PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the "ministry") reconsideration decision of November 4, 2015, which found that the appellant did not meet four 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. However, the ministry was not satisfied that:

- In the opinion of a medical practitioner the appellant has an impairment that is likely to continue for at least two years;
- 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 ministry did not attend the hearing. Having confirmed that the ministry was notified, the panel proceeded with the hearing in accordance with section 86(b) of the Employment and Assistance Regulation.

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 dated August 9, 2015 along with a physician's report ("PR") completed by the appellant's general practitioner (the "physician") dated September 3, 2015 and assessor's report ("AR") also completed by the physician and dated September 3, 2015.
- An assessor's report form completed by the appellant's registered social worker (the "social worker") on September 10, 2015, including four typewritten pages of comments related to cognitive and emotional functioning. Collectively the completed form and attached typewritten pages are referred to hereinafter as the supplemental assessor's report, or ("SAR").
- A one-page letter from the social worker to the ministry dated October 8, 2015.
- An e-mail from the appellant to the social worker dated October 19, 2015.
- A four-page letter from the social worker to ministry dated October 21, 2015 consisting primarily of argument on behalf of the appellant.

Admissibility of Additional Information

Prior to the hearing, the appellant submitted to the Tribunal office the following documents under a covering letter written by the social worker dated November 24, 2015:

1. A letter from a neurosurgeon, dated November 3, 2015 reporting on the results of an examination of the appellant (the "neurosurgeon's report").
2. A form listing four medications prescribed for the appellant, dated November 9, 2015.
3. A form listing an additional mediation prescribed for the appellant, also dated November 9, 2015.
4. A CT scan report for an examination of the appellant's lumbar spine on June 22, 2015.
5. A letter from the physician, dated November 13, 2015 whereby the physician forwarded the SAR to the ministry, and requested immediate adjudication of the appellant's file based on "her significant psychosocial history and the severity of her current situation."
6. A letter from the social worker, dated November 24, 2015 wherein the social worker provided an update on the appellant's condition based on personal interviews with her over the preceding ten days.

These six documents primarily provide more detail regarding information that was in the appellant's reconsideration submissions. The panel finds that the documents are consistent with, and tend to corroborate, information that was before the ministry regarding the appellant's impairment. Accordingly, the panel has admitted the documents into evidence in accordance with section 22(4) of the *Employment and Assistance Act.*

At the hearing the appellant submitted a two-page letter from the social worker dated November 30, 2015. The panel accepted this letter as argument.

* * *

The panel reviewed the evidence as follows:

Diagnoses

In the PR the physician (who had known the appellant for three months and had seen her two to ten times) diagnosed the appellant with degenerative disc disease (no date of onset noted). She also diagnosed depression and anxiety, both exacerbated as of August, 2015.

Duration

In response to the question "Is the impairment likely to continue for two years or more from today?" in the PR, the physician marked the "no" box. She wrote "Unsure will see if good results [with] steroid injection would expect resolution in 2-3 months."

Physical Impairment

- With respect to physical functional skills, the physician reported in the PR that the appellant can walk 2-4 blocks unaided, climb 2-5 steps unaided, do no lifting, and remain seated 2-3 hours.
- In the AR the physician reported that the appellant independently manages walking indoors, and that she takes significantly longer than typical walking outdoors ("pain limits mobility"), climbing stairs, and standing ("only short periods due to pain"). She also reported that the appellant requires continuous assistance lifting/carrying/holding ("unable to lift…carry").
- In the SAR the social worker reported that the appellant takes significantly longer than typical walking indoors ("hands on furniture to give sense of safety from falls"), walking outdoors ("1 ½ blocks, stops along route, 3-4 times slower"), and climbing stairs ("5 steps maximum…"). He reported that the appellant avoids standing and that she feels compression in her back after 60 minutes. The social worker indicated that the appellant requires continuous assistance with lifting ("10 lbs maximum divided 5 lbs each hand"), and carrying/holding.
- In his letter of November 3, 2015 the neurologist reported that the appellant's back problems began in August 2014 without any precipitating event, they have progressively worsened, and currently she has radicular symptoms involving the left leg. He reported that the June 22, 2015 CT scan shows a possible left L5-S1 foraminal stenosis that requires further investigations by MRI. If the MRI does reveal significant foraminal stenosis, the appellant may be a candidate for an epidural steroid injection or surgical intervention.
- In the SAR the social worker described "severe, unrelenting low back/leg pain."
- In her self-report the appellant wrote that she has three degenerated discs causing constant extreme pain in the lower left side of her body. She has extreme shooting pains and is getting numbness on the left side causing temporary paralysis.

