

## PART C – Decision under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Social Innovation (the ministry) dated April 8, 2014 denying the appellant's application for designation as a person with disabilities (PWD). The ministry determined that the appellant did not meet three of the five criteria required for PWD designation as set out in the *Employment and Assistance for Persons with Disabilities Act*, section 2. The appellant has met the criteria of being 18 years or older and a medical practitioner has confirmed her impairment is likely to continue for at least 2 years. However, the ministry determined that, based on the information provided, the appellant had not met the following criteria:

- the ministry is satisfied that the appellant has a severe mental or physical impairment, subs. 2(2);
- the appellant's impairment, in the opinion of a prescribed professional, directly and significantly restricts her ability to perform daily living activities (DLA) either continuously or periodically for extended periods, subs. 2(2)(b)(i); and
- in the opinion of a prescribed professional, the appellant requires help to perform the DLA restricted by her impairment, subs. 2(2)(b)(ii).

## 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 consisted of the following:

1. The appellant's PWD Designation Application, containing the following three parts:
  - The appellant's Self Report completed October 16, 2013;
  - The Physician Report (PR) dated September 25, 2013, completed by the appellant's current psychiatrist who indicates in the PR that the appellant has been his patient for 3 months and has seen her 2-10 times in those 3 months; and
  - The Assessor Report (AR) dated September 20, 2013, completed by a psychiatric nurse who indicates that he has known the appellant for 1.5 years and had seen her 2-10 times in the previous year.
2. A bundle of medical reports from the appellant's psychiatric treatment team for the period from March 14, 2011 through March 25, 2014. Included in this bundle are reports by the appellant's current psychiatrist from 2014 (January 21, 2014) and 2013 (December 10, November 6, September 19 and August 20). The bundle also includes reports of the appellant's former treating psychiatrist and a psychiatric resident for the years 2013 (March 12), 2012 (December 14, October 5, July 3, April 20, February 21 and January 13) and 2011 (June 21 and June 6). Attached to the bundle are reports from the appellant's family physician from 2009 (October 6, June 30, and February 24), 2008 (December 30, December 2, October 28, October 2, August 12, July 10, June 12, May 20, April 10 and January 31) and 2007 (November 27 and September 27), as well as another former treating psychiatrist from 2006 (July 7 and March 6).
3. The appellant's Request for Reconsideration dated March 24, 2014, on which the following submission was written, "medical professional's understanding of your rating scale are of two different interpretations. Consideration of the impacts the client's mental illness has had on her life, friendships, supports and employment."

The appellant's current psychiatrist who completed the PR and the psychiatric nurse who completed the AR attended the hearing as witnesses for the appellant – the psychiatric nurse also appeared as the appellant's advocate. Both medical professionals spoke to the panel about the appellant's condition and their answers on the PR and AR. The panel admits as evidence the testimony of the psychiatrist and psychiatric nurse at the hearing as oral testimony in support of the information and records that were before the minister when the decision being appealed was made pursuant to subs. 22(4) of the *Employment and Assistance Act*.

The following is a summary of the evidence from the PR and AR regarding the appellant's impairments as they relate to the three PWD criteria at issue. The panel has also included reference to the appellant's self report in the PWD application, as well as her submissions at the hearing.

### Severity of impairments (criteria set out in subs. 2(2) EAPWDA)

In the reconsideration decision, the ministry notes that the appellant meets the age criterion as she is at least 18 years old, and that a medical practitioner has confirmed that her impairment is likely to continue for two years or more, as set out by her physician in the PR, meeting the second criterion.

In its reconsideration decision, the ministry found that the appellant's psychiatrist and psychiatric nurse did not provide evidence of a severe physical impairment in the PWD application materials. In the PR, the psychiatrist wrote "N/A" in the section addressing the impact of the appellant's impairment on her functional skills. In the AR, the psychiatric nurse wrote, "currently no physical disabilities" and indicated she has independent functioning in all aspects of mobility and physical ability. At the hearing, the appellant did not assert that she suffers from a severe physical impairment – the focus of the evidence and the submissions was on the appellant's mental impairments.

In the PR, the appellant's psychiatrist identified her impairments as borderline personality disorder and mood disorder with depressive symptoms "moderate severity," writing the additional comment, "moderate range – patient has mood instability and doesn't cope well in crisis situations." The psychiatrist indicated that the appellant is on medication which causes sedation. In the AR, the psychiatric nurse identified the appellant's mental impairments as bipolar affective disorder and borderline personality disorder. In the January 2014 report of the appellant's psychiatrist, the appellant's conditions are identified as "background diagnosis of background bipolar affective disorder and borderline personality traits."

