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 September 2, 2016, 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 an assistive device, the significant help or supervision of another person, or the services of an assistance animal 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

Information before the ministry at reconsideration included:

- A PWD application comprised of the appellant's Self-report (SR) dated March 10, 2016, as well as a Physician Report (PR) dated April 12, 2016 and an Assessor Report (AR) dated April 18, 2016, which were both completed by the appellant's general practitioner (GP) of 2 months.
- Three Occupational Therapist (OT) assessments (memory and cognition) from 2013 and 2014 completed by three different OTs.
- February 17, 2016 consultation report from an endocrinologist.
- March 3, 2016 consultation report and August 14, 2016 letter from the appellant's psychiatrist.
- May 3, 2016 Medical Report – Employability completed by the GP.
- Results of a June 9, 2016 head magnetic resonance imaging (MRI).
- August 20, 2016 letter from the appellant's sister.
- August 23, 2016 Request for Reconsideration from the appellant.

Additional evidence submitted on appeal and admissibility

Section 22(4) of the Employment and Assistance Act limits the evidence that the panel may admit to information and records before the minister at the time of reconsideration and oral and written testimony in support of the information available at reconsideration.

At the hearing, the appellant provided oral testimony and a letter dated November 1, 2016 from her psychiatrist.

The ministry did not object to the new information being admitted into evidence. The panel admitted the additional oral and written testimony into evidence pursuant to section 22(4) of the EAA as the information therein was consistent with the information before the ministry at reconsideration and was therefore in support of the information available at reconsideration.

The ministry did not provide additional evidence on appeal and relied on its reconsideration decision.

Summary of relevant evidence

Diagnoses and history

The appellant's GP provides the following diagnoses:

- Diabetes mellitus type 1 – requires insulin and has difficulty maintaining stable blood glucose levels affecting functioning as far as energy and intellectual capacity are concerned;
- Major depressive disorder – severe depression with 15 or more years of treatment with varying amounts of success, never lasting long when successful;
- Proctocolitis; and
- Non-specific general body pain syndrome.

The appellant is also diagnosed with Obsessive Compulsive Disorder (OCD) and social anxiety disorder by her psychiatrist.

The June 9, 2016 MRI identified foci in the peripheral subcortical white matter of both frontal lobes but a causal diagnosis is not made.

Physical Impairment

In the PR and AR, the GP provides the following information.

- The appellant is able to stand, walk indoors and outdoors (4+ blocks), and climb stairs (5+ steps) independently.
- The appellant is able to lift 15 to 35 lbs. and remain seated 1 to 2 hours.
- The ability to walk outdoors and carry/hold "may fluctuate."

In the Medical Report, completed the month following the PWD application, the GP reports that due to diabetes, which is listed as the secondary medical condition, the appellant "sometimes may have fatigue and other symptoms if blood sugars drop." He describes the appellant's overall medical condition, including the primary medical condition of major depressive disorder, as severe.

The endocrinologist notes that "glycemic control is not at target"…"but she is having fewer lows." Carbohydrate ratio looks ok, as her sugars around meals are fine, but her fasting sugar is high. She is also bolusing many times throughout the day, up to 12 times, which is stacking her insulin and causing lows by the end of the day. The endocrinologist recommends that the appellant try not to bolus if she has bolused within the last 3 hours and made a number of changes to the insulin pump settings, indicating that she would be happy to see the appellant in 3 months for reassessment. The endocrinologist also describes the appellant's ulcerative colitis as stable.

Both the appellant and her sister report that the appellant experiences hypoglycemic episodes due to difficulties managing sugar levels and that the appellant is awaiting further information respecting the results of the recent MRI. At the hearing, the appellant stated that the cause of the brain lesions is still unknown and she has an electroencephalogram scheduled. She continues to see the endocrinologist on a regular basis.

Mental Impairment

In the PR and AR, the GP provides the following information.

