

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of September 11, 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 application form consisting of the appellant's self-report form dated February 6, 2015 ("SR"), a physician's report ("PR") completed by the appellant's general practitioner (the "physician") on February 23, 2015; and an assessor's report ("AR") completed by an occupational therapist (the "OT") on February 23, 2015.
- The appellant's Request for Reconsideration ("RFR") form completed by the appellant's son and signed by the appellant on August 31, 2015. The RFR states that the appellant has had several cerebral vascular accidents (strokes) that have severely impaired her cognitive ability and everyday tasks such as paying bills, grocery shopping, and baking that were all easy to her before and are now a challenge.
- Medical evaluation notes from an occupational rehabilitation centre dated November 4, 2014.
- Consult report from the OT dated February 3, 2015 (the "OT1 Report") with attached Montreal Cognitive Assessment (MoCA) dated January 20, 2015
- PWD Decision Summary dated June 26, 2015
- Letter from the ministry to the appellant dated August 10, 2015 advising that her application for PWD designation was denied
- Letter from the appellant's neighbor dated August 20, 2015
- Letter from another occupational therapist (the "OT2") dated August 26, 2015 (the "OT2 Report")

### Diagnoses

- In the PR the physician (who has known the appellant for 20+ years and has seen her two to ten times in the past 12 months) diagnosed the appellant with cerebrovascular accident, date of onset June 2012.
- In the AR, the OT states that the appellant's physical or mental impairments that impact her ability to manage DLA are: moderate attention and concentration impairments and executive functioning impairments that impair her ability to manage finances.

### Physical Impairment

- In terms of physical functioning the physician reported in the PR that the appellant can walk 4+ blocks unaided, can climb 5+ steps unaided, can lift 5 to 15 pounds, and that her ability to remain seated was unknown.
- In the AR the OT reported that the appellant independently manages walking indoors, walking outdoors, climbing stairs, standing, lifting, and carrying and holding.

### Mental Impairment

- In the Health History portion of the PR the physician commented that the appellant has severe cognitive dysfunction. The PR indicates that the appellant has difficulties with communication due to cognitive issues being mild sensory processing/verbal difficulties.
- In the PR the physician indicated that the appellant suffers significant deficits in six of twelve

categories of cognitive and emotional function: executive, language, memory, emotional disturbance, motivation and attention. The physician comments that the appellant's overall cognitive deficits are interfering with her DLA.

- In the AR the OT indicates that the appellant's ability to communicate with speaking, reading and writing are satisfactory, noting some word finding issues when fatigued. Her hearing is good.
- For question 4 of section B, Mental or Physical Impairment the OT reports that the appellant has moderate impact to emotion, attention/concentration and memory, minimal impact to bodily functions (sleep disturbance), consciousness (orientation) and language. The OT reports that there is no impact to the appellant's impulse control, insight and judgment, motivation, motor activity, psychotic symptoms, other neuropsychological problems and other emotional or mental problems. The OT comments that the appellant has difficulty falling asleep and staying asleep, feels daytime fatigue, emotional lability (often becomes emotional), has difficulty with orientation (must cross-off days on calendar to keep track of days), memory/executive functioning (difficulty with divided attention and complex tasks, learning new skills and poor short-term memory) and language (minor word finding difficulties).

In the SR the appellant describes that she has difficulty with concentration, memory and organization.

The OT1 Report indicates that the appellant scored 11/30 on the MoCA with deficits in the areas of visuospatial/executive functioning, language, attention, abstraction and delayed recall. The OT notes that despite her low score the appellant seems to be functioning well at home with the support of her neighbors and friends.

The OT2 Report indicates that the appellant has had numerous cerebrovascular incidents which have left her with significant loss in relation to short term and long term memory, overall executive functioning skills and anxiety, with inability to manage DLA such as money management, bill payment and grocery shopping. The OT2 Report indicates that the appellant has frequent dizziness, poor concentration, poor short-term memory, poor word recall and ongoing difficulty with sleep with daily fatigue. The OT2 Report states that the appellant's disability has caused extreme impairment in her ability to be successful and function in day-to-day tasks.

