PART C – Decision under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Social Innovation (the ministry) dated December 8, 2015 which held 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* for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement and that a medical practitioner confirmed that the appellant has an impairment that is likely to continue for at least 2 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
- as a result of those restrictions, in the opinion of a prescribed professional, the appellant requires help, as it is defined in the legislation, to perform DLA.

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Act (*EAPWDA*), section 2

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

PART E – Summary of Facts

Evidence before the ministry at reconsideration

- A PWD application comprised of the appellant's Self-report (SR) dated July 17, 2015 and both a Physician Report (PR) and an Assessor Report (AR) dated July 13, 2015 and completed by a general practitioner ("the locum") who saw the appellant 11 or more times in the past 12 months while acting as locum tenens for the appellant's regular general practitioner ("the family doctor").
- A November 24, 2015 1-page letter from the family doctor submitted at reconsideration.

Additional information submitted on appeal and admissibility

Section 22(4) of the *Employment and Assistance Act (EAA)* limits the evidence that a panel may admit. Only information and records before the minister at the time of reconsideration and oral and written testimony in support of the information available at reconsideration may be admitted for consideration by the panel.

The appellant and her mother provided oral testimony that either reiterated or provided greater detail consistent with the information in the appellant's SR and therefore corroborated the previous testimony. The panel admitted the oral testimony as being in support of the information before the ministry at reconsideration.

Summary of relevant evidence

Diagnoses

The locum diagnoses the appellant with post-traumatic stress disorder (PTSD), concussion and myofascial pain syndrome, all of which have an onset date of January 2015 at which time the appellant was involved in a motor vehicle accident (MVA), and with generalized anxiety with an onset date of April 2012.

Physical Impairment

In the PR and AR, the locum provides the following information:

- "Mod-severe" concussive symptoms greatly limit ability to undergo prolonged mental or physical activity – usually less than 30 minutes before symptoms worsen.
- Severe myofascial pain syndrome in the neck/upper back/shoulders limits range of motion (ROM) in all directions of the appellant's cervical spine.
- The appellant can walk 1 to 2 blocks unaided. Walking indoors is managed independently. Due to back/knee pain, the appellant takes significantly longer and requires periodic assistance from another person for walking outdoors.
- The appellant can lift 5 to 15 lbs (periodic assistance is required for lifting and carrying/holding

when neck/back pain too severe).
- Climbing stairs takes significantly longer due to back/knee pain. The number of stairs the appellant can climb unaided is not specified.
- The amount of time the appellant can remain seated is not specified.

In his November 24, 2015 letter, the family doctor indicates that the appellant's advocate (social worker) asked him to review and comment on specific areas of the AR and PR completed by the locum. The family doctor does not comment on the physical functional skills assessment by the locum but respecting the appellant's physical impairment notes that the appellant is receiving competent and cutting-edge Specialist Pain Services…..and "does not have a large burden of clear and identifiable *organic* causation for many of her pain symptoms." He also writes that the combined burden of mental, physical and *emotional* [emphasis included] challenges are currently and cumulatively quite onerous.

In her SR, the appellant writes that she experiences pain in her neck, shoulders and knee when sitting, standing, walking, laying and when climbing or descending stairs. She also suffers from muscle tremors and numbness in her right arm/body and is unable to carry any weight for any length of time.

At the hearing, the appellant states that she can physically walk 1 block but that she needs to be propped up and that she can climb the sets of 3 and 5 steps to her home but that she has fallen down the set of 5 steps many times. She has impaired movement of her right side and the loss of sensation in her leg is hazardous. The appellant demonstrated her ability to move her neck, stating that she can tilt her head back but is limited to 5 mm of movement forward and 10 mm to the left and 6 mm to the right and that she cannot put her arms over her head or behind her. She described a lifting limit of an absolute maximum of 10 lbs which can only be sustained for 10-15 seconds. She receives nerve blocking treatment every 4 weeks but the pain relief only lasts 3-5 days and it is unsafe to have more frequent treatment.

Mental Impairment

In the PR and AR, the locum provides the following information:
- The appellant has PTSD around the MVA, with 4-5 flash backs/panic attacks during the day (at random times and also predictably when showering or a passenger in a car) and frequently has 1-4 overnight that disturb her sleep.
- Due to concussion/PTSD/anxiety, the appellant has significant deficits with cognitive and emotional functioning in 3 of 12 listed areas – executive, emotional disturbance and attention or sustained concentration ("concussive symptoms limit her ability to concentrate for prolonged periods of time"). A major impact on daily functioning is reported in these 3 areas and also for bodily functions, which additional commentary identifies as relating to sleep disturbance due to nightmares/flashbacks. Confusion is also noted but not identified as a significant deficit. A minimal impact on daily functioning is indicated for the remaining 10 areas of cognitive and emotional functioning (including consciousness, which encompasses confusion).
- The appellant is independent with all listed aspects of social functioning (appropriate social decisions, able to develop and maintain relationships, interact appropriately with others, able to deal appropriately with unexpected demands, able to secure assistance from others). The locum comments that she has not experienced the appellant in this context – "presumed

normal."

