PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the "ministry") reconsideration decision of January 25, 2016, which found that the appellant did not meet three of five statutory requirements of section 2 of the *Employment and Assistance for Persons With Disabilities Act* ("EAPWDA") for designation as a person with disabilities ("PWD"). The ministry found that the appellant met the age requirement, and that in the opinion of a medical practitioner the appellant's impairment is likely to continue for at least two years. However, the ministry was not satisfied that:

- the evidence establishes that the appellant has a severe physical or mental impairment;
- the appellant's daily living activities ("DLA") are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and that
- as a result of those restrictions, the appellant requires the significant help or supervision of another person, an assistive device, or the services of an assistance animal.

PART D – Relevant Legislation

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

PART E – Summary of Facts

The information before the ministry at the time of reconsideration included the following:

1. The appellant's *PWD Application* consisting of:
   - the appellant's self-report ("SR") completed by the appellant and dated January 8, 2014.
   - a physician's report ("PR") completed by the appellant's general practitioner (Physician A) and dated January 22, 2015 which indicates that he has known the appellant for less than 6 months and that he has seen the appellant 2 to 10 times in the past 12 months.
   - an assessor's report ("AR") completed by Physician A) and dated January 22, 2015.
2. A 3-page statement produced by the National Organization for Rare Disorders (NORD) describing a rare heritable disorder with which the appellant has been diagnosed.
3. A 3-page questionnaire (QR) designed by the appellant's advocate posing a series of questions to which another physician (Physician B) has responded. Physician B reports that he first met the appellant on December 23, 2015 and had a follow-up visit on January 12, 2016. He confirms that he has access to the appellant's medical file.
4. The appellant's *Request for Reconsideration* signed and dated January 12, 2016 that was accompanied by the QR.

The appellant's *Notice of Appeal* was dated February 4, 2016 in which he states that the reason for his appeal is "*I feel that the disabling nature of my situation have (sic) not been heard. I am on powerful pain killers for pain and psychiatric medication for depression yet the severity hasn't been established."*

The panel will first summarize the evidence from the PR, AR and the QR relating to the PWD criteria at issue.

Diagnoses

• In the PR, Physician A diagnosed the appellant with COPD (onset 2014), a rare disease of the musculoskeletal system and connective tissue (onset 1968) and Osteoporosis (onset unspecified)

Severity of Impairment:

Physical Impairment

• In the SR the appellant indicates that the rare disease from which he suffers has caused hearing loss and he now has hearing aids in both ears. The disease has also caused his fingers and toes to be stubbed which causes them to bend too far backward and results in a great deal of pain. This makes walking very difficult. In addition, the appellant has a cleft palate as a result of the disease. The appellant also suffers from COPD and any type of minimal physical movement causes severe shortage of breath. A fall resulted in serious injury to the appellant's left shoulder that causes pain and results in his inability to lift anything with that arm. In addition, the appellant sustained an injury to his right knee which has never healed properly and causes him pain as well as limiting his mobility. The appellant reports that he is unable to walk more than 100 meters due to shortness of breath and pain in his feet and knee. It takes him at least four times longer than typical. He finds climbing stairs very difficult and if there is no railing he would need to have someone to hold onto. Bending his knee is terribly painful and he loses his balance due to problems with his feet. Stairs take him much longer because of loss of breath. He states that he could lift approximately 15 pounds but not with any repetition and cannot carry (such a weight) due to COPD and his inability to tolerate more weight on his feet. His hearing is poor and he wears hearing aids in both ears.

• In the PR, Physician A reported that the appellant has moderate COPD and walking is limited to 100 meters before the appellant requires rest. An increase in physical exertion by the appellant leads to dyspnea (shortness of breath). He reports that the appellant has whole body arthritis and severe osteoporosis and states that the appellant's osteoarthritis may improve with medication and his COPD may partially improve with regular inhaler use and smoking cessation but his impairment is likely to continue for two years or more. In regard to functional skills, the physician reports that the appellant can walk less than 1 block unaided on a flat surface, climb 5+ stairs unaided, lift 5 to 15 pounds and has no limitation on how long he can remain seated.
• In the AR, Physician A reports that the appellant has COPD causing reduced mobility and dyspnea on exertion. He also indicates that the appellant has a rare disease which limits his grip (strength), and walking and causes hearing loss. In regard to mobility and physical ability he reports that the appellant is "independent" in walking indoors and outdoors ("*takes 2-3 times longer"*), climbing stairs ("*takes 2-3 times longer and needs rails"*), standing, lifting and carrying & holding ("*takes 2-3 times longer"*). He comments that "*Surfaces dictate ability to walk due (to) foot/knee pain."*
• In the QR, Physician B reports that the appellant's medical condition is permanent and will not improve. He disagrees with the statement that walking takes the appellant 4-6 times longer than typical and instead comments "*Observed patient walk into office and noted him to take approx. 2-3 (times) longer than average. Uses cane due to foot pain*." He also comments "*I would agree (that the appellant) has functional limitations due to multiple fractures secondary to his genetic condition*." He indicates that he agrees with the statement *"Would you agree that (the appellant's) condition is severe, that he has significant restrictions with his ADL's (sic) and as a result requires an assistive device or the assistance of another person most of the time as mentioned above?" Finally, he comments as follows: "(The appellant) would benefit from a motorized wheelchair for mobility. His condition is permanent causing difficulty with ADLs as per his report. On my exam today, I can appreciate his mobility is slowed and his ability to write with a pen and normal grip strength (sic) but he reports with prolonged use/activity he has (increased) pain."*

