

PART C – DECISION UNDER APPEAL

(State the reconsideration decision)

The decision under appeal is the ministry's reconsideration decision dated December 22, 2009 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 her 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 or that 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. The ministry also found that a prescribed professional has not confirmed that, as a result of direct and significant restrictions, the appellant requires help to perform DLA.

PART D – RELEVANT LEGISLATION

(State the relevant Legislation considered)

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

Please set out the facts as determined by the panel, based on the evidence at the hearing. Please note that subsection 22(4) of the Employment and Assistance Act states that, in a hearing referred to in subsection (3), a panel may admit as evidence only:

- (a) the information and records that were before the minister when the decision was being made, and
- (b) oral or written testimony in support of the information and records referred to in paragraph (a).

The evidence before the ministry at the time of reconsideration was comprised of a PWD application (Physician Report (PR), and Assessor Report (AR)), letters dated August 27, 2008, February 4, 2009, March 4 and 25, 2009, and April 22, 2009 from the appellant's psychiatrist, an April 23, 2009 letter from a pain and symptom management clinic physician, an October 2008 care treatment plan, a December 1, 2009 letter from the appellant's general practitioner, and an undated 3-page letter from the appellant.

In the PR completed by the appellant's psychiatrist, the appellant is diagnosed with bipolar affective disorder and chronic pain syndrome secondary to breast cancer; the physician notes a long history of depression dating back to childhood and more than 13 breast cancer related surgeries which resulted in chronic pain which leaves the appellant "incapacitated". Medications may cause drowsiness and problems with alertness. Regarding Functional Skills, the appellant's ability to walk unaided on a flat surface, climb steps unaided, lift, and remain seated is reported as "unknown" and no difficulties with communication are indicated. Significant deficits with 9 of 11 specified aspects of cognitive and emotional function are indicated (consciousness, executive, memory, perceptual psychomotor, emotional disturbance, motivation, impulse control, motor activity, and attention or sustained concentration) due to bipolar affective disorder with hospitalization in September 2008 noted.

In the AR, completed by the same psychiatrist, difficulties with planning, organizing, concentrating, mood swings, and impulsivity (overspending at times) are listed as the impairments impacting the appellant's ability to manage DLA. The appellant's Ability to Communicate is reported as good and the appellant is independent with all aspects of Mobility and Physical Ability (walking indoors, walking outdoors, climbing stairs, standing, lifting, and carrying/holding). A major impact is noted for 6 aspects of Cognitive and Emotional Functioning (consciousness, emotion, impulse control, executive, motivation, and motor activity); a moderate impact is noted in 4 aspects (bodily functions, insight and judgment, attention/concentration, and memory); no impact is noted for the remaining 4 listed aspects. Regarding DLA, the appellant is reported to be independent with all aspects of personal care, basic housekeeping, meals, medications, and transportation. Periodic assistance is indicated for all aspects of shopping ("occ help from family"), paying rent and bills, and social functioning ("help from family"); marginal functioning is reported with both immediate and extended social networks. Assistance is required from family and friends.

In the August 27, 2008 psychiatrist's consult letter, a history of major depression is indicated as is the likelihood that the appellant has generalized anxiety and panic disorder. In the February 4, 2009 letter, the psychiatrist indicates increased depression since last seeing the appellant in September 2008. In the March 4, 2009 letter, the psychiatrist changes the appellant's diagnosis to bipolar II disorder. The March 25, 2009 letter details the course of psychiatric medication. In the April 22, 2009 letter, the psychiatrist writes that the appellant seems sensitive to side effects and that her mood is still low.

In the April 23, 2009 letter from a physician at a pain and symptom management clinic, the appellant's continuing chest pain is reported as fairly stable and the appellant "is able to function fully in activities of daily living. The appellant's depression, a major symptom, has "been helped by the recent commencement of Lithium therapy".

The October 2008 treatment plan indicates that the appellant has major depression, anxiety/panic disorder and severe chronic pain secondary to breast cancer which leaves her unable to work and that the global

assessment of function (Axis 5) indicates moderate symptoms.

In her undated letter, the appellant describes nerve damage resulting from breast cancer surgery, pain and finger numbness, and memory loss due to medication. She writes that she uses strong narcotics, antidepressants and anti-convulsion medication. She writes that she suffers from severe depression, panic attacks, no appetite, and nightmares and was hospitalized when suicidal. She reports that her daughter looks in on her, making sure that she eats and takes her medication and that her daughter or friends do her shopping because of panic attacks which result from being in public.

In the December 1, 2009 letter, the appellant's general practitioner writes that chronic regional pain syndrome secondary to breast cancer surgery results in symptoms on a daily basis and contributes to the appellant's depression daily. The physician also writes that the appellant suffers greatly with respect to her depression, that her symptoms are [on a] daily basis, and that she requires significant follow-up and was hospitalized in the past.

At the hearing, the ministry stated that the information provided did not address the frequency and duration of restrictions to functioning and, as such, it was not established that the appellant's DLA are impacted to a degree to establish a severe impairment or that her ability to manage DLA is directly and significantly restricted either continuously or periodically for extended periods necessitating help with DLA.

At the hearing, the appellant stated that the PWD application had been completed based on the amount of help she currently receives rather than the help she requires. The appellant stated that she has good days on which she dresses and eats; however, even then, she does not do housework, does not cook as she relies on frozen food, and is unable to lift her arms. On bad days, she does not dress or eat. She often does not feel stable enough to drive due to pain and emotional stress and relies on her daughter for transportation.