In the PR, the appellant's psychiatrist indicated that she has deficits with cognitive and emotional functions in the areas of emotional disturbance, motivation, impulse control and attention or sustained concentration, but did not provide any commentary. In the section addressing the impact of the appellant's impairment on her DLA, the appellant's psychiatrist wrote "N/A" and provided no commentary. In the AR, the psychiatric nurse indicated that the appellant's impairment had no "major impact" on any of the listed areas for cognitive and emotional functioning, and causes a minimal impact in the areas of insight and judgment, attention/ concentration, executive, memory and motivation. The psychiatric nurse indicated in the AR a moderate impact in the areas of emotion, impulse control, psychotic symptoms and other emotional or mental problems, writing the comment, "client experiences fluctuating mood and unstable social supports. She has significant difficulty interpreting social cues, interacting [with] people." The psychiatric nurse reported that the appellant has a good ability to communicate in all areas.

In the reports of the appellant's psychiatric treatment team included in the request for reconsideration, the report of the appellant's current psychiatrist for January 21, 2014 indicates that the appellant has a diagnosis of bipolar affective disorder and borderline personality traits. He wrote, "she has been attending the clinic regularly and overall we have not observed or seen any active symptoms of bipolar affective disorder, however, we have noted active symptoms of poor personality coping skills, especially in the context of impulsive behaviour and borderline traits." Later in the report, he wrote, "overall her current mental state remains stable" and "there is no evidence or any active symptoms of clinical depression or elation." He also noted that her bipolar affective disorder has "been in remission for the last several months." In this report, the psychiatrist reported that the appellant's Global Assessment of Functioning (GAF) is 60 (out of 100), which he testified to the panel is in the "moderate range;" however, he questioned the accuracy of this assessment as he stated that it incorporates physical aspects of functioning as well. In the psychiatrist's report of December 10, 2013, he described both bipolar affective disorder and personality disorder, specifically borderline traits, as being "in remission." In the November 6, 2013 report, he indicated that the appellant "report: to be in good form" but reported some stressors with her roommate and her boyfriend. In this report, her GAF was reported as "around 65" and it was reported that the appellant is compliant with her medications and denies any side effects.

In his testimony at the hearing, the appellant's psychiatrist spoke to the severity of the appellant's mental impairment, describing how her condition can fluctuate. While he agreed that he indicated in the PR that the appellant's condition is in the "moderate range," he testified that her condition could move into the severe range if triggered and that she has experienced severe conditions for which she has been hospitalized in the past. In answering a question about the impact of the appellant's impairment on her DLA to gauge its severity, the psychiatrist spoke to his answers regarding the impact of her impairment on her cognitive and emotional functioning, stating that he could not comment on its impact on her DLA because her condition fluctuates – when she is in a mild to moderate state, she can perform her DLA, but when she is in a severe depressive state, she may have difficulties.

At the hearing, the appellant said that on most normal days, she is able to function well – she will get up, feed herself, take her dog for a walk, and try to spend time with her family. When she is experiencing a bad day, she will have difficulty caring for herself, she said she won't eat properly and will just stay in her room and avoid contact with others.

*Ability to perform DLA (criteria set out in subs. 2(2)(b) EAPWDA)*

In the PR, the appellant's physician wrote "N/A" in the section to assess the impact of the appellant's impairment on her ability to perform her DLA. In his testimony at the hearing, the psychiatrist said that because the appellant's condition fluctuates, he could not accurately comment on the impact on her DLAs. When her condition is severe, she will have difficulty functioning and may have to be hospitalized.

In the section of the AR regarding the assistance required by the appellant to perform her DLAs, the psychiatric nurse indicated that the appellant could independently perform all tasks of the listed DLAs of personal care, basic housekeeping, shopping, and meals, without any commentary. For the DLA of pay rent and bills, the psychiatric nurse wrote in the AR that the appellant could independently perform the task of banking, and required periodic assistance for the tasks of budgeting and pay rent and bills, writing the comment "lives with father." In his testimony at the hearing, the psychiatric nurse explained that at the time he completed the AR, the appellant was living in her father's house and did not need to budget or pay rent or bills. The psychiatric nurse testified that the appellant is presently living in an apartment with a roommate and can, for the most part, independently perform the tasks of budgeting and paying rent and bills. He testified that when she is experiencing a depressive episode, she will contact him and he will remind her to pay her rent and/or bills. For the DLA of medications, the psychiatric nurse indicated in the AR that the appellant could independently perform the task of filling/refilling prescriptions, but required periodic assistance with the tasks of taking as directed and safe handling and storage, writing "[history] non-compliance [with] memory short term issues." At the hearing, he testified that at present, the appellant is good with her medications and it is only if she slips into depression that she will have problems taking her medications. For the DLA of transportation, the psychiatric nurse indicated in the AR that the appellant could independently perform the task of getting in and out of a vehicle, but required continuous assistance with the task of using public transit, and required periodic assistance with the task of using transit schedules and arranging transportation, writing the comment, "difficulty understanding routes and times; loses patience waiting."