- The appellant has good functioning with her immediate social network and marginal functioning with extended social networks (minimal interaction with community outside of health care).
- In the PR, the appellant is reported as having no difficulties with communication. In the AR, the appellant's ability to communicate via speaking is reported as good, with reading, writing and hearing reported as satisfactory.

The family doctor writes that he disagrees with the ministry's conclusion that the appellant's "current cognitive and emotional functioning is not currently severely impaired. Certainly her functioning in the realm of emotions is severely impaired (as described in my previous documentation)" adding that it is this even moreso (sic) than her physical symptoms that he is concerned may prove *most* [emphasis included] resistant to treatment. He notes that the appellant is under the care of a competent psychiatrist and has counselling/psychological support. The panel notes that the appellant and her mother did not know what previous documentation was being referenced and that the November 24, 2015 letter is the only information from the family doctor in the appeal record.

In her SR, the appellant reports that PTSD causes severe flashbacks and anxiety which has led to depression. Further, her short and long term memory are affected and her cognitive thought process is extremely scattered and it takes great effort to communicate and understand what is going on around her or what tasks she has started. Her concussion causes light sensitivity and the inability to filter sound which leads to confusion.

At the hearing, the appellant and her mother confirmed the appellant's previous description of the occurrence of nightmares and disruption to sleep. The appellant stated that she takes medication daily for her PTSD and that she routinely uses anti-anxiety medication to deal with flashbacks, terrors and to be able attend medical appointments. She also sees a therapist weekly and a psychologist approximately every 3 weeks.

DLA

In the AR, the locum reports:

- All listed tasks of the DLA *meals*, *medications* and *transportation* are managed independently with no noted restriction. Dr. A comments that unfortunately public transportation is limited in the appellant's community.
- All tasks of the DLA *paying rent and bills* (banking, budgeting, pay rent and bills) require periodic assistance from another person, depending on concussive symptoms limiting concentration.
- Both tasks of the DLA *basic housekeeping* (laundry, basic housekeeping) require periodic assistance from another person, dependent on pain/limited ROM neck/arms.
- For the DLA *personal care*, the appellant independently manages feeding herself, regulating diet, and transfers in/out of bed and on/off chairs. Periodic assistance from another person is required with dressing and grooming (due to neck/back pain – occasionally limited ROM of arms/neck and occasional limited cervical ROM) and with bathing (panic attacks/flashbacks frequently with showering).
- For the DLA *shopping*, the appellant independently makes appropriate choices and depending

on the severity of concussive symptoms requires periodic assistance from another person reading prices and labels, paying for purchases and carrying purchases home. Continuous assistance from another person is required for going to and from stores (unable to drive at present time).

- *Social functioning* is managed independently (as described above).

The family doctor writes that the information he and the appellant previously provided should suffice to support a claim of restriction of ADL's to a "significant" degree. The combined burden of mental, physical and *emotional* challenges is currently and cumulatively quite onerous.

In her SR, the appellant reports that her PTSD, flashbacks and concussive symptoms leave her unable to perform several areas of self-care, including personal care, unable to drive and requiring constant supervision/guidance with everyday functions including meals preparation, personal hygiene and housework.

At the hearing, the appellant and her mother emphasized that the appellant has difficulties with her daily activities. In particular, the appellant cannot walk outside unattended as she becomes confused and distracted. She routinely forgets why she has walked into a room and will forget about food she was in the midst of preparing. She doesn't have the ability to understand what is being asked of her and requires her mother's help with dressing, cooking, cleaning, and meal planning. Further, the locum did not report the communication problems that impact her relations with others including that she cannot see friends unattended and cannot comprehend them. Her ability to communicate is also limited because she struggles to find the right word, has only been able to read as of approximately 5 months ago, and is still learning to write. The appellant is unable to drive herself and cannot tolerate the sounds and people associated with public transportation. She requires help showering due to limited head/neck/shoulder ROM. The appellant stated that she loves to work but is not capable of employment due to her physical and mental symptoms.

Need for Help

The locum indicates that assistance is provided by family. The family doctor writes that the appellant could not likely cope for long in the world without the ongoing assistance of her patient and supportive mother.

In the SR and at the hearing, the appellant reports the need for the continuous supervision/guidance with everyday functions including meals, personal care, housework, following directions and requires someone to drive her.

PART F – Reasons for Panel Decision

Issue on Appeal

The issue on 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:

- a severe physical or mental impairment was not established;
- the appellant's daily living activities (DLA) are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and
- as a result of those restrictions, in the opinion of a prescribed professional, the appellant does not requires help, as it is defined in the legislation, to perform DLA?

