

PART C – Decision under Appeal

The decision under appeal is the ministry's reconsideration decision dated December 8, 2010 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

Employment and Assistance for Persons with Disabilities Act (EAPWDA), section 2
Employment and Assistance for Persons with Disabilities Regulation (EAPWDR), section 2

PART E – Summary of Facts

The evidence before the ministry at reconsideration was comprised of: (a) a PWD application (Self-Report (SR), Physician Report (PR), and Assessor Report (AR)); (b) a September 5, 2010 2-page hand written letter from the appellant; (c) a 4-page typewritten advocate prepared submission signed and verified by the appellant on March 15, 2010; (d) a March 15, 2010 letter from the appellant's advocate to the appellant's general practitioner requesting further information; (e) instructions respecting Bacillus Calmette Guerin (BCG) treatment; (f) medical documentation respecting the appellant's bladder cancer; (g) medical documentation respecting the appellant's lungs (chest); (h) an October 15, 2009 letter from a gastroenterologist; (i) information respecting the appellant's lumbar spine.

In the SR, the appellant provides the following information. As a result of bladder cancer, irritable bowel syndrome (IBS), osteoporosis and arthritis, it takes her longer than usual to bathe and dress as the small of her back and hips ache. Medication choices are usually limited to non-prescription medication due to intestinal bleeding resulting from IBS, colitis, and intestinal problems. She tires very easily and has had life-long problems with her leg which limits walking. She is awaiting her third surgery for bladder cancer; previous surgeries were performed on March 25th and September 11th of 2009. Stress is a major part of daily function due to her cancer. She uses an inhaler for breathing and takes sinus medication. A leg stabilizer for her knee is used and, when in unbearable pain, she gets a steroid injection.

In the PR, completed and dated March 20, 2010 by the appellant's general practitioner of 25 years, the following information is provided. The appellant is diagnosed with bladder cancer, IBS, depression, anxiety and arthritis. The appellant is on no medication for depression and anxiety. Tylenol is used for arthritis/sciatica. Superficial bladder tumours do not affect the appellant's current functioning but she gets periodic surgeries to remove them. The appellant is undergoing BCG treatments weekly for 6 weeks for the bladder cancer which may have some side effect. The appellant uses a cane and would benefit from a bus pass or taxi vouchers. Regarding functional skills, the appellant can walk 1 to 2 blocks and can lift 5 to 15 pounds. No information is provided respecting the appellant's ability to climb stairs but the physician writes "she says uses elevator." The time the appellant can remain seated is not limited and there are no difficulties with communication. Significant deficits with cognitive and emotional function are reported in 3 of 11 listed areas – executive, emotional disturbance, and attention or sustained concentration, with narrative that the appellant is "somewhat scattered. Chronic anxiety/depression."

In the AR, also completed on March 20, 2010 by the appellant's physician, the physician writes that the appellant says she gets tired easily and sometimes gets confused. The appellant has stress from her cancer diagnosis. The appellant's ability to communicate is reported as good. The appellant independently manages walking indoors and outdoors and standing with continuous assistance indicated for lifting and carrying/holding with narrative "she says she does" and "she says is too fatigued to lift or carry." The appellant is neither reported as independent nor requiring assistance with climbing stairs but is reported to use the elevator in her apartment building. Regarding cognitive and emotional functioning, a major impact on daily functioning is reported for 1 area, motivation, with a moderate impact reported for 7 areas and either minimal or no impact reported for the remaining 8 areas. Narrative includes "tends to lose her temper when things don't go her way", "possible personality disorder problems", "has trouble sleeping and can't seem to get adequate rest", and "she gets bowel cramping from irritable bowel syndrome." Regarding DLA, periodic assistance is indicated for 1 aspect of basic housekeeping ("daughter helps") and 1 aspect of shopping, going to and from stores ("friend often comes with her"). Continuous assistance is indicated for 1 aspect of shopping, carrying purchases home ("uses shopping buggy or gets friends to carry"), and 1 aspect of transportation, using transit schedules ("needs a bus pass"). Problems with trust and interacting appropriately are identified for 4 aspects of social functioning, appropriate social decisions, ability to develop and maintain relationships, interact appropriately with others, deal appropriately with unexpected demands, with continuous support/supervision required for the