At the hearing, the appellant told the panel that on her good days, she is able to perform all of her DLA and that she is trying to live as independently as she can. The appellant said she regularly takes her medication, describing how she sets alarms for herself. She described one past incident where she inadvertently withdrew from one of her medications and had supports to help her. The appellant told the panel that she relies on her family and friends for her transportation because she has a hard time understanding how to do transfers on public transit and how much time she'll need between stops. She also said that she gets severe anxiety when faced with a transit schedule, so she doesn't take public transit.

In the section of the AR listing the impact of the appellant's impairment on her social functioning, the psychiatric nurse has indicated that the appellant required periodic support with appropriate social decisions and ability to secure assistance from others. He indicated that she requires continuous support in the other listed areas (able to develop and maintain relationships, interacts appropriately with others, and able to deal appropriately with unexpected demands), writing "client experiences significant issues [with] personal boundaries" and "experiences anxiety and panic." The psychiatric nurse indicated that the appellant has very disrupted functioning with her immediate social network and marginal functioning with her extended social network writing, "client participates regularly [with] counseling services, group therapy and community outreach support."

Assistance required/provided (criteria set out in subs. 2(2)(b)(ii) EAPWDA)

In the PR, the appellant's psychiatrist wrote that the appellant "needs regular and constant and frequent support with community which is provided by case manager and myself. Patient doesn't respond well in difficult situations."

In the section of the AR describing the assistance provided for the appellant, the psychiatric nurse indicated that the appellant receives help from friends, health authority professionals and community service agencies writing, "[the appellant] uses her friends for support but burns them out. She is currently running out of people (friends) to call for assistance." The psychiatric nurse wrote "N/A" under the listed assistive devices set out in the AR and check marked "no" that the appellant does not have an assistance animal.

## PART F – Reasons for Panel Decision

The issue in this appeal is whether the ministry reasonably determined that the appellant is ineligible for PWD designation because she did not meet all the requirements in section 2 of the EAPWDA. Specifically, the ministry determined that the information provided did not establish that the appellant's impairment is severe and that, in the opinion of a prescribed professional, her impairment directly and significantly restricts her ability to perform daily living activities either continuously or periodically for extended periods and, as a result of those restrictions, she requires help to perform those activities.

The following section of the EAPWDA applies to this appeal:

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.

The following section of the EAPWDR applies to this appeal:

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.

The appellant's psychiatrist and psychiatric nurse did not provide evidence of a severe physical impairment in the PWD application materials – as reviewed above, in the PR, the psychiatrist wrote "N/A" regarding the impact of the appellant's impairment on her functional skills and in the AR, the psychiatric nurse wrote, "currently no physical disabilities" and that she has independent functioning in all aspects of mobility and physical ability. At the hearing, the appellant did not assert that she suffers from a severe physical impairment; accordingly, the panel finds the ministry's determination that the appellant does not have a severe physical impairment is reasonable based on the evidence.

### Severity of mental impairment

The appellant asserts that she has a severe mental impairment. She told the panel she has been trying repeatedly to obtain PWD designation as she feels that her mental impairment is severe, particularly when it is fluctuating into a depressive state. The appellant's psychiatrist testified that for the most part, the appellant's mental impairment is in the moderate range, but it fluctuates and can fluctuate into the severe range when she is in a depressive state. He testified that she has recently displayed "death wish mode" and he is concerned that her depressive states are increasing in frequency. The psychiatrist agreed that the appellant displays a moderate range on the Global Assessment of Functioning (GAF) scores as set out in the treatment reports, but said that in his opinion, this measurement is geared also towards the physical aspects of the appellant's state and is not solely an assessment of the mental aspects.

In its reconsideration decision, the ministry noted the information provided by the appellant's psychiatrist in the PR, the reports of the treating psychiatric team from March 2011 through March 2014, and the information of the psychiatric nurse in the AR. The ministry found that "it would be reasonable to assume that a severe mental impairment would impact [the appellant's] ability to manage [her] daily living activities" but that the psychiatric nurse in the AR indicates that the appellant can independently manage the majority of her DLA. The ministry acknowledged in the reconsideration decision that the appellant has a "significant mental impairment" but that the appellant's psychiatrist and the psychiatric nurse have not provided enough evidence to determine that she has a severe mental impairment.

