PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the "ministry") reconsideration decision of June 30, 2015, which found that the appellant did not meet three of five statutory requirements of section 2 of the *Employment and Assistance for Persons With Disabilities Act* ("EAPWDA") for designation as a person with disabilities ("PWD"). The ministry found that the appellant met the age requirement and that in the opinion of a medical practitioner the appellant's 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 that
- as a result of those restrictions, the appellant requires the significant help or supervision of another person, an assistive device, or the services of an assistance animal.

PART D – Relevant Legislation

EAPWDA, section 2
Employment and Assistance for Persons with Disabilities Regulation ("EAPWDR"), section 2

PART E – Summary of Facts

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

- The appellant's PWD designation application consisting of the appellant's self-report form dated December 30, 2014 ("SR"), a physician's report completed by the appellant's general practitioner dated February 24, 2015 ("PR") and an assessor's report completed by a physiotherapist dated November 26, 2014 ("AR").
- The appellant's Request for Reconsideration dated May 19, 2015.
- Consult report from a physiatrist to the appellant's physician dated February 26, 2015 (the "Physiatrist Report").
- Letter from the appellant's advocate dated May 22, 2015.
- Fax from the appellant's advocate dated June 29, 2015 with the appellant's submission from her advocate dated June 3, 2015 (the "June 3 Submission") with attached doctor's notes, physiotherapy notes, RN Assessor report dated June 12, 2015, and timeline of the appellant's physical and mental health conditions.
- Fax from the appellant's advocate dated June 30, 2015 enclosing the appellant's submission dated June 30, 2015 and documents titled Conclusion and Timeline (the "June 30 Submission").

Diagnoses

- In the PR the physician indicates that the appellant has been diagnosed with a whiplash injury to her neck and shoulders, date of onset 2014 and anxiety/depression, date of onset 2012. The physician indicates that he has seen the appellant two to ten times in the past 12 months. The physician also notes that the appellant has been his patient intermittently since 2007 and mainly since 2013.
- In the AR, the physiotherapist states that the appellant's physical or mental impairments that impact her ability to manage DLA are: decreased short-term memory, increase in depression and anxiety/panic attacks due to injury situation and pain. The physiotherapist indicates that she has known the appellant one month and seen the appellant two to ten times in the past year, providing physiotherapy, neuro bio-feed back, and vestibular treatment.

Physical Impairment

- In the Health History portion of the PR the physician commented that the appellant reports constant pain in her neck, shoulders, thoracic ribs and lower back, with headaches and decreased ability to sleep.
- In terms of physical functioning the physician reported in the PR that the appellant can walk 1 to 2 blocks unaided, can climb 5+ stairs unaided, is limited to lifting 5 to 15 pounds and is able to sit less than one hour.
- In the AR the physiotherapist reported that the appellant independently manages walking indoors, climbing stairs and standing but requires periodic assistance with walking outdoors and lifting and continuous assistance with carrying and holding.
- The RN Assessor Report indicates that the appellant is able to walk up 5 steps, but she cannot walk down steep stairs, experiences vertigo, experiences discomfort with lifting 5 pounds, and has pain from shingles.

- The Physiatrist Report indicates that the appellant reported mild tenderness to all areas of palpation along her cervical spine, lumbar spine and thoracic spine. The Physiatrist notes that on examination the appellant had full range of motion in her right shoulder but was unable to abduct it on its own. The Physiatrist also notes that the appellant's other symptoms were vague and that she has a tendency for catastrophization.
- The June 3 Submission indicates that the appellant has pain in her neck, shoulders, low back, ribs and chest walls, whiplash and soft tissue injuries, frozen right shoulder (cannot raise arm) and ligament/muscle injury on ankles.
- The June 30 Submission contains summaries of various medical practitioners noting that the appellant sustained soft tissue injuries and whiplash injury, pain in her neck, upper chest wall and lower back, and dizziness.

In the SR the appellant states that she has pain in her neck, shoulders, spine, lower back, ribs, chest walls, whiplash, soft tissue injuries, frozen right shoulder (cannot raise her arm when at worst), ligament/muscle injury on left ankle (both ankles are affected), ongoing headaches since an accident in March 2014, bronchial spasms, extreme dizziness, exhaustion, sleep problems, nausea and lung problems. The appellant states that she has constant coughing, bronchial attacks, requires oxygen and puffers. The appellant states that her physical impairment makes it extremely difficult to manage indoor and outdoor activities.