last 2 aspects. All aspects of personal care, meals, paying rent and bills, and medications, as well as the remaining 1 aspect of basic housekeeping (laundry), 3 aspects of shopping (reading prices and labels, making appropriate choices, paying for purchases), 2 aspects of transportation (getting in and out of a vehicle, using public transit), and 1 aspect of social functioning (able to secure assistance from others) are managed independently. Additional narrative is that the appellant requires multivitamin supplements, does not have enough money to budget after paying bills, and may need help with meals if she has more surgeries. Marginal functioning is reported with both immediate and extended social networks with narrative that the appellant often gets into disagreements – trust problems. Assistance is currently provided by friends, volunteers and community service agencies and the appellant uses a cane and requires a grab bar for the shower.

The medical documentation respecting the appellant's bladder cancer includes operative reports for transurethral resection (TUR) surgeries, consult letters, and pathology and ultrasound reports including the results of a March 25, 2010 pathology report diagnosing superficial bladder cancer (low-grade papillary urothelial carcinoma, non-invasive). Additional documentation indicates that the course of treatment is a transurethral resection of the bladder tumor to be followed by BCG therapy. A March 25, 2009 operative report is included respecting a previous TUR surgery.

Documentation respecting lung function includes the results of a March 23, 2010 pulmonary function test indicating "minimal airflow obstruction" and the findings of chest x-rays, including the most recent of March 4, 2010 which identifies calcified, non-enlarged lymph nodes, similar to a December 27, 2008 study, and states that the heart is not enlarged and the lungs are clear. An August 19, 2005 report states that calcified nodes would be consistent with old, healed, tuberculosis with no evidence of any active pulmonary disease.

In his letter of October 15, 2009, the gastroenterologist writes that he will indefinitely delay a colonoscopy while the appellant is undergoing treatment for her bladder tumour but will perform a colonoscopy once things have settled down to reassure the appellant about her irritable bowel.

Information respecting the appellant's lumbar spine includes a May 15, 2006 report comparing results from a July 14, 2003 study: lower lumbar apophyseal arthropathy, increased lordosis, slightly increased L5-6 degenerative disc changes, increased lordosis and increased L1-2 degenerative disc changes. Possibility of ankylosing spondylitis is raised. Also included are the results of an August 15, 2006 tomography report - mild spinal stenosis at the L3-4 level and disc bulge at the L4-5 level and no evidence of ankylosing spondylitis, sacroilitis or lordosis.

In the March 15, 2010 submission, the appellant writes that she has agitated depression which is a form of major depression causing irritability and intense inner tension. She often has thoughts that race or are crowded causing confusion and frustration as well as severe anxiety, poor concentration and short-term memory loss. Degenerative arthritis results in swelling, stiffness and tenderness which limit mobility of her knees, back, legs, neck and shoulders. As a result, it is difficult to bend to pick up objects and she is able to walk only short distances before experiencing knee and back pain. On an average day, her pain level is 7-9, with 10 being the highest pain tolerance. She requires help with vacuuming, laundry, shopping, planning, transportation, and is unable to get in and out of the bathtub. She uses a cane when needed and a stabilizer knee brace to improve overall mobility. A handwritten signed note by the appellant's general practitioner appears at the end of the March 15, 2010 submission stating: "I have read this letter but do not comment on it or make judgment on it and have initialed & signed on patient's request. It was written by her advocate, not by me."

