PART C – Decision under Appeal

The Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated 22 September 2015 determined that the appellant did not meet 3 of the 5 statutory requirements of section 2 of the Employment and Assistance for Persons with Disabilities Act (EAPWDA) for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement and that her impairment was likely to continue for at least 2 years. However, the ministry was not satisfied that

- the appellant had a severe mental or physical impairment and
- that the appellant's mental or physical impairment, in the opinion of a prescribed professional, directly and significantly restricted daily living activities (DLA) either continuously or periodically for extended periods and
- that as a result of those restrictions, in the opinion of a prescribed professional, the appellant required help to perform DLA.

PART D – Relevant Legislation

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

PART E – Summary of Facts

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

- PWD Application – , Section 1, 3 page Applicant Information (Self Report – SR) completed and signed by the appellant before a witness on 27 April 2015. She wrote that she suffers from the following ailments: chronic fatigue syndrome, fibromyalgia that cause muscle weakness, disturbed sleep, almost constant headaches, exhaustion and worsened stress.
  - Anxiety and panic disorder causing lowered tolerance for stress, episodes of rapid heartbeat and shortness of breath, lightheadedness, finding it difficult and draining to be around people and when stressed, she cannot function and panics.
  - Scoliosis (rotoscoliosis) with degenerative disc disease, osteoarthritis (OA) in sacroiliac causing hip, leg, back and neck pain, pain doing basic household tasks, periodic bouts of intense pain, cannot sit or stand for any length of time.
  - Complications from adult chickenpox causing hearing loss, inner ear damage, balance problems, dizziness, memory loss, language problems spoken and written and with numbers and filling forms.
- PWD Application, Section 2, 8 page Physician Report (PR) dated 1 May 2015, completed and signed by the appellant's physician, a general practitioner (GP), who reported the following;
  - Specific diagnoses: Chronic fatigue syndrome (onset March 2001); hearing impairment (onset 2009); fibromyalgia (onset March 2001); anxiety disorder (onset 1990); scoliosis (onset in childhood).
  - Health history: Significant physical and mental condition affecting her ability to complete certain tasks; chronic pain in multiple joints; pain and weakness in several muscle groups; impairs the appellant's ability for restful sleep, keep her house clean and work; ongoing fatigue due to poor sleep and illness; easily overwhelmed mentally; generalized anxiety and panic attacks; hearing loss causing an issue for verbal and written communication stemming from adult chickenpox infection in 2009.
  - The appellant was prescribed no medication that interfered with her ability to perform DLA.
  - The appellant does not require any prostheses or aids for her impairment.
  - The impairment was likely to continue for 2 years or more from that date and the GP explained that scoliosis is a severe and permanent condition in the appellant's case and no surgery recommended. Fibromyalgia, hearing and memory loss and anxiety are chronic conditions and will affect her life long.
  - In terms of functional skills, the GP indicated that the appellant could walk 4+ blocks unaided, she could climb 5 + steps unaided, she can lift up to 7 kg, she can remain seated for less than 1 hour and has difficulties with communication, cognitive being reported as the cause.
  - In terms of cognitive and emotional functions, the GP indicated significant deficits in the areas of language, memory and emotional disturbance but provided no further comment.
  - The GP did not complete the DLA section as she also completed the Assessor Report.
  - The GP did not provide any further comment.
  - The GP had known the appellant for 3 months but noted that she had replaced her former GP who retired and had seen the appellant once.
- PWD Application, Section 3, 11 page Assessor Report (AR) also dated 1 May 2015, completed and signed by the same GP reported the following:
  - The appellant lives with family, friends or caregiver.