Mental impairment
• In the PR, Physician A reports that the appellant has difficulties with communication and consequently requires hearing aids due to arthritis in his ears. He confirms that the appellant has no significant deficits with any areas of cognitive and emotional function.
• In the AR, Physician A reports that the appellant has "good" ability in speaking, reading and writing but has "poor" ability in hearing although he explains that the appellant's hearing is improved by the use of hearing aids. He writes "N/A" and puts a stroke through the section to be completed for an appellant with an identified mental impairment or brain injury. Similarly, he put a stroke through the section on "social functioning" which is to be completed if the appellant had an identified mental impairment, including brain injury.
• In the QR, Physician B reports that the appellant is on medication for depressive symptoms.

Restrictions in performing DLA
• In the SR, the appellant reports that he is able to look after personal care but has to take his time doing so. In regard to basic housekeeping he comments "*I try to keep things tidy so I don't have major housework to do, I do things slowly to maintain my home*." He reports that his father shops for him since he can't walk through the store and can't carry his groceries. He also states that he is not able to use public transit because he can't walk to the bus stop or stand and wait.
• In the PR, Physician A reports that the appellant has not been prescribed any medication and/or

treatments that interfere with his ability to perform DLA.
• In the AR, Physician A reports that the appellant is "independent" in managing the following ADL: dressing, grooming, bathing, toileting, feeding self, regulating diet, transfers (in/out of bed), transfers (on/off of chair) laundry, basic housekeeping ("*takes 2 times longer"*), reading prices and labels, making appropriate choices (shopping), paying for purchases, meal planning, food preparation, cooking, safe storage of food (ability, not environmental circumstances), banking, budgeting, pay(ing) rent and bills, filling/refilling prescriptions, taking (medications) as directed, safe storage and handling (of medications), and getting in and out of a vehicle. The physician indicates that the appellant requires continuous assistance from another person to (or is unable to) go to and from stores ("*unable to drive, can't walk far*"), carrying purchases home *("cannot carry, pain/weakness and dyspnea")* and using public transit *("unable to walk to bus stop").*
• In the QR, Physician B indicates that he is unable to comment in response to the statement "(*The appellant) states when dressing, showering etc., it takes him at least 4-6 times longer and he cannot fasten buttons due to the pain in his hands*." In response to this statement he comments "(*The appellant) has apparent deformity of the (left) index finger which we are investigating. Due to foot issues and stability issues he reports needing more time for these ADLs*." The physician agrees with the statement *"(The appellant) states he cannot perform basic housework, he has not washed his floors since October, cleaned his bathroom or vacuumed since November. Pain prevents him from being able to perform these simple tasks for himself*." The physician adds "Due to his mobility issues with foot pain it is challenging for him to complete household tasks." He indicates that he is unable to comment in response to the statement "(*The appellant) states he cannot peel or chop vegetables, needs help to open jars, etc. due to pain in his hands*. The physician adds "*Patient reports pain with MCP/DIP/PIP joints bilaterally. I can observe him hold a pen to write at office OK. Cannot observe above tasks here.*"

Help required/provided
• In the PR, Physician A indicates that the appellant does not require any prostheses or aids for his impairment.
• In the AR the physician reported that the appellant lives alone. The physician left blank the section which asks what assistance is provided to the appellant by other people. He also did not respond to the question which asks *"If help is required but there is none available, please describe what assistance would be necessary*?" He did not indicate that the appellant routinely uses any equipment or devices to help compensate for his impairment although he did indicate that the appellant requires a power wheelchair for mobility outside the home. Finally, he confirmed that the appellant does not have an assistance animal.
• In the QR, Physician B confirmed that the appellant uses a cane and would benefit from a motorized wheelchair for mobility.

