PART C – Decision under Appeal

The Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated 30 October 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:

- A PWD Application, divided in 3 sections: 1 Self Report (SR), 2 Physician Report (PR) and 3 Assessor Report (AR) as follows:
- Section 1 – a 3 page Applicant Information (SR) completed and signed by the appellant before her physician as a witness on 3 June 2015. In an attachment to the form, the appellant described her medical condition and how it impacted on her daily activities. In particular, she stated she had seizures once or twice a month and that her anxiety contributes to her seizures because of her concerns of having a seizure in public. She also indicated that when a seizure occurs, she is at risk of self-injury and that she is unable to complete DLA without the continuous assistance of a family member. She also mentioned the following:
    - *Personal care*: continuous assistance from family member – unable to dress, groom or shower without assistance;
    - *Meal preparation*: unable to complete – family member prepares and cooks all meals;
    - *Basic housework*: continuous assistance from family member for housework and laundry because physically unable to complete those tasks;
    - *Daily shopping*: needs assistance from family member for fear of having a seizure in public – cannot comprehend prices and labels – unable to carry purchases, needs assistance;
    - *Use of transportation*: needs assistance – family member drives her to medical appointments and grocery shopping – anxiety prevents her from using public transit;
    - *Management of finances*: unable to manage personal finances – a family member does it and pays all her bills for her.

- Section 2 – an 8 page PR also dated 3 June 2015 completed and signed by the appellant's physician, a general practitioner (GP) who reported the following:
    - Specific diagnoses: epilepsy (onset 1979), anxiety (onset 2014), osteoporosis (onset 2004) and arthritis (onset 2000).
    - Health history: last seizure 2013 but daily fear of the next one – constant anxiety, especially bad outside her home and with strangers – she tried to work but cannot cope interacting with the public – panic. Constant pain in her neck (arthritis) and daily headache. Both shoulders painful, worse when she attempts to be physically active.
    - 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 the diagnoses are considered permanent and constant.
    - 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 2 to 7 kg (5 to 15 lbs), she can remain seated for 1 to 2 hours and has no difficulties with communication.
    - In terms of cognitive and emotional functions, the GP indicated significant deficits for executive, emotional disturbance, motivation and attention or sustained concentration with the comment that anxiety / fears significantly interfere with daily cognitive function.
    - Additional comments: anxiety levels steadily increased over the last years – she feels emotionally handicapped if she has to go out in public. Her anxiety exceeds her ability to calmly rationalize a situation in public.
    - The GP had known the appellant for 24 years and in the 12 months before the PR, the GP

had seen the appellant 2 to 10 times.

- Section 3 – an 11 page AR completed by the same GP and also dated 3 June 2015 reported the following:
  - The appellant lives with 2 family members.
  - In terms of physical or mental impairments that impact DLA, the GP indicated uncontrolled anxiety and arthritic neck and shoulder pain to move or exert.
  - The appellant's speaking, reading, writing and hearing abilities are good.
  - In terms of mobility and physical ability, the GP indicated that the appellant was independent for walking indoors and outdoors, climbing stairs and standing but needed periodic assistance for lifting, carrying and holding with the comment "needs help carrying anything over 5 – 10 lbs" and that her ability to carry anything of weight was limited.
  - In terms of "Cognitive and Emotional Functioning" the GP reported a major impact on emotion, a moderate impact on bodily functions, attention/concentration and motivation, minimal impact on impulse control, insight & judgment, executive and memory and no impact on consciousness, motor activity, language, psychotic symptoms and other neuropsychological problems. In his comments the GP reiterated that anxiety was constant and that the appellant has daily cognitive challenges. He also mentioned sleep deprivation ++ for years as anxiety keeps her awake until about 3 am despite being very tired.
  - For DLA, the GP provided the following assessments (the GP's comments in brackets):
    - *Personal care*: independent;
    - *Basic housekeeping*: continuous assistance from another person or unable (family members must do it all);
    - *Shopping*: independent for reading prices & labels, making appropriate choices and paying for purchases but needs continuous assistance for going to and from stores (needs company to help keep her calm) and carrying purchases home (needs help if weight > 5-10 lbs);
    - *Meals*: independent;
    - *Pay rent and bills*: independent;
    - *Medications*: independent;
    - *Transportation*: independent for getting in and out of a vehicle and using transit schedules and arranging transportation but needs continuous assistance from another person or unable for using public transit (needs company to control phobias);
    - *Social functioning*: independent for appropriate social decision and able to secure assistance from others but needs periodic support/supervision for ability to develop & maintain relationships (very emotionally uncomfortable with strangers or men), interacting appropriately with others (stressed & avoids others) and ability to deal appropriately with unexpected demands (does not handle unexpected stress well). Good functioning for immediate social network but marginal functioning for extended social networks (avoids public).
  - In terms of support/supervision required which would help maintain the appellant in the community, the GP wrote that she needed family or friend to accompany and calm her.
  - No safety issue was reported.
  - For assistance provided by others, the GP indicated "Family" & "Friends" with the comment that she was dependent on both but had very small number of old friends.

