent with, or contradicts, that contained in the PR and AR and is therefore not in support of the PR or AR. For example, the GP assesses the appellant as independent in all aspects of personal care and basic housekeeping; the appellant indicates she has difficulty with many aspects of the former and all aspects of the latter; the GP assess the appellant as independent for shopping, except for carrying purchases home, while the current physician states that she is "not able, needs to be supervised." There is no mention in the PR or AR that the appellant experiences "bad days" most days of the week or that she needs to be accompanied for activities outside the home. The information provided by the NP and the physician that the appellant requires the help of a social worker in making decisions contradicts the GP's statement that "no need for help to maintain her in the community." Given these inconsistencies and contradictions, and pursuant to section 22(4)(b) of the *EAA,* the panel does not admit as evidence the information provided in these documents.

The panel accepts the article "Introduction to Brain Injury" as background information of general application not specific to the appellant.

The panel does not admit as evidence the testimony of the case manager regarding the support to the appellant she provides, as this information does not corroborate or substantiate any evidence before the ministry at reconsideration.

The panel admits as evidence the testimony of the appellant as in support of what was before the ministry at reconsideration.

APPEAL #

PART F – Reasons for Panel Decision

The issue in this appeal is whether the ministry reasonably determined that the appellant is ineligible for PWD designation because she did not meet all the requirements in section 2 of the EAPWDA. Specifically the ministry determined that the information provided did not establish that the appellant has a severe mental or physical impairment that in the opinion of a prescribed professional

(i) directly and significantly restricts her ability to perform daily living activities either continuously or periodically for extended periods; and,

(ii) as a result of those restrictions she requires help to perform those activities.

The ministry determined that she met the 2 other criteria in *EAPWDA* section 2(2) set out below.

The following section of the *EAPWDA* applies to this appeal:

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.

The following section of the EAPWDR applies to this appeal:

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 panel will consider each party's position regarding the reasonableness of the ministry's decision under the applicable PWD criteria at issue in this appeal.

Severity of impairment

Mental impairment

In the reconsideration decision, the ministry reviewed the evidence in the PR and AR, noting that in the PR the GP assessed the appellant with significant deficits in several areas of cognitive and emotional functioning and in the AR identified major impacts in the areas of emotion, attention/concentration and memory as well as moderate impacts in other areas. The GP indicated that the appellant requires periodic support/supervision with interacting appropriately with others and dealing with unexpected demands, but does not provide an explanation of the degree and duration of support and supervision as requested on the application, while stating that the appellant does not need help maintaining herself in the community. The ministry referred to the letters of support provided at reconsideration advising that her symptoms are that of a person with a brain injury, but held that these letters do not provide enough information on the appellant's cognitive and emotional functioning. The position of the ministry was that there was not enough information provided by the appellant's previous medical practitioner and in the additional information submitted to establish that she has a severe mental impairment.

The position of the appellant is that there is sufficient information to establish a severe mental impairment. In addition to the GP's identification of the major impacts of her mental health condition on daily functioning in the areas of emotion, attention/concentration and memory, the physician's letter of 13 July 2015 supports a finding of a severe mental impairment: "…[the appellant] does have a documented past medical history of cerebral malignancy 15 years ago with subsequently a brain injury, Anxiety and Depression, with a significant impact on her daily activities. She does struggle with simple activities going from personal care, preparing meals and walking to more complex tasks. It appears that her cognitive functions declined over time resulting in challenges in organization with worsening of her anxiety …."

Panel findings

A diagnosis of a serious medical condition does not in itself determine PWD eligibility. Under the legislation, eligibility for PWD hinges on “an impairment” and its severity. An “impairment” is more than a diagnosed medical condition. An impairment is a medical condition that results in restrictions to a person’s ability to function independently, appropriately, effectively or for a reasonable duration.

To assess the severity of an impairment one must consider the nature of the impairment and the extent of its impact on daily functioning, as evidenced by functional skill limitations and the degree to which the ability to perform DLA is restricted

At reconsideration, the ministry had before it the original application with the PR and AR completed by the GP and several letters of support and medical reports submitted by the appellant’s new medical team. The appellant had “dissolved” her doctor/patient relationship with the, and in the time available to submit additional information for reconsideration the new medical team was focusing on clarifying the diagnosis of her medical condition, trying to obtain a better understanding of her symptoms and the impact on daily functioning, while arranging for new tests and examinations.

The GP has diagnosed the appellant with Anxiety Disorder/stress++ and brain tumor, lymphoma in 2000. The latter diagnosis was subsequently clarified by the NP, and corroborated by the appellant’s current physician, as acquired brain injury as a result of the appellant's treatment for CNS lymphoma 15 years ago. As noted by the ministry, in the PR the GP identified significant deficits with cognitive and emotional function in the areas of executive, memory, emotional disturbance, motivation and attention or sustained concentration. In the AR, the GP assessed the appellant's mental impairment as having a major impact on daily functioning in the areas of emotion, attention/concentration and memory, noting that the appellant has experienced a progressive decline in her functioning due to her brain tumor history. However, the GP did not provide further commentary to support these assessments. In the reconsideration decision, the ministry found that the letters of support provided with the Request for Reconsideration advising that the appellant’s symptoms are that of a person with a brain injury do not provide enough information on the appellant’s cognitive and emotional functioning.

