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 22 February 2016 that denied the appellant designation as a person with disabilities (PWD). The ministry determined that the appellant did not meet all of the required criteria for PWD designation set out in the *Employment and Assistance for Persons with Disabilities Act*, section 2. Specifically, the ministry determined that the information provided did not establish that the appellant has a severe mental or physical impairment that in the opinion of a prescribed professional

(i) directly and significantly restricts her ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and,

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

The ministry determined that the appellant satisfied the other 2 criteria: she has reached 18 years of age and her impairment in the opinion of a medical practitioner is likely to continue for at least 2 years.

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

The appellant did not attend the hearing. After confirming that the appellant was notified of the hearing, the hearing proceeded in accordance with section 86(b) of the Employment and Assistance Regulation.

The evidence before the ministry at reconsideration consisted of the following:

1. The appellant's PWD Designation Application dated 02 June 2015. The Application contained:
   - A Self Report (SR) completed by the appellant with the assistance of an outreach worker from a charitable organization.
   - A Physician Report (PR) dated 10 August 2015, completed by the appellant's general practitioner (GP) who has seen her 2-10 times over the past year
   - An Assessor Report (AR) dated 14 August 2015, completed by a health authority occupational therapist (OT) who has known the appellant for 4 months and seen her 2-10 times in that period.
2. The appellant's Request for Reconsideration dated 16 February 2016.

In the PR, the GP lists the following diagnoses related to the appellant's impairment: hydrocephalus (onset 1989), stroke (2015), hypertension (onset 2007) and migraine (onset 2007).

The panel will first summarize the evidence from the PR and the AR relating to the appellant's impairments as it relates to the PWD criteria at issue.

Severity/health history

Physical impairment

PR:
Under Health History, the GP writes: "[The appellant] suffered raised intracranial pressure in 1989 hence she has a VP [ventriculoperitoneal] shunt to reduce pressure. She is on treatment for high blood pressure and depression. [Illegible] is secondary to the migraine."

As to functional skills, the GP reports that the appellant can walk 4+ blocks unaided, can climb 5+ steps unaided, can lift 15 to 35 lbs., and has no limitation in remaining seated.

The GP reports that the appellant's height and weight are relevant to her impairment: ~160 cm and ~ 60 kg.

The GP indicates that the appellant has been prescribed medication that interferes with her ability to perform DLA, without providing explanation. The anticipated duration of the medication is "for life."

AR:
The OT describes the appellant's impairment as follows: "The appellant experiences fluctuating dizziness negatively impacting motor skills & balance. She has poor visual scanning as well as double vision. Constant headaches."

Mental impairment

PR:
The GP assesses the appellant as having no difficulties with communications, though indicating "Motor" as the cause.

The GP indicates that the appellant has significant deficits with cognitive and emotional function in the areas of memory, emotional disturbance, motivation, motor activity, and attention.

In commenting on the appellant's social functioning, the GP writes: "Her speech is sometimes incomprehensible due to the stroke she suffered."

AR:
The OT assesses the appellant's ability to communicate as good for speaking and hearing, satisfactory for writing and poor for reading (commenting: " double vision")

Regarding cognitive and emotional functioning, the OT indicates that the appellant's mental impairment restricts or impacts her functioning as follows:

- Major impact – attention/concentration and memory.
- Moderate impact – motivation.
- Minimal impact – bodily functions, emotion, executive, and motor activity.
- No impact – consciousness, impulse control, insight and judgment, language, psychotic symptoms, and other neuropsychological problems.

Ability to perform DLA

PR:
The GP indicates that the appellant's impairment directly restricts her ability to perform DLA.

The GP indicates that the appellant's activity is restricted on a periodic basis for the following DLA: personal self-care, management of medications, basic housework, daily shopping, mobility inside the home, mobility outside the home, and use of transportation. The GP indicates that the appellant is not restricted for the following DLA: meal preparation, management of medications, management of finances, and social functioning.

Commenting on those DLA for which the appellant is restricted on a periodic basis, the GP writes: "Sometimes her migraine headaches make it difficult for daily basic functions."

AR:
The OT reports that the appellant lives with family or friends.

Regarding mobility and physical ability, the OT assesses the appellant as independent for walking indoors, walking outdoors, climbing stairs ("requires handrail for long stairs"), standing, lifting and carrying and holding (for the latter 2 activities "able but affected by balance problems").