- To the question "If help is required but there is none available, please describe what assistance would be necessary", the GP provided no comment.
- No assistive device or assistance animal used.
- Additional comments: the GP reiterated that the appellant's anxiety levels are getting worse with aging and increasing pain/disability caused by arthritic progression. The appellant's social/public phobia also continues to increase with age.
- The assessor's sources of information were:
  - Office interview with the appellant;
  - File/chart information – clinic notes.
- The GP had known the appellant for 24 years and had seen her 2 – 10 times during the previous year.
- Services provided by the GP's office: family doctor.

- In her Request for Reconsideration dated 5 October 2015 the appellant mentioned that she needed help to explain her situation and that it was getting worse.
- A letter dated 16 October 2015 from an advocate reiterated the appellant's SR, also indicating that the appellant's medical condition prevented her from searching for and gaining employment and that she had no control when an epileptic seizure will take place.

With her Notice of Appeal dated 6 November 2015, the appellant stated she would like to be healthy and busy working but her problems are getting worse with age. She wrote: "I am really suffering specially from my epilepsy that won't allow me to work any kind it would easily trigger". She also expressed her concerns about her need for help and that other people that are healthier get disability designation – she is also concerned that she does not know how to explain her situation.

At the hearing the appellant reiterated the information in her SR and provided additional information. She testified that she had applied to the federal government CPP disability program and was accepted based on the same evidence as for the PWD application. She explained that in the PR, her physician was mentioning the latest big episode when she injured herself during a seizure and was transported by ambulance to the hospital but that since then she had had many smaller seizures, almost daily, that she did not report to her physician. She insisted that she could not work and mentioned having participated recently in a work program but that at the end of the process they could not help her because of her medical condition. She also explained that the discrepancies between her SR and the GP's reports about DLA were because she had not disclosed exactly all the help that she needed as a result of pride and being embarrassed to share that with others – however she stated that her physician knew about 90% of her condition.

The panel determined that the additional oral evidence was admissible under s. 22 (4) of the Employment and Assistance Act (EAA) as it was in support of records before the minister at reconsideration and provided more information about her condition and provided corroboration of the evidence presented.

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. The panel also notes that the reports do mention the appellant's inability to work but under the legislation, this is not one of the criteria establishing eligibility to a PWD designation.

Severe physical impairment:

The appellant argued that she suffers from epilepsy and that has worsened with the years and that she has almost daily seizures that prevent her from working or even going outside her home. When a seizure takes place, she is at risk of physical injury, affecting her ability to take care of herself and, as a result she needs help from family members.

The ministry argued that according to the medical reports the appellant was independent in most areas of DLA with minimal functioning impairment and that a severe physical impairment was not demonstrated.

Panel decision:

The panel notes that the appellant suffers from serious physical illnesses but that her functional skills as described by her physician do not suggest a severe physical impairment. She can walk 4+ blocks and climb 5+ stairs unaided, she is limited to lifting or carrying no more than 10 lbs and can remain seated 1 to 2 hours. The physician noted arthritic pain in her neck and shoulders, especially when she is physically active, but the impacts on her DLA are not clear, other than limiting her ability to carry anything of weight. In the AR, the GP indicated that the appellant was independent for walking indoors & outdoors as well as climbing stairs and standing, which is consistent with his opinion in the PR.

The evidence provided by the prescribed professional in the PR and AR is not consistent with the SR and the advocate letter dated 16 October 2015 and the panel finds the ministry reasonably determined that the evidence from a prescribed professional is fundamental to determine the severity of the impairment. Given the evidence presented, the panel concludes that the ministry was reasonable in determining that based on the assessment of the GP, the evidence provided did not establish a severe physical impairment.

Severe mental impairment:

The appellant argued that her epilepsy caused constant anxiety since she is always concerned that a new seizure could occur and that she is particularly afraid that this could happen in a public place, with the potential of causing self-injuries. It also prompted social and public phobia impacting her extended social network as she avoids being in public.

The ministry argued that the medical evidence presented did not represent a severe overall mental impairment.

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. In the PR, the GP flagged executive, emotional disturbance, motivation and attention or sustained concentration as having significant deficits in terms of cognitive and emotional functions. However, in the AR the GP indicated a major impact only for emotions, a moderate impact for attention/concentration and motivation and minimal impact for executive, which taken together appear to be inconsistent with a *significant* impact. Sleep deprivation is the only bodily function that is reported by the GP and it is

moderately impacted according to the AR and not mentioned in the PR.