At the hearing, the appellant provided the following oral testimony. She underwent her fourth cancer surgery on February 18, 2011 for the removal of 3 more tumours but does not yet have the pathology report to provide as evidence. She has undergone 10 BCG treatments but the treatment was suspended due to the most recent

surgery. The BCG treatment made her tired and affected her muscles. The appellant stated that, although the general practitioner may have given the impression that the BCG treatment will cure the bladder cancer, it will only extend the time she can keep her bladder. The PWD application was completed prior to the BCG treatment and does not reflect her current condition. She is unable to do things as she used to and relies on a friend to help with DLA, including housework, as she has no immediate family in town. Due to a childhood injury, her left knee gives out which affects her ability to walk. Additionally, she gets dizzy, possibly due to medication, which affects her balance and she fears passing out when walking outdoors. She is constantly tired and aches due to arthritis. She has been waiting for low income housing for 4 years and has limited resources to meet her needs. The cancer surgeon was unwilling to complete the PWD application as he felt it was not his role. The physician who completed the PWD application used to be her family practitioner but no longer has a family practice and can only be seen as a walk-in-clinic physician, leaving the appellant without a physician to provide follow-up care. The appellant submitted two pamphlets produced by the Canadian Urological Association. The pamphlet entitled, BCG Treatment for Bladder Cancer, explains the process of BCG treatment and states that it is used to stimulate a reaction that can kill cancer cells and prevent them from coming back. The pamphlet entitled Bladder Tumour provides general information respecting bladder tumours and treatment with TUR surgery. The panel admitted both pamphlets and the appellant's oral testimony into evidence under section 22(4) of the Employment and Assistance Act as they were found to be in support of the information and records before the ministry at the time of reconsideration. The ministry made no submissions respecting the pamphlets and had no objection to their admission into evidence.

No additional evidence was provided by the ministry at the hearing.

PART F – Reasons for Panel Decision

The issue under appeal is whether the ministry reasonably concluded that the appellant is ineligible for designation as a PWD because she does not have a severe physical or mental impairment, her DLA are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods and, 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.

With respect to the existence of a severe physical impairment, the appellant argues that the evidence of the physician in the PWD application does not reflect her medical condition or functioning after her most recent surgery or after starting the BCG treatment. It is the appellant's position that she is severely impaired by her medical conditions which limit her ability to walk, carry heavy items, and perform her daily activities including housework. The ministry's position is that, although the appellant has some limitations with physical functioning, a severe physical impairment has not been established as most aspects of mobility/physical abilities are managed independently and the functional skill limitations are more in keeping with a moderate degree of impairment.

The panel finds that a medical practitioner has diagnosed the appellant with bladder cancer, IBS, and arthritis. The evidence of the appellant is that, due to arthritis, she can only walk short distances before experiencing pain, uses a cane when needed and a stabilizer knee brace to improve overall mobility, and is unable to lift heavy objects. It is also the appellant's evidence that she is constantly tired and has balance problems due to dizziness possibly caused by medication. In the PR, the appellant is reported as able to walk 1 to 2 blocks, lift 5 to 15 lbs, and remain seated without limitation. In the AR, walking indoors and outdoors and standing are reported as independently managed, with continuous assistance required for lifting and carrying/holding. No information is provided in the PR or AR or by the appellant respecting her ability to climb stairs though the use of an elevator in her apartment building is reported. The physician confirms the use of a cane and writes that the appellant's bladder cancer does not affect functioning "presently."

The panel acknowledges the appellant's argument that the general practitioner's evidence does not reflect her condition following her most recent bladder cancer surgery and the BCG treatment but, notes that the panel must rely on the available medical information. The panel finds that the medical documentation comprised of consult letters, test results, and operative reports is in keeping with the diagnoses made by the appellant's

general practitioner but does not provide information respecting the impact the appellant's medical conditions have on her physical functioning. The panel finds that the evidence of the physician and the appellant establishes that the appellant can independently manage walking outdoors for distances up to 2 blocks, that there are no limitations as to how long the appellant can remain seated, and that assistance with lifting is required for heavy items. The panel finds, based on the degree of independence reported for physical functioning, that the ministry reasonably determined that the described limitations are more in keeping with a moderate degree of impairment. Therefore, the panel finds that the ministry reasonably determined that a severe physical impairment was not established under section 2(2) of the EAPWDA.