- No difficulties with communication. Good speaking, reading, and hearing abilities; writing ability is satisfactory.
- Significant deficit with cognitive and emotional function for 6 of 11 listed areas – consciousness, executive, memory, emotional disturbance, motivation, and attention or sustained concentration. Consciousness may fluctuate dependant on blood glucose levels.
- A major impact on daily functioning is reported for bodily functions, concentration, emotion, and attention/concentration. A moderate impact is reported for insight and judgment,

executive, memory, motivation, motor activity, and psychotic symptoms. A minimal impact is reported for the remaining 3 listed areas of cognitive and emotional functioning.

- The PR identifies a periodic restriction respecting social functioning. The AR indicates that the appellant independently manages appropriate social decisions and interacts appropriately with others, and that the appellant requires periodic support or supervision to develop and maintain relationships, to deal appropriately with unexpected demands, and to secure assistance from others.
- Marginal functioning with immediate and extended social networks.
- The GP did not provide a response where asked to identify any safety issues.

In the March 3, 2016 initial visit consultation report, the psychiatrist notes that the appellant reports her energy is high, her concentration is improving, and that she gets panic attacks when depressed. In her Formulation/Summary, the psychiatrist notes that the appellant is currently feeling overwhelmed with her physical health concerns, some of which are being investigated, and that what the appellant describes as panic attacks are not true panic attacks. DSM V Diagnosis is: depression with anxious distress – Moderate; somatic symptom disorder – Moderate; some cluster B personality traits. In her August 14, 2016 letter, the psychiatrist reports that the appellant has a severe form of obsessive compulsive disorder where she is not able to function well in her day to day activities. “It is currently interfering with her life” and the psychiatrist does not anticipate the appellant returning to work anytime soon.

In her SR and request for reconsideration submission, the appellant describes her depression and anxiety, reporting that she has extreme obsessive thoughts and severe anxiety and social anxiety. Hypoglycemic episodes have damaged her brain, affecting her memory, and she has trouble processing information and details. She has days that the impairment is so severe she cannot remember how to hold cutlery.

The appellant’s sister notes that the appellant has been hospitalized and describes the appellant’s symptoms as including slurred speech and limbs giving out on a daily basis to the point of collapse. The appellant’s sister also indicates a quick deterioration of the appellant’s cognitive functioning and a complete lapse of her short term memory.

The most recent OT assessment of May 23, 2014, noted a change from May 2013 in the appellant’s general memory index from the 12th percentile to the 32nd percentile and improvements in areas including name recall and delayed appointment recall, but that further improvements are necessary in verbal and spatial memory to achieve a higher general memory index score.

At the hearing, the appellant stated that her current depression has lasted close to two years and that her medical conditions have become disabling, including being hospitalized in October 2015. Things are worse for her depending on the week – some weeks she has exhaustion and needs to sleep all day so that she can get some things done later. In a bad month, she will have two weeks of exhaustion and in a good month she is tired 1-2 days a week. She has extreme social anxiety which causes her legs to almost give out and the inability to see straight. She explained that her OCD manifests as distressing thoughts not repetitive actions. She often forgets where she is going when driving and has panic attacks when driving due to fear about her blood sugar levels. Her OCD is constant; sometimes the severity of her depression and anxiety lessens but it is always there. She

reiterated that she has severe memory problems, including the time she awoke and did not remember how to use a knife and fork.

In the November 1, 2016 letter, the psychiatrist writes that the appellant's mood is affected by her OCD and social anxiety and she is currently not stable and continues to be severely symptomatic. She is unable to function normally and finds it hard to do day to day tasks.

DLA

In the PR, the GP reports periodic restrictions with personal self-care, basic housework, daily shopping, mobility outside the home, use of transportation, and social functioning relating to fluctuations in blood glucose and mood. Mood deficit reduces significantly ability in social interaction. There is no restriction identified for the remaining DLA – meal preparation, management of medications, and mobility inside the home. It is unknown whether the ability to manage finances is restricted. The GP identifies insulin therapy as interfering with the ability to perform DLA – makes blood glucose alter rapidly with sometimes profound influence on level of consciousness, energy, and brain function.