### DLA

- In the PR the physician indicated that the appellant has not been prescribed medication or treatment that interferes with her ability to perform DLA.
- In the PR the physician reported that the appellant is continuously restricted with 4 of the 9 DLA tasks of meal preparation, daily shopping, management of finances and social functioning. With respect to social functioning the physician explains that the appellant has difficulties with comprehension, finances and social interaction.
- In the AR the OT indicated that the appellant independently manages all tasks related to personal care, basic housekeeping, medications and social functioning. With respect to shopping the OT indicates that the appellant is independent with going to and from stores, reading prices and labels and carrying purchases home but requires periodic assistance from others with making appropriate choices and paying for purchases, noting difficulty using cash to pay for items.
- For meals, the OT indicates that the appellant is independent with meal planning and safe storage of food but requires periodic assistance with food preparation and cooking, due to

[ ]

cognitive impairment and difficulty learning new recipes and relearning baking skills. The OT indicates that the appellant requires continuous assistance with paying rent and bills, that her daughter has power of attorney and manages her finances.

- With respect to transportation, the OT indicates that the appellant is independent with getting in and out of a vehicle, requires periodic assistance using public transit (unable to afford, not available and difficulty negotiating schedules) and continuous assistance using transit schedules.
- In the AR, the OT indicates that the appellant has good functioning with her immediate social network but marginal functioning with extended social networks. The OT also comments that she questions how the appellant would negotiate a social interaction where the other party did not have her best interests in mind.

In the SR the appellant stated that she forgets how to bake and must look up recipes but that she did not need to do that before.

The OT1 Report indicates that the appellant is independent with her basic personal care needs but requires assistance with DLA of “*managing finances, applying for PWD, complex cooking, etc*”. The OT indicates that the appellant reports being unsuccessful with several attempts to return to work which is further evidence of executive functioning impairments. The OT also indicates that she has significant concerns about the appellant’s ability to safely drive a motor vehicle and the appellant is already self-limiting her vehicle use to day-time hours and limiting her distractions while driving.

The OT2 Report states that the appellant continues to live alone and that she has two neighbors who check on her on a daily basis to ensure she is safe and does not require any help. The daughter completes all bill payments, the appellant does not drive, she cannot complete basic grocery shopping as she becomes overwhelmed with the tasks; (never shops alone now), and cannot follow recipes (forgetting ingredients, re-adding ingredients, rigid in her cooking).

The neighbor indicates that she has lived next door to the appellant for five years and that before her stroke the appellant was very active but now is no longer able to do most activities. The neighbor states that the appellant has trouble remembering how to do things, get confused very easily, and gets very upset when she cannot remember what things are called. The neighbor states that the appellant has come over to borrow something then can’t remember what she wanted to borrow. The neighbor states that the appellant used to know to wait until it was cooler to cut her lawn but now she will go out and mow the lawn in the hottest part of the day so the neighbor will go over and tell her to stop. The appellant has told the neighbor that she has put pots on the stove to cook something and has gone off to do something else and forgotten that it is on the stove and burnt the pot to the point she has to throw the pot away. The neighbor worries about the appellant burning the place down. The neighbor states that the appellant has worked all her life paying taxes but is now sick and needs financial help.

### Help

- In the PR the physician reports that the appellant does not have any prosthesis or aids for her impairment. The physician indicates that the appellant is helped by family with DLA and requires structured routine and community care aides.
- In the AR the OT indicates that the appellant receives help from family and friends, noting that the appellant’s son, daughter and neighbors provide assistance for grocery shopping,

transportation, finances and daily check-ins. The appellant does not use assistive devices or have an assistance animal.

In the SR the appellant states that her kids help with financing, paying bills, reminding her of appointments and taking her to doctors appointments.

The OT1 Report indicates that the appellant would benefit from speech and language therapy to address her memory and language deficits.

### **Additional information provided**

In her Notice of Appeal the appellant states that the ministry's reconsideration decision was unreasonable.

Prior to the hearing the appellant's advocate provided a written submission setting out the appellant's position with respect to her PWD application and reasons why the ministry's reconsideration decision was not reasonable.

At the hearing the appellant's advocate provided oral evidence, which included a summary of the information regarding the appellant's impairment, DLA and help needed as well as oral argument.