In terms of DLA that are specific to a mental impairment under s. 2 (1)(b) of the EAPWDR, making decision about personal activities, care or finances, the AR suggests the appellant is independent for the vast majority (personal care, reading prices & labels, making appropriate choices, paying for purchases, meals, banking, pay rent & bills, medications, using transit schedules and arranging transportation). With respect to the other aspect of mental functioning, "relate to, communicate or interact with others effectively", the appellant has no communication difficulties according to the PR but her interaction with others is marginal due to anxiety and stress but she is independent securing assistance from others.

Again, the panel notes there are significant discrepancies between the GP's reports and the SR where the appellant stated she needed assistance from a family member to take her daily medication, to read labels and prices and manage her personal finances. For the same reasons as above, the panel finds the ministry reasonably based its decision on the prescribed professional reports, given the significant inconsistencies between his reports and the SR. The panel acknowledges the reluctance of the appellant to share with her physician her need for help for many DLA because of her being embarrassed but the panel must still apply the legislation and assess the reasonableness of the ministry decision.

Given the evidence presented, taking into account the difficulty to have a clear picture of the appellant's mental impairment given the inconsistencies between the physician reports and the appellant, 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 basically needed continuous help to do most if not all of her DLA, she could not take a shower by herself and needed help to dress and groom. She is reluctant to leave home, as she is afraid of having a seizure in public and hurting herself and needed someone to go with her for shopping and medical appointments.

While acknowledging that the appellant's anxiety level rises when she is out of her home, in the community, and therefore she requires periodic assistance from family members, the ministry argued that the information provided supported that the appellant is primarily independent and the amount of assistance required is not extensive or required 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 SR and her advocate's submissions at reconsideration. With respect to the advocate's letter, the panel notes that it was mostly a reiteration of the appellant's SR and a comment on the appellant's inability to secure employment – as mentioned above, employability is not one of the criteria for a PWD designation; since there is no evidence the advocate is one of the prescribed professionals that

are listed at s. 2 (2) of the EAPWDR, the panel must consider her evidence similarly as the appellant's SR.

As noted above, there are significant inconsistencies between the appellant's SR and the physician's reports, in particular for DLA. For instance:

- *Personal care*: the appellant indicates she requires continuous support from a family member, including for dressing, grooming and showering as well as using the toilet and taking medication. The GP reported that the appellant was independent for all aspects of personal care and medication.
- *Meals*: the appellant stated she was unable to prepare meals and needed continuous assistance from a family member. The GP reported she was independent for all aspects of meals.
- *Shopping*: the appellant stated she needed assistance from a family member at all times, fearing a seizure in public and because she could not comprehend prices and labels – she also needed help to carry her purchases back home. While the GP agrees that the appellant needs help going to stores to keep her calm and for carrying purchases home because of her limitations in the weight she can lift, he nonetheless stated she was independent for reading prices and labels, making appropriate choices and paying for purchases.
- *Transportation*: the appellant stated that she needed a family member to drive her to her appointments and for shopping and could not use public transit but the GP indicated that she needed continuous assistance for using public transit because she needs company to control her phobia and that she was independent in getting in and out of a vehicle and using transit schedules and arranging transportation.
- *Finances*: while the appellant stated she was unable to manage her personal finances and needed a family member to do that for her and to pay bills for her, the GP reported that she was independent for all aspects of paying rent and bills, including banking and budgeting.

Overall, the AR indicates the appellant is independent for the vast majority of DLA but needs continuous assistance if she has to carry or lift items heavier than 5 – 10 lbs or if her anxiety because of her fear for epileptic seizure would keep her at home if she did not have someone to help her (shopping, transit, interpersonal relationships / extended social network). Unfortunately, the GP does not provide any information as to the type and amount of assistance required and with respect to social functioning; where the GP indicated periodic support/supervision would be required, he did not provide any information as to the degree and duration of the required support/supervision. As well, both the appellant and the GP agree that the appellant gets help from a family member for basic housekeeping, including laundry, but the GP provides no explanation as to why such help is continuously required and how it is related to the appellant's impairments.

Given the evidence presented, the discrepancies and inconsistencies between the GP and the appellant's reports that make it difficult to have a clear understanding of the impact of the appellant's impairment on her DLA 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 most DLA and that a family member provides extensive help.

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

Panel decision:

While the evidence shows that the appellant gets help from family members, it is not clear whether it is required as a direct result of her restrictions or is simply a family arrangement. When going out of her home, she needs to be accompanied to calm her phobia and reduce her anxiety. However, 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.