PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated September 6, 2017, which found that the appellant did not meet three of the five 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 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 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 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.

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

The evidence before the ministry at the time of the reconsideration decision included the Persons With Disabilities (PWD) Application comprised of the appellant's self reports dated June 8 and August 22, 2017 respectively (together referred to as the SR), a medical report (MR) dated June 8, 2017 completed by her general practitioner (the GP), who has known the appellant for 5 months and who has seen the appellant 2 to 10 times in the past 12 months, an assessor report (AR) also completed by the GP and dated June 21, 2017, and an additional assessment completed by Nurse J on August 22, 2017 (NA).

Diagnosis

In the MR the GP notes that the appellant suffers from:

- Pulmonary Langerhans (PL) (since 1988);
- Chronic Obstructive Pulmonary Disorder (COPD) – severe Emphysema (since 2006);
- Mood Disorder (since 2006);
- Anxiety Disorder (since 2006).

Physical Impairment

In her SR the appellant reports that her PL affects her mobility when it acts up, causing low energy and muscle pain. She finds it hard to breathe and has dizzy spells. She can't leave home when she finds it hard to breathe and has difficulty with outdoor and indoor household chores. She cites an example: while shopping she had to rest 5 times for up to 10 minutes to catch her breath, in all taking 3 hours to purchase 4 bags of groceries. She is particularly affected by cold weather. In her August 22, 2017 report the appellant notes that her medical status has worsened.

In the MR the GP reported that the appellant:

- has moderate to severe emphysema, very severe airflow obstruction, significant reversibility with hyperinflation, gas dropping, and mild decrease in diffusion capacity;
- is very limited in her mobility and activities due to her severe COPD;
- finds it difficult to maintain independence and function due to frequent episodes of severe dyspnea (shortness of breath) after even minor exertion;
- can walk 1 to 2 blocks unaided, climb 5+ steps unaided, lift 2 to 7 kg and has no limitation with remaining seated.

In the AR the GP reported that the appellant:

- experiences severe shortness of breath with activities due to PL/COPD;
- walks much more slowly than others her age;
- can manage 1 flight of stairs with breaks;
- requires periodic assistance from another person with lifting bags and carrying/holding
- is independent but takes significantly longer than typical with walking outdoors (1/4 as fast), climbing stairs and standing (needs breaks);
- is independent with walking indoors.

In the NA Nurse J notes that the appellant's energy level and overall physical status had deteriorated between visits and he observed her to struggle with attending the interview, showing pain in her right shoulder and chest area . He adds that her respiration appears to be increasingly compromised due to her lung disease, aging and global energy loss that is becoming more regular and of longer duration. Nurse J also noted that the appellant provided the following information:

- she had difficulty breathing due to smoke from forest fires;

- complained of vertigo, nausea and vomiting that requires coaching/validation/physical support;
- has fallen asleep due to narcolepsy;
- is highly sensitive to heat and cold;
- struggles to carry even the smallest of weights, including a grocery bag containing her personal papers.

Mental Impairment
In her SR the appellant wrote that she is often emotionally unstable, with weepiness, panic attacks, frustration, anger, depression, panic attacks and general lack of control over her emotions. She has recently experienced menopause secondary to a hysterectomy, which has led to crying spells, mood swings and forgetfulness. When she becomes depressed she won't leave the house.

In the MR the GP notes that the appellant has experienced severe anxiety and depression for many years, which has not been helped by medication. As a result she has marked limitation in social functioning. The GP describes her depression as chronic and her anxiety disorder as generalized, with attendance at appointments being a very major undertaking. The GP adds that the appellant has significant deficits with cognitive and emotional functioning in the areas of executive, memory, emotional disturbance, motivation and attention/sustained concentration. Her depression/anxiety cause continuously restricted social functioning, and her frequent dyspnea episodes increase her anxiety and become a vicious cycle that increases her disability. Her long term depression affects mood, motivation, concentration, focus and social function.

In the AR the GP notes that the appellant has good ability with reading, writing and hearing, and satisfactory speaking ability. She has severe anxiety and depression, which impact her mental function. She has poor concentration and initiative, and can get very anxious and angry, causing verbal outbursts. She may withdraw from others for as long as 2 weeks at a time. Her mood and anxiety severely impair her social functioning. In the area of cognitive and emotional functioning the GP indicates the following impacts:
- major impact in the area of emotion;
- moderate impacts in areas of impulse control, attention/concentration, memory, motivation and other emotional/mental problems;
- minimal impacts in the area of executive functioning;
- no impacts in the remaining 7 listed areas (bodily functions, consciousness, insight and judgement, motor activity, language, psychotic symptoms and other neuropsychological problems).

