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 01 September 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 his ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and,

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

The ministry determined that the appellant satisfied the other 2 criteria: he has reached 18 years of age and his 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

PART E – Summary of Facts

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

1. The appellant's PWD Designation Application dated 01 April 2015. The Application contained:
    - A Physician Report (PR) dated 04 April 2015, completed by the appellant's general practitioner (GP) who has known the appellant since March 2015 and seen him once.
    - An Assessor Report (AR) dated 04 April 2015, completed by the same GP.
    - The appellant chose not to complete a Self Report.

2. The appellant's Request for Reconsideration, dated 28 August 2015, to which was attached a submission and several medical reports and articles (see below).

In the PR, the GP lists the following diagnoses related to the appellant's impairment: FAS (fetal alcohol syndrome), MDD GAD (mood disorder and generalized anxiety disorder), OSA (obstructive sleep apnea), thyroid disease, bilateral foot and knee OA (osteoarthritis), seizure and MVC in August 2014 resulting in a crushed right foot. The GP reports that the appellant's impairment will likely continue for 2 years or more. In the AP, the GP indicates that her information sources were an office interview and [advocacy organization] assessments.

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

Duration

The GP indicates that the appellant's impairments will likely continue for two years or more, noting that foot injury is likely to last longer than 2 years.

Physical impairment

PR:
Under health history, the GP reports:
ADLs/IADLs/shopping/filling out Rx/house duties/laundry impaired.
OSA – can't breath well, can't sleep well.
Thyroid disease – chronic fatigue.
Epilepsy – seizures, fatigue.
OA – foot pain + swelling; cant walk long: can't climb stairs.
MVC – right foot severe fracture, had surgery (IF), uneven gait, chronic pain, foot swelling, walks slowly.

As to functional skills, the GP reports that the appellant can walk less than 1 block unaided, can climb no steps, is limited to lifting 5 – 15 lbs. and can remain seated for less than 1 hour.

The GP indicates that the appellant has been prescribed medications that interfere with his ability to perform DLA, attaching a list of his current medications, noting these cause drowsiness, fatigue, dry mouth and dizziness.

Under additional comments, the GP writes that the appellant's recent MVC caused a significant foot injury, requiring surgery with 4 plates. Since then he has uneven gait, it is painful walking and he can't walk long, [unreadable]. He has difficulty with all daily tasks including shopping, housekeeping, laundry, filling out prescriptions – all ADLs and IADLs are impaired

Mental impairment

PR:
Under health history, the GP reports:
FAS – since birth, has had cognitive decline.
MDD GAD – panic attacks, mentally slow/can't process information/ anxiety/mainly negative life experience/loneliness feelings.

The GP assesses the appellant with cognitive and emotional deficits in the following areas: consciousness, executive, language, memory, perceptual psychomotor, emotional disturbance, motivation, impulse control, motor activity, and attention or sustained concentration. The GP comments: "due to depression, anxiety, FAS and epilepsy."

Under additional comments, the GP writes that the appellant's verbal communication is slow – poor mental processing and cognitive decline. He has severe clinical depression due to many life events. He has poor motivation.

Ability to perform DLA

AR:
The GP reports that the appellant lives alone.

Regarding communications, in the PR the GP reports that the appellant has difficulties with communications, with a cognitive cause. The GP comments: "Speaking slow – difficulty finding words & recall; can't formulate thoughts."
In the AR, the GP assess the appellant's ability for speaking as satisfactory (slow expression), for reading as Poor (grade 8 education), for writing as satisfactory (spelling is bad) and for hearing as poor (uses hearing aid).

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

- Walking indoors – independent (thyroid disease/fatigue).

For the following activities, the GP assesses the appellant as requiring continuous assistance from another person or unable and taking significantly longer than typical, with comments as noted:

- Walking outdoors – SOB and foot pain.
- Climbing stairs –
- Standing – less than 15 min.
- Lifting – 5 – 10 lbs.
- Carrying and holding – balance problems.