At the hearing, the appellant's general practitioner of 8 years gave evidence that the combination of the appellant's medication resistant severe depression and chronic regional pain syndrome affect her activities of daily living and executive function. The physician stated that the appellant's ability to manage grooming, laundry, transportation, walking, and shopping are greatly impacted and that she requires assistance on a daily basis with these activities. Additionally, the appellant has other contributing minor medical issues including a bowel resection and narrowing of the spine which results in arm weakness.

At the hearing, the appellant's daughter stated that the appellant has required increasing help over the last 2 years to the point where she requires assistance with meals and personal care 90% of the time.

The panel admitted the oral evidence of the appellant, her daughter, and her physician under section 22(4) of the Employment and Assistance Act as it is in support of the information and records before the ministry at reconsideration; the ministry had no objection.

PART F – REASONS FOR PANEL DECISION

(State the reasons for the panel decision)

The issue under appeal is whether the ministry reasonably concluded that the appellant does not have a severe physical or mental impairment and that her DLA are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods, and that the appellant does not require help to perform DLA. The ministry determined that the age requirement had been met and that the appellant has an impairment that will last for 2 years.

The criteria for being designated as a person with disabilities (PWD) are set out in section 2 of the EAPWDA. The minister may designate a person as a PWD when the following requirements are met. Pursuant to section 2(2) the applicant must have reached the age of 18 and the minister must be satisfied that the person has a severe mental or physical impairment. Under section 2(2)(a) the impairment must be likely, in the opinion of a medical practitioner, to continue for at least 2 years. Section 2(2)(b)(i) requires that the impairment, in the opinion of a prescribed professional, directly and significantly restricts the person's ability to perform daily living activities (DLA) either continuously or periodically for extended periods. Section 2(2)(b)(ii) states that as a result of those restrictions the person must require help to perform DLA. Section 2(3)(b) of the EAPWDA states that a person requires help in relation to a DLA if the person requires an assistive device, the significant help or supervision of another person, or the services of an assistance animal.

Section 2(1)(a) of the EAPWDR defines DLA for a person who has a severe physical or mental impairment as preparing own meals, managing personal finances, shopping for personal needs, using public or personal transportation, performing housework to keep one's residence in acceptable sanitary condition, moving about indoors and outdoors, performing personal hygiene and self care and managing personal medication. Section 2(1)(b) adds two additional activities for a person with a severe mental impairment: making decisions about personal activities, care or finances; and, relating to, communicating or interacting with others effectively.

The appellant's position is that she is eligible for designation as a PWD because her impairment is severe and continuously restricts her ability to perform DLA necessitating the regular assistance of other people.

The ministry's position is that the evidence does not establish the existence of a severe physical or mental impairment that, in the opinion of a prescribed professional, significantly restricts DLA or necessitates help with DLA.

Regarding the existence of a severe mental impairment, the panel finds that the oral and written evidence of the appellant's general practitioner is that the appellant suffers greatly from symptoms of depression on a daily basis. Additionally, the evidence of the appellant's psychiatrist is that the appellant's bi-polar disorder results in significant deficits to 9 of 11 aspects of cognitive and emotional function with either a moderate or major impact on daily functioning in 10 of 13 specified areas. On the basis of this evidence, the panel finds that a severe degree of symptoms experienced and consequent impact on daily functioning has been established and that the ministry did not reasonably determine that a severe mental impairment was not established under section 2(2) of the EAPWDA.

Regarding the existence of a severe physical impairment, the panel finds that there is evidence of some restriction in terms of the appellant's ability to lift her arms due to a physical impairment and that she suffers from chronic pain secondary to multiple surgeries relating to breast cancer. However, given the evidence of the psychiatrist that the appellant is independent with mobility and physical ability and the evidence of the

appellant's general practitioner which is suggestive of limitations respecting activities including walking, meal preparation and grooming primarily related to the appellant's mental impairment, the panel finds that the ministry reasonably determined that a severe physical impairment has not been established under section 2(2) of the EAPWDA.

Regarding the degree to which the appellant's DLA are restricted, the panel finds that the evidence of the appellant's psychiatrist indicates a minimal degree of restriction as the appellant is independent in the majority of DLA, only requiring periodic assistance of an unspecified frequency and duration with the remaining DLA. The evidence of the pain and symptom management clinic physician also indicates minimal restrictions as the appellant is "able to function fully in activities of daily living". The appellant's general practitioner has given conflicting evidence as he reports ongoing daily restrictions and the need for ongoing assistance with the majority of DLA (personal care, housekeeping, shopping, transportation, and walking). In addressing this conflict, the panel has placed greater weight and reliance on the evidence of the appellant's general practitioner for the following reasons: (i) it is the most recent evidence; (ii) it is consistent with the significant deficits with cognitive and emotional function indicated by both the general practitioner and psychiatrist; (iii) and, it is consistent with the evidence of the appellant and her daughter. Therefore, as the panel accepts the evidence of the appellant's general practitioner, the panel finds that the evidence of a prescribed professional establishes that the appellant is directly and significantly restricted continuously with the majority of DLA and that the ministry did not reasonably conclude that the criterion of section 2(2)(b)(i) of the EAPWDA was not met.

In assessing the evidence respecting the need for help, the panel has again, for the above stated reasons, given more weight to the evidence of the appellant's general practitioner. Therefore, as a direct and significant continuous restriction with DLA has been established, and as the appellant's general practitioner has indicated that the appellant requires assistance on a daily basis with the majority of DLA, the panel finds that the ministry did not reasonably determine that the evidence does not establish that, in the opinion of a prescribed professional, the significant help or supervision of another person, use of an assistive device or assistance animal is required to perform DLA as required under section 2(2)(b)(ii) of the EAPWDA.

The panel finds that the ministry's reconsideration decision is not reasonably supported by the evidence and rescinds the decision.