In the area of social functioning the GP notes that the appellant is independent with making appropriate social decisions but requires continuous support/supervision with being able to deal appropriately with unexpected demands and getting help from others, and requires periodic support/supervision with developing and maintaining relationships and interacting appropriately with others. She has marginal functioning in both immediate and extended social networks, and would benefit from the help of a community support worker, friends or an advocate.

In the NA Nurse J notes that the appellant showed a marked distraction in her processing of inquiry and information. She also exhibited dyslexia of letters and words, with Attention Deficit Disorder (ADD) features, and showed disorganized organizational skills and tangential thought process. Her increasingly compromised respiration escalates her anxiety, increasing her depressed mood and overall declining personal organizational and self-care skills on a daily basis. Nurse J also recorded that the appellant reported the following:
- she is irritable due to difficulty breathing and fatigue, which increases her anxiety and depressed mood;
- she stutters and occasionally vomits due to anxiety;

- when she feels this way she will isolate at home for weeks at a time.

Daily Living Activities (DLA)
In the MR the GP notes that the appellant has not been prescribed medications that interfere with her ability to manage DLA. Her ability to perform DLA is restricted in the following areas:

- continuously restricted with basic housework, daily shopping, mobility outside her home and social functioning ("depression/anxiety interfere with social function");
- periodically restricted with personal self-care and meal preparation ("may have dyspnea while preparing meals has to stop and rest");
- not restricted in the areas of medication management, indoor mobility, use of transportation and management of finances.

The GP also notes that the appellant's severe COPD results in marked restriction of ability to perform DLA.

In the AR the GP indicates that the appellant is independent in all areas of personal care, basic housekeeping ("slow due to dyspnea"), shopping, except carrying purchases home, for which she needs help, meal planning, paying bills, medication management and transportation. She is noted to take significantly longer than typical with food preparation and cooking ("long standing causes dyspnea") and cannot use public transit ("due to anxiety").

In the areas of social functioning the GP notes that the appellant is independent in making appropriate social decisions but requires periodic support/supervision in developing and maintaining relationships and interacting appropriately with others, and requires continuous support/supervision in dealing appropriately with unexpected demands and securing assistance from others ("results in severe anxiety")

In the NA Nurse J notes that the appellant reported that:

- she struggles with low body energy to attend to personal body habitués and deportment with diminished DLA;
- when her energy is low she isolates at home for weeks at a time and it can potentially take weeks to clean her home due to low energy, mood, vertigo, nausea, vomiting, not bathing regularly or able to prepare and eat food;
- she is at times unable to fill her medication prescriptions because she can't afford specific respiratory medications;
- she can't use public transit because of her escalating anxiety in crowded environments which causes her prolonged coughing episodes and fear of tinnitus and vomiting;
- when grocery shopping she receives assistance from staff if she doesn't have a cart, and when she gets home she carries her items into the house one at a time if no assistance is available;
- her energy losses due to the disease process in her lungs increase her depressed mood and cause an overall decline in personal organizational and self-care skills on a daily basis.

Assistance Required
In the MR the GP indicates that the appellant does not require prostheses or aids. He also notes that the appellant needs help with DLA from friends and her roommate.

In the AR the GP notes that the appellant receives assistance from friends, but does not have adequate help.

In the NA Nurse J writes that the few people the appellant knows assist her at times. He also notes that the appellant has modified her shower by converting it to a bathtub where she can sit in a bath chair.

Additional Information at the Hearing
At the hearing the appellant provided the following oral evidence:

- she had to leave another province due to her inability to tolerate cold weather and now is affected by any change in temperature exceeding 10 degrees;
- she had a total hysterectomy caused by endometriosis, which may have been caused by PL or immunodeficiency;
- she had a head injury but didn't realize how serious it was;
- she suffers from arthritis;
- anxiety medications have not helped;
- she is now experiencing cognitive impairments, for example locking herself out of her house on 4 occasions;
- she requires help at home
- she uses the phone a lot to reach out to people on the days when she can't leave home;
- she cries because the chemicals in her body aren't functioning correctly;
- on bad days she can't do housework, and must drive to her mailbox ¾ block away, rather than walk;
- she needs help to wash floors, scrub the shower and weed the garden;
- her meal preparation takes a very long time due to her breathing difficulties and fatigues. For example she takes potatoes to the table, sits and rests, peels the potatoes, sits and rests, takes them to the stove to cook, then must sit and rest. The same is true for laundry – she must do everything in stages;
- her memory loss is both short term and long term;
- in 2007-08 she had a highly responsible job organizing inventory in a very large warehouse, but had to quit due to severe anxiety and panic attacks;
- currently her neighbour helps with the lawn and garden, and a friend helps with shopping on days when she can't go herself. She also helps clean house on bad days. On good days the appellant can do it herself.
- good days can be as frequent as 15 per month, but bad days can sometimes go as high as 20 per month.