The appellant's son provided oral evidence that the appellant lives on her own but needs people to check on her on a daily basis, that she needs help with finances and shopping. The appellant's son described that his mother is no longer driving and that she gets very frustrated and emotional easily, crying several times a day. He stated that when his mother cooks she has difficulty learning new recipes and will get very frustrated, start crying and break down. He stated that his mother is capable of personal care and basic housework and doing tasks with supervision or assistance of others, but is not capable of doing tasks as she did before. For example, he stated that the appellant has left water running and has left pots on the stove. The appellant's son stated that he and his sister look after all their mother's finances. He also stated that his mother can shop and some days are fine, but on other days she will forget the list, not know what to put on the list, or fill her shopping cart with unnecessary items so they try to get someone to go shopping with her.

### **Admissibility of New Information**

The ministry did not object to the oral evidence of the appellant's son or her advocate or the appellant's written submission. The panel has admitted the appellant's advocate and son's oral testimony, as it is evidence 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*. In particular, the new information corroborates the information at reconsideration respecting the appellant's impairment, her ability to perform DLA, and help needed. The written submission was argument only and did not contain new information.

## 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, and that in the opinion of a prescribed professional the appellant's impairments do not directly and significantly restrict her from performing DLA either continuously or 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.

\*\*\*\*\*

### **Panel Decision - Severe Physical Impairment**

The ministry's position, as set out in its reconsideration decision, is that the information provided is not evidence of a severe physical impairment.

The appellant's advocate confirmed that the appellant is not taking the position that she has a severe physical impairment.

As the appellant, through her advocate, confirmed that she is not disputing this part of the reconsideration decision, the panel finds that the ministry reasonably determined that the information provided does not demonstrate that the appellant has a severe physical impairment.

### **Panel Decision - Severe Mental Impairment**

The ministry's position is that the information provided does not establish that the appellant has a severe mental impairment. The ministry notes that in the PR, the physician indicates that the appellant has significant deficits in the areas of executive, language, memory, emotional disturbance, motivation and attention. The ministry notes that the AR indicates that the appellant's deficits impact the appellant's cognitive and emotional functioning as follows: 4 moderate impacts in the areas of emotions, attention/concentration, executive and memory; 3 minimal impacts in the areas of bodily function, consciousness and language and no impacts to the remaining areas. The ministry notes the information that the appellant sleeps approximately 6 hours per night, feels fatigued during the day, is emotionally labile and has difficulty with orientation, memory/executive functioning and language.

The ministry also notes that the appellant's level of ability with hearing is good and speaking, reading

and writing is satisfactory with some word finding issues when fatigued. The ministry notes that while the physician indicates that the appellant is restricted in social functioning with difficulties with comprehension, finances and social interaction the OT indicates that the appellant does not require support/supervision with any aspects of social functioning and has good functioning with her immediate social network and marginal functioning with her extended social network.

The ministry also notes that the OT has concerns about the appellant's ability to negotiate a social interaction where the other party did not have her best interests in mind. The ministry's position is that the information provided by the physician and the OT speaks to a moderate impairment rather than a severe mental impairment.

The appellant's position is that the information provided by the physician, OT1 and OT2 establish that the appellant has a severe mental impairment and that the ministry's reasons for denying the appellant's PWD application are inadequate and unreasonable.

The appellant argues that the reconsideration decision is contrary to *Hudson v British Columbia* 2009 BCSC 1461 ("*Hudson*") as the ministry gave no criteria or factors to distinguish between a moderate impairment as opposed to a severe one; and that this lack of reasoning makes it difficult for the appellant to understand how the ministry reached its decision, raising the question of whether the standard of "justification, transparency and intelligibility" from *Dunsmuir v New Brunswick* 2008 SCC 9 is met.

The appellant argues that the EAA Tribunal has repeatedly stated that "*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*" in order to assess the impairment's severity. The appellant argues that the reconsideration decision only relies upon the functional skill limitations and did not consider the degree to which the ability to perform DLA is restricted. The appellant's position is that by disregarding a factor that is mandatory to consider the reconsideration decision amounts to an unreasonable interpretation of "*impairment*" for the purposes of EAPWDR section 2(2).

The advocate also argued that the case of *Garbutt v. British Columbia (Social Development)* ("*Garbutt*"), further supports the appellant's position that only two DLA must be significantly impacted to demonstrate that the impairment is severe.