Mental Impairment

- In the Health History portion of the PR the physician indicates that the appellant has anxiety, panic, brain fog with poor memory, delayed response to questions, irritability, confusion and lack of ability to concentrate. The physician indicates that the appellant has difficulties with communication due to cognitive causes, commenting that the patient states she has difficulty communicating when experiencing anxiety and panic disorder. The physician indicates that the appellant has significant deficits with cognitive or emotional function in the areas of emotional disturbance, motivation and attention or sustained concentration.
- In the AR the physiotherapist indicates that the appellant has decreased short-term memory, increased depression and anxiety/panic attacks due to injury sensation-pain.
- In the AR the physiotherapist indicates that the appellant's ability to communicate with speaking is both good and satisfactory, and that her reading is satisfactory and poor, noting, that she has difficulty with expression due to dizziness and cognitive issues. The physiotherapist indicates that the appellant's ability to communicate with writing and hearing is good.
- In the AR, the physiotherapist assesses the following impacts of the appellant's mental impairment on daily functioning: major impact to bodily functions, emotion and attention/concentration and moderate impact to executive, memory, motivation, language, psychotic symptoms and other emotional or mental problems and minimal impacts to consciousness, impulse control, insight and judgment, motor activity and other neuropsychological problems. The physiotherapist comments that the appellant has major impact to her sleep due to pain and nightmares of the accident, confusion due to short-term memory loss and "cloudy thinking". The physiotherapist also notes other emotional issues of anxiety, panic attacks and depression.
- The RN Assessor Report indicates that the appellant has panic disorder, feelings of hopelessness and suicidal ideation and uses cognitive behavioral therapy, art therapy and

other tools to help her stay focused and positive.

- The Physiatrist Reports states that the appellant's chief complaint of dizziness and cloudiness in thinking is surprising and that it would be surprising if these symptoms were related to concussion.
- The June 3 Submission indicates that the appellant experienced neglect and abuse as a child, bullying in school and episodes of depression which were aggravated from her 2014 motor vehicle accident. The June 3 Submission also states that the appellant has constant and continuous cognitive difficulties due to her post-concussion syndrome (headaches, dizziness, sensitivity to light and noise, fatigue) as well as troubles with concentration and focus.
- The June 30 Submission indicates that the appellant has ongoing anxiety and depression, pain and accident related difficulties and difficulty communicating with others effectively.

In the SR the appellant reports that she has a possible brain injury from an accident with ongoing concussion symptoms, depression, anxiety, serious confusion and lack of concentration, panic attacks, sleep problems, brain fog, delayed response to questions and irritability.

DLA

- In the PR the physician indicates "see section 3 for comprehensive assessment".
- The physician indicates that the appellant has not been prescribed any medication and/or treatments that interfere with her ability to perform DLA.
- In Section F of the PR, Additional Comments, the physician indicates "see previous"
- In the AR the physiotherapist indicates that the appellant is independent with all aspects of personal care but takes significantly longer with all of them, noting that she is very slow and takes a long time due to physical limitations of pain and decreased mobility secondary to an accident but also affected by depression. The physiotherapist also notes that she needs help with bathtub.
- The AR indicates that the appellant requires periodic assistance with laundry and basic housekeeping.
- The AR indicates that for shopping, the appellant is independent with reading prices and labels and making appropriate choices but requires periodic assistance going to and from stores due to dizziness and physical lifting, requires periodic assistance with paying for purchases due to cognitive and short term memory issues and requires continuous assistance carrying purchases home due to pain. The physiotherapist comments that the appellant has difficulties with shopping, tasks and activities outside the house due to anxiety and panic attacks.
- The AR indicates that the appellant takes significantly longer than typical with all aspects of meals, explaining that she takes two to four times longer due to pain. The AR indicates that the appellant takes significantly longer than typical with all aspects of paying rent and bills due to cognition. The AR indicates that the appellant takes significantly longer with filling/refilling prescriptions but is independent with taking medication as directed and safe handling and storage of medications. The AR indicates that the appellant takes significantly longer than typical with getting in and out of a vehicle as she is limited by pain. The physiotherapist indicates that using public transit and using transit schedules and arranging transportation are not applicable.
- The AR indicates that the appellant is independent with 3 of 5 aspects of social functioning (making appropriate social decisions, interacting appropriately with others, and securing assistance from others) but that she requires periodic support/supervision with developing and maintaining relationships and dealing with appropriately with unexpected demands, due to

anxiety and increased symptoms from the accident.
- The AR indicates that the appellant has marginal functioning with respect to her immediate and extended social networks as depression, anxiety and panic attacks as well as pain and cognitive difficulties affect her ability to express herself.
- In Part E – Additional Information the physiotherapist indicates that the appellant as involved in a motor vehicle accident on March 19, 2014 which has affected her ability to move and perform DLA from a physical perspective, noting c-spine, t-spine and pelvis. The physiotherapist also indicates that the appellant has poor short-term memory and "fuzzy thinking"/brain fog since the accident which affects her ability to perform higher-level DLA tasks such as money and directions. The physiotherapist also notes that the appellant has anxiety, depression and panic attacks, which have affected her DLA of social interaction, relationships, and cognitive and emotional function.