With respect to the material submitted at reconsideration, the letters of support from her new medical team go into further detail on the appellant’s mental health condition. For instance, the case manager from the brain injury support organization wrote:

> “From a brain injury case management perspective, it is clear that the appellant is dealing with multiple brain injury symptoms. She experiences energy crashes, sleep problems, headaches, chronic pain, changes in speech, problems with balance and coordination, weakness in the arms and legs, numbness and tingling in hands. Her cognitive abilities are compromised as well, which include difficulties focusing, memory problems, slowed thinking, flooding, and challenges with the executive function which include organizing, planning, reasoning, decision-making, problem-solving and multitasking…. She also deals with a reduced self-awareness, emotional fluctuations, depression, anxiety, stress, changes in social skills and reduced ability to work. This has been clearly shown in the past year when she worked at eight jobs but could not follow through after each attempt and finally moving on from the job….”

Similarly, the NP wrote:

> "In our interactions, during the acquisition of a full history, it became clear that [the appellant] has lapses in both the short and long-term memory. Her case manager from the [brain injury support organization] attends our appointments, and has been able to fill in the gaps that [the appellant] is not able to remember. In addition she reports symptoms of recurrent headaches, fatigue, dizziness, pain, confusion, and emotional/psycho social deficits."

Inability to work is in itself not a criterion for PWD designation. However, the panel considers that the evidence that the appellant in the past year worked at eight consecutive jobs but could not hold down these jobs because of memory and concentration problems tends to substantiate the GP's assessment of major impacts on daily functioning in the areas of memory and attention/concentration. The NP's evidence that due to short and long-term memory lapses the appellant required the assistance of her case manager in providing her medical history further substantiate these assessments.

The RPN reported that the appellant's Global Assessment of Functioning is assessed at 50, indicating serious symptoms or serious impairment in social, occupational or school functioning. Her Montreal Cognitive Assessment revealed a score of 21/30, with a score of 26/30 or higher considered normal. Her current physician, who wrote: "It appears that her cognitive functions declined over time resulting in challenges in organization with worsening of her anxiety…"

On review of this material submitted at reconsideration, the panel notes that the information provided relates mainly to an extensive list of symptoms of the appellant's acquired brain injury (and test scores supporting that diagnosis). With the exception of the impacts of the appellant's memory deficits on her ability to work and to describe her medical history, the information does not describe in what way, to what extent and under what circumstances her brain injury restricts her ability to function effectively or independently, as might be evidenced on her ability to manage her DLA. For example, the case manage wrote: "Her cognitive abilities are compromised as well, which include difficulties focusing, memory problems, slowed thinking, flooding, and challenges with the executive function which include organizing, planning, reasoning, decision-making, problem-solving and multitasking." While these symptoms/difficulties may point to a serious mental health condition, no detailed description is provided on the impact on daily functioning, including the nature and extent of restrictions in the ability to perform DLA, such as, regarding the above-quoted sentence, the DLA of making decisions about personal activities, care or finances. Without such information, the panel finds that the ministry was reasonable in concluding that the information provided in the letters of support do not provide enough information on the appellant's cognitive and emotional functioning, especially in terms of restrictions in the ability to perform DLA, that would "satisfy" the ministry that a the appellant has a severe mental impairment.

The legislation requires that for PWD designation, the minister must be "satisfied" that the person has a severe mental or physical impairment. For the minister to be "satisfied" that the person's impairment is severe, the panel considers it reasonable for the ministry to expect that the information provided presents a clear and complete picture of the nature and extent of the impacts of the person's medical conditions on daily functioning.

Considering that
a) while the GP assessed 3 major impacts of the appellant's mental health condition/brain injury on daily functioning, he provided no further analysis to substantiate these assessments,
b) the GP has assessed the appellant as independent in most aspects of DLA (see also Direct and significant restriction on the ability to perform DLA, below), and
c) the panel's finding above that the information contained in the letters of support do not provide enough information on the impacts of the appellant's brain injury on daily functioning, including on restrictions to DLA,
the panel finds that the ministry was reasonable in determining that the information provided did not establish a severe mental impairment.

Physical impairment

In the reconsideration decision, the ministry noted that the GP has assessed the appellant has been able to walk 4+ blocks unaided, climb 5+ steps, lift 5 to 15 lbs and remain seated for a limited amount of time. In terms of mobility and physical ability, the GP assessed the appellant as requiring periodic assistance from another person with walking outdoors, standing, lifting, and carrying and holding; however no explanation is provided regarding this assessment. Based on the information provided in the assessments provided by the GP and the additional information provided at reconsideration, the ministry found that there was not enough information to demonstrate that the appellant experiences significant limitations to her physical functioning. Therefore the ministry could not determine that the appellant has a severe physical impairment.