Relevant Legislation

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.

(4) The minister may rescind a designation under subsection (2).

EAPWDR

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 authorized under an enactment to practice the profession of

(a) medical practitioner,

(b) registered psychologist,

(c) registered nurse or registered psychiatric nurse,

(d) occupational therapist,

(e) physical therapist,

(f) social worker,

(g) chiropractor, or

(h) nurse practitioner.

Severe Physical Impairment

The appellant argues that her condition was not properly documented by the locum and she is severely limited in her ability to walk, lift/carry and climb stairs.

The ministry notes that the locum neither describes the activities which are limited to 30 minutes nor the degree to which the concussive symptoms worsen. Also, the degree to which the appellant's range of motion is limited due to pain is not described. Further, a lifting limitation of 5-15 lbs. is not considered indicative of a severe impairment. Neither the frequency/duration of periodic assistance required with walking outdoors, carrying/holding and lifting nor how much longer than typical walking outdoors, climbing stairs and carrying/holding take is indicated. Based on these assessments

together with the appellant's SR and the letter from the family doctor, the ministry concludes that a severe impairment of the appellant's physical functioning has not been established.

Panel Decision

The legislation 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. While the legislation does not define "impairment", the PR and AR 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 appellant is diagnosed with concussion and myofascial pain syndrome which cause symptoms, including limited ROM, that impact physical functioning. The appellant indicates that she is unable to walk outdoors without being physically propped up by another person and has given testimony suggesting the need for ongoing assistance with lifting as she is limited to holding for only 10-15 seconds. However, the locum has not described ongoing limitations of this degree. Rather, the locum reports that the appellant can walk 1-2 blocks unaided, that assistance is required with lifting when neck/back pain is "too severe" and that "prolonged" activity isn't possible as symptoms will have worsened in less than 30 minutes. The locum also reflects varying concussive, pain, and ROM symptoms when describing the limits to ROM of the arms/neck/cervical spine as occasional and indicating that the assistance needed is, for all but one task, periodic not continuous. Further, as the ministry notes, the locum does not indicate how often or for what duration the periodic assistance is required. There is no evidence of limitations in the time the appellant can remain seated and neither the locum nor the family doctor has assessed the appellant's ability to climb stairs. The appellant stated that she could climb the two sets of steps to her home, 8 steps in total, but that she often falls when climbing the second set which is 5 steps. The family doctor does not describe the appellant's physical functional skills or any specific limitations on physical functioning and neither physician reports the need for an assistive device.

Based on the above analysis, the panel finds that the ministry reasonably concluded that a severe physical impairment has not been established.

Severe Mental Impairment

The appellant argues her condition was not properly documented by the locum and that the symptoms from PTSD, her concussion and anxiety cause severe mental impairment.

The ministry's position is that while major impacts to 4 areas of cognitive and emotional functioning are indicated, the remaining 10 areas are minimally impacted. Furthermore, the locum does not describe the severity of the panic attacks or flashbacks or the severity or duration of the resulting sleep disturbances. The ministry also notes that the frequency or duration of limitations on the ability to concentrate due to concussive symptoms is not described. Although marginal functioning with

extended social networks is reported, the appellant is independent in all areas of social functioning and there is no indication of any safety issues. The ministry argues that the information from the family doctor does not describe the nature of the impairment in the area of emotion or impacts to daily functioning as evidenced by limitations in cognitive/emotional/social functioning or the degree to which performing DLA is limited. Based on the assessments of the locum, family doctor and the appellant's SR, the ministry concludes that a moderate rather than severe mental impairment has been established.

Panel Decision

The appellant is diagnosed with PTSD, concussive symptoms and anxiety which impact her mental functioning. While the locum reports a major impact on daily functioning in 4 areas of cognitive and emotional functioning [bodily functions (includes sleep disturbance), emotion, attention/concentration, and executive], the majority of areas are minimally impacted. The appellant reports a significant degree of confusion, memory problems and difficulties communicating. However, the locum has not identified a significant degree of impairment in these 3 areas. Further, while indicating a major impact for concentration, this is qualified by the locum's comment that the ability to concentrate for "prolonged periods of time" is impacted. Both the locum and the appellant describe nightly disruptions to the appellant's sleep. While the appellant reports severe limitations in the ability to communicate, the locum reports a satisfactory ability and the family doctor does not specifically address communication. The locum reports a major impact on "emotion" and the family doctor confirms emotional functioning is severely impaired. However, it is unclear what the impact is on daily functioning, noting in particular that the locum reports independent functioning for all aspects of social functioning. When looking at the prescribed DLA, discussed further below, the appellant is reported as independently managing the cognitive decision-making aspects of all DLA with the exception of financial management, for which periodic assistance from another person is required dependent upon concussive symptoms, and as the ministry notes, it is unclear how often these symptoms are at a level necessitating assistance.