Evidence of Witness Nurse J:
Nurse J noted that the appellant was having a very difficult time prior to the commencement of the appeal hearing, and was experiencing "seesaw respirations", which are indicative of cardiac failure or COPD in medium or medium-late stage.

Admissibility of Additional Information
The ministry did not object to the admissibility of the appellant's oral evidence (or the oral evidence of Witness Nurse J). The panel admitted all of the information under EAA Section 22 (4) (b) as evidence in support of the information that was before the ministry at reconsideration, except the appellant's reference to having incurred a head injury. The head injury was not before the ministry at the time of reconsideration and was not considered by the ministry. All of the remaining new evidence of the appellant and Nurse J supported and added further detail to the information provided to the ministry before the time of reconsideration.

PART F – Reasons for Panel Decision

The issue in this appeal is whether the ministry decision of September 6, 2017 that determined that the appellant did not meet three of the five statutory requirements of Section 2 of the *Employment and Assistance for Persons with Disabilities Act* 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 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 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 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 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:

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 argues that she suffers from at least several physical impairments, the most serious of which are PL and COPD. She finds it increasingly hard to breathe (dyspnea), and as a result her daily functioning been severely restricted.

The ministry's position is that the physical impairments described by the GP in the MR and AR and by Nurse J in the NA are insufficient to establish a severe physical impairment.

Panel Decision
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. "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 or a "prescribed professional" – in this case, the appellant's GP and Nurse J. The legislation requires that for PWD designation, the minister must be satisfied that the person has a severe mental or physical impairment.

In the MR the GP writes that the appellant suffers severe dyspnea on exertion but works very hard to maintain independence. The GP notes that the appellant is "very limited in mobility and activity" but does not describe the nature or severity of limitations to mobility or activity. The GP assesses her as

able to walk 1-2 blocks and to climb 5+ steps unaided, having no difficulty remaining seated, and able to lift 2-7 kg. The overall description of functional skills in the MR is not indicative of a severe impairment.

In the AR the GP describes severe shortness of breath with activity or exertion and notes that the appellant is independent with walking indoors, can climb a flight of stairs slowly, with breaks, requires assistance with lifting, and takes significantly longer when walking outdoors (1/4 as fast as others) and standing (needs breaks). Apart from the specific reference to the length of time it takes for the appellant to walk outdoors the GP does not state how much longer the appellant takes to climb stairs, lift or remain standing, the frequency or duration of her rest periods or specify the amount of assistance needed with carrying packages.

In the NA and in his oral evidence at the hearing Nurse J observed several medical conditions which were not mentioned by the GP, including shoulder and chest pain, vertigo, nausea, vomiting, extreme sensitivity to heat and cold, and seesaw respirations. Nurse J does not address the specific functional skills of walking indoors and out, climbing or remaining seated as required in the PWD application. His assessment of the appellant's ability to lift and carry ("had difficulty carrying a bag of personal papers") differs markedly from the GP's assessment of 2-7 kg. As a result the ministry is left with contradictory assessments from two prescribed professionals.

At the hearing the appellant described in greater detail the limitations to her physical functioning, which are significant, and the panel was impressed by the appellant's struggle to remain independent in the face of her deteriorating energy and increased dyspnea. However, it is the evidence of prescribed professionals that provides the basis upon which the ministry determines the severity of the impairment and its impact on daily functioning. The panel finds that the ministry reasonably determined that the GP's assessment of functional skills in the MR and AR were insufficient to establish a severe physical impairment, and Nurse J's assessment contained discrepancies between it and the MR and AR that made it difficult to establish a severe physical impairment.

Severe Mental Impairment

The appellant argues that she suffers from a severe mental impairment arising from anxiety, depression and diminished cognitive ability, particularly with her short and long term memory.

The ministry argues that the information provided in the MR, AR and NA is not indicative of a severe mental impairment.

Panel Decision

As with physical impairment, a diagnosis of a mental disorder is not by itself sufficient to establish a severe mental impairment. 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, must be determined.

In the MR the GP notes that the appellant has marked limitations in social functioning due to long-standing anxiety and depression that to date has not been successfully treated by medications. However the GP does not describe the nature of these limitations. She adds that the appellant's low mood and anxiety are significant barriers to functioning at basic tasks, and that the appellant's episodes of dyspnea cause an increase in anxiety. The GP also remarks that long term chronic depression affects mood, motivation, concentration, focus and social function, but does not describe the severity of the impact on mood and concentration

