



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 31 December 2018 that denied the appellant designation as a person with disabilities (PWD). The ministry determined that the appellant did not meet all of the required criteria for PWD designation set out in section 2 of the *Employment and Assistance for Persons with Disabilities Act*, section 2. Specifically, the ministry determined that the information provided did not establish that the appellant has a severe mental or physical impairment that in the opinion of a prescribed professional

(i) directly and significantly restricts his ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and,

(ii) as a result of those restrictions, he requires help to perform those activities.

The ministry determined that the appellant satisfied the other 2 criteria: he has reached 18 years of age and his impairment in the opinion of a medical practitioner is likely to continue for at least 2 years.

The ministry also found that it has not been demonstrated that the appellant is in one of the prescribed classes of persons who may be eligible for PWD designation on the alternative grounds set out in section 2.1 of the *Employment and Assistance for Persons with Disabilities Regulation*. As there was no information or argument provided by the appellant regarding alternative grounds for designation, the panel considers this matter not to be at issue in this appeal.

PART D – RELEVANT LEGISLATION

Employment and Assistance for Persons with Disabilities Act (EAPWDA) – section 2
Employment and Assistance for Persons with Disabilities Regulation (EAPWDR) – sections 2 and 2.1.

[Redacted]

PART E – SUMMARY OF FACTS

The evidence before the ministry at reconsideration consisted of the following:

1. The appellant's PWD Designation Application dated 22 August 2018. The Application contained:
 - A Self Report (SR).
 - A Medical Report (MR) dated 28 August 2018, completed by a general practitioner (GP) who has known the appellant for 11 years and seen him 2-10 times in the past year.
 - An Assessor Report (AR) dated 14 August 2018, completed by a health authority social worker (SW) who has known the appellant for 3 months and seen him 2-10 times in that period.
 - The following additional material: Medical Record printed by the GP on 22 August 2018, summarizing the appellant's medications and past history; GAD-7 Questionnaire completed 20 June 2017 - score 15; and PHQ-9 Questionnaire completed 20 June 20, 2017 - score 19.

2. The appellant's Request for Reconsideration dated 17 December 2018, attached to which is a letter from the SW (SW letter) dated 13 December 2018 and a letter from the appellant's employer dated 05 December 2018.

In the MR, the GP provides the following diagnoses related to the appellant's impairment: Major Depressive Disorder (onset June 2017), Anxiety Disorder (onset June 2017), Somatoform Disorder (onset ?), and Chronic Bronchitis (onset 2015).

The SW describes the appellant's impairment as follows: "Chronic COPD and Asthma, Depression, Anxiety, chronic pain (chest and back).

The panel will first summarize the evidence from the MR, the AR and the SW letter as it relates to the PWD criteria at issue in this appeal.

Severity/health history

Physical impairment

MR:

Regarding functional skills, the GP reports that the appellant can walk 4+ blocks unaided on a flat surface, can climb 5+ steps unaided, is limited to lifting 15 to 35 lbs., and there are no limitations to remaining seated.

The GP indicates that the appellant has not been prescribed any medication and/or treatments that interfere with his ability to perform DLA, explaining that, "He is on medication but they do not interfere with his activity."

AR:

Respecting mobility and physical ability, the SW assesses the appellant as Independent for walking indoors, walking outdoors, and standing; and taking significantly longer than typical for

climbing stairs ("depending on day"), lifting ("hurts back and chest"), and carrying and holding ("depending on day/pain").

Under Additional Information, the SW writes, "Gets tired/fatigued easily," and "Mood is impacted a lot by health condition (incontinence/vomiting)."

SW letter:

In her letter, the SW writes:

"[The appellant] wakes up at least 2 to 3 times a week with severe physical complications and symptoms due to his CPD [*sic*] and stomach issues where he cannot get off the couch and is vomiting, has diarrhea, is pale, has chest pain, is sweating profusely, cannot eat, and is unable to work and has to call in sick which has become a repeat pattern. On his down days, which are a few times a week, he cannot climb stairs or lift anything as he is lightheaded and weak. These are the days when he is on the couch.

[His] health has further deteriorated on occasion and he has had numerous hospitalizations for dehydration and other various issues which have impacted his ability to work full-time as he regularly has to call in sick or get doctor notes to explain why he is absent so frequently."

Mental impairment

MR:

Under Health History, the GP refers to the GAD7 and PHQ9 questionnaires and writes, "He is significantly affected by anxiety and depression and by his compromised childhood, education, and social circumstances." He also comments, "He is on medication for his anxiety and depression which help him"

The GP indicates that the appellant has no difficulties with communication.