The appellant argues that the information establishes that the appellant's ability to perform instrumental activities of DLA such as managing her finances, applying for PWD, complex cooking, retaining employment, driving a motor vehicle, making bill payments, basic grocery shopping, cooking which involves any slight change from old deeply-ingrained recipes and basic household duties is so restricted that she either always requires assistance or is unable to do even with assistance.

The appellant's position is that the PR confirms that the appellant has a history of severe cognitive dysfunction and significant deficits with executive, language, memory, emotional disturbance, motivation and attention or sustained concentration. The advocate argues that where there is any discrepancy between the physician and either OT1 or OT2, the physician's evidence should be given greater weight.



[ ]

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. Likewise the use of the word “severe” in and of itself does not establish a severe impairment.

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.

In the PR, the physician states that the appellant’s cognitive dysfunction is severe and that she has significant deficits with cognitive and emotional function in the areas of executive, language, memory, emotional disturbance, motivation and attention, commenting that her overall cognitive deficits are interfering with her DLA. However, in the AR the OT1 indicates that the appellant has moderate impact to emotion, attention/concentration, memory; minimal impact to bodily functions, consciousness and language and no impact to the remaining areas of impulse control, insight and judgment, motivation, motor activity, psychotic symptoms, other neuropsychological problems and other emotional or mental problems. While the physician indicates that the appellant’s impairment is severe, the panel notes only 6 of 12 areas of cognitive and emotional function are impacted and the OT1, in the AR does not indicate there is major impact to any areas of cognitive and emotional functioning. In addition, although the physician indicates language and motivation/attention are impacted, the AR indicates that the impact to language is minimal; noting minor word finding difficulties, and that there is no impact to motivation.

The written submission provided by the advocate states that the information establishes that the appellant’s ability to perform instrumental activities of DLA such as managing her finances, applying for PWD, complex cooking, retaining employment, driving a motor vehicle, making bill payments, basic grocery shopping, cooking which involves any slight change from old deeply-ingrained recipes and basic household duties is so restricted that she either always requires assistance or is unable to do even with assistance. However, the PR and AR both indicate that the appellant is not restricted with personal self-care, basic housework, or management of medications.

The PR indicates that the appellant’s restriction with meal preparation is continuous, yet the AR indicates that she is independent with meal planning and safe storage of food, requiring periodic assistance from another person with food preparation and cooking. Although the advocate argues that where there is a discrepancy the physician’s evidence should be preferred, the panel notes that the oral evidence provided by the appellant’s son is more consistent with the information in the AR as he stated that the appellant is able to cook for herself as she can prepare meals that she has made for years, whereas she has difficulty learning new recipes.

The panel notes that the reconsideration decision reviewed the information from the PR and AR with respect to social functioning, noting that the physician indicated difficulties with comprehension, finances and social interaction whereas the AR indicates the appellant does not require support/supervisions with any aspects of social functioning. The reconsideration decision also indicates that the ministry reviewed and considered the OT1’s comments where she questions the appellant’s ability to negotiate a social interaction where the other party did not have the appellant’s

best interests in mind.

Although the appellant argues that the ministry only considered the functional skill limitations and did not consider the degree to which the appellant's ability to perform DLA is restricted, the panel finds that the ministry did in fact consider both factors and determined that the information provided by the appellant's prescribed professionals did not support a finding of a severe mental impairment. In addition, the panel notes that in the OT1 Report the OT notes that despite the appellant's low score on the MoCA, she "*seems to be functioning quite well at home with the support of her neighbors and children*".

While the appellant raises the question of whether the standard of "justification, transparency and intelligibility" was met, the panel agrees that in judicial review, reasonableness is concerned with the existence of justification, transparency and intelligibility within the decision making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes, which are defensible in respect to the facts and the law. In *Garbutt*, the Court found that the test is whether the reasons allow the reader to understand why the Tribunal made its decision, and permit the Court to determine whether the conclusion is within the range of acceptable outcomes.

