PART C – DECISION UNDER APPEAL

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Poverty Reduction (the ministry) dated January 23, 2018, 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 has confirmed that the appellant's impairment is likely to continue for at least 2 years.

However, the ministry was not satisfied 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

1) The appellant's PWD application comprised of:
    - A September 27, 2017, Self-report from the appellant; and
    - A Medical Report (MR) and an Assessor Report (AR) dated October 6, 2017, which were both completed by the appellant's general practitioner (GP) of 10 years.
2) The appellant's Request for Reconsideration dated January 21, 2018.
3) November 18, 2010, 2-page medical report by a neurologist.
4) January 2, 2013, 3-page Geriatric Consult report by a psychiatrist.
5) April 14, 2014, 3-page neurology report.
6) 2-page neuropsychiatric report respecting a February 24, 2016, appointment, with an addendum dated March 3, 2016.

Information provided on appeal and admissibility

1) The appellant's Notice of Appeal (NOA), received by the tribunal on March 5, 2018, in which the appellant writes that she is physically unable to work. She has un-diagnosed seizure-like episodes, needs help at home and needs support. She also has two autistic kids.
2) At the hearing, the appellant provided oral testimony but did not submit additional documents.

Section 22(4) of the *Employment and Assistance Act* (EAA) provides that panels may admit as evidence (i.e. take into account in making its decision) the information and records that were before the minister when the decision being appealed was made and "oral and written testimony in support of the information and records" before the minister when the decision being appealed was made – i.e. information that substantiates or corroborates the information that was before the minister at reconsideration. These limitations reflect the jurisdiction of the panel established under section 24 of the EAA – to determine whether the ministry's reconsideration decision is reasonably supported by the evidence or a reasonable application of the enactment in the circumstances of an appellant. That is, panels are limited to determining if the ministry's decision is reasonable and are not to assume the role of decision-makers of the first instance. Accordingly, panels cannot admit information that would place them in that role.

The ministry did not object to the admission of the information provided by the appellant on appeal. The panel determined that the appellant's oral testimony respecting a recent aneurism and impacts to her daily functioning due to the symptoms of Parkinson's disease introduces medical conditions not before the ministry at reconsideration. Additionally, the appellant stated that, after a period when she was not allowed to drive, this is no longer the case, as her physicians trust her judgment not to drive when she feels a seizure coming one; this conflicts with the information at reconsideration. Accordingly, in accordance with section 22(4) of the EAA, the panel did not admit the above information as it was not in support of the information at reconsideration. The balance of the information provided by the appellant at hearing and in her NOA was consistent with and tended to substantiate the appellant's self-reported information available at reconsideration and was therefore was admitted under section 22(4) of the EAA.

The ministry reviewed its reconsideration decision but did not provide additional evidence. Additionally, the ministry did acknowledge that an incorrect name was given for the appellant's GP and was understanding towards the confusion it caused the appellant.

The arguments of both parties are set out in Part F of this decision.

With the consent of the appellant, an observer from the ministry was in attendance at the hearing.

Summary of relevant evidence

The panel notes that when referencing the MR and the AR, the reconsideration decision attributes the information therein to a physician who is not known to the appellant and whose name does not appear on the MR and AR. However, as the ministry's summary of the information accurately reflects the information in the MR and AR, which were completed and signed by the appellant's GP, the panel considers the error to be typographic, with no impact on the substance of the ministry's reconsideration decision.

Diagnoses

In the MR, where asked to provide a specific diagnosis and provide health history, the GP writes:

- Non Epileptic Seizures (onset 2010)
- Depression (onset 2015)

Physical Impairment

The GP reports as follows:

- Severely disabled by unpredictable and uncontrolled episodes of epilepsy like disorder.
- Has seizures without loss of consciousness.
- Able to walk 4+ blocks unaided on a flat surface and climb 5+ stairs unaided.
- No limitations in the ability to lift or remain seated.
- Walking indoors and outdoors, climbing stairs, standing, lifting, and carrying/holding are managed independently ("can be dangerous if she has seizures.")
- No aids, prostheses or assistive devices required.