In the SR, the appellant states that she has difficulty with getting in and out of the bathtub, standing in the shower, reaching up and down to wash her body and hair, preparing and eating meals, keeping her home clean and motivating herself to perform basic hygiene duties on a daily basis, shopping for personal needs, lifting and carrying items, and going up and down stairs.

The June 30 Submission indicates that the appellant's disability continuously restrict her DLA.

Help

- In the PR the physician states that the appellant does not require any prosthesis for her impairment. The appellant did not provide any information to indicate whether the appellant requires assistance with DLA, noting "see section 3 for comprehensive assessment".
- In the AR, the physiotherapist indicates that the appellant requires assistance with DLA by family, friends and Health Authority Professionals, commenting that she requires physiotherapy, psychiatric help, massage and psychologist. The physiotherapist indicates that the appellant is having difficulty acquiring a psychiatrist due to the cost.
- The physiotherapist also notes that the appellant uses a sacroiliac belt and a pillow for driving. The appellant does not have an Assistance Animal.

In the SR the appellant states that she gets or needs help from community agencies, counselors, family members, friends, health professionals and support groups. The appellant also states that she has used a cane to assist with walking, wears an SI belt at all times and uses a cushion for driving.

Additional information provided

In her Notice of Appeal the appellant states that she has an advocate helping her and that they have discovered several errors in some of the previously submitted medical documentation which related to the understanding of the severity of her disability and how her DLA are affected.

With the consent of both parties, the hearing was conducted as a written hearing, pursuant to section 22(3)(b) of the *Employment and Assistance Act.*

Prior to the hearing the appellant provided a submission dated September 14, 2015 that included an updated PWD application with additional information in the SR and PR (the "September 2015 Submission"). In the SR the appellant adds that she uses a cushion for sitting or lumbar support, a

cranial collar, icepacks, heat packs and medication. The PR has additional information provided August 24, 2015 (the "PR2") indicating that the appellant has additional diagnoses of "*post traumatic stress disorder/mood disorder and musculoskeletal system"*, date of onset 2014. The Health History portion of the PR2 indicates that the appellant also has ongoing lower back pain and that she is 5'4" and weighs 128 pounds. The PR2 indicates that the appellant requires aids for her impairment including a foam form-fitting lumbar support, intermittent use of a soft cervical collar for comfort/support, sacro-iliac belt and cognitive behavioral therapy counseling. For Functional Skills the PR2 indicates that the appellant can walk 2 to 5 steps unaided, can climb 2 to 5 steps unaided, is limited to lifting under 5 pounds and can remain seated less than 1 hour. The physician notes that the appellant also has additional significant deficits with cognitive and emotional function in the area of memory, commenting that the appellant demonstrates impairment in multiple cognitive areas including working memory and difficulty processing information.

In the PR2 the physician completed Section E – DLA stating that the appellant's impairment directly restricts her ability to perform DLA. The physician indicates that the appellant has continuous restrictions to meal preparation and basic housework and periodic restrictions to personal self-care, daily shopping, mobility inside the home, mobility outside the home, management of finances and social functioning, and no restrictions to management of medications or use of transportation. The physician explains that when the appellant experiences periods of worsening depression her DLA of personal self care take significantly longer due to lack of motivation and disorganized mental function. The physician explains that during periods of worsening depression and anxiety the appellant remains at home with no contact socially except with family and close friends. The physician states that the appellant's panic episodes decrease functioning and create avoidance socially. The physician states that the appellant requires assistance from friends, neighbors, and parents when available intermittently. In Part F – Additional Comments the physician states that at the time of the completion of the PR he was waiting for assessment by a neuropsychologist and neurologist and would like to add the changes marked "Addendum" now that the appellant has been assessed. He states that the appellant has demonstrated cognitive impairment which has not improved and developed into a worsening mood disorder with disability, that she has tried numerous medications which are poorly tolerated, and that she is attending counseling intermittently since 2007 and mainly since 2013.

The physician also attached a report from a neuropsychologist dated July 2, 2015 which indicates that the appellant displays significant impairment in multiple cognitive domains (i.e. Mild Neurocognitive Disorder) and that the etiology is likely multi-factorial with contributors from a concussion, pain due to soft tissue damage and exacerbation of symptoms of anxiety and depression. The neuropsychologist states that many of her areas of cognitive weakness are quite severely impaired and much worse than would be expected 14 months post-concussion and that her psychological distress subsequent to the accident has developed into diagnosable mood disorders including post-traumatic stress disorder, major depressive disorder with suicidal thoughts, accompanied with serious impairment in adaptive occupational and social functioning with management of symptoms warranted. The neuropsychologist indicates that the appellant has severe impairments in her ability to attend and hold information in her mind, even for short periods of time. The neuropsychologist notes that the appellant's pain interferes with her DLA of walking, gardening, heavy chores, and that she struggles to perform day-to-day tasks. The neuropsychologist recommends a variety of treatment and assistance including but not limited to counseling, yoga, mindful meditation, mild massage, occupational therapy assistance to develop goals and create a

daily plan to assist with DLA.