- In terms of physical or mental impairments that impact DLA, the GP indicated fatigue, weakness, easily stressed and anxious; pain in several joints; limited sitting and standing; hearing loss, difficulty with spoken and written language, calculation; short term memory loss.
- The appellant's speaking, reading, writing abilities are satisfactory while hearing ability is poor.
- In terms of mobility and physical ability, the GP indicated that she is independent for walking indoors and outdoors and climbing stairs but needs periodic assistance from another person for standing, lifting, carrying and holding (comment: shopping cart for groceries).
- In terms of "Cognitive and Emotional Functioning" the GP reported:
  - major impact for bodily functions (circling "sleep disturbance"), consciousness and emotion;
  - moderate impact for attention/concentration, executive, memory, language and other neuropsychological problems;
  - minimal impact for motivation and motor activity (co-ordination underlined);
  - no impact for impulse control, insight and judgement, psychotic symptoms and other emotional or mental problems.
  - The GP commented that she is a light sleeper, not getting deep restorative sleep, needs to make lists for planning, easily distractible, motivation decreased with fatigue and has some issues with balance, spatial perception and coordination.
- In terms of DLA, the GP provided the following assessments (the GP's comments in brackets):
  - Personal care: independent in all aspects but takes significantly longer than typical for dressing and grooming (scoliosis and OA makes grooming difficult – lifting arms and dressing take longer; for transfers in/out of bed and on/off chair: increased pain with any movement in her hips);
  - Basic housekeeping: needs continuous assistance from another person or unable (limited due to pain – will often ignore these tasks);
  - Shopping: independent for reading prices & labels, making appropriate choices and paying for purchases but uses assistive devices for going to and from stores (grocery cart for transport of items at all times) and carrying purchases home (grocery cart);
  - Meals: independent for safe storage of food but takes significantly longer for meal planning, food preparation and cooking;
  - Pay rent and bills: takes significantly longer for all aspects;
  - Medications: independent for safe handling and storage and the other aspects do not apply as she is not filling prescriptions at that time (will organize her spouse's medications in cups for each day but at times will forget to administer them);
  - Transportation: independent for using public transit but takes significantly longer for getting in and out of a vehicle (due to hips pain) and using transit schedules and arranging transportation.
  - Social functioning: independent for appropriate social decisions, ability to develop and maintain relationships and appropriate interaction with others but needs periodic support/supervision for ability to deal appropriately with unexpected demands (the smallest unexpected situation leads to her feeling overwhelmed) and ability to

secure assistance from others (not much support available). Good functioning in terms of immediate social network but marginal functioning for extended social network.
  - In terms of support/supervision required which would help maintain her in the community, none was indicated.
  - No safety issue was reported.
  - Assistance provided by other people: her partner.
  - Assistance provided through the use of assistive devices: other – grocery cart for shopping and carrying items.
  - The appellant does not have an assistance animal.
  - No additional information was provided.
  - The assessor's sources of information were:
    - Office interview with appellant;
    - File/chart information: complete medical chart on EMR at medical office.
  - This was not the first contact with the appellant and the GP had known her for less than 3 months and had seen her once.
  - In terms of program or services offered by the GP's organization, she indicated that she was the appellant's new family physician, having taken over her file from her previous physician who retired. The GP has access to her complete medical record for reference.
- With the PWD application, the following documents were provided:
  - A 2-page letter from an otology / neurotology specialist dated 18 March 2010 indicated that the appellant reported intermittent tinnitus and at times felt off balance. Her hearing is in the mild impairment range to borderline normal bilaterally. Mild hearing loss.
  - A 1-page letter from the same specialist dated 8 October 2010 reported that the head MRI was normal and the appellant seemed to function better, no vertigo. The specialist recommends head and body position exercises – no drugs or surgical intervention.
  - An x-ray report dated 12 June 2012 indicated "Increased scoliosis" and that the appellant had a rotoscoliosis of the lumbar spine convex to the left measuring 22 degrees.
  - A 1-page letter by an osteopathic physician dated 24 July 2012 indicating that the appellant reported chronic low back pain and associated lumbar scoliosis, aggravated by vacuuming and cleaning. The physician mentioned that the appellant has a shorter left leg that contributes to her curvature and indicated that she has chronic back pain due to a scoliotic postural strain and muscle tension. She was encouraged to work on a back routine of exercises but she is not able to afford a fitness centre. The physician wrote: "She will work on home-based exercise and see how she manages. A repeat trial with a left 3/8" heel lift might be worthwhile for her leg length discrepancy, but she is not interested."
- With her Request for Reconsideration dated 23 August 2015, the appellant provided the following additional information:
  - She sleeps very poorly and must sleep during the day.
  - She is able to perform some activities but it takes her much longer and she experiences significant post-exertion fatigue.
  - Her DLA are impacted as follows:
    - food preparation, dressing and grooming take twice as long;
    - most of her laundry does not get done for weeks or months;
    - housework does not get done for 6 to 8 weeks;
    - takes 3 times longer to do cheques, fill in forms, understand a bus schedule and still

makes mistakes;
- does not remember basic cooking things and must write herself notes on how to do things;
- while she understands a shopping cart is not an assistive device and while she can lift up to 15 lbs, she is unable to carry heavy groceries home from the grocery store and uses a shopping cart.