In her oral testimony the appellant stated that:

- She is in constant, severe pain. She does not want to be on pain killers for the rest of her life as she is determined to not get addicted to medications again. She stopped taking T-3s for pain as they cause her to have violent nightmares. The pain has recently resulted in periods of nausea.

- She managed to get an emergency MRI yesterday and she hopes to be able to make an appointment with the neurosurgeon next week.
- She was supposed to get an epidural steroid injection in July but "fell through the cracks" of the system. By following up through her social worker, she was offered an injection last week but declined because she was so close to getting the MRI and a consultation with the neurosurgeon.
- The epidurals would only provide a few weeks relief and most and she would be limited to only two injections a year. She would prefer immediate surgery.
- Her physician has recently advised her that she is now of the belief that surgical intervention is the only realistic treatment.
- Recently there have been three times where her daughter had to help her to get out of bed – the episodes of paralysis are getting longer and longer.
- The episodes of paralysis put her at risk of bowel and bladder incontinence. She has been advised by her physician that if she experiences incontinence it will represent a worsening in her condition, necessitating an emergency stay in hospital.
- She was present with the physician when she completed the PR, but didn't realize the physician was also filling out the AR. She thought the physician was in too much of a rush, though the physician has been a wonderful support.

Mental Impairment

- In the PR the physician reported that the appellant has no difficulties with communication. She indicated that the appellant has significant deficits with one of twelve categories of cognitive and emotional function (emotional disturbance). She commented "Recurrence depression, ongoing radicular pain, sciatica." Under Health History, the physician commented "depressed – can't eat, can't concentrate, anxiety." Under Additional Comments, the physician wrote "Recent medication change and significant family trauma has caused an exacerbation of her depression/anxiety. Meds are only partially controlling pain."
- In the AR the physician described the appellant's speaking and hearing as "good", but her reading and writing as "poor", commenting "depression, can't concentrate." The physician identified moderate impacts to seven of fourteen categories of cognitive and emotional function (bodily functions, consciousness, emotion, attention/concentration, executive, memory, and motivation). She reported minimal or no impacts in the remaining categories. The physician commented "Major depression affects ability to make decisions/concentrate. Pain causes anxiety to be active on a regular basis."
- In the SAR the social worker described the appellant's mental impairment as "severe anxiety and depression." He reported major impacts to 11 of 14 categories of cognitive and emotional functioning, and provided extensive comments on each impact in attached pages. He commented that the appellant is a very high suicide risk and has no specific "plan" for taking her own life. She has had two hospital stays in the past for mental health issues and spent two years in addictions recovery programs.
- In his letter of October 8, 2015 the social worker indicated that the depression and anxiety medications have not had the desired effects and that the appellant is more reclusive and isolating within her daughter's home. Suicidal thoughts continue and the appellant is being seen by a mental health counsellor.

In her oral testimony the appellant stated that:

- She is back on medications for depression and anxiety after not needing them for six years.
- She has strong thoughts of suicide and feels out of control of her life.
- Thoughts of her grandchild keep her going. She often "puts on a façade" at home because she doesn't want her grandchild to see her in a bad state.

DLA

In the PR the physician reported that:

- The appellant has been prescribed medications that interfere with her ability to perform DLA, saying that they can cause drowsiness. The anticipated duration of the medications remains to be determined pending an appointment with the neurosurgeon and an epidural steroid injection.
- The appellant is periodically restricted in the DLA of basic housework, daily shopping, mobility outside the home, use of transportation, management of finances, decision-making, and social functioning. The degree of description is "at this time very restricted as pain increases and depression [illegible]." The remaining DLA are unrestricted.
- "Periodic" means that the appellant has times when pain is severe enough to stop her from performing.
- Regarding the DLA of social functioning, the appellant is "very depressed, not able to concentrate and difficulty making decisions."