In the AR, the GP reports that all listed tasks of the DLA: personal care, basic housekeeping, shopping, meals, pay rent and bills, medications, and transportation, are independently managed, explaining that while they are marked as independent, this is not the case all the time due to fluctuating sugar levels and a potential fluctuating level of functioning due to major depression. The impairments are not necessarily the same day to day; these functions may at any time (and indeed are often) acutely affected short term. As noted above, under the heading *Mental Impairment,* periodic support/supervision is required for 3 aspects of social functioning and the remaining 2 aspects are managed independently.

The psychiatrist's information is as summarized above under the heading *Mental Impairment.*

Need for Help

In the PR, the GP reports that he is not able to be specific as to what assistance is required due to the unpredictable and fluctuating nature of the appellant's medical conditions. In the AR, the GP describes the support/supervision required with social functioning to help maintain the appellant in the community as support with finances to obtain medicine and living arrangements. Assistance is provided by friends. An insulin pump is listed as an assistive device. The appellant does not have an assistance animal.

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 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 require an assistive device, the significant help or supervision of another person, or the services of an assistance animal 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 Impairment

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.

Physical Impairment

The appellant's position is that her medical conditions are disabling and that she continues to be impacted by the effects of imbalances in her blood sugar levels due to diabetes.

The ministry's position is that the information provided demonstrates that the appellant experiences limitations to her physical functioning due to fluctuations with her sugar levels. However, there is not enough information in the assessments provided by the GP regarding how much longer than typical walking outdoors and carrying/holding take and how often this fluctuates in order to determine if it represents a significant limitation to the appellant's overall level of physical functioning. Therefore, the ministry determined that the information provided does not establish a severe physical impairment. The ministry noted that employability or ability to work is not taken into consideration for the purposes of determining PWD eligibility.

Panel Decision

The appellant is diagnosed with a number of physical medical conditions, with limitations to physical functioning attributed by the health care professionals and the appellant to Type I diabetes, not the diagnoses of proctocolitis and non-specific general body pain syndrome. The GP reports that the appellant's physical functional skills are reasonably good, including the ability to independently walk 4+ blocks, climb 5+ steps, and lift 15-35 lbs., though walking outdoors and carrying/holding may take longer due to fluctuations of blood glucose levels. These fluctuations are also reported to result in acute short-term impairment and are described by the GP as unpredictable, sudden, and as occurring often. However, it is unclear what the GP means by short-term, which could mean anything from an hour to a few days, or what is meant by often, which could include anything from daily to weekly. The appellant's own evidence does not describe these short-term acute impacts on functioning. The endocrinologist assessed the appellant as having fewer lows but that fasting sugar is high, and that bolusing many times throughout the day is causing lows by the end of the day. The endocrinologist recommended changes in an effort to improve blood sugar stability, but no additional information from the endocrinologist has been provided respecting the expected outcome of those changes.

As it is unclear how often the appellant's otherwise good physical functioning is impaired by fluctuations in her blood sugar levels, or how much longer walking and carrying/holding take as a result of the fluctuations, the panel finds that the ministry reasonably determined that the information does not establish a severe physical impairment.

Mental Impairment

The appellant argues that her mental functioning has been severely impaired as a result of hypoglycemic episodes, depression, anxiety and OCD and that the ministry has not taken into consideration how the severity of her disabilities limit her activities daily.

The ministry notes that the GP reports that the appellant does not have any difficulties with communication and that the appellant has major, moderate, and minimal impacts on daily cognitive and emotional functioning. The ministry also notes that periodic support/supervision is required for 3 of 5 listed aspects of social functioning but that the degree and duration of this support/supervision is not described as requested in the PWD application and that the help is described as support with finances to obtain medicine and living arrangements. The ministry concludes that the information provided does not establish a severe mental impairment.

Panel Decision

The appellant is diagnosed by her GP with major depressive disorder. The GP identifies significant deficits with more than half of the listed areas of cognitive and emotional functioning and reports that there is a major impact on daily functioning in four areas – bodily functions (which the appellant indicates is related to sleep disturbances), consciousness, emotion, and attention/concentration. Additionally, a moderate impact on daily functioning is reported for six additional areas, including executive and memory. The GP attributes these impacts on functioning to both hypoglycemic episodes which result in temporary acute impairment of cognitive function and fluctuations in the appellant's mood.