The physician also attached a letter from a psychologist dated August 12, 2015 (the "Psychologist Report"), which provides an opinion with respect to the items found on the AR.

The appellant also provided a letter itemizing errors in the Physiatrist Report. The appellant states that there are several errors in the Physiatrist Report with respect to her headaches, neck pain, the impact of her neck pain to her DLA. The appellant states that the Physiatrist's statement that she has a tendency for catastrophization "*needs to be shut down as this is not an accurate statement and one that is made with lack of knowledge, experience, and without consideration*".

The ministry provided a submission dated September 23, 2015 indicating that they have reviewed the additional information provided by the appellant in her September 2015 Submission further clarifying her medical condition and restrictions to her DLA. The ministry states that had it had this information at the time of the reconsideration decision, the ministry may have found the appellant had met the criteria for PWD designation.

Admissibility of New Information

The panel has admitted the appellant's new information as it is in support of information and records that were before the ministry at the time of reconsideration, in accordance with section 22(4) of the *Employment and Assistance Act* regarding her impairments, functional limitations, ability to perform DLA and help needed. In particular, the new diagnosis of musculoskeletal system and mood disorder tend to corroborate the information before the ministry at the time of reconsideration as the clinical records contained in the June 3 Submission note ongoing musculoskeletal symptoms and neuro-psych symptoms. However, the panel has not admitted the information as it relates to the new diagnosis of PTSD as that is a new diagnosis that was not before the ministry at the time of reconsideration.

PART F – Reasons for Panel Decision

The issue on this appeal is whether the ministry's decision to deny the appellant designation as a PWD was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. In particular, was the ministry reasonable in determining that the appellant does not have a severe physical or mental impairment, that in the opinion of a prescribed professional the appellant's impairments do not directly and significantly restrict her from performing DLA either continuously or periodically for extended periods, and that as a result of those restrictions the appellant does not require help to perform DLA?

The relevant legislation is as follows:

EAPWDA:

2 (1) In this section:

"assistive device" means a device designed to enable a person to perform a daily living activity that, because of a severe mental or physical impairment, the person is unable to perform;

"daily living activity" has the prescribed meaning;

"prescribed professional" has the prescribed meaning.

(2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act if the minister is satisfied that the person has a severe mental or physical impairment that

(a) in the opinion of a medical practitioner is likely to continue for at least 2 years, and

(b) in the opinion of a prescribed professional

(i) directly and significantly restricts the person's ability to perform daily living activities either

(A) continuously, or

(B) periodically for extended periods, and

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

(3) For the purposes of subsection (2),

(a) a person who has a severe mental impairment includes a person with a mental disorder, and

(b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires

(i) an assistive device,

(ii) the significant help or supervision of another person, or

(iii) the services of an assistance animal.

EAPWDR section 2(1):

2 (1) For the purposes of the Act and this regulation, **"daily living activities"**,

(a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following activities:

(i) prepare own meals;

(ii) manage personal finances;

(iii) shop for personal needs;

(iv) use public or personal transportation facilities;

(v) perform housework to maintain the person's place of residence in acceptable sanitary condition;

(vi) move about indoors and outdoors;

(vii) perform personal hygiene and self care;

(viii) manage personal medication, and

(b) in relation to a person who has a severe mental impairment, includes the following activities:

(i) make decisions about personal activities, care or finances;

(ii) relate to, communicate or interact with others effectively.

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Severe Physical Impairment

The appellant's position is that she has several physical impairments caused from a motor vehicle accident that occurred in 2014 including pain in her neck, shoulders, spine, lower back, ribs, chest walls, whiplash, soft tissue injuries, frozen right shoulder (cannot raise her arm when at worst), ligament/muscle injury on left ankle (both ankles affected), sleep problems, poor balance and coordination. The appellant's position is that the cumulative weight of the medical documentation confirms that her physical impairment is severe and significantly impacts her functional abilities.

The ministry's position, as set out in its reconsideration decision, is that collectively considering the information provided the minister is not satisfied that the information provided establishes a severe physical impairment. The reconsideration indicates that the PR indicates that the appellant is able to walk 1 to 2 blocks and climb 5+ steps unaided, lift 5-15 pounds and is able to sit for less than one hour is not indicative of a severe physical impairment. The ministry states that when reporting the severity of the appellant's physical medical condition the physician notes that the "*patient states*" that she has constant pain in her neck, shoulders, thoracic ribs and lower back with headaches, and that as the physician did not provide further comments the ministry does not find this statement compelling in verifying the severity of the appellant's physical impairments.