The GP indicates that the appellant has significant deficits with cognitive and emotional function in the areas of emotional disturbance, motivation, and attention or sustained concentration.

AR:

The SW assesses the appellant's ability to communicate as good for speaking, poor reading ("can't read very well") and writing, and satisfactory for hearing.

The SW assesses the appellant's mental impairment as having the following impacts on functioning:

- Major impact: Attention/concentration, executive, and motivation
- Moderate impact: Bodily functions, emotion, and memory.
- Minimal impact: Consciousness, impulse control, insight and judgment, motor activity, other neuropsychological problems, and other emotional or mental problems.
- No impact: Language and psychotic symptoms.

SW letter:

[The appellant] has also experienced substantial trauma dating back to his early childhood.

[He] also struggles with major depression disorder which is further impacted when his physical health is not well and he feels shame for not being able to provide financially. [His] depression also dictates his mood daily, and whether he is able to go to work and on occasion he gets so down due to his mood and physical health that he gets panic attacks. [He] constantly stresses over his finances as more recently he has not been able to work full-time hours due to his health and he still has rent, car bills etc. and feels trapped due to his physical and mental limitations. [He] is crippled with anxiety at times and feels emotionally exhausted, isolates, is shaky, throws up and cannot eat or sleep with ruminating thoughts. [His] anxiety and depression greatly impact his work weekly as he comes into work an emotional wreck at times and is sent home or is unable to go into work due to his anxiety and stomach issues such as persistent diarrhea. [He] has been off work for approximately a month now due to his mounting anxiety and depression and recurring panic attacks which would not settle down and culminated in [being] hospitalized for hydration and high fever.

Ability to perform DLA

MR:

The GP reports that appellant's ability to perform DLA is not restricted for any of the listed activities: personal self-care, meal preparation, management of medications, basic housework, daily shopping, mobility inside the home, mobility outside the home, use of transportation, management of finances, and social functioning.

The GP comments, "Uncomfortable when in a group of people" and "He avoids social situations or gatherings."

AR:

The SW provides the following assessments of the assistance the appellant requires in performing DLA:

- Personal care – independent for dressing, grooming, bathing, toileting, feeding self, transfers in/out of bed, transfers on/off chair; take significantly longer than typical for regulating diet.
- Basic housekeeping – independent for laundry; it takes significantly longer than typical for basic housekeeping.
- Shopping – takes significantly longer than typical for going to and from stores, reading prices and labels, making appropriate choices, and carrying purchases home; independent for paying for purchases.
- Meals – independent for food preparation and safe storage of food; take significantly longer than typical for meal planning and cooking.
- Pay rent and bills – Independent in all aspects: banking, budgeting, and paying the rent and bills.
- Medications – takes significantly longer than typical for all aspects: filling/refilling prescriptions, taking as directed, and safe handling and storage.
- Transportation – Independent in all aspects: getting in and out of the vehicle, using public transit, and using transit schedules and arranging transportation.

The SW comments, "Depending on day & pain threshold, can be independent to requiring more time and assistance," and "Needs to be reminded regarding medication otherwise fairly independent."

With respect to social functioning, the SW assesses the appellant as independent for making appropriate social decisions and interacting appropriately with others; requiring periodic support/supervision for ability to develop and maintain relationships, ability to deal appropriately with unexpected demands, and ability to secure assistance from others.

The SW describes how appellant's mental impairment impacts his relationship with his immediate and extended social networks as good functioning.

The SW describes the support/supervision required for the appellant's social functioning by writing, "supportive housing option would be beneficial."

Help provided/required

MR:

The GP indicates that the appellant does not require any prostheses or aids to compensate for his impairment.

AR:

The SW indicates the appellant requires the use of a breathing device, explaining, "Tube for inhalers x3 – breathing issues".

The SW indicates that the appellant does not have an assistance animal, but is "Interested in therapy animal."

The SW indicates that assistance is provided by family, friends and health authority professionals. She describes the help required when none is available as "subsidized supportive housing."

Self Report

In his SR, the appellant writes:

"Rarely do I have a day when I don't feel like I'm suffering. Daily when I wake up I feel like I want to throw up. I don't want to eat anything until late in the afternoon. If I eat it's very light and lately I've mainly been subsisting on ginger ale. If I eat regularly or even have one big meal I will vomit. I throw up about twice a week after a strenuous day at work especially.