In the AR the physician reported that:

- The appellant independently manages all tasks related to the six DLA of personal self-care, meal preparation, managing personal finances (pay rent and bills), managing medications, use of transportation, and social functioning. Nonetheless, the physician noted that the appellant has very disrupted social functioning with both her immediate and extended social networks, commenting "has difficulty coping with mood changes has caused some discord at home."
- The appellant takes significantly longer than typical with basic housekeeping ("needs help – daughter"), and with tasks related to daily shopping (going to and from store, paying for purchases "financial issue", and carrying purchases home.

In the SAR the social worker reported that:

- The appellant independently manages all aspects of the DLA of daily shopping, as well as the following tasks related to identified DLA: personal self-care (grooming), basic housekeeping (laundry), meal preparation (meal planning and safe storage of food), managing personal finances (banking), managing medications (safe handling and storage).
- The appellant requires continuous help from others with budgeting (investigation personal bankruptcy) and paying rent and bills (cannot manage to pay mounting bills).
- With respect to the DLA of social functioning the appellant independently manages the tasks of developing/maintaining relationships and interacting appropriately with others. However, she

requires continuous support with the tasks of making appropriate social decisions, dealing appropriately with unexpected demands, and securing assistance from others. He reported that the appellant has marginal functioning with respect to her immediate social network, commenting that "[Appellant's] daughter provides [her] with respite from her constant suicidal thoughts and offers encouragement. Without this she would likely slip into deeper depression and higher suicidal risk. The social worker also stated that "[The appellant] indicated that she has lost her 'filters' for reading signs that she has taken over a conversation or has stopped listening to someone and preoccupied herself with her own thoughts. This has significant social ramifications. In earlier years she stated that she was more attune to others needs more than her own."

In response to questions from the panel during her oral testimony the appellant stated that:

- She had a long career as a chef and was used to working long hours and making continuous decisions. The long hours limited her ability to develop a social network.
- Her parents are a source of emotional support for her.
- She hasn't seen one of her sisters in many years, and used to support another sister financially for a long period of time.
- She has a gentleman friend in another community but doesn't get to see him much anymore because of difficulty travelling and sleeping.
- Her daughter's mother-in-law is a best friend, and her son-in-law is very supportive.
- She has no problem interacting in the community.
- Her problem with reading and writing is lack of motivation and focus.

Help

- In the PR the physician reported that the appellant does not require any prostheses or aids for impairment, and in the AR that the appellant does not routinely use any prostheses or aids. She indicated that assistance is provided by the appellant's family and commented "unable to live on her own."
- In the SAR the social worker indicated that the appellant uses relies on bars on the walls for toileting aids and bathing aids. He indicated that she would benefit from having a pole or bar beside her bed to aid in transfers, a cane to shift from sitting to standing, and a bath bench to reduce the risk of falls in the shower. He reported that the appellant receives assistance provided by friend, family, and health authority professionals.

In her oral testimony the appellant stated that:

- She has moved in with her daughter because financially she can't live on what she's receiving.
- Her daughter is a big help physically and emotionally.

Admissibility of Additional Oral Information

The oral statements of the appellant and her representative added additional detail that substantially tended to reiterate or corroborate information that had been before the ministry at reconsideration. The panel accepted these statements into evidence in accordance with section 22(4) of the *Employment and Assistance Act*.

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 section 2 of the EAPWDA in the circumstances of the appellant. In particular, was the ministry reasonable in determining that

- the evidence does not establish that, in the opinion of a medical practitioner, the appellant's impairment is likely to continue for at least 2 years;
- the evidence does not establish that the appellant has a severe physical or mental impairment;
- the appellant's DLA are not, 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 does not require the significant help or supervision of another person, an assistive device, or the services of an assistance animal?

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.

(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.