### Analysis and decision

The legislation provides that the minister may designate a person as a PWD if the minister is satisfied that the person has a severe mental or physical impairment that in the opinion of a medical practitioner is likely to continue for at least 2 years (subs. 2(2)(a) of the EAPWDA). The appellant's psychiatrist confirmed in the PR section of the PWD application that the appellant suffers from a borderline personality disorder and mood disorder, which he confirmed in the treatment reports as bipolar affective disorder. The appellant asserts that her mental conditions amount to a severe mental impairment.

In the PWD application form, the ministry has provided a definition of "impairment" which, although it is not set out in the applicable legislation, offers guidance in considering the existence and severity of an applicant's impairment. The ministry states, "impairment" is 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.” To determine the severity of an impairment, there is both a cause – the impairment itself – and an effect – the degree to which it restricts the ability to function independently, effectively, appropriately or for a reasonable duration. The legislation provides that the determination of the severity of an impairment is at the discretion of the minister, taking into account all of the evidence, including that of the appellant. However, the starting point must be the medical evidence.

The appellant’s treating psychiatrist and psychiatric nurse both testified before the panel that the appellant’s mental condition fluctuates and can be in the severe range at times, when she is in a depressive state. At the time her condition has decompensated, the appellant may be hospitalized. However, the panel notes that the evidence of the degree to which the appellant’s mental conditions “restrict her ability to function independently, effectively, appropriately or for a reasonable duration” is limited. In the PR, the appellant’s psychiatrist indicated that the appellant’s condition has no impact on any of her DLA, writing “N/A” on the form. Although the psychiatrist explained his answer to the panel by referring to the impact of the appellant’s mental impairment on 4 of the 11 listed aspects of her cognitive and emotional functioning, the psychiatrist agreed that the appellant is able to perform her DLA independently when her condition is not exacerbated. The psychiatrist could not indicate when the appellant’s condition will fluctuate to an aggravated condition or the duration of time it would remain worsened. In the AR, although the psychiatric nurse indicated that the appellant’s mental impairment has a moderate impact on 4 areas of her cognitive and emotional functioning (emotion, impulse control, psychotic symptoms and other), he did not report any major impact in any areas. The psychiatric nurse indicated that the appellant could independently perform almost all of the tasks of her DLA, clarifying his answers that she is able to independently pay her rent and bills as she is no longer living with her father, and can take her medications independently – except when she is in a severe state when she would require reminders. Like the psychiatrist, the psychiatric nurse agreed that the appellant’s condition fluctuates and he could not predict the time or duration of an episode. In the report dated January 21, 2014, the psychiatrist provided an assessment that “overall her current mental state remains stable” and “there is no evidence or any active symptoms of clinical depression or elation.” He also noted that her bipolar affective disorder “has been in remission for the last several months” and there was no evidence provided to the panel that the appellant has experienced an episode in the 4 months since the time of this report.

Accordingly, the panel finds that the ministry’s determination that the appellant’s medical professional (her psychiatrist) and her psychiatric nurse have not provided enough evidence to determine that she has a severe mental impairment is reasonable based on the evidence.

*Significant restrictions in the ability to perform DLA.*

In the reconsideration decision, the ministry found that based on all available information provided by the appellant, the psychiatrist and the psychiatric nurse, there is not enough evidence to establish that the appellant’s impairments directly and significantly restrict her DLA continuously or periodically for extended periods. The ministry referred to the information in the PR provided by the psychiatrist that there was no impact on the appellant’s DLAs – the note “N/A” on the specific page of the PR. The ministry also noted that the psychiatric nurse indicated in the AR that the appellant could independently manage the majority of her DLA. The ministry acknowledged the report of the psychiatric nurse in the AR that the appellant has very disrupted to marginal functioning with her



social networks, but that the psychiatric nurse had not indicated any major impacts in her cognitive and emotional functioning – only moderate impacts. The ministry also referred to the treatment reports that the appellant's mental state "remains stable."

The appellant argues that when she is in a severe state, she cannot function and she requires PWD designation. She described how on her bad days when she hasn't had enough sleep, she has difficulty motivating herself to eat healthy meals or to manage her personal hygiene. She told the panel she is trying to live independently, but she is not happy in her current living situation with her roommate and she needs the PWD designation so that she can move into an apartment by herself as she believes that she will have fewer stressors or triggers in a different living situation.