The GP comments: “Takes 3x longer due to physical and cognitive impairment.”

The GP assesses the assistance required for managing DLA as follows (the GP’s comments in parentheses):

- Personal care: dressing (about 70% of time), grooming, bathing (low motivation) – continuous assistance from another person or unable and takes significantly longer than typical; toileting and feeding self (no interest in self care or cooking or eating)– independent; transfers in/out of bed and on/off of chair – periodic assistance from another person and takes significantly longer than typical.
- Basic housekeeping: laundry (puts of 70% of time) and basic housekeeping (mentally not focused and not interested)– continuous assistance from another person or unable and takes significantly longer than typical.
- Shopping: going to and from stores (needs transportation), reading prices and labels (takes 3 – 4x longer), making appropriate choices (slow decision), paying for purchases (misunderstandings, needs hearing aids) and carrying purchases home – continuous assistance from another person or unable and takes significantly longer than typical.
- Meals: meal planning (no interest), food preparation (no motivation), cooking (no energy, has to sit/lean on counter) – continuous assistance from another person or unable and takes significantly longer than typical; safe storage of food (forgets to refrigerate food) – periodic assistance from another person.
- Paying rent and bills: banking (standing is difficult)– continuous assistance from another person or unable and takes significantly longer than typical; budgeting – periodic assistance from another person and take significantly longer than typical; pay rent and bills (foot pain, can’t walk long) – independent and takes significantly longer than typical
- Medications: filling/refilling prescriptions (forgets to pick up pills) and taking as directed – continuous assistance from another person or unable and takes significantly longer than typical; safe handling and storage – Independent and takes significantly longer than typical.
- Transportation: getting in/out of vehicle (problem with standing and walking), using public transit (can’t climb stairs), using transit schedules and arranging transportation– continuous assistance from another person or unable and takes significantly longer than typical.

The GP comments the appellant needs to be driven to pharmacy, bank, store 3 – 4 times per week; he needs to be reminded to pay bills weekly and he needs help for all of the above.

In the AR, GP indicates that the appellant's mental impairment or brain injury restricts or impacts his functioning as follows:

- Major impact – bodily functions, consciousness, the motion, impulse control, attention/concentration, executive, memory, motivation, motor activity, language and psychotic symptoms.
- Moderate impact – insight and judgment, and other neuropsychological problems.
- Minimal impact – their emotional or mental problems.

The GP comments that:

FAS – since birth, cognitive and mental/emotional impairment.
MDD – depressed mood, no motivation.
GAD – [unreadable]
Epilepsy – develops seizures. Seizure meds cause emotional disturbance.

The GP notes risk of seizure and risk of fall as safety issues.

With respect to social functioning, the GP assesses the appellant as requiring periodic support/supervision for making appropriate social decisions (need to help 70% of time); and continuous support/supervision for developing and maintaining relationships (difficulty communicating), interacting appropriately with others (difficulty asking for help), dealing appropriately with unexpected demands (get overwhelmed easily), securing assistance from others (gets panicky and stressed easily).

The GP describes the impact of the appellant's impairment on his immediate and extended social networks as very disrupted functioning, commenting that he gets angry and hostile and is not trusting.

Help provided/required

PR:
The GP indicates that the appellant requires the following aids for his impairment: lifting device, elevator, escalator and carry cart.

AR:
The GP writes that the appellant needs help for ADLs, housekeeping and transportation, and that he needs counseling, physiotherapy., the assistance of an RSW (social worker) and transportation with regard to support/supervision required for social functioning.

The GP indicates that the appellant routinely uses a lifting device, toileting aids, bathing aids (railing) and a stool. The appellant also uses a CPAP device and a hearing aid.