In the November 18, 2010, medical report, the neurologist recommends starting anti-seizure medication, reviewing life stressors, and that the appellant not drive when having random episodes.

In the January 2, 2013, Geriatric Consult report, the psychiatrist notes that the appellant appears to have symptoms of restless leg syndrome, and notes that the appellant was seen respecting a question of peripheral neuropathy.

In the April 14, 2014, neurology report, the neurologist writes that he does not think the paresthesia have physiologic basis, and suspects they are part of somatoform disorder. Fibromyalgia is another potential benign etiology to these symptoms. The neurologist does not think there is a serious underlying cause to the numbness and recommends review by another specialist to ease appellant's anxiety about an underlying movement disorder, which will hopefully be helpful in further cementing a somatoform diagnosis and preventing additional unnecessary investigations.

The neuropsychiatric report respecting a February 24, 2016, appointment discusses changes to medications from which the appellant has noticed a significant improvement in fatigue and sleepiness, but at the same time, some of the pain is coming back. Going forward, the recommended plan includes medications, having better structure to the day and being more active. The March 3, 2016, addendum notes that the appellant reported that "She had no recurrence of episodes in the last month."

In her SR, the appellant describes her disability as: numb face, seizure like episodes, slurred speech, memory loss, loss of function of hands, arms and legs, unable to walk properly on certain days, no energy, sore joints, tightened limbs, numbing of hands, arms and legs, very shaky, loss of sleep, emotional, and horrible dreams. Her disability affects her as it's a constant stress, completely unpredictable, and has disrupted her life in every possible way. She used to be extremely active and is now unable. Working makes all symptoms worse.

In her reconsideration submission, the appellant writes that she cannot work, and can barely keep up with day to day life. She needs assistance with household chores and her two autistic children because her health is not improving. She is undergoing more medical tests. Her symptoms are a daily occurrence. Some days she is unable to get up her stairs, or even walk without assistance.

At the hearing, the appellant stated that prior to taking medication, she had seizures every day. Currently, the frequency of episodes is up and down and cannot be predicted. She described having 3-10 episodes per month and also stated that sometimes she has 3-4 per week. She can feel a seizure coming on, at which time she takes medication that stops the seizures after a few minutes. Her medications are still being adjusted and she has upcoming appointments with her neurologist and neurosurgeon. The appellant also reiterated that there are some days she cannot walk.

Mental Impairment

The GP reports as follows:

- Difficulties with communication "only during seizures."
- Significant deficit with cognitive and emotional function in 4 of 11 specified areas: consciousness, executive, memory, and emotional disturbance.
- Depression is reasonably controlled but meds affect her memory and thoughts. Depression: inability to cope; frequent "breakdowns."
- Severely limited by her epileptic disorder as the seizures can come on at any time and leave her fatigued and disoriented.
- Good ability to communicate in the areas of speaking, reading, and hearing. Poor writing ability.
- Major impact on daily functioning for emotion. Moderate impact for consciousness, attention/concentration, executive, memory, motivation, motor activity, and other neuropsychological problems. Minimal or no impact in the remaining six areas. Seizures limit ability to work: unpredictable. Depression.
- Social functioning:
    - Appropriate social decisions, deal appropriately with unexpected demands, and ability to secure assistance from others require periodic support/supervision.
    - Ability to develop and maintain relationships and interact appropriately with others are managed independently.
    - Help is described as "See enclosed consults."
- Marginal functioning with immediate and extended social networks.

In the January 2, 2013, Geriatric Consult report the psychiatrist describes the appellant's mental state as objectively euthymic mood, reactive affect, no evidence of any psychotic symptoms, and no signs of cognitive impairment. MRI, CT scan, EEG all normal. High psychogenic element in symptoms. Recommends depression medication.

DLA

The GP reports the following:

- The appellant has been prescribed medication and/or treatments that interfere with the ability to perform DLA.
- All listed tasks of all DLA are managed independently. "Only limited by seizures."
- The ability to manage the DLA social functioning is as described above under *Mental Impairment*.

At reconsideration and on appeal, the appellant reports that she requires help at home and with her children, both of whom have severe autism. At the hearing, the appellant stated that she goes shopping alone.