In the MR the GP also indicates significant deficits in cognitive and emotional functioning in the areas executive ability, memory, emotional disturbance, motivation, and attention/concentration, but in the AR she assesses no impact on bodily functions, consciousness, insight/judgement, motor activity, language, psychotic symptoms and other neuropsychological problems, minimal impact to executive ability, moderate impacts in impulse control, attention/concentration, memory, motivation and other mental problems. The only area assessed as having a major impact is emotion. On the next page the GP comments that due to poor concentration and poor initiative the appellant can get very anxious and angry, causing verbal outbursts, and may withdraw from others for as long as 2 weeks at a time but the GP does not describe the frequency of the outbursts or the withdrawal. In Section 3-C of the PWD application the GP states that the appellant requires continuous support/supervision in dealing with unexpected demands and securing assistance from others, and requires periodic support/supervision in developing and maintaining relationships and interacting appropriately with others, but the frequency and duration of support required is not described. The GP also notes that the appellant is independent in making appropriate social decisions.

In the NA Nurse J indicates that the appellant suffers from dyslexia and ADD, which are not mentioned by the appellant's GP. Nurse J also notes that the appellant shows disorganized organizational skills, whereas the GP describes the impact of the appellant's mental impairment on organizational skills as minimal. Nurse J indicates that the appellant displays consistent poor retention of being able to read, listen and verbalize, but the GP assesses no impact in the area of language in the AR and indicates that the appellant's ability to communicate is good in all areas except speaking, which is satisfactory.

In conclusion, although the evidence demonstrates that the appellant suffers from depression and anxiety that negatively impacts her emotional functioning and limits her ability to function socially, the panel finds that the ministry reasonably determined that a severe mental impairment was not established due to the contradictory findings made by the GP in the MR and AR, the limited impacts on all but one of the areas of cognitive and emotional functioning set out in the AR and the findings made by Nurse J in the NA which are inconsistent with the assessments made by the GP.

Restrictions in Ability to Perform DLA

The appellant argues that her ability to perform DLA is significantly restricted as a result of her PL and COPD and her depression and anxiety.

The ministry's position is that a severe impairment has not been established that directly and significantly restricts the appellant's ability to perform DLA, and that the information submitted by the prescribed professional is not sufficient to establish that the appellant's DLA are directly and significantly restricted either continuously or 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. While other evidence may be considered, 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 the MR the GP indicates that the appellant is continuously restricted in the areas of basic housework, daily shopping, mobility outside the home and social functioning, periodically restricted in personal self-care and meal preparation, and not restricted in medication management, mobility indoors, use of transportation and financial management. The GP does not provide an explanation of restriction to personal self care, and says that the appellant *may* have marked dyspnea while preparing meals, but does not elaborate on how frequently the dyspnea occurs. When asked to comment on the degree of restriction the GP states: "severe COPD results in marked restriction", but does not specify what DLA are markedly restricted.

In the AR the GP indicates that the appellant is independent in all areas of personal care, basic housekeeping (but takes significantly longer to do laundry and basic housekeeping due to dyspnea), shopping (but takes significantly longer due to dyspnea and needs help carrying), meals, paying rent, managing medications and transportation (although she can't use public transportation due to anxiety). In describing the impact of the appellant's impairments on social functioning the GP notes that the appellant is independent in making appropriate social decisions but requires periodic support/supervision in developing and maintaining relationships and interacting appropriately with others. However, the GP offers no explanation where asked to do so on the form. The GP indicates that the appellant requires continuous support/supervision in dealing appropriately with unexpected demands and securing assistance from others, but does not describe the degree and duration of the support/supervision required.

In the NA Nurse J indicates that the appellant reports that it may take weeks to clean her home, and because of low energy, low mood, vertigo, nausea and vomiting does not bathe regularly, prepare food or eat.

Because the GP indicates that the appellant is independent in most of the DLA listed in the AR and does not describe the degree, frequency and duration of those DLA with which the appellant requires periodic or continuous assistance, and because Nurse J's assessment of the appellant's ability to perform DLA is inconsistent with the GP's assessments the panel finds that the ministry reasonably determined that the information fails to establish that the appellant suffers from a severe impairment that in the opinion of a prescribed professional directly and significantly restricts DLA continuously or periodically for extended periods.

Help in Performing DLA

The appellant argues that she requires the significant help of a neighbour and a friend to perform DLA, as well as an assistive device in the form of a bath chair.

The ministry's position is that because it has not been established that his DLA are significantly restricted as a result of a severe impairment it cannot be determined that significant help is required from other people.

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 a DLA.

In the MR the GP indicates that the appellant does not require prostheses or aids. In the AR the GP notes that the appellant receives assistance from friends. She does not describe the type of assistance required by the appellant.

In the NA Nurse J indicates that the appellant reported that she has a modified shower converted to a bath tub where she can sit in a bath chair.

The establishment of direct and significant restrictions with DLA is a precondition of the need for help criterion. Because 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

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 confirms the decision. The appellant is not successful on appeal.