Reconsideration submission

The appellant wrote to share his medical history based on tests, naming four different doctors responsible for these tests. Dr. A was his doctor for 18-20 years and had most of these tests done and has his medical history/ records. Dr. B was the one that did the surgery on his right foot – it needed surgery, requiring four plates to be put in, because his foot had been crushed. Tests done by Dr. A show that he has hypothyroidism, obstructive sleep apnea, fetal alcohol syndrome, hypothyroidism/rosacea, seizures, tinnitus (both ears) and arthritis in the right. He suffers from these illnesses every day, but not all once and they stopped him participating in daily life. He wonders if any research is being done on these to explain how they work together.

He writes that his right foot is healing and that he will be going back to Dr. B get the plates out. He went through a lot of pain and it took a lot of patience for the foot to heal. He had no support since the beginning of August 2014 – he went through a lot of emotions and there was a lot of anger

He provides a list of the medications he takes.

Attached to his submission are the following:

- A pharmacy printout of his drug expenses from March through May 2015.
- A letter to Dr. A requesting a copy of his medical history/records, with a hand written response indicating that he transferred out of that clinic in April 2014 and advising him to contact another clinic as they have his records.
- A consult report dated 13 September 2012 from another physician confirming that he has severe obstructive sleep apnea and that he wishes to use CPAP therapy on a trial basis. Sleep test reports dated 26 September 2012, 27 May 2013 and 04 October 2013 are also attached.
- Copies of articles from the Internet relating to hypothyroidism, obstructive sleep apnea and fetal alcohol syndrome.

Notice of Appeal

In his Notice of Appeal, dated 11 September 2015, the appellant writes: "The minister has not considered presented information – thus made erred decision."

Submission on appeal

Prior to the hearing, the appellant submitted:

- A letter dated 07 August 2012 from an ENT specialist stating that the appellant has moderately severe hearing loss and is in need of hearing aids. Attached are the results of a hearing test.
- Copies of pharmacy receipts for the appellant's prescription drugs from 29 May 2015 to 16 June 2015.
- The PR and AR both dated 21 January 2014 from a PWD designation application ("the 2014 application"), completed by the appellant's former physician of 11 years (Dr. A). The diagnoses related to the appellant's impairments are substantially the same as in the present application (except for the foot injury, which occurred later in 2014), but there are marked differences in the assessments relating to functional skills limitations and ability to perform DLA.

The hearing

At the hearing, the appellant's advocate reviewed the PR and AR, going to argument as to how the diagnoses and assessments established that the criteria at issue had been met. The balance of her presentation also went to argument (see Part F, Reasons for Panel Decision, below).

The appellant provided a brief overview of his life history. Of relevance to this appeal is that he was born with FAS, had severe learning difficulties, taking Grade 1 three times, and reached only Grade 8.

In answer to questions, the appellant stated that he has always walked slowly; now he can walk only 2 ½ blocks before he needs to stop and rest. He has balance problems, so he has bathroom grab bars and a shower stool and needs to use rails when going up or down stairs. He currently has no one in his life to provide him the help he needs.

The ministry stood by its position at reconsideration. The ministry representative noted that in the original PWD designation denial summary, the Health Assistance Branch adjudicator stated that

attempts to contact the GP were made (twice by fax) to discuss the application and to determine if there were any consultations that could be forwarded for review. However, no further information was provided by the GP.

Admissibility of new Information

The ministry did not object to the admissibility of the 2014 application. The panel finds that this information is not in support of the information and records before the ministry at reconsideration, as many of the assessments set out in 2014 application tend to conflict with, and therefore do not corroborate, those found in the current application. The panel cannot pick and choose only those assessments that are in support of those in the PR or AR and ignore those that are different. The panel therefore does not admit the 2014 application as evidence under section 22(4) of the *Employment and Assistance Act (EAR).*

The panel finds the other information submitted on appeal and the appellant's testimony at the hearing is in support of that before the ministry at reconsideration and admits this information as evidence.