### *Analysis and decision*

The legislation provides that the minister may designate a person as a PWD if the minister is satisfied that the person has a severe mental impairment that, in the opinion of a prescribed professional, directly and significantly restricts the person's ability to perform DLA either continuously or periodically for extended periods. In the reconsideration decision, the ministry wrote that it relies on the expert medical opinions and assessments provided by the psychiatrist and the psychiatric nurse in determining the appellant's PWD eligibility.

The Ministry acknowledges that the appellant has a significant mental impairment; however, it found that neither the psychiatrist nor the psychiatric nurse (as assessor) provided enough evidence to determine that there is a severe mental impairment as the majority of the DLAs are performed independently or require little help from others.

For a person with a mental impairment, the legislation focuses on the restriction of the ability to make decisions about personal activities, care or finances (decision making) and relate to, communicate or interact with others effectively (social functioning). In the PR, the appellant's psychiatrist expressly indicated that her mental impairment has no impact on her DLA and he clarified this answer at the hearing to the panel by stating that because her condition fluctuates, he could not predict its impact on her DLA. The psychiatrist focused on the impact of the appellant's mental condition on her cognitive and emotional functioning, but agreed that for the most part, her condition does not affect her ability to perform her DLA. In the AR, the psychiatric nurse indicated that the appellant's mental impairment does not impact the majority of the tasks of her listed DLA, including all tasks of personal care, basic housekeeping, shopping, and meals and he clarified that the appellant can pay rent and bills as she no longer lives with her father. The psychiatric nurse and the appellant clarified in their testimony that the appellant is able to take her medications regularly. The appellant also independently manages the decision-making components of the DLA of shopping (making appropriate choices), meal preparation (meal planning and food storage) and requires unspecified periodic support/supervision with making appropriate social decisions.

Regarding the DLA of social functioning, the psychiatric nurse indicated that the appellant has a good ability to communicate in all areas. The appellant requires continuous support in the areas of ability to develop and maintain relationships and interacting appropriately with others. The psychiatric nurse indicated that the appellant has very disrupted functioning with her immediate social network and marginal functioning with her extended social network, writing, "client participates regularly [with] counseling services, group therapy and community outreach support." The psychiatric nurse's

comment was that the appellant's mood fluctuates and she has unstable social supports, and further in the AR that she has significant issues with personal boundaries and experiences anxiety and panic. As previously discussed, the extent and duration of these episodes was not explained.

The panel finds that the information provided by the appellant's prescribed professionals in the PR and the AR, as well as in their testimony at the hearing, does not establish that the appellant's mental impairment directly and significantly restricts her ability to perform her DLA either continuously or periodically for extended periods. Accordingly, the panel finds the ministry's determination that there was not enough evidence from the appellant's prescribed professionals to establish the appellant is significantly restricted in her ability to perform DLA as required under subs. 2(2)(b)(i) was reasonable based on the evidence.

### Help with DLA

In its reconsideration decision, the ministry determined that as it "has been established that [DLA] are not significantly restricted (criterion 4); therefore, it cannot be determined that significant help is required from other people." The ministry also wrote that the appellant does "not require the services of an assistance animal."

The legislation (section 2(2) of the EAPWDA) states that the minister may designate a person as a person with disabilities for the purposes of the Act if the person meets the criteria of having a severe mental or physical impairment that in the opinion of a medical practitioner is likely to continue for at least 2 years, and in the opinion of a prescribed professional directly and significantly restricts the person's ability to perform DLA either continuously or periodically for extended periods, and as a result of those restrictions, the person requires help to perform those activities. Further, subs. 2(3) of the EAPWDR provides that for the purposes of subs. (2), "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 assistive animal."

This panel has upheld the ministry's determination that there was not enough evidence from the appellant's prescribed professionals to establish that she is significantly restricted in her ability to perform her DLA, as required by subs. 2(2)(b)(i) of the EAPWDA. The panel acknowledges that the appellant is receiving assistance from her psychiatric treatment team, attending counseling sessions on a regular basis and having almost daily contact with her psychiatric nurse (as set out in the AR, as well as in his testimony at the hearing). While the panel notes that the appellant's psychiatric nurse has indicated in the AR that the appellant relies on the help of her mother and her friends for transportation and in his testimony, he indicated that he will help the appellant by reminding her to pay her rent or take her medication during a depressive episode, the panel finds that the ministry's determination that "as it has not been established that [DLA] are significantly restricted (criterion 4); therefore, it can be determined that significant help is not required from other persons" is reasonable based on the evidence.

### Conclusion

Having reviewed and considered all of the evidence, and the relevant legislation, the panel finds that the ministry's decision that the appellant was not eligible for PWD designation is reasonable based on the evidence. The panel therefore confirms the ministry's decision.