- With her letter, she included a note from her GP dated 8 September 2015 stating: “I have reviewed the additional writing provided by my patient specifically addressing the three criteria on which she was denied PWD designation. I feel this is a fair assessment of her conditions and limitations.”

The appellant provided written submissions dated 27 October 2015 exposing her arguments as to the unreasonableness of the ministry’s reconsideration decision, with no additional evidence.

PART F – Reasons for Panel Decision

The issue under appeal is whether the ministry's determination that the appellant has not met all of the eligibility criteria of section 2 of the EAPWDA for designation as a PWD was either a reasonable application of the legislation or reasonably supported by the evidence. The ministry was not satisfied that

- the appellant had a severe mental or physical impairment and
- that the appellant's mental or physical impairment, in the opinion of a prescribed professional, directly and significantly restricted DLA either continuously or periodically for extended periods and
- that as a result of those restrictions, in the opinion of a prescribed professional, the appellant required help to perform DLA

The ministry determined that the age requirement and that her impairment was likely to continue for at least 2 years had been met.

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

2 (1) In this section:
"assistive device" means a device designed to enable a person to perform a daily living activity that, because of a severe mental or physical impairment, the person is unable to perform;
"daily living activity" has the prescribed meaning;
"health professional" repealed
"prescribed professional" has the prescribed meaning;
(2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act if the minister is satisfied that the person has a severe mental or physical impairment that
 (a) in the opinion of a medical practitioner is likely to continue for at least 2 years, and
 (b) in the opinion of a prescribed professional
  (i) directly and significantly restricts the person's ability to perform daily living activities either
   (A) continuously, or
   (B) periodically for extended periods, and
  (ii) as a result of those restrictions, the person requires help to perform those activities.
(3) For the purposes of subsection (2),
 (a) a person who has a severe mental impairment includes a person with a mental disorder, and
 (b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires
  (i) an assistive device,
  (ii) the significant help or supervision of another person, or
  (iii) the services of an assistance animal.
(4) The minister may rescind a designation under subsection (2).

Section 2 of the EAPWDR provides further clarification:
2 (1)For the purposes of the Act and this regulation, **"daily living activities"**,
 (a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following activities:
  (i) prepare own meals;

(ii) manage personal finances;
(iii) shop for personal needs;
(iv) use public or personal transportation facilities;
(v) perform housework to maintain the person's place of residence in acceptable sanitary condition;
(vi) move about indoors and outdoors;
(vii) perform personal hygiene and self care;
(viii) manage personal medication, and

(b) in relation to a person who has a severe mental impairment, includes the following activities:
(i) make decisions about personal activities, care or finances;
(ii) relate to, communicate or interact with others effectively.

(2) For the purposes of the Act, **"prescribed professional"** means a person who is

(a) authorized under an enactment to practise the profession of
(i) medical practitioner,
(ii) registered psychologist,
(iii) registered nurse or registered psychiatric nurse,
(iv) occupational therapist,
(v) physical therapist,
(vi) social worker,
(vii) chiropractor, or
(viii) nurse practitioner, or

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

Severity of the impairment:

A diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a severe impairment. While the legislation does not define "impairment", the ministry's PR and AR forms define "impairment" as a "loss or abnormality of psychological, anatomical or physiological structure or functioning causing a restriction in the ability to function independently, effectively, appropriately or for a reasonable duration." While this is not a legislative definition, and is therefore not binding on the panel, in the panel's opinion, it reflects the legislative intent and provides an appropriate analytical framework for assessing the degree of impairment *resulting from a medical condition*.