The ministry also notes that as the physician had known the appellant longer than the assessor it would have been preferably to have him comment on the appellant's DLA. The reconsideration decision also states that if the appellant's whiplash injury were considered severe it would be expected that she would benefit from a basic aid such as a neck brace and that neither the physician nor assessor recommend use of a neck brace. The reconsideration decision also notes that as the assessor is a physiotherapist the minister expects that if the physical impairment were severe the

assessor would have chosen to focus most of her assessment on the appellant's ability to perform DLA due to physical impairments but that the assessor provides an assessment related to the appellant's mental health issues.

The reconsideration decision also notes that while they accept the appellant's self-reports of many health issues such as bronchial spasms, poor balance, memory problems, nausea and sensitivity to light and noise, the physician in the PR only diagnosed "*whiplash injury neck/shoulders*" in regards to a physical diagnosis; as a result the minister is not satisfied that any other health impairments mentioned in the SR are considered severe impairments.

The ministry also states that the RN Assessor Report is problematic as the RN does not indicate how long she has known the appellant, so the minister gave the RN Assessor Report little weight in determining the severity of the appellant's physical impairments. The ministry also notes that the report from the Physiatrist indicates that the appellant does not feel like her headaches are a major impediment in her life at this time and that many of the appellant's symptoms are vague and that she has a tendency for catastrophization. The ministry states that the information from the Physiatrist further supports its position that the appellant's physical impairments are not severe.

Panel Decision:

A diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a severe impairment. An "impairment" is a medical condition that results in restrictions to a person's ability to function independently or effectively.

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 performing 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. However, the legislation is also clear that the fundamental basis for the analysis is the evidence from a prescribed professional.

While the information provided includes information on the appellant's inability to work, in determining eligibility for PWD designation an applicant's employability is not a criterion.

In the PR, the physician diagnosed the appellant with whiplash injury neck/shoulders. In the PR2 the physician adds the diagnosis of musculoskeletal system.

In the PR the physician indicates that the appellant can walk 1-2 blocks unaided on a flat surface, can climb 5+ steps unaided, can lift 5 to 15 pounds and can remain seated less than one hour. In the PR 2 the physician indicates that the appellant can walk 1-2 blocks unaided, can climb 2 to 5 steps unaided, can lift under 5 pounds and can remain seated less than 1 hour. The physician indicates that at the time the PR was completed he was waiting for assessments by a neuropsychologist and psychologist but he does not explain how those assessments impact his opinion with respect to the appellant's functional limitations or how her functional limitations have changed since the PR was completed.

The RN Assessor Report also provides information that is inconsistent with the information provided by the physician in both the PR and the PR2. For example, the RN indicates that the appellant can

walk up 5 steps but cannot walk down steep stairs whereas the PR indicates the appellant can climb 5+ steps and the PR2 indicates that she can only climb 2 to 5 steps unaided. The physician does not comment on the RN Assessor Report or explain why his opinion has changed between the PR and PR2.

The RN Assessor Report indicates that the appellant has lifted 15 pounds of groceries but that it takes her several days to recover and she has severe pain during those times. The RN Assessor indicates that her current physiotherapist is having her lift 5 pounds. This is more consistent with the PR2 than the PR but the physician does not explain why his opinion changed and/or if the change in the PR2 was based in part on the RN Assessor Report or not.

The AR, which was completed by a physiotherapist, states that the impairments impacting the appellant's ability to manage DLA are "*short term memory, and an increase in depression and anxiety/panic attacks due to injury sensation – pain*". As the physiotherapist's expertise is in physical management it is not clear why the assessor's focus is on the appellant's mental health issues rather than physical issues and the panel finds that the ministry was reasonable in giving more weight to the PR than the AR in assessing the appellant's physical impairment.

The other information provided in the June 3 Submission and June 30 Submission details the appellant's various physical symptoms but does not provide further information regarding the frequency and/or severity of the symptoms. The panel notes that the Physiatrist Report indicates that while the appellant reports significant issues with a frozen right shoulder her range of motion in that arm was full, that many of her symptoms were vague and that the appellant has a tendency for catastrophization. The panel notes that the Physiatrist Report is quite inconsistent with the information provided by the physician in the PR2 and in the RN Assessor Report. While the appellant has repudiated several aspects of the Physiatrist Report, the panel finds that it was prepared by a medical practitioner and put before the ministry at reconsideration.