The OT assesses the assistance required for managing DLA as follows (the OT's comments in

parentheses):

- Personal care – Independent for all aspects.
- Basic housekeeping – independent for all aspects.
- Shopping – no assessment for going to and from stores (able to walk under 1 km.; unable to drive therefore requires assistance); independent for reading prices and labels (for a short time, > unable to read & scan for long periods of time), making appropriate choices, paying for purchases and carrying purchases home. The OT further explains: "[The appellant] is able to go grocery shopping; however, attention and memory skill limit task ability. Becomes fatigued & balance decreases when in store for more than 20 min. Balance decreases with up/down scanning or extended reaching. Headaches increase with mental & eye strain."
- Meals – independent for all aspects (slower pace & requires cues as she has forgotten to turn off stove.
- Pay rent and bills – independent for all aspects.
- Medications – independent for filling/refilling prescriptions and safe handling and storage; periodic assistance from another person required for taking as directed (sometimes forgets to take medications).
- Transportation – independent for all aspects (no public transport available at current location; unable to drive).

With respect to social functioning, the OT assesses the appellant as independent for making appropriate social decisions, developing and maintaining relationships, interacting appropriately with others, dealing appropriately with unexpected demands and securing assistance from others.

The GP assesses the impact of the appellant's impairment on her immediate social networks as good functioning and on her extended social network as marginal functioning, commenting "Socially isolated due to environmental barriers. Family drives client into town; however this is not a positive long-term solution."

Help provided/required

PR:
The GP indicates that the appellant requires a prosthesis or aid for her impairment, noting the VP shunt.

AR:
The OT reports that help required for the appellant' DLA is provided by family, health authority professionals and community service agencies.
The OT indicates the appellant routinely uses a bathing aid (a grab bar/clamp) to compensate for her impairment.

The OT provides additional comment:

> "The appellant struggles with managing iADL activities in a time sensitive manner. Requires frequent breaks & rests to decrease eyestrain & headaches & dizziness. Independent with most tasks, however slow & requires time to complete tasks. Headaches & double vision & poor memory/concentration are primary limitations."

Self report

In her SR, the appellant writes that in March 2015, she suffered a stroke that primarily affected her left side. Since the stroke, the sight in her right eye is very blurry and she sees double all the time. The stroke also affected her ability to concentrate – now she has a very poor memory. She is also dizzy all the time and has very poor balance. She still suffers from extreme headaches and is both light and motion sensitive – making it difficult, if not impossible, to move around or complete the simplest tasks.

In describing how her disability affects her life and her ability to take care of herself, the appellant writes that everything seems to take her at least 2-3 times longer to do than normal (7/7 days). She has to move very slowly or she gets dizzy and she staggers when she walks or tracks to the right side. Dizziness affects her every day and in everything she does – it is especially bad when she bends over or moves side to side. She often will lose her balance, so she holds onto furniture or anything else that is around.

She writes that she forgets to do things every day, giving examples such as making water for tea and then forgetting to drink it. If she takes a break or sits for a rest, she seems to forget what she was doing. Cooking and cleaning is almost all done for her by her cousin who lives with her. She helps out where she can, usually sitting at the table cutting vegetables or prepping something, but she can't move her focus or walk around without getting very dizzy. If she moves quickly, she can be dizzy for15 seconds or up to 2 or 3 minutes – this happens at least 4-6 times/day -- and then she is in danger of falling.

She goes on to write that she can't drive because everything is blurry and she sees double and doesn't have any depth perception. Her cousin drives her to all her appointments or stores. Grocery shopping is a chore because she often gets frustrated or overwhelmed and the light, motion and sounds in stores stresses her out and then she feels anxious and must leave the store. She has noticed that since the stroke she has trouble chewing on her left side so she does all her chewing on the right side; she thinks this is because facial muscles were affected.

In terms of her mental health, the appellant writes that 7 days out of 7 she has confusion, anxiety and depression. Every day she forgets things or doesn't finish things she started to do. At least 2-3 times a week she forgets to take her medication on time or will forget to eat a meal. She has difficulty interacting with others and has trouble asking for help and tends to avoid most activities that would take her out of the house or around people. She is exhausted all day long.

The appellant reports that she has been prescribed medication for high blood pressure, for anxiety/depression and for pain relief.

Regarding help from assistive devices, she writes that she uses chairs and furniture to stabilize herself when she moves around the house. She uses handrails on all stairs, uses large handle tools to help with her grip and a bath bar so she doesn't fall. She also uses an eye mask to help her sleep or when she has a headache.

Request for Reconsideration

In her Request for Reconsideration**,** the appellant provides no new information. Under Reasons, she explains her position (see Part E, Reasons for Panel Decision, below).

Notice of Appeal

The appellant's Notice of Appeal is dated 03 March 2016. Under Reasons, she writes:

"Not enough information from physician & OT. Vision problems affect all of daily living."

The hearing

The ministry stood by its position at reconsideration.