The panel notes that the legislation clearly provides that the determination of severity of impairment is at the discretion of the minister, taking into account all of the evidence including that of the appellant. However, the legislation is also clear that the fundamental basis for the analysis is the *evidence from a prescribed professional* respecting the nature of the impairment and its impact on daily functioning.

Severe physical impairment:

The appellant argued that the overall cumulative effect of having multiple serious health issues to contend with everyday does amount to severe physical impairment. She also argued that she is sleep

deprived and has to sleep during the day to overcome her fatigue and that makes it much longer to perform her DLA and she experiences post-exertion fatigue. The pain, exhaustion and cognitive deficits affect her ability to perform certain tasks altogether and prolong the duration of completion of other tasks and do confirm severe physical impairment. Finally she argued that the ministry gave unfair weight to details that were part of the PWD application as opposed to the evidence she presented at reconsideration.

The ministry argued that while the appellant experienced limitations due to back pain, the assessment provided by her GP spoke to a moderate rather than a severe physical impairment. The ministry also argued that a shopping cart should not be considered as an assistive device and that the appellant did not require any prostheses or aids for her impairment.

Panel decision:

While the panel acknowledges that the cumulative medical issues that the appellant faces may be challenging, the panel must still look at the reasonableness of the ministry's determination, based on all the evidence. In terms of physical impairment, the panel notes that the GP indicated in the PR that the appellant did not need any prostheses or aids for her impairment and that her description of the appellant's functional skills (walks 4+ blocks and climb 5+ stairs unaided, can lift up to 7 kg) does not suggest the ministry was unreasonable in determining it spoke more of a moderate than a severe impairment. In the AR, the GP indicated that the appellant was independent for walking indoors and outdoors as well as climbing stairs, which is consistent with her opinion in the PR. She mentioned that the appellant needed periodic assistance from another person for standing, lifting, carrying and holding but did not provide any explanation as to what assistance was needed from another person other than the appellant using a shopping cart to carry groceries back home.

The additional evidence provided by the appellant at reconsideration and endorsed by the GP did not provide more information as to those specific abilities that were identified in the PR and the AR. The panel's analysis of the impact on DLA further in this decision will provide a more detailed analysis on the impact of the appellant's impairments on her DLA. Given the appellant's particular abilities as reported by the GP, the panel finds that the ministry, while acknowledging that she experiences limitations to her physical functioning, was reasonable in determining that the assessment of the GP speaks to a moderate impairment and that the evidence provided did not establish a *severe* physical impairment.

Severe mental impairment:

The appellant reiterated the arguments used for her physical impairment since it is the cumulative effect of her multiple serious health issues that cause also her mental impairment. She also argued that her cognitive deficits were the result of chronic fatigue syndrome, fibromyalgia, complications from adult chickenpox and anxiety/panic disorder.

The ministry argued that there was not enough information provided by the appellant's physician to support a severe mental impairment. While there are difficulties with social functioning, the GP did not indicate the degree and duration of support/supervision required and, further, the GP did not indicate that the appellant required support or supervision to maintain her in the community.

Panel decision:

At the outset, the panel notes that the only mental impairment identified in the PR is “anxiety disorders”, the other diagnoses being rather linked to the appellant’s physical abilities. The panel also notes that there are inconsistencies between the PR and the AR: For instance, in the PR, the GP identified 3 areas where the appellant experiences “significant deficits with cognitive and emotional functions”, language, memory and emotional disturbance. However in the AR, the same GP noted a major impact on only 1 of those 3 areas, emotion while she reported a moderate impact for language and memory. In the PR she did not identify consciousness as being significantly impacted but in the AR, she identified it as having a major impact. In the PR, the GP did not provide any comment as to those deficits.

In terms of ability to communicate, the GP reported satisfactory speaking, reading and writing and poor hearing that she explained was caused by chickenpox as an adult. On the next page of the AR, the GP then identified “language” as one area of moderate impact with no further explanation. The panel notes that the appellant’s written arguments at reconsideration and for the tribunal were well presented, very articulated and goal oriented, consistent with good writing skills. The appellant is independent for social functioning other than her ability to deal with unexpected demands and to secure assistance from others but the GP did not indicate what periodic support/supervision was required – she only mentioned that the smallest unexpected situation leads to her feeling overwhelmed and that the appellant mentioned there was not much support available.