PART F – Reasons for Panel Decision

The issue in this appeal is whether the ministry decision that determined that the appellant did not meet two of the five statutory requirements of Section 2 of the *EAPWDA* for designation as a person with disabilities (PWD) is reasonably supported by the evidence or is a reasonable application of the legislation in the circumstances of the appellant. The ministry found that the appellant met the age requirement and that, in the opinion of a medical practitioner, his impairment is likely to continue for at least two years. However, the ministry was not satisfied that the evidence establishes that:

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

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) 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

The positions of the parties

The position of the ministry

In the reconsideration decision, the ministry reviewed the evidence relating to severity of impairment and concluded that:

> "[Your GP] provided the assessment of physical functioning on your PWD application from one meeting with you. Your medical practitioner has not provided any information to confirm that she has had the opportunity to review previous consultations on your medical condition, test results or medical reports. As a result, the minister is unable to confirm this level of impairment of physical functioning without more information. Therefore, the minister is unable to determine that you have a severe medical impairment." Similar wording is used for mental impairment.

In its analysis regarding restrictions in performing DLA, the ministry used similar wording to that cited above, prefacing it with:

> "[The GP] provided the assessment of your restrictions to performing daily living activities on your PWD application from one meeting with you. Therefore, your contact with [the GP] has been very limited, with little opportunity for your physician to develop an opinion based on a history contact, experience, observations and knowledge of you."

At the hearing, the ministry noted that in the original PWD designation denial summary, the ministry adjudicator stated that attempts to contact the GP were made (twice by fax) to discuss the application and to determine if there were any consultations that could be forwarded for review. However, no

further information was provided by the GP.

The position of the ministry is that the information provided therefore does not establish that the appellant meets any of the criteria at issue in this appeal.

The position of the appellant

At the hearing, the appellant's advocate argued that, under the legislation, since there is undisputed evidence that appellant requires assistive devices, namely a CPAP device and hearing aids, this demonstrates that his ability to perform DLA is significantly restricted, and this in turn demonstrates severe impairment and that he therefore meets the legislated PWD criteria. Moreover, the GP's assessments of major impacts of the appellants mental health conditions on daily functioning, and her assessments of the continuous assistance and support/supervision required for virtually all DLA further demonstrate that the ministry was unreasonable in denying the appellant PWD designation.

As to the ministry's denial based on the GP meeting with the only once, the advocate argued that there is nothing in the legislation that speaks to the frequency of contact between the applicant and the medical practitioner/prescribed professional. She advocate indicated that the material prepared by her advocacy organization and given to the GP offered proposed assessments, but a covering letter stressed that these were suggestions only and the GP was free to use her own judgment in using them, or amending or ignoring them. The advocate noted that the ministry's position was hardly consistent, accepting the diagnoses and the opinion of the GP that the impairments would continue for at least 2 years, while giving no consideration to the assessments set out in the PR and AR.

Panel majority decision

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. Section 2 of the EAPWDA requires that the minister be "satisfied" that the person has a severe mental or physical impairment that, in the opinion of a prescribed professional results in the direct and significant restrictions in the ability to perform DLA and a resulting need for help. *The prescribed professional's opinion is fundamental in this determination.*

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. The legislation is clear that the fundamental basis for the analysis of severity is the evidence provided by a medical practitioner – in this case the appellant's GP. The DLA and help criteria are expressly contingent on the opinion of a prescribed professional, in this case also the appellant's GP.

The legislation does not set out any minimum requirements respecting the number of times a medical practitioner/prescribed professional must have seen the person for whom the PR and AR are completed, for the minister to be "satisfied" that the person's impairment is severe and that the DLA and help criteria are met. In order to be satisfied it is the responsibility of the ministry to carefully

consider all of the evidence presented by the appellant. The fundamental basis of the ministry's decision should be its assessment of the PWD application that is completed by an appellant's prescribed professional(s).