With respect to the existence of a severe mental impairment, the appellant argues that she is impaired by major depression, severe anxiety, and stress resulting from her cancer diagnosis. The ministry argues that a severe mental impairment has not been established as only one major impact on daily functioning is reported and there is no compelling narrative by the physician of a serious mental health disorder.

The panel finds that a medical practitioner has diagnosed the appellant with depression and anxiety and reported significant deficits in 3 of 11 specified aspects of cognitive and emotional function - executive, emotional disturbance, and attention or sustained concentration. The appellant is not on medication for either anxiety or depression and the physician reports a major impact on daily functioning in 1 of 14 listed areas with narrative identifying that the appellant tends to lose her temper when things do not go her way, has trouble sleeping and may have personality disorder problems. Respecting social functioning, problems with trust are identified necessitating continuous support with 2 of 5 aspects, interacting appropriately with others and dealing appropriately with unexpected demands. The evidence of the appellant is that she has symptoms including irritability, intense inner tension, confusion, frustration as well as severe anxiety, poor concentration, short-term memory loss and a great deal of stress related to her ongoing bladder cancer

The panel finds that, while the evidence establishes significant deficits in some areas of cognitive and emotional functioning which have a moderate impact in 8 areas of daily functioning, it also establishes that there is no major impact on daily functioning for all but 1 of 14 identified areas. Additionally, with the exception of 2 of 5 aspects of social functioning, neither the appellant nor the physician report that assistance is required with DLA due to a mental impairment, including the ability to make decisions about personal activities, care or finances. Therefore, the panel finds that the ministry reasonably determined that the evidence as to the impact the appellant's mental impairment has on her daily functioning does not establish a severe mental impairment under section 2(2) of the EAPWDA.

Regarding the appellant's ability to manage DLA, the appellant argues that she is restricted to the point of requiring ongoing assistance with shopping and housekeeping and is limited to walking short distances outside her home. The ministry's position is that the evidence of the prescribed professional establishes that the appellant can walk 2 blocks, carry 15 lbs, and independently manages the majority of DLA without assistance and, therefore, does not establish that her impairment directly and significantly restricts DLA either continuously or periodically for extended periods. The ministry further contends that narrative identifying the need for a bus pass, multivitamins, and more money does not identify restrictions related to impairment.

The panel finds that the ministry reasonably viewed the narrative respecting the need for multivitamins, additional finances and a bus pass as not identifying restrictions related to either a physical or mental impairment. The panel also finds that, given the evidence establishing that the appellant can lift between 5 and 15 lbs and walk 2 blocks, the ministry reasonably determined that the identified restrictions with shopping, going to and from stores and carrying purchases home, and basic housekeeping do not reflect significant restrictions as help would be required for tasks involving heavier weights and longer distances. The evidence of the prescribed professional does establish the need for continuous assistance with 2 of 5 aspects of social functioning. However, as the appellant independently manages personal care, meals, paying rent and bills,

medications, and transportation and requires assistance only with tasks associated with longer distances and heavier weights, the panel finds that the ministry reasonably determined that, in the opinion of a prescribed professional, a direct and significant restriction with DLA, either continuously or periodically for extended periods, was not established under 2(2)(b)(i) of the EAPWDA.

Regarding the need for help with DLA, the appellant argues that she requires the ongoing assistance of another person with shopping and housekeeping and that she requires the use of a knee brace and, when necessary, a cane. The ministry's position is that, as it has not been established that DLA are significantly restricted, it cannot be determined that significant help from another person is required. The ministry also contends that, although assistive devices are reportedly used, there is no indication that they were prescribed by a medical professional.

The panel finds that the appellant requires some assistance from another person and uses a cane, both of which are confirmed by the appellant's physician. However, as a significant restriction with DLA, either continuously or periodically for extended periods was not established, the panel finds that the ministry reasonably determined that the appellant does not require help with DLA which are directly and significantly restricted under section 2(2)(b)(ii) of the EAPWDA.

The panel finds that the ministry's decision was reasonably supported by the evidence and confirms the decision.