The psychologist indicates that the appellant is independent with walking indoors and standing, requires periodic assistance with walking outdoors, avoids climbing stairs and requires continuous assistance with lifting and carrying and holding (carries minimal items under 5 pounds).

Taking all of the information into account, the panel finds that there are numerous inconsistencies and it is difficult to obtain a clear picture of the severity of the appellant's physical impairment, particularly the frequency and duration of her functional limitations. The panel has concluded that the ministry reasonably determined that the evidence falls short of establishing that the appellant has a severe physical impairment as contemplated by the legislation.

Severe Mental Impairment

The appellant's position is that she has a history of prolonged and episodically severe anxiety since the age of fourteen that was aggravated by the motor vehicle accident in 2014. The appellant's position is that her pain, constant and continuous cognitive difficulties, depression, anxiety, panic attacks, nightmares, confusion and fogginess as described in the PWD application, PR2 and other supporting documentation demonstrate that she has a severe mental impairment.

The ministry's position is that although the appellant has been diagnosed with anxiety and

depression, the ministry questions whether the physician validates her assessment or simply reiterates it as in the PR the physician appears to be simply reporting the appellant's reports of her difficulties. The ministry notes that in the PR the physician identifies three areas of significant deficits with cognitive and emotional functioning being emotional disturbance, motivation and attention or sustained concentration and that although he commented that the appellant has brain fog with poor memory, he did not check off "memory" as a significant deficit.

The reconsideration decision notes that the appellant's physiotherapist, who has known the appellant for one month, completed Section B of the AR. The ministry states that as the assessor is not an expert in mental health conditions and has not known the appellant for long, the minister places very little weight on her assessment. The reconsideration decision also states that although the appellant indicated that she is seeing a psychiatrist, the fact that she has a scheduled visit with a psychiatrist does not establish a severe mental impairment. The minister also took into consideration the Physiatrist Report commenting that the appellant has a tendency for catastrophization.

The ministry's position is that the information provided is not sufficient to establish that the appellant has a severe mental impairment.

Panel Decision:

The panel finds that the appellant has been diagnosed with anxiety and depression but the time of onset is not clear. For example, in the PR the physician indicates date of onset is 2012 but in the June 30 Submission the conclusion is that the appellant has a history of anxiety and depression since the age of 14. The panel finds that the information provided does not provide a clear picture of the frequency and duration of her symptoms or the impact these impairments have on her functional abilities. For example the June 30 Submission indicates that the appellant has a history of prolonged and episodically severe anxiety and depression but there is no further information on the frequency or severity of the episodic symptoms.

The panel notes that in the PR2 the physician reports that the appellant has significant deficits with cognitive and emotional function to the areas of emotional disturbance, motivation, attention or sustained concentration and memory, whereas memory was not included on the PR. However, the remaining areas of consciousness, executive, language, perceptual psychomotor, psychotic symptoms, impulse control, motor activity and other are not areas where deficits are evident.

The neuropsychologist report indicates that the appellant has mild neurocognitive disorder, a moderate level of depression, but also states that her emotional distress is so severe that her ability to concentrate is likely affected and her confusion may at times be demonstrated by poor communication skills.

The Psychologist Report indicates that the mental or physical impairments that impact the appellant's ability to manage DLA include difficulty with short-term memory (severe, frequent), depression (severe, occasional to frequent), anxiety (severe-constant) and panic attacks (reduced due to high level of avoidance and they still occur). The Psychologist Report indicates that the appellant's ability to communicate with speaking, reading and writing are poor, particularly when pain is at its worst and that her hearing is good. The Psychologist Report summarizes the restrictions to the appellant's functioning much the same as Section B, item 4 of the AR, noting the appellant has major impact to

bodily functions, emotion, attention/concentration, motivation and other emotional or mental problems, moderate impact to insight and judgment, executive, memory, language, and psychotic symptoms, and minimal impact to consciousness, impulse control ad other neuropsychological problems. The psychologist notes minimal to moderate impact with respect to motor activity.

The panel finds that although the appellant is seeing a psychiatrist the fact that she is attending for counseling does not establish that her mental impairment is severe.

The new information provided contains some differences from the previously provided information there is also some similar information and the errors that the appellant refers to are not clear. Given the inconsistencies in the information provided and no clear information as to the errors in the information provided, the panel finds that it is difficult to obtain a clear picture of how the appellant's mental impairments impact her functional abilities. The panel finds that the ministry reasonably determined that the information provided does not demonstrate a severe mental impairment.