Need for Help

The GP describes assistance provided as "usually helped by family."

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. That is, was the ministry reasonable when determining that the requirements of section 2(2) of the EAPWDA were not met because:

- 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 or nurse 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

Definitions for Act

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.

(3) The definition of "parent" in section 1 (1) applies for the purposes of the definition of "dependent child" in section 1 (1) of the Act.

Alternative grounds for designation under section 2 of Act

2.1 The following classes of persons are prescribed for the purposes of section 2 (2) *[persons with disabilities]* of the Act:

(a) a person who is enrolled in Plan P (Palliative Care) under the Drug Plans Regulation, B.C. Reg. 73/2015;

(b) a person who has at any time been determined to be eligible to be the subject of payments made through the Ministry of Children and Family Development's At Home Program;

(c) a person who has at any time been determined by Community Living British Columbia to be eligible to receive community living support under the *Community Living Authority Act*;

(d) a person whose family has at any time been determined by Community Living British Columbia to be eligible to receive community living support under the *Community Living Authority Act* to assist that family in caring for the person;

(e) a person who is considered to be disabled under section 42 (2) of the *Canada Pension Plan* (Canada).

Panel Decision

Severe Physical or Mental 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 MR 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.

When considering the evidence provided respecting the severity of impairment, the ministry must exercise its decision-making discretion reasonably by weighing and assessing all of the relevant evidence and cannot simply defer to the opinion of a prescribed professional as that would be an improper fettering of its decision-making authority.

Physical Impairment

The appellant is diagnosed with non-epileptic seizures by her GP. The appellant argues that her functioning is impaired by her seizures as well as other medical conditions and that the physical functional skills assessment by the GP is not accurate. The ministry's position is that the information does not establish a severe physical impairment. The ministry notes that diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a severe impairment. Rather, impairment is established by considering the nature of the impairment and the extent of its impact on functioning as evidenced by limitations and restrictions in mobility and physical ability. The ministry also notes that an applicant's employability or ability to work is not taken into consideration. The ministry points to the level of independent physical functioning assessed by the GP in the MR and the AR and that while the GP comments that walking, climbing stairs, standing and lifting/carrying and

holding "Can be dangerous if she has seizures," the GP does not provide information explaining the frequency of the seizures. Additionally, the March 3, 2016, addendum to the neuropsychiatric report indicates that there "was no recurrence of episodes last month" with no further explanation as to frequency of the episodes.

The panel finds that while the GP reports that the appellant is severely disabled due to unpredictable seizures, the ministry has reasonably viewed the physical functional assessment by the GP as not establishing severe physical impairment. According to the GP, the appellant's physical functioning is only impaired when she is having seizures and, as the ministry notes, the GP does not describe the frequency of the seizures. The additional medical information, much of which dates back 4 or more years, provides little information as to the impact on daily functioning, though the most recent of the medical reports (February and March 2016) notes that the appellant reported that her fatigue and sleepiness have been significantly improved by medication and that she went a month without any seizure episodes. At hearing, the appellant stated that although seizure activity continues to be unpredictable, medication has reduced the frequency of seizures and can stop the seizures after a few minutes. Both the appellant and the GP report impacts on the ability to work due to seizure episodes, but as the ministry notes, PWD eligibility is not based on an applicant's ability to work. The panel concludes that the ministry was reasonable in determining that, in the absence of information from the GP as to the frequency of the seizures, given the assessment of good physical functioning at all other times, a severe physical impairment is not established.

Mental Impairment

The GP diagnoses the appellant with depression that is reasonably controlled, noting that medication affects memory and thoughts. The appellant does not expressly argue that she has a severe mental impairment in her written submissions and did not address her depression at the hearing. The ministry argues that while the information establishes that the appellant has limitations to her cognitive and emotional functioning, the information provided by the GP speaks to a moderate not severe mental impairment. The ministry notes that while the GP identifies significant deficits in four areas of cognitive and emotional function, a major impact on daily functioning is assessed for only one of those areas, emotion, with all other impacts being moderate, minimal or as having no impact. Noting difficulties with communication, "Only during seizures," the appellant has good abilities to communicate in terms of being able to read, speak and hear, though a poor ability to write is reported with no accompanying explanation.