Based on the above analysis, the panel finds that the ministry reasonably determined that the information did not establish a severe mental impairment.

Restrictions in the ability to perform DLA

The appellant argues that her condition affects her everyday living more than the locum documented and that as a result of her physical and mental symptoms she is unable to independently perform several areas of self-care, including personal care, meal preparation and housework and she is unable to drive. The appellant expressed her frustration with the locum's assessment in the AR and stated that she had intended to have her social worker complete the AR.

The ministry's position is that the locum has not described the frequency or duration of the required periodic assistance from another person or the frequency or duration of the periods of pain or concussive symptoms, or the periods in which the appellant's ROM is restricted. The family doctor does not describe the DLA with which the appellant's mother provides assistance or the nature and duration of that assistance. While acknowledging that the legislation does not specifically require the frequency and duration of restrictions be explained, the ministry notes that it finds this information valuable in determining the significance of the restrictions. Relying on the expertise of the prescribed

professionals, the ministry concludes that the appellant's DLA are not significantly restricted continuously or periodically for extended periods.

Panel Decision

The legislative requirement respecting DLA set out in section 2(2)(b)(i) of the EAPWDA is that the minister be satisfied that as a result of a severe physical or mental impairment a person is, in the opinion of a prescribed professional, directly and significantly restricted in the ability to perform DLA either continuously or periodically for extended periods. Consequently, while other evidence may be considered for clarification or support, the ministry's determination as to whether or not it is satisfied, is dependent upon the evidence from prescribed professionals. DLA are defined in section 2(1) of the EAPWDR and are listed in both the PR and the AR sections of the PWD application with the opportunity for the prescribed professional to check marked boxes and provide additional narrative.

In this case, both the locum and the family doctor are the prescribed professionals. The locum reports that certain tasks of the DLA moving about indoors/outdoors, personal care, basic housekeeping, shopping, and management of medications are impacted by the appellant's physical and cognitive symptoms. However, the majority of DLA tasks are managed independently. For those DLA tasks which are restricted, all but one (going to and from stores) are reported to require periodic not continuous assistance. The locum's narrative indicates that the restrictions are dependent on the severity of the appellant's pain and concussive symptoms and the limits to ROM which are described as occasional. Additionally, as the ministry notes, there is no description of how often or for how long the periodic assistance is required.

Respecting the 2 DLA specific to mental impairment - make decisions about personal activities, care or finances and relate to, communicate or interact with others effectively - more succinctly referenced as decision-making and social functioning, the locum has identified minimal limitations. The appellant's ability to communicate is identified as good for speaking and satisfactory in all other forms. With the exception of requiring periodic assistance with financial management decisions which depends on concussive symptoms, there are no reported difficulties managing the decision-making tasks of other DLA and, though marginal functioning is noted for extended social networks, the appellant independently manages all listed areas of social functioning. The family doctor states that ADL's are restricted to a significant degree but does not identify any particular DLA and, as the ministry notes, does not describe the nature or duration of the assistance provided by the appellant's mother. At the hearing, the appellant emphasized her inability to work however the panel notes that the legislated definition of DLA does not include the ability to work.

The panel acknowledges that the appellant's own description of the impact on her DLA identifies a much greater degree of restriction and that she feels that the locum did not accurately describe her restrictions. However, as noted above, under the legislation, the ministry must be satisfied of the requisite degree of restriction with DLA based primarily on the information from a prescribed professional. Based on the above analysis, the panel finds that the ministry reasonable determined that there is not enough evidence to satisfy the ministry that, in the opinion of a prescribed professional, the appellant's DLA are significantly restricted either continuously or periodically for extended periods.

Help to perform DLA

The appellant argues that she requires constant supervision and guidance to perform personal care, meal preparation, and housework and that she is unable to drive or interact with friends.

The ministry's position is that because it has not been established that DLA are significantly restricted, it cannot be determined that help is required.

Panel Decision

Section 2(2)(b)(ii) of the EAPWDA requires that, as a result of direct and significant restrictions in the ability to perform DLA, a person requires help to perform those activities. In other words, the requirements of section 2(2)(b)(i) respecting direct and significant restrictions with DLA discussed above are a precondition to meeting the need for help criterion. Help is defined in subsection (3) as the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform a DLA.

As the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established, the panel finds that the ministry reasonably concluded that it cannot be determined that the appellant requires help to perform DLA.

Conclusion

Having reviewed and considered all of the evidence and relevant legislation, the panel finds that the ministry's reconsideration decision which determined that the appellant was not eligible for PWD designation was reasonably supported by the evidence, and therefore confirms the decision.