When addressing social functioning, the GP reports marginal functioning with both immediate and extended social networks and that social functioning is periodically restricted and requires periodic support or supervision. As the ministry notes, the GP does not describe the degree or duration of the periodic support/supervisions required for social functioning. However, the GP comments that "mood deficit reduces significantly her ability in social interaction", and, as discussed above, the GP reports that the appellant experiences either major or moderate impacts on her daily cognitive and emotional functioning. Additionally, the psychiatrist assesses the appellant as being severely symptomatic respecting her OCD and social anxiety.

Based on the level of impact the appellant's hypoglycemic episodes and mental conditions are reported to have on her cognitive and emotional functioning on a daily basis, the panel finds that the ministry was unreasonable when it determined that the information does not establish that the appellant has a severe mental impairment.

Restrictions in the ability to perform DLA

The appellant argues that although there are fluctuations, she is continuously impacted by her medical conditions and that the ministry has not taken into consideration how the severity of her disabilities are limiting her DLA.

The ministry acknowledges that the appellant has certain limitations in her ability to perform DLA resulting from fluctuations with her mood and blood sugar levels but that the frequency and duration of these periods are not described in order to determine if they represent a significant restriction to her overall level of functioning. Therefore, the ministry concludes that the information provided by the medical practitioner does not establish that a severe impairment significantly restricts DLA continuously or periodically for extended periods.

Panel Decision

The legislative requirement respecting DLA set out in section 2(2)(b) 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, the appellant's GP and psychiatrist are the prescribed professionals who have provided information addressing the appellant's ability to perform daily activities.

In the PR, where asked if impairment directly restricts the appellant's ability to perform DLA, the GP reports that the appellant is periodically restricted with personal self-care, basic housework, daily shopping, mobility outside the home (one aspect of the DLA move about outdoors and indoors), use of transportation, and social functioning. In the AR, where asked to indicate the assistance required related to impairment, the GP reports that, with the exception of some aspects of social functioning, the appellant independently manages DLA except during periods when her ability to perform DLA is impacted due to fluctuating sugar levels and potential fluctuating level of functioning due to major depression. The GP does not indicate how often either of these fluctuations occur. While the GP describes sugar level fluctuations as often resulting in an acute short-term impact on the appellant's ability to perform DLA, which indicates a significant degree of impairment, this degree of impairment is not identified by the GP as being for extended periods. As previously discussed, major and moderate impacts on daily cognitive and emotional functioning are reported by the GP, however, the GP does not report a corresponding daily impact on the ability to perform DLA. That is, the GP has not provided information that there is an ongoing, or continuous, restriction in the ability to perform DLA.

The psychiatrist states that because of OCD the appellant is not able to function well in her day to day activities, that it is hard to do day to day tasks, and that the psychiatrist does not anticipate the appellant returning to work anytime soon. However, it is unclear which prescribed DLA are impacted or whether, despite not functioning well and having difficulty, the appellant is still able to perform DLA in a manner that is adequate to meet basic needs. The ability to work is not a prescribed DLA and is reasonably viewed as reflecting the need for a more sustained and demanding level of functioning than managing DLA tasks.

Based on the above information, the panel finds that the ministry reasonably determined that a severe impairment that significantly restricts the appellant's ability to perform DLA continuously or periodically for extended periods as required by section 2(2)(b)(i) of the EAPWDA has not been established.

Help to perform DLA

At the hearing, the appellant argued that her abilities are limited on a daily basis and that she requires daily assistance from her roommate and weekly assistance from her mother to perform her DLA.

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. 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 DLA.

The panel notes that an insulin pump is not an assistive device as defined in the legislation. The establishment of direct and significant restrictions with DLA is a precondition of the need for help criterion. As the panel found that the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established, the panel also finds that the ministry reasonably concluded that it cannot be determined that the appellant requires help to perform DLA as required by section 2(2)(b)(ii) of the EAPWDA.

Conclusion

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. The appellant is not successful on appeal.