Although the appellant argues that the ministry's reconsideration was not clear and the reasoning not transparent, the panel finds, for the above noted reasons; that the ministry's reconsideration decision does allow the reader to understand why the decision was made. Furthermore, in *Garbutt*, the court found that EAPWDA provides that it is the minister who must be satisfied as to the severity of the impairment, not the medical professionals or prescribed professionals. Accordingly, the panel finds that the ministry was reasonable in determining that the information provided is not sufficient to demonstrate that the appellant has a severe mental impairment. The panel also notes that there is not a legislative requirement that DLA be considered when looking at the severity of an impairment.

The panel also notes that although the appellant's evidence and the information in the AR, OT1 Report and OT2 Report indicates that the appellant's impairments interfere with her ability to work, employability is not a criterion for designation as PWD.

### **Panel Decision - Significant Restrictions to DLA**

The ministry's position is that it relies on the medical opinion and expertise of the appellant's physician and occupational therapists and finds that there is not enough evidence to establish that the appellant's impairments directly and significantly restrict her DLA either continuously or periodically for extended periods. The reconsideration decision notes that in the PR, the physician indicates that the appellant's ability to manage meal preparation, daily shopping and management of finances is continuously restricted and that the appellant is helped by family, structured routine and community care aids, but otherwise does not have any restrictions with personal self-care, management of medications, basic housework, mobility inside the home, mobility outside the home and use of transportation.

The reconsideration decision reviews the AR noting that the appellant requires continuous assistance with banking; budgeting; paying rent and bills; using transit schedules and arranging transportation; periodic assistance with making appropriate choices when shopping; paying for purchases, food preparation, cooking and using public transit but that the appellant is independent with other DLA of

dressing, grooming, bathing, toileting, feeding self, regulating diet, transfers in and out of bed, transfers on and off of a chair, laundry, basic housekeeping, going to and from stores, reading prices and labels, carrying purchases home, meal planning, safely storing food; all aspects of medications, and getting in and out of a vehicle.

The reconsideration decision acknowledges that the appellant has certain limitations resulting from an executive functioning impairment that impact her ability to manage DLA, particularly managing finances. However, the ministry's position is that the frequency and duration of these periods are not described in order to determine if they represent a significant restriction to the appellant's overall level of functioning. The ministry finds that the assessments provided by the PR and the occupational therapists are indicative of a moderate level of restriction and do not establish that a severe impairment significantly restricts DLA continuously or periodically for extended periods.

The appellant's position is that the reconsideration decision is inadequate and employs contradictory, inapplicable reasoning. The advocate argues that the ministry just reviewed the facts and asserts a conclusion, and does not provide criteria or factors to communicate the distinction between a moderate as opposed to a significant level of restriction which is contrary to *Hudson* so the reasons provided are insufficient for the appellant to understand the reconsideration decision.

The appellant's position is that the physician indicates that the appellant's executive functioning impairment restrictions are continuous yet the ministry concludes that the "*frequency and duration of these periods are not described in order to determine if they represent a significant restriction to [her] overall level of functioning*". The appellant argues that the implicit finding that the appellant's restrictions are of a periodic nature is completely unfounded and contrary to what the physician entered on the PR.

The appellant argues that based on *Hudson* and *Garbutt* there is no statutory requirement for more than 2 DLA to be significantly restricted and that as the PR indicates that the appellant has continuous restrictions with the DLA of meal preparation, daily shopping, management of finances and social functioning, the appellant satisfies the legislative criteria.

The legislation – s. 2(2)(b)(i) of the EAPWDA – requires that the minister be satisfied 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 appellant's circumstances, the PR and AR both indicate that the appellant is independent with all tasks of personal care, management of medications, basic housework, and mobility inside and outside the home. With respect to basic household duties, the advocate argues that the appellant

either always requires assistance or is unable to do even with assistance but both the PR and the AR indicate that the appellant is not restricted with basic housework.