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PART F – Reasons for Panel Decision

The issue in this appeal is whether the ministry decision that determined that the appellant did not meet three of the five statutory requirements of Section 2 of the *EAPWDA* for designation as a person with disabilities (PWD) is reasonably supported by the evidence or is a reasonable application of the legislation in the circumstances of the appellant. The ministry found that the appellant met the age requirement and that, in the opinion of a medical practitioner, her 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 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 these restrictions, the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

The following section of the *EAPWDA* applies to this appeal:

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 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.

The following section of the EAPWDR applies to this appeal:

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.

The positions of the parties

The appellant's position

The appellant's position is set out in her Request for Reconsideration. She writes:

"The issue as I see it and experience it on a daily basis is my vision impairment with blurred and double vision, constant headaches and migraines. This affects my daily life with dizziness and balance. I'm not able to read and therefore not able for work. I am also not able to drive and must rely on other people to get to any of my appointments. I am also having anxiety, as I cannot function at a normal capacity.

I don't feel the ministry has considered how life-changing it is when vision has been impaired."

The ministry's position

The position of the Ministry, as set out in the reconsideration decision, is that severe impairment of the appellant's physical functioning has not been established. The ministry referred to the appellant's functional skills limitations as reported by the GP in the PR (can walk 4+ blocks unaided, etc.). The ministry also reviewed the information provided by the OT in the AR, noting that the OT has indicated the appellant is independent in all listed areas of mobility and physical ability, and referring to several gaps and inconsistencies in the information provided, Including a lack of description of this severity/frequency/duration of the appellant's fluctuating dizziness or the severity or frequency of the periods in which her ability with lifting/carrying/holding is affected by balance problems.

With respect to mental functioning, the ministry also determined that a severe mental impairment has not been established. The ministry referred to the significant deficits with cognitive and emotional functioning identified by the GP in the PR and the impacts on daily functioning assessed by the OT in the AR and noted several inconsistencies. For example, while the GP indicates a significant deficit in the area of emotional disturbance, the OT assesses a minimal impact in that area, and the GP indicates a significant deficit with motor activity, the OT assesses a minimal impact. The ministry also noted that although the OT indicates major impacts in the areas of cognitive and emotional functioning, she also indicates moderate impacts in one area, minimal impacts in four areas and no impacts in seven areas of cognitive and emotional functioning. The ministry found that the cumulative impacts to cognitive and emotional functioning as indicated by the OT are indicative of a moderate, as opposed to severe impairment of mental function. The ministry also the notes that the OT does not describe the severity of the appellant's limitation with vision.

With regard to DLA, the ministry noted that the GP had indicated that the appellant was restricted in performing several DLA on a periodic basis due to her migraines, but they GP did not describe the frequency/duration of her migraine headaches that cause these periodic restrictions. The ministry also reviewed the assessments of the appellant's ability to perform DLA as provided by the OT, noting that the appellant was assessed as independent with all listed DLA except taking medications as directed and going to/from stores, but no information was provided as to the frequency/duration of the periodic assistance required with taking medications as directed. Based on the assessments provided, the ministry found that there is not enough evidence to confirm that the appellant has a severe impairment that significantly restricts her ability to perform DOA either continuously or periodically for extended periods.

The ministry found that as it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required.

Panel decision

Severity of impairment

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, the appellant’s GP and the OT.

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

presents a clear and complete picture of the nature and extent of the impacts of the person's medical conditions on daily functioning.

Physical impairment

As stated in her Request for Reconsideration and her Notice of Appeal, it is clear to the panel that the major physical issue affecting the appellant's physical functioning is her blurred and double vision and related dizziness/balance problems, together with her migraine headaches. However, the GP makes no reference to her vision/dizziness/balance issues in the PR, mentioning only the migraines. As the ministry pointed out in the reconsideration decision, the GP provided no information as to the severity or frequency of the migraines, only that "sometimes" they make daily functioning difficult. In the AR, the OT identifies the vision/dizziness/balance problems as impacting the appellant's ability to manage DLA, but again no description is provided as to the severity/frequency/duration of these problems except that she requires frequent breaks and rests to decrease eye stain/headaches/dizziness and that she is independent with most tasks, but she is slow and requires time to complete most tasks.

Considering the functional skill limitations reported by the GP (can walk 4+ blocks unaided, etc,) and the assessments by the OT that of the appellant is independent in all listed aspects of mobility and physical functioning and taking into account the (sometimes conflicting) assessments by the GP and OT regarding her ability to perform DLA requiring physical effort (see below under "Direct and significant restrictions in the ability to perform DLA"), the panel finds that the ministry was reasonable in determining that a severe physical impairment had not been established.