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Duration

The appellant's position is that she satisfies the duration requirement. She argued that she has periodically struggled with depression and anxiety throughout her life. She relied on her social worker's letter of October 21, 2015 to argue that the physician's reference to a resolution of her back problem in 2-3 months was an indication of how long it would take to recover post-surgery. She argued that there has not yet been a date set for surgery, and that there is no way of telling what the resolution will be in her case until the neurosurgeon gets to see the results of the MRI.

The ministry's position, as set out in its reconsideration decision, is that the physician has not indicated that the appellant's impairment is likely to continue for two years or more.

Panel Decision

The legislation – section 2(2)(a) of the EAPWDA – does not permit the ministry to designate an applicant as a PWD unless it is satisfied that, in the opinion of a medical practitioner, the applicant's impairment is likely to continue for at least 2 years.

In the appellant's situation her physician has stated that she would expect to see a resolution in 2-3 months. She expected this period of recovery after treatment with epidural steroid injections, which treatment has not yet been tried and may now be contraindicated. According to the appellant's evidence the physician now appears to believe that surgical treatment is the only option. The appellant acknowledges that the prognosis isn't likely to be known until the neurosurgeon reviews the MRI report. At present, there is no evidence before the panel that a medical practitioner has expressed the opinion that either the mental impairment (depression/anxiety) or the physical impairment (back/left leg pain and numbness) is likely to last for at least two years.

Based on the foregoing analysis, the panel finds that the ministry reasonably determined that this legislative criterion has not been satisfied.

Severe Physical Impairment

The appellant's position is that her degenerative disc disease, which she said results in continuous severe pain and numbness, constitutes a severe physical impairment. She referred to the physician's letter of November 13, 2015 wherein the physician endorsed the SAR by forwarding it to the ministry and remarked on "the severity of her current situation." She noted that the social worker had described her back and leg pain as severe and unrelenting. The appellant stated that her physical condition has turned her whole world upside down. She argued that she is inevitably destined for either epidural treatment or, more likely, surgical intervention and that this indicates the severity of her condition.

While acknowledging that the appellant experiences limitations to her physical functioning due to back pain and numbness in her leg, the ministry's position (as set out in its reconsideration decision) is that the assessments provided by the physician and social worker speak to a moderate rather than a severe physical impairment.

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, its expected duration, 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. The minister must consider all relevant evidence (including that of the appellant) though the fundamental basis for the analysis is the evidence from prescribed professionals – in this case, the physician and the social worker. In exercising its decision-making power the ministry cannot merely defer to the opinion of the professionals with respect to whether the statutory requirements are met as that approach would amount to an improper fettering of discretion. Accordingly, the use of the term "severe" by the social worker does not determine that the criterion of severity has been satisfied.

The evidence of both the physician and the social worker indicates that the appellant independently manages her mobility without assistive devices, though it takes her longer than typical to do so, and she may at times benefit from use of a cane. There is no evidence of her requiring assistance from another person for walking. She experiences limitations in stair climbing and needs assistance in lift/carrying items over ten pounds. Since the physician has not provided the requisite opinion of the duration of impairment, it is difficult to find that the impairment is "severe" as required by the legislation.

Accordingly, while acknowledging that the appellant does have a serious medical condition, 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 her depression and anxiety constitute a severe mental impairment. The social worker referred to her depression and anxiety as "severe" and indicated that it has caused numerous impacts and deficits in the appellant's cognitive and emotional functioning. The appellant acknowledged significant differences between the physician and the social worker in describing impacts to cognitive and emotional functioning. She appellant argued that more weight should be given to the SAR than to the physician's evidence where the two differ, saying that 1) the physician's focus is expected to be on the medical issues, 2) the physician may not always have time or orientation to consider psychosocial issues of a patient or address them within the standard office visit, and 3) the design of the form for the physician is not conducive to elaborate information gathering, and 4) a non-physician assessor is expected to have much more time to ask questions and gather more information relating to psychosocial, functional, emotional and cognitive issues.

The ministry's position is that the information provided does not establish a severe mental

impairment. The ministry noted inconsistencies between the evidence of the physician and the social worker.