At the hearing, the appellant did not argue that she has a severe physical impairment, though she does suffer from arthritis, and resulting pain.

Panel findings

In his diagnoses related to the appellant's impairment, the only one listed of a physical nature is asthma. The GP also mentions under Health History that the appellant also has arthritis, complaining of pain especially in her joints and hands. While the GP assesses the appellant as requiring periodic assistance in moving about outdoors, standing, lifting and carrying and holding, as the ministry notes, the GP provided no explanation. Given the functional ability reported by the GP (able to walk 4+ blocks, etc.) and the appellant assessed as independent in almost all other DLA requiring physical effort, the panel finds that the ministry was reasonable in determining that a severe physical impairment had not been established.

Direct and significant restrictions in the ability to perform DLA.

In the reconsideration decision, the ministry reviewed the AR, noting that the GP has assessed the appellant as requiring periodic assistance with their ability to manage carrying purchases home, food preparation, filling and refilling prescriptions and safe handling and storing medications. However the nature, frequency and duration of periodic assistance required is not described. The ministry further notes that all other aspects of the appellant's DLA are managed independently, with the GP indicating that the appellant never used public transit as she is unable to cope. The position of the ministry is

that the information provided by the GP does not establish that a severe impairment significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods

The position of the appellant is that the information provided by her current physician in the Supplementary Medical Opinion submitted after reconsideration demonstrates that her ability to perform DLA is significantly restricted on a continuous basis.

Panel findings

The legislation – section 2(2)(b)(i) of the *EAPWDA* – requires the minister to assess direct and significant restrictions of DLA in consideration of the opinion of a prescribed professional. This doesn't mean that other evidence shouldn't be factored in as required to provide clarification of the professional evidence, but the legislative language makes it clear that the prescribed professionals' evidence is fundamental to the ministry's determination as to whether it is "satisfied".

For the reasons explained in Part E above, the panel has not admitted as evidence the Supplementary Medical Opinion completed by the appellant's current physician submitted after reconsideration. The only analysis of the appellant's ability to perform DLA before the ministry at reconsideration is that of the GP in the AR.

With regard to those DLA applicable to a person with a severe mental or physical impairment, for the DLA of moving about indoors and outdoors, the GP has assessed the appellant as requiring periodic assistance from another person for walking outdoors, standing, lifting and carrying and holding and independent for walking indoors and climbing stairs. For the other DLA in this category, the GP has assessed the appellant as independent for most aspects except for carrying purchases home, food preparation, filling and refilling prescriptions and safe handling and storing of medications, where periodic assistance from another person is required. While the GP did not specifically assess the appellant's ability or using public transit and using transit schedules and arranging transportation, the GP did indicate that the appellant never uses public transit as she is unable to cope. As the ministry noted, for those aspects of DLA for which the GP assessed the appellant as requiring periodic assistance, no further information is provided as to the nature, frequency and duration of such assistance. Without such explanatory detail, it is not possible to determine whether the need for such periodic assistance is a direct result of the appellant's physical impairment (e.g. her asthma for walking outdoors or her arthritis for food preparation), the severity of which has not been established in this appeal, or her severe mental impairment.

Regarding the "social functioning" DLA applicable to a person with a severe mental impairment as set out in section 2(1)(b) of the EAPWDR, namely make decisions about personal activities, care or finances and relate to, communicate or interact with others effectively, the GP assesses the appellant as independent for making appropriate social decisions, developing and maintaining relationships and securing assistance from others; he assesses the appellant as requiring periodic support/supervision for ability to develop and maintain relationships and dealing appropriately with unexpected demands. Where the prescribed professional is asked to explain/describe these assessments, including a description of the degree and duration of support/supervision required, the GP left this area of the form blank. Asked to describe the support/supervision required which would help to maintain the appellant in the community, the GP writes: "No need for help to maintain her in the community."

Considering that the GP has assessed the appellant as independent in managing most aspects of her DLA, and the lack of explanatory detail in describing the nature and extent of periodic assistance required that would enable an assessment as to whether her restrictions were continuous (on an ongoing basis) or periodic (episodic) for extended periods, the panel finds the ministry was reasonable in determining that there was not enough evidence to establish that the appellant's impairments directly and significantly restrict her ability to perform DLA either continuously or periodically for extended periods.

Help with DLA

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

The position of the appellant is that she requires the support and assistance from her case manager at the brain injury support organization many times a week to help her organize her life.

Panel findings

The panel notes that the legislation requires that in the opinion of a prescribed professional the need for help must arise from direct and significant restrictions in the ability to perform DLA that are either continuous or periodic for extended periods. Since it has not been established that DLA are directly and significantly restricted, the panel finds that the ministry was reasonable in finding that it cannot be determined that help is required as provided under section 2(2)(b)(ii) of the *EAPWDA*.

Conclusion

Having reviewed and considered all of the evidence and the relevant legislation, and for the reasons provided above, the panel finds that the ministry's decision that the appellant was not eligible for PWD designation was reasonably supported by the evidence. The panel therefore confirms the ministry's decision.