At the hearing, the appellant described his symptoms of bone degeneration associated with his rare disease. He explained that his mother and grandmother suffered from the same disease and that it is a genetic (inheritable) disease. The disease was first diagnosed when the appellant was in grade 8. He estimates that he has suffered 12-18 broken bones and had many casts on his arms and legs. It is a condition that becomes more pronounced and more painful as one ages. He is scheduled for surgery later this month that will fuse the bones in his feet because his joints have degenerated. He has quit smoking and reduced his consumption of alcohol because he recognizes that they may make his symptoms worse. He reports that the pain in his feet gets worse as the day progresses and by the end of the day he finds that he is "hobbling" to get around in his apartment. He also suffers

from anxiety and depression and has been taking antidepressants since July 2015. He reported that he is able to cook and clean but finds these activities to be increasingly difficult. His dad does most of the shopping for him although he can use a scooter when he shops at Walmart.

He reported that he has also been seen by a bone specialist (Physician C) and submitted two scans (one of his hips and one of his spine) as evidence of the severity of his condition. The ministry indicated that they had no objection to the admission of this new evidence. The panel determined that this evidence was in support of the medical evidence before the ministry at the time of reconsideration and agreed to admit the evidence pursuant to section 22(4) of the *EAA.*

In response to questions from the panel, the appellant stated that:

- He completed section 1 of the PWD application in January 2015 – not January 2014.
- He has been using a cane for about 4 months.
- He delayed submitting the PWD application until September 2015 (the application had been completed in January 2015) because he felt that Physician A's information in the PWD application did not adequately describe the severity of his condition. He reported that he agreed with the ministry's decision that he did not qualify for PWD status because the physician's evidence was not sufficient for him to qualify.
- Although Physician A did not confirm that the appellant has a mental impairment or brain injury, the appellant indicated that he has been taking anti-depressants since June/July 2015. He has trouble sleeping, sometimes has trouble getting out of bed and sometimes doesn't shower.
- He indicated that he had never discussed with Physician A his ability to perform DLA. Whereas Physician A reported that the appellant was unable to drive, the appellant indicated that this was not true although he is finding driving his van to be increasingly difficult.
- In addition to the assistance that he receives from his dad with shopping, the appellant reported that he has a friend who does his laundry. The ministry made no objection to this information being provided by the appellant. As this new information was in support of the information (concerning the challenges faced by the appellant in doing housework) before the ministry at the time of reconsideration, the panel agreed to admit the evidence pursuant to section 22(4) of the *EAA.*

The ministry noted that Physician A did not confirm that the appellant uses a cane and did not confirm that the appellant suffers from anxiety and depression. In response to questions from the panel, the ministry representative stated that:

- She was unsure why the ministry determined that greater weight should be given to Physician A's evidence than that of Physician B. She speculated that it was because Physician A was the appellant's family doctor and Physician B was a "fill-in."
- She was unsure why the Reconsideration Decision reported that "The information provided by your physician does not demonstrate that the <u>majority</u> (underlining added) of your ADLs are directly and significantly restricted . . ." The ministry representative acknowledged that the legislation requires only that the appellant have 2 or more ADLs to be directly and significantly restricted – not a majority of ADLs.

PART F – Reasons for Panel Decision

The issue in this appeal is whether the ministry's decision to deny the appellant designation as a PWD was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. In particular, was the ministry reasonable in determining that the appellant does not have a severe physical or mental impairment, and that in the opinion of a prescribed professional the appellant's impairments do not directly and significantly restrict him from performing DLA either continuously or periodically for extended periods, and that as a result of those restrictions the appellant does not require help to perform DLA.

The relevant legislation is as follows:

EAPWDA:

2 (1) In this section:

"assistive device" means a device designed to enable a person to perform a daily living activity that, because of a severe mental or physical impairment, the person is unable to perform;

"daily living activity" has the prescribed meaning;

"prescribed professional" has the prescribed meaning.

(2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act if the minister is satisfied that the person has a severe mental or physical impairment that

(a) in the opinion of a medical practitioner is likely to continue for at least 2 years, and

(b) in the opinion of a prescribed professional

(i) directly and significantly restricts the person's ability to perform daily living activities either

(A) continuously, or

(B) periodically for extended periods, and

(ii) as a result of those restrictions, the person requires help to perform those activities.

(3) For the purposes of subsection (2),

(a) a person who has a severe mental impairment includes a person with a mental disorder, and

(b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires

(i) an assistive device,

(ii) the significant help or supervision of another person, or

(iii) the services of an assistance animal.