The information regarding the appellant's self-assessment of her impairments also varies considerably. The Physiatrist indicates that the appellant has a tendency to catastrophize her situation; the psychologist states that the appellant does not catastrophize her situation and the neuropsychologist indicates that the appellant has a mild tendency to enhance her problems. In the PR2 the physician seems to have placed great weight on the neuropsychologist and psychologist assessments but does not comment on the Physiatrist Report. The appellant provides a statement detailing the errors in the Physiatrist Report, stating adamantly that his opinion that she has a tendency to catastrophize is not accurate and is a statement made with lack of knowledge, experience and without consideration. However, there is no further information provided by the physician, who has known her longer than any of the other experts, providing his opinion regarding the appellant and given the three differing opinions between the various experts, the panel is unable to determine which of the three opinions is accurate.

The panel has concluded that the ministry reasonably determined that the evidence falls short of establishing that the appellant has a severe mental impairment as contemplated by the legislation.

Significant Restrictions to DLA

The appellant's position is that she has a severe physical and mental impairment that directly restricts her ability to manage her DLA. The appellant's position is that her pain and fatigue are constant barriers to all types of activities and impact all areas of DLA. For example the June 3 Submission summarizes the appellant's difficulties with personal care routines, preparing and eating meals, keeping her home clean, shopping for personal needs and moving about indoors and outdoors. in the June 30 Submission the information indicates that standing, getting in and out of the bathtub, reaching while bathing, cooking or cleaning, are always painful and require periods of rest between and after activities.

The reconsideration decision states that the minister is not satisfied that the appellant has a severe impairment that, in the opinion of a prescribed professional, directly and significantly restricts the appellant's ability to perform DLA set out in the legislation. In particular the ministry states that the physician is the only prescribed professional in the PWD application that has known the appellant longer than one month and he chose not to complete Section E (DLAs) of the PWD application. The

ministry states that this is problematic as it would have been preferable for the physician to have provided at least some insight into the impact that the appellant's impairments have on her DLA. Given the physician's lack of narrative in the PR the minister questions the efforts he made in examining the AR, particularly when the PR was completed 3 months after the AR. The ministry also states that it would have expected that the physician would have at least some slight differences in opinion on at least some of the assessments regarding DLA and that it is likely that there would have been some differences (either improving or deteriorating) in the 3 months between the time the AR and PR were completed.

The ministry's position is that the minister has read and considered the information provided, including the appellant's SR but is not satisfied that the restrictions the appellant describes are validated by a prescribed professional, also taking into account the Physiatrist's opinion that the appellant has a tendency for catastrophization.

The ministry states that they reviewed all of the information provided but finds that there is not enough evidence to establish that the appellant's impairments directly and significantly restricts her DLA continuously or periodically for extended periods, so the legislative criterion has not been met.

Panel Decision:

The legislation – s. 2(2)(b)(i) of the EAPWDA – requires that in the opinion of a prescribed professional, a severe mental or physical impairment directly and significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods. The term "directly" means that there must be a causal link between the severe impairment and the restriction. The direct restriction must also be significant. Finally, there is a component related to time or duration. The direct and significant restriction may be either continuous or periodic. If it is periodic it must be for extended periods. Inherently, any analysis of periodicity must also include consideration of the frequency. All other things being equal, a restriction that only arises once a year is less likely to be significant than one, which occurs several times a week. Accordingly, in circumstances where the evidence indicates that a restriction arises periodically, it is appropriate for the ministry to require evidence of the duration and frequency of the restriction in order to be "satisfied" that this legislative criterion is met.

In the PR, the physician did not complete Section E – Daily Living Activities and simply defers to the AR. In the AR the physiotherapist notes that the appellant is independent with all listed tasks of personal care but indicates that the appellant takes significantly longer than typical, explaining that she is very slow and takes a long time due to physical limitations of pain and decreased mobility secondary to the motor vehicle accident but also effected by depression. The PR and the PR2 both indicate that the appellant has not been prescribed any medication and/or treatments that interfere with her ability to perform DLA.

The AR indicates that the appellant requires periodic assistance from others with basic housekeeping but there is no further explanation to indicate the frequency or duration of assistance needed. With respect to shopping the AR indicates that the appellant is independent with reading prices and labels, and making appropriate choices but needs periodic assistance with going to and from stores (due to dizziness and physical lifting) and paying for purchases (due to cognitive and short-term memory issues). The AR indicates that the appellant requires continuous assistance carrying purchases

home due to pain. The assessor also comments that the appellant has difficulty with shopping and activities outside the house also due to anxiety and panic attacks. The AR indicates that the appellant takes significantly longer with all aspects of meals due to pain, noting that it takes two to four times longer. The AR also indicates that the appellant takes significantly longer with all aspects of paying rent and bills due to cognitive issues. The AR indicates that the appellant takes significantly longer filling/refilling medications but is independent with taking medications as directed and safe handling and storage of medications. The AR also indicates that the appellant takes significantly longer with getting in and out of a vehicle as she is limited by pain. As the assessor is a physiotherapist with expertise in physical assessment not mental assessment and had known the appellant only one month before completing the AR, the panel finds it reasonable that the ministry gave less weight to the AR than the PR.