With respect to meal preparation, the PR indicates that the appellant's DLA of meal preparation is continuously restricted but the AR indicates that the appellant is independent with meal planning and safe storage of food and requires periodic assistance from another person with food preparation and cooking. The OT explains that the appellant has difficulty learning new recipes and relearning baking skills. The appellant's son indicates that some days the appellant is fine but some days, particularly when trying new recipes, she gets frustrated and has a breakdown. Although the advocate argues that the information establishes that the appellant's restriction is continuous as evidenced by the PR, the panel finds that the information between the PR and the AR is inconsistent and that the information in the SR and from the appellant's son establishes that the appellant's restriction with cooking and food preparation is not continuous as she is able to cook on her own on a regular basis. The AR indicates that the restriction is periodic but does not provide any further information to explain the frequency or duration of assistance needed. The appellant's son said that some days are fine and on other days she requires assistance and the neighbor indicates that the appellant has forgotten pots on the stove and gets frustrated when she cannot follow a recipe in a cookbook but there is no other information indicating the frequency or duration of assistance provided with meal preparation.

With respect to daily shopping the PR indicates that the DLA is continuously restricted whereas the AR indicates that the appellant is independent with going to and from stores, reading prices and labels, and carrying purchases home and requires periodic assistance from another person with making appropriate choices and paying for purchases. The information provided between the PR and AR is inconsistent and the OT has not provided any further information to indicate the frequency or duration of assistance provided.

With respect to management of finances both the PR and the AR indicate that the appellant has a continuous restriction and all the information establishes that the appellant requires assistance with this DLA. With respect to social functioning the PR indicates that the appellant's restriction is continuous but in the AR the OT indicates that the appellant is independent with all aspects of social functioning. The OT describes that the appellant has good functioning with respect to her immediate social network and marginal functioning with respect to her extended social networks. While the OT comments that she questions how the appellant would negotiate a social interaction where the other party did not have her best interest in mind but in the OT1 Report states that despite the appellant's low score on the MoCA, she "*seems to be functioning quite well at home with the support of her neighbors and children*". The OT does not provide any further information on the frequency or duration of support provided so the panel finds that the ministry's determination that the information provided does raise questions of periodic assistance that is not addressed by either the physician or either of the OT's.

While the appellant argues that based on the *Hudson and Garbutt* decision, only two DLA must be significantly restricted to meet the legislated criteria, the panel finds that while restrictions are noted for some tasks of 5 DLA, the information does not sufficiently indicate that the restrictions are either continuous or periodic for extended periods given the inconsistencies in the information provided as noted above. Neither is 2 DLA a "magic number" which automatically satisfies the legislative criteria. The evidence must be considered as a whole and in context. Given the significant degree of independence exhibited by the appellant, including the fact that she lives alone and is independent

with all aspects of personal care, basic housework, and management of medications, and the limited evidence with respect to the frequency or duration of the periodic restrictions noted by the OT, the panel finds, on balance, that the ministry reasonably determined that the evidence is insufficient to show that the appellant's ability to perform his DLA is significantly restricted either continuously or periodically for extended periods.

**Panel Decision - Help with DLA**

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

The appellant's position is that the ministry avoided an analysis of this criterion by concluding that it cannot be fulfilled if the prior criterion (i.e. whether the appellant's ability to do DLA is significantly restricted) is not fulfilled. The appellant's position is that the ministry's premise in that regard was not reasonable so there is no reasoning provided to support their determination that the appellant does not require help. The appellant's position is that the information provides ample evidence of the assistance the appellant requires and is receiving.

The physician reports that the appellant does not require any prosthesis or aids for her impairment but that the appellant is helped by family with DLA and requires structured routine and community care aides. In the AR, the OT indicates that the appellant receives help from family and friends, which is consistent with the appellant's evidence, as provided through her advocate, and the evidence of her son and neighbor. The AR indicates that the appellant does not require the use of any assistive devices or an assistive animal.

The appellant's evidence, as provided in the SR, from her advocate, son and neighbor, confirm that the appellant requires assistance with finances, some shopping and some cooking. The OT1 Report also indicates that the appellant would benefit from speech and language therapy to address her memory and language deficits. However, there is little narrative to provide detail about the frequency or duration of the assistance provided and the information provided establishes that the appellant is independent with many DLA. There is simply insufficient evidence to show that he appellant relies on "the significant help or supervision of another person".

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.

As the panel finds that the ministry reasonably determined that the appellant does not have a severe impairment that directly and significantly restricts the appellant's ability to manage her DLA either continuously or periodically for an extended period of time, the necessary precondition has not been satisfied in this case.

Accordingly, 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**

The panel acknowledges that the appellant's medical condition affects her ability to function. However, 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.