EAPWDR section 2(1):

2 (1) For the purposes of the Act and this regulation, **"daily living activities"** ,

(a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following activities:

(i) prepare own meals;

(ii) manage personal finances;

(iii) shop for personal needs;

(iv) use public or personal transportation facilities;

(v) perform housework to maintain the person's place of residence in acceptable sanitary condition;

(vi) move about indoors and outdoors;

(vii) perform personal hygiene and self care;

(viii) manage personal medication, and

(b) in relation to a person who has a severe mental impairment, includes the following activities:

(i) make decisions about personal activities, care or finances;

(ii) relate to, communicate or interact with others effectively.

(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.

Severe Physical Impairment

The appellant's position is that his rare genetic disease causes him a great deal of pain especially in his hands and feet. He has difficulty walking, and his injuries to his knee and shoulder also cause pain and limit his ability to function. His condition will continue to deteriorate over time.

The ministry argues that Physician A reported that the appellant could climb 5+ stairs unaided, lift 5 to 15 pounds and had no limitation on how long he could remain seated. The ministry acknowledged

that Physician A reported that the appellant could walk less than a block unaided on a flat surface, but the ministry also noted that Physician A reported that the appellant was "independent" in walking indoors and walking outdoors. The ministry noted that Physician B had agreed that the appellant's condition is severe but the ministry determined that greater weight should be given to the evidence provided by Physician A.

Panel Decision

The panel notes that a diagnosis of a serious medical condition does not in itself determine PWD eligibility. Under the legislation, eligibility for PWD hinges on an "impairment" and its severity. An "impairment" is more than a diagnosed medical condition. An impairment is a medical condition that results in restrictions to a person's ability to function independently, appropriately, effectively or for a reasonable duration.

To assess the severity of impairment one must consider the nature of the impairment and the extent of its impact on daily functioning, as evidenced by functional skill limitations and the degree to which the ability to perform DLA is restricted. The legislation makes it clear that the determination of severity is at the discretion of the minister, taking into account all of the evidence. However, the legislation is also clear that the fundamental basis for the analysis is the evidence from a medical practitioner and a prescribed professional – in this case, Physicians A and B.

The legislation requires that for PWD designation, the minister must be "satisfied" that the person has a severe mental or physical impairment. For the minister to be "satisfied" that the person's impairment is severe, the panel considers it reasonable for the ministry to expect that the information provided by the medical professional presents a clear and complete picture of the nature and extent of the impacts of the person's medical conditions on daily functioning.

The panel notes that the appellant concluded that the evidence provided by Physician A did not adequately describe the severity of his condition and was likely to lead to the rejection of his application by the ministry. The panel also notes that the evidence provided by Physician A indicates that the appellant's functional skills are not severely impaired, with the exception of his ability to walk a reasonable distance unaided. But even here, the physician's evidence is contradictory since he reports that the appellant is "independent" walking indoors and walking outdoors (although he is reported to take 2-3 times longer). Physician B did not comment upon how far the appellant is able to walk. She states that she observed the patient walk into her office and concluded that it takes him approximately 2-3 times longer than average. She also observed that the appellant uses a cane due to foot pain. She reported that she was unable to comment on whether the appellant can lift more than 10 pounds and how far he could carry such a weight. She confirmed that she considers the appellant's condition to be severe but comments "On my exam today, I can appreciate his mobility is slowed and his ability to write with a pen and normal grip strength (sic), but he reports with prolonged use/activity he has (increased) pain."

The panel notes that the ministry determined that it would give greater weight to the evidence provided by Physician A than to that provided by Physician B. The panel appreciates that Physician A has known the appellant for (marginally) longer and did complete the assessment necessary to complete sections 2 and 3 of the PWD application. Moreover, the panel notes that Physician B responded that she was unable to comment upon 4 of the 9 statements to which she was invited to agree or disagree. This suggests that Physician B had limited knowledge of the appellant.

Finally, the panel reviewed the two scans submitted by the appellant at the hearing. The panel noted that the scans provided very little diagnostic information (commentary) other than noting that the appellant has osteoporosis and a high risk of fracture for both his left hip and his lumbar spine.

Accordingly, the panel concluded that the ministry reasonably determined that greater weight should be given to the evidence of Physician A. In light of the evidence provided by Physician A (described above) the panel concluded that the ministry reasonably determined that the evidence does not establish that the appellant has a severe physical impairment.

Severe Mental Impairment

At the hearing, the appellant reported that he is on antidepressants and suffers from anxiety and depression. He expressed surprise when the panel noted that Physician A had written "*N/A*" on the section that asks whether the appellant has a mental impairment or brain injury.