Panel Decision

In terms of mental functional skills, the evidence of the physician, the social worker, and the appellant are consistent that her ability to communicate is good except that she lacks the motivation to read or write. The panel notes that the social worker described the appellant's depression as "severe" and noted a number of major impacts to cognitive and emotional functioning. As noted above in the discussion of severe physical impairment, a prescribed professional's use of the term "severe" does not determine that the legislative criterion is satisfied. The physician also noted significant deficits and impacts (though of a more moderate nature) in a number of areas of cognitive and emotional function, but since the physician has not provided the requisite opinion of the duration of impairment, it is difficult to find that the impairment is "severe" as required by the legislation.

Section 2(1)(b) of the EAPWDR prescribes two DLA that are specific to mental impairment – make decisions about personal activities, care or finances (*decision making*), and relate to, communicate or interact with others effectively (*social functioning*).

Both the physician and the appellant have indicated there is a degree of impairment with social functioning, with the physician noting extremely disrupted functioning with both immediate and extended social networks (though indicating the appellant independently manages all functions related to social functioning.) The social worker reported that the appellant is at least marginally functional with respect to her immediate social network. The appellant's oral evidence was that she has no problem interacting in the community. The appellant also indicated that she currently has a supportive relationship with her parents, her daughter, her son-in-law, and her daughter's mother-in-law. The preponderance of the evidence is that while the appellant may be tending to socially isolate more, she still maintains at least marginal social functioning.

The evidence indicates that though the physician referred to impaired decision-making, the appellant is not significantly restricted in that regard. The physician reported that she independently manages her medications, though the social worker stated she requires encouragement to fill her prescriptions. The panel notes the appellant's evidence that she was capable of making decisions with respect to whether to take T-3 pain killers and postponing the epidural injections until after seeing the neurosurgeon. The physician's evidence is that the appellant independently manages her own finances. The social worker noted she does her own banking but needs help from others with respect to budgeting/investigating bankruptcy and paying her mounting bills. Both the physician and the social worker confirm that the appellant independently manages the decision-making components of the DLA of daily shopping (making appropriate choices), and meal preparation (meal planning and safe storage of food.) On balance, the evidence doesn't indicate a significant restriction in the appellant's decision-making ability.

Considering the evidence that :

- the appellant has satisfactory communication skills,
- her decision making and social functioning are not significantly restricted, and
- the prognosis for her mental impairment has not been established for the requisite two year

period,

the panel concludes that while the appellant clearly does experience impacts with respect to her mental health, the ministry reasonably determined that the evidence does not demonstrate a severe mental impairment.

Significant Restrictions to DLA

The appellant's position is that her impairments cause significant restrictions to her ability to manage her DLA. She argued that her physician and social worker confirmed that she is restricted in a number of DLA.

The ministry's position is that there is not enough evidence to confirm that the appellant's impairments directly and significantly restrict her ability to perform DLA either continuously or periodically for extended periods.

Panel Decision

In the PR the physician indicated that the appellant's impairments directly and continuously restrict her ability to manage seven DLA independently, saying that they are "very restricted." The AR provides a more detailed breakdown of the DLA into discrete tasks which provide some evidence of the significance of the restrictions. In the AR the physician indicated restrictions to four of the ten prescribed DLA – basic housekeeping, daily shopping, social functioning, and decision-making. For the reasons discussed above under **Severe Mental Impairment**, the panel has concluded on the balance of probabilities that social functioning and decision-making are not significantly restricted. The physician has indicated that the restrictions to the DLA of daily shopping are related to finances and to carrying purchases home. In the SAR, the social worker indicated that the appellant independently manages all functions related to daily shopping.

Considering the evidence as a whole, in the context of the lack of evidence of duration of the impairments, the panel concludes that the ministry reasonably determined that the appellant's ability to manage her DLA independently is not significantly restricted either continuously or periodically for extended periods as required by the legislation.

Help with DLA

The appellant's position is that she requires help from friends, families and professionals for a number of DLA.

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

Panel Decision

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 panel finds the evidence falls short of satisfying that precondition.

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 currently affects her ability to function. However, having reviewed and considered all of the evidence and the relevant legislation and for the foregoing reasons, 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.