The panel considers the ministry's conclusion to be reasonably supported by the evidence. The appellant's mental disorder, depression, is described by the GP as being "reasonably controlled," and as having a major impact on daily functioning in only 1 of 14 listed aspect of cognitive and emotional functioning, emotion. While moderate impacts on daily functioning are reported in a number of other aspects of cognitive and emotional functioning, including attention/concentration, executive and memory, there is no corresponding impact on the ability to manage cognitive DLA tasks such as making appropriate shopping choices and managing finances, all of which are reported as "only limited by seizures." As noted by the ministry, there is no explanation as to why the appellant is assessed as having poor writing abilities, and the appellant is otherwise assessed as having good communication abilities except during seizures. In terms of social functioning, continuous support/supervision is not required for any aspect, as all aspects are either managed independently or with periodic support/supervision. The GP's description of the help required "See enclosed consults" does not provide additional insight respecting the appellant's current daily mental functioning.

Based on the above analysis, the panel concludes that the ministry was reasonable to determine that information respecting cognitive, emotional and social functioning does not establish a severe mental impairment.

Restrictions in the ability to perform DLA

Section 2(2)(b)(i) of the EAPWDA requires that the minister be satisfied that in the opinion of a prescribed

professional, a severe mental or physical impairment directly and significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods. 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. The term "directly" means that there must be a causal link between the severe impairment and the restriction. The direct restriction must also be significant. Finally, there is a component related to time or duration – the direct and significant restriction may be either continuous or periodic. If periodic, it must be for extended periods. Inherently, any analysis of periodicity must also include consideration of the frequency. All other things being equal, a restriction that only arises once a year is less likely to be significant than one that occurs several times a week. Accordingly, in circumstances where the evidence indicates that a restriction arises periodically, it is appropriate for the ministry to require evidence of the duration and frequency of the restriction in order to be "satisfied" that this legislative criterion is met.

DLA are defined in section 2(1) of the EAPWDR and are listed in both the MR and the AR sections of the PWD application with the opportunity for the prescribed professional to check marked boxes and provide additional narrative. DLA, as defined in the legislation, do not include the ability to work.

The GP and the other physicians who completed the additional medical reports are all prescribed professionals as defined in the legislation. The appellant's position is that she requires help at home and with her children. The ministry's position is that not enough evidence is provided to establish that the appellant's overall ability to manage DLA is significantly restricted. The ministry acknowledges that the GP indicates that medication interferes with the appellant's ability to perform DLA but notes that no explanation of the medications currently taken or how they affect the ability to perform DLA is provided by the GP. The ministry notes that for social functioning, the appellant is assessed as either being independent or as requiring periodic support/supervision and that the appellant is assessed as managing all activities of all other DLA independently as the ability to manage these DLA is "Only limited by seizures." The ministry notes that the only description of the help requires is to see additional medical reports and that family usually helps.

The panel finds that the GP assesses the appellant as independently able to manage all aspects of the DLA move about indoors and outdoors, personal care, basic housekeeping, shopping, meals, pay rent and bills, medications, and transportation independently except when having seizures. The additional medical information does not address the appellant's ability to manage her DLA. Accordingly, given that the appellant's ability to manage her DLA is "only limited by seizures", in the absence of information from the GP or other prescribed professional confirming the frequency and duration of the seizures, the ministry has reasonably concluded that the restrictions are not established as being significant restrictions that are either continuous or periodic for extended periods. Respecting the final DLA, social functioning, the appellant independently manages some aspects and requires periodic support/supervision for others with no description of the type, degree or frequency of that assistance.

Based on the above analysis, the panel concludes that the ministry reasonably determined that while the information establishes that the appellant experiences some restrictions to DLA as a result of her medical conditions, it has not been established that in the opinion of a prescribed professional the appellant's impairment *significantly* restricts his ability to perform DLA either *continuously or periodically for extended periods*.

Help to perform DLA

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 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.