The ministry argues that although Physician B reported that the appellant has depressive symptoms, a mental impairment was not diagnosed and that Physician A did not report any mental or cognitive impairments.

Panel Decision

The panel notes that Physician A reported "*No*" to the question "*Are there significant deficits with cognitive and emotional function?"* and had written "*N/A*" on the section that asks whether the appellant has a mental impairment or brain injury. Accordingly, the panel considered the evidence provided by Physician A to confirm that the appellant does not have a mental impairment. Physician B noted that the appellant is on medication for depressive symptoms but otherwise made no comment regarding whether the appellant has a severe mental impairment. At the hearing, the appellant described other manifestations of his depressive symptoms (trouble sleeping, not getting out of bed, not showering). Although the panel appreciated that both the appellant and Physician B commented upon the appellant's symptoms of depression, the panel noted that neither Physician A nor Physician B confirmed a diagnosis of a mental impairment. Accordingly, the panel concluded that the ministry reasonably determined that there was insufficient evidence that the appellant suffered from a severe mental impairment.

Significant Restrictions to DLA

The appellant's position is that his ability to perform DLA is limited by the pain he experiences – especially in his hands and feet. In the SR, the appellant reports that he is unable to do daily shopping since he can't walk through the store and can't carry his groceries. Moreover, he reports that he is not able to use public transit because he can't walk to the bus stop or stand and wait.

The ministry's position is that the appellant is independent in all ADLs with the exception of being unable to walk to public transit (as well as going to/from stores and carrying purchases home). The ministry observes that Physician A did not report that the appellant requires periodic assistance for extended periods for any DLA, and notes that although the appellant reports severe restrictions in DLA such as personal care and meal planning this is not confirmed by Physician A. The ministry concluded that "*The information provided by your physician does not demonstrate that the majority of your ADLs (sic) are directly and significantly restricted either continuously or periodically for extended periods.*"

Panel Decision

Physician A confirmed that the appellant requires continuous assistance (or is unable to do) going to and from stores *("unable to drive, can't walk far*"), carrying purchases home ("*cannot carry, pain/weakness and dyspnea*) and using public transit ("*unable to walk to bus stop*."). Nonetheless. the panel notes that the appellant indicated that he is able to drive which means that he is able to go to and from stores and is not reliant on public transit. Moreover, the panel notes that Physician A reported that the appellant is "independent" in performing the following DLA: dressing, grooming, bathing, toileting, feeding self, regulating diet, transfers (in/out of bed), transfers (on/off of chair), laundry basic housekeeping, reading prices and labels, making appropriate choices (shopping), paying for purchases, meal planning, food preparation, cooking, safe storage of food (ability, not environmental circumstances), banking, budgeting, pay rent and bills, filling/refilling prescriptions, taking (medications as directed), safe handling and storage (medications), and getting in and out of a vehicle. Physician B indicated that he was unable to comment on whether the appellant had difficulty dressing, showering, etc. and insofar as the appellant being able to peel or chop vegetables and needing help to open jars. Physician B did agree that the appellant reports that he is unable to perform basic housework. But this in not consistent with the information provided by Physician A. Accordingly, the panel concluded that that the ministry reasonably determined that "*The information provided by your physician does not demonstrate that the majority of (the appellant's) ADL's* (sic*) are directly and significantly restricted either continuously or periodically for extended periods*."

Assistance with DLA

The appellant's position is that he uses a cane, and receives assistance from his father with daily shopping and from a friend who does his laundry.

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

Panel Decision

The panel notes that Physician A confirmed that the appellant does not require any prostheses or aids for his impairment, does not receive assistance from other people, does not require assistance through the use of assistive devices and does not have an assistance animal. Physician B reported that the appellant uses a cane but provided no other information concerning assistance provided to, or required by, the appellant. The appellant reported in the SR that his father shops for him and at the hearing, the appellant reported that a friend helps him by doing his laundry. The panel also noted that the appellant uses a cane and that both Physician A and Physician B confirmed that the appellant requires a motorized wheelchair for mobility. Nonetheless, the panel previously concluded that the ministry reasonably determined that the majority of the appellant's DLA are not directly and significantly restricted either continuously or periodically for extended periods. Moreover, section 2(2)(b) requires that the appellant must require help to perform DLA *as a result of his restrictions*. Consequently, the panel concluded that there was insufficient evidence that the appellant requires an assistive device and the significant help of another person to perform his DLA. The panel therefore concluded that the ministry was reasonable in determining that " *. . . it cannot be determined that significant help is required from other persons."*

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.