In this decision the ministry failed to provide its conclusions or determination that would be drawn from its analysis of the content of the evidence (the PWD application). The ministry instead focused its reasoning behind the decision on the due diligence and authority of the physician which the ministry states made it difficult for it to be able to make a determination. The legislation, however, does not explicitly or implicitly state that the authority of the physician is only recognized or that the physician shows due diligence only when he/she meets a specific set of criteria, such as multiple visits with the appellant or a review of specific medical history. The minister did not aptly exercise its decision-making authority by assessing and weighing all the information provided, including that of the medical practitioner/prescribed professional. For this reason, the majority panel finds that the ministry was unreasonable to determine that the evidence establishes that the appellant did not meet the legislative requirements of the EAPWDA.

Dissenting opinion

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. Specifically, section 2 of the EAPWDA requires that the minister be "satisfied" that the person has a severe mental or physical impairment that, in the opinion of a prescribed professional results in the direct and significant restrictions in the ability to perform DLA and a resulting need for help.

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. The legislation makes it clear that the determination of severity is at the discretion of the minister, taking into account all of the evidence, including that of the appellant. However, the legislation is also clear that the fundamental basis for the analysis of severity is the evidence from a medical practitioner – the appellant's GP. The DLA and help criteria are expressly contingent on the opinion of a prescribed professional, in this case also the appellant's GP.

While the legislation does not set out any minimum requirements respecting the number of times a medical practitioner/prescribed professional must have seen the person for whom the PR and AR are completed, for the minister to be "satisfied" that the person's impairment is severe and that the DLA and help criteria are met, the dissenting panel member considers it reasonable for the ministry to expect that the information provided presents a clear, professional and independent assessment of the nature and extent of the impacts of the person's medical conditions on daily functioning.

To the dissenting panel member, the legislative language that the minister must be "satisfied" provides the ministry, in duly exercising its decision-making authority, with the responsibility of assessing and weighing all information provided, including that of the medical practitioner/prescribed professional. Any reservations that the ministry might have over the assessments provided by the medical practitioner/prescribed professional must be considered by the panel.

In this case, the ministry had for consideration a PWD application, the PR and AR of which was completed by a medical practitioner who indicated that she had met with the appellant once and used as her sources of information an office interview and assessments provided by an advocacy organization. In the reconsideration decision, the ministry notes that the appellant's contact with the GP has been very limited, with little opportunity for the physician to develop an opinion based on a history of contact, experience, observations and knowledge of him. The ministry also stated that the GP has not provided any information to confirm that she has had the opportunity to review previous consultations on the appellant's medical condition, test results or medical reports. The AR form provides a list of a number of other potential sources of information, such as "file/chart information (specify)" and "other professionals (specify)," none of which were checked. The physician indicated that the only documentary information used as a source for her assessments were those provided by the advocacy organization. As such, these would likely reflect a self-report by the appellant in an appellant/advocate interview, not the independent, unbiased and professional findings or opinions of other medical professionals who have treated or tested the appellant in the past. The dissenting panel member accepts the ministry's position that there is a lack of information provided by the GP to dispel these concerns.

The dissenting panel member is guided by the general principle of administrative law that it is the responsibility of a person applying for a public benefit to provide the information necessary to establish eligibility. In the present appeal, the panel finds that it is the responsibility of the appellant to satisfy the ministry that the information provided reflects the independent and professional medical assessment expected of a medical practitioner. As the GP met once with the appellant, and there is no information provided by the GP that she reviewed any sources of medical information other than that provided by an advocacy organization, the dissenting panel member finds that the ministry was reasonable in determining that the information provided did not establish that the appellant met the PWD criteria at issue in this appeal.

Conclusion

Having reviewed and considered all of the evidence and the relevant legislation, and for the reasons provided above, the panel majority finds that the ministry's decision that the appellant was not eligible for PWD designation was not reasonably supported by the evidence and is not a reasonable application of the legislation in the circumstances of the appellant. The panel majority therefore rescinds the ministry's decision.