In the PR2 the physician indicates that the appellant requires continuous assistance with meal preparation and basic housework and periodic assistance with personal self-care, daily shopping, mobility inside the home, mobility outside the home, use of transportation, management of finances and social functioning. The physician explains that when the appellant has periods of worsening depression, then dressing, grooming and bathing take significantly longer due to lack of motivation and disorganized mental function and that her social functioning becomes limited to family and close friends. However, the physician does not describe if there has been any change since the time the PR was completed, why his opinion is now different, and he does not provide any information on the frequency or the duration of the periods of worsening depression and anxiety. In addition, the panel notes that the PR2 indicates that the appellant is not restricted with respect to management of medications or use of transportation, which is inconsistent with the AR.

The neuropsychological evaluation indicates that the appellant felt that her cognitive difficulties have been resolving gradually as compared with just after the accident where she had very significant difficulties with thinking. The neuropsychological report also indicates that the appellant struggles to perform day- to-day tasks and that her recreational and social activities have been limited. However there is no information about the duration or frequency of these limitations.

The Psychologist Report indicates that the appellant has prolonged and severe psychological symptoms of anxiety and depression that debilitate her and prevent her from completing DLA that have been ongoing for over a year. However, none of the information provided describes how often the appellant is debilitated, how often her episodic bouts of anxiety and depression are or how often they last. In addition, while there are some items that are consistent as between the Psychologist Report and the AR (i.e. they both indicate that the appellant significantly longer to complete DLA of personal care) there are also inconsistencies (i.e. the psychologist indicates that the appellant requires continuous assistance with basic housekeeping and laundry whereas the AR indicates that she requires periodic assistance).

Looking at all the evidence the panel finds that there are significant inconsistencies between the various information provided, and that the information provided does not provide a clear picture of the restrictions to the appellant's DLA. The panel finds it difficult to reconcile the differing opinions regarding the appellant's description of her symptoms to her various treating practitioners and assessing physicians, particularly taking into account the Physiatrist's statement that she has a tendency to catastrophize situations.

The panel finds that the information provided does not demonstrate that the appellant satisfies the legislative criteria, namely that she has a severe impairment which directly and significantly restricts her ability to perform DLA either continuously or periodically for extended periods.

Help with DLA

The appellant's position is that she requires assistance with DLA and that she gets or needs help from community agencies, counselors, family members, friends, health professionals, and support groups. The appellant's position is that she has used a cane to assist with walking, that she wears an SI belt at all times, and requires a cushion for driving, cervical collar, ice packs and heat packs, as well as prescriptions and medications.

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 reconsideration decision also indicates that no assistive devices are required.

Panel Decision

In the PR the physician states that the appellant does not require any prostheses or aides for her impairment but in the PR2 the physician indicates that the appellant requires a foam form-fitting lumbar support, intermittent use of soft cervical collar for comfort/support, sacro-iliac belt and counseling (cognitive behavioral therapy). However, the physician does not indicate why his opinion has changed with respect to the requirement of the physical aids or whether there has been a change in the appellant's circumstances since the time he completed the PR as compared with the PR2, a period of 7 months.

The AR indicates that the appellant receives assistance from family, friends, health authority professionals and requires physiotherapy, psychiatric counseling, psychological counseling and massage and that she has difficulty acquiring a psychiatrist due to cost. The AR also indicates that the appellant uses a sacroiliac belt and a pillow for driving but does not have an assistance animal.

A finding that a severe impairment directly and significantly restricts a person's ability to manage her DLA either continuously or periodically for an extended period is a precondition to a person requiring "help" as defined by section 2(3)(b) of the EAPWDA. For the reasons provided above, the necessary precondition has not been satisfied in this case.

Accordingly, even though the panel finds that the AR and PR2 do indicate that some help is required by the appellant, the panel finds that the ministry reasonably concluded it could not be determined that the appellant requires help with DLA as defined by section 2(3)(b) of the EAPWDA.

Conclusion

Having reviewed and considered all of the evidence and the relevant legislation, the panel finds that the ministry's decision finding the appellant ineligible for PWD designation is a reasonable application of the legislation in the circumstances of the appellant. The panel therefore confirms the ministry's decision.

However, the panel also notes that the statement in the ministry's submission indicating that had the ministry had the appellant's new information at the time of the reconsideration decision, the ministry may have found that the appellant met the criteria for PWD designation. Given the ministry's position in this regard, and taking into account the new diagnosis of PTSD and mood disorders that the panel did not consider in this appeal, the panel expects that the ministry will review all of the information now provided and revisit the appellant's PWD designation based on all of the medical information and documentation.