Given the evidence presented and taking into account the inconsistencies, the panel finds the ministry reasonably determined that there was not enough evidence to demonstrate that the appellant has a severe mental impairment.

Daily living activities:

The appellant argued that she had provided more information about the impact of her impairments on her DLA at reconsideration. For instance food preparation, dressing and grooming take twice as long as typical, the laundry does not get done for weeks or months, housework does not get done for 6 – 8 weeks, it takes her 3 times longer to write cheques, fill forms, understand a bus schedule, she must write herself notes on how to do things as she has memory loss and is unable to carry groceries home hence the need for a shopping cart. She argued that her physician in her letter of 8 September 2015 confirms her rendition of the impact of her impairment on her DLA.

The ministry argued that the evidence provided by the appellant and her GP showed that her DLA that are impacted are indicative of a moderate level of restriction and that it does not establish that a severe impairment significantly restricts DLA continuously or periodically for extended periods.

Panel decision:

The issue is whether the appellant’s impairments, in the opinion of a prescribed professional, directly and significantly restrict her ability to perform DLA either continuously or periodically for extended periods. The panel reviewed the DLA as assessed by the appellant’s GP as well as the appellant’s

submissions at reconsideration that were endorsed by her GP and finds as follows:

- Personal care: the appellant is independent but takes twice as long for dressing and grooming. This is not a *significant* restriction.
- Basic housekeeping: the GP indicated the appellant required “continuous assistance from another person or unable” but the evidence is that she will often ignore the task and delay it for weeks or months for laundry or for 6 – 8 weeks for housework. There is no indication what aspects could be delayed for weeks – doing the dishes? Light or heavy work? What assistance would be required? Is this a lack of motivation or a direct result of the impairment? There is not enough evidence to support a *significant* restriction.
- Shopping: the appellant is independent except for going to and from stores and carrying purchases home where she needs an assistive device but the explanation is that the appellant needs a “grocery cart”. The panel notes a grocery or shopping cart is not an assistive device under s. 2 (1) of the EAPWDA. The evidence does not support a *significant* restriction.
- Meals: the appellant is independent for the safe storage of food but takes significantly longer than typical for meal planning, food preparation and cooking. The panel accepts the appellant’s evidence that it takes her twice as much as normal but finds that this is not consistent with a *significant* restriction.
- Pay rent and bills: those activities take significantly longer than typical according to the GP who did not indicate how much more time it takes. The panel accepts the appellant’s evidence that it takes her three times more than normal but notes that there is no explanation as to specifically what is impacted in terms of banking, budgeting and paying rent and bills other than writing cheques. There is not enough evidence to support a *significant* restriction.
- Medication: the appellant does not have any prescribed medication and does not take medication. She is independent for safe handling and storage. She can actually organize her spouse’s daily medication but may forget to administer them. The panel concludes this is not a *significant* restriction.
- Transportation: the appellant is independent using transit but takes longer to get in and out a vehicle due to hip pain (no indication of what type of vehicle is involved) and to use transit schedule and arranging transportation (three times longer) but there is no indication as to how often she takes transit or has to arrange transportation – every day, once a month, twice a year? Thus, there is not enough evidence to support a *significant* restriction.
- Social functioning: the physician confirmed that the appellant has good functioning in terms of her immediate social network and that she has marginal functioning with her extended social network - sufficient to fulfill basic needs. This evidence does not demonstrate a *significant* restriction.

Given the evidence presented and taking into account the opinion of the appellant’s GP, the panel finds that the ministry reasonably determined there was not enough information from a prescribed professional to establish that the appellant’s *impairments directly and significantly restricted* DLA continuously or periodically for extended periods.

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

The appellant argued that because of her condition, she requires help with DLA but does not receive such help and many things are left undone or take much longer, often with errors. She indicated her spouse could not help given his severe health issues.

The ministry argued that since DLA are not significantly restricted, it cannot be determined that significant help is required from other persons.

Panel decision:

There is very little evidence that the appellant would require help to perform her DLA. Where the form asks the GP to describe the support/supervision required to keep her in the community if the appellant required help and “if help is required but there is none available, please describe what assistance would be necessary”, she did not provide any comment. Further, 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, that 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:

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