Mental impairment

The GP does not identify a mental health condition as a diagnosis related to the appellant's impairment, but does mention under Health History that she is being treated for depression. The GP indicates that the appellant has several cognitive and emotional deficits and in the AR the OT identifies major impacts in 2 areas: attention/concentration and memory, and a moderate impact with motivation. As the ministry pointed out in the reconsideration decision, there are some inconsistencies between the assessments in the PR and AR, including the GP indicating a significant deficit for emotion and the OT assessing a minimal impact in that area.

In terms of impacts of the appellant's mental functioning on DLA, the information provided by the OT points to memory issues as being a major factor, with the appellant requiring "cues" when cooking so as not to forget to turn off the stove and periodic assistance required for taking medication as directed as she " sometimes" forgets to take her medication. In her SR, the appellant writes that forgetting to take her medication on time happens 2-3 times a week, but this frequency is not confirmed by either prescribed professional.

While the GP comments that the appellants speaking is sometimes "incomprehensible," this impact is not reported by the OT, who has worked with the appellant biweekly for 4 months, and who assesses her speaking ability as good.

Considering that the GP has indicated that the appellant is not restricted in her social functioning, and that the OT has assessed the appellant as independent in all listed areas of social functioning, with good functioning with her immediate social network and marginal functioning with her extended social

network, the panel finds that the ministry was reasonable in determining that the appellant has a moderate as opposed to a severe impairment of mental functioning.

Direct and significant restrictions in the ability to perform DLA

The panel notes that, according to the legislation, the direct and significant restriction in the ability to perform DLA must be a result of a severe impairment, a criterion that has not been established in this appeal. The legislation – section 2(2)(b)(i) of the *EAPWDA* – requires the minister to assess direct and significant restrictions of DLA in consideration of the opinion of a prescribed professional, in this case the appellant's GP or OT. This doesn't mean that other evidence shouldn't be factored in as required to provide clarification of the professional evidence, but the legislative language makes it clear that the prescribed professional's evidence is fundamental to the ministry's determination as to whether it is "satisfied."

In the PR, the GP indicated that the appellant was restricted in her ability to perform several DLA on a periodic basis, but except for the reference to migraines "sometimes" making it difficult for daily basic functioning, does not further explain the reasons behind these restrictions – no reference to blurry and double vision/dizziness/balance issues – or the frequency and duration of these restrictions.

In the AR, the OT assesses the appellant as independent for walking indoors, walking outdoors, climbing stairs and standing (the DLA of moving about indoors and outdoors), noting that she requires a handrail for long stairs (publicly available handrails are not considered assistive devices). The OT also assesses the appellant as independent for virtually all aspects of the other DLA applicable to a person with mental or physical impairment, with the exception of taking medications as directed, for which periodic assistance from another person is required, but no information is provided as to the nature, type or frequency and duration of such assistance. The OT also assesses the appellant as independent for all listed areas of social functioning, while assessing her with good functioning with her immediate social network and marginal functioning with her extended social network. The OT also comments that the appellant is socially isolated due to environmental barriers (without explaining what these barriers are) and that the family drives the appellant into town but this is not a positive long-term solution.

Considering the lack of information provided by the GP and the extent to which the OT has assessed the appellant as independent in her ability to manage almost all DLA, and taking into account that a severe mental or physical impairment has not been established, the panel finds that the ministry was reasonable in determining that there is not enough evidence to confirm that the appellant has a severe impairment that significantly restricts her ability to perform DLA either continuously or periodically for extended periods.

Help with DLA

Section 2(2)(b)(ii) of the *EAPWDA* requires that, as a result of being directly and significantly restricted in the ability to perform DLA either continuously or periodically for extended periods, a person requires help to perform those activities. That is, the establishment of direct and significant restrictions under section 2(2)(b)(i) is a precondition of 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.

In the PR, the GP identified the appellant's VP shunt as an assistive device. The panel does not consider such a medical device, or other surgically implanted devices such as a heart pacemaker or a replacement hip or knee, to meet the definition set out in section 2(1) of the EAPWDA of an assistive device. The VP shunt was implanted to correct the appellant's hydrocephalus. While hydrocephalus is a serious medical condition, it is not a severe impairment established in this appeal. Further, the definition speaks to a device "designed to enable a person to perform DLA," implying that the person has control over the device and how it is used. Such is not the case with an implanted device.

The panel recognizes that the appellant benefits from the help of her cousin, with whom she lives, and from the use of grab bar in the bath. However, 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 under section 2(2)(b)(ii) of the *EAPWDA* 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 determining that the appellant was not eligible for PWD designation was reasonably supported by the evidence. The panel therefore confirms the ministry's decision.