I also constantly suffer from chest pain, shortness of breath and wheezing. I've had to go to the emergency ward at the hospital because of this so many times that I've lost count. Apart from that, I experience hot sweats, feel light headed, have sinus pressure mostly felt behind my eye and have occasional migraines.

Mainly it affects my job performance and attendance. When I feel so awful and can't eat, I get weak and it's always a struggle to work many hours and even 4 days in a row.

Once the chest pains, shortness of breath, nausea and headaches are at their worst, I try and take a few moments of a break but then my boss gets mad at me and wonders why I'm standing around doing nothing. I had a chance to be trained as a manager but I kept getting sick and had to miss a number of days. They keep expecting me to work extra hours even when they see me looking like I'm going to pass out or vomiting or using my inhaler more.

My stomach hurts as well as the rest of my body. I can work part time only and do light duties. If I walk, it can only be for short distances. If I eat, its mainly crackers and peanut butter sandwiches. I'm affected in every way. I can't go to restaurants and have a nice meal. I can't work the hours my workplace expects me to. I have no motivation to make meals or shower. I just need to lie down until all the ill feelings pass."

Request for Reconsideration

In addition to the SW letter quoted above, the appellant attached a letter from his employer, who reports that due to medical reasons and the advice of his physician, the appellant has been off work for a few weeks at a time. He returned to work on a part-time basis as of September 2018 and had taken days off due to sickness as was required.

Notice of Appeal

In his Notice of Appeal, dated 04 April 2018, the appellant writes:

"I believe contrary to your decision that my impairments significantly restricts *[sic]* my ability to perform daily living activities continuously and/or periodically for extended periods of time."

The hearing

At the hearing, the appellant submitted the following letter, dated 24 January 2019, from one of his previous physicians ("letter from the other doctor"):

"This gentleman is requesting a letter of support in his Appeal for disability.

I have not seen much of him recently.

However - three years ago I was his regular family doctor and was treating him for chronic abdominal pain for which no organic cause had been found and a likely diagnosis of quite severe Irritable Bowel Syndrome had been made. Furthermore he was suffering from anxiety and depression at the time.

On searching Pharmanet, with his permission, it appears his symptoms have not changed much as he is still being intermittently treated with anti-depressants (SSRIs) and medications to help his badominal *[sic]* pain (PPIs) by a variety of doctors in the last year. When I saw him regular *[sic]* his symptoms of both the anxiety/ depression, as well as his abdominal pain/ nausea and cyclical vomiting attacks were severe enough that they considerably interfered with all tasks of daily living. At the time his then-partner [name] helped him with a lot of his daily tasks.

Following this he moved back to live with his Mum, so she could help him with his ADLs *[activities of daily living]* - his Mother used to help with his laundry and cleaning on the days he was feeling too unwell to do so. I believe these tasks have now been taken over by his

[REDACTED]

new partner, with whom he lives.

His health conditions are likely chronic and improvement is not expected as both, his abdominal pain and his depression and anxiety do not seem to have improved much since I have seen him last, a few years back.”

In his presentation, the appellant covered much the same ground as that set out in his SR and the S&W letter. In particular, he stressed that he wakes up most mornings with panic attacks, his stomach hurts, he does not want to eat or get up – it either takes him some time to get mobilized or it causes him to stay in bed for most of the day. When anxious, he is prone to uncontrollable shaking, nausea and vomiting.

In answer to questions, he stated that he has managed to continue working 20 – 30 hours/week, most recently working a couple of days ago, but he had to leave early because he was unwell.

He explained the SW's assessments of taking significantly longer than typical for climbing stairs, lifting and carrying by stating that if he is feeling shaky he will use the downstairs bathroom at home rather than going to the upstairs bathroom, and that at work management has organized his job to accommodate his situation so that he doesn't have to lift heavy items. When he has a bad day he does not lift at all. Regarding the same assessment for shopping, he said that he does not shop often, but when he does and if he is feeling shaky, he would go to the store's washroom to vomit, accounting for the extra time. As to taking significantly longer than typical for meal planning and cooking, he said that because he never knows how he is going to feel, he doesn't do any planning. Besides, because of his sensitive stomach, he restricts his diet to such items as crackers and applesauce, boiled eggs and bread, or peanut butter sandwiches. Sometimes he takes Boost. He added that he takes a lot of Gravol to treat his nausea and vomiting. Regarding taking his medications the appellant said that he forgets to take them when he has a panic attack.

Asked about the GP's diagnosis of Somatoform Disorder, the appellant replied that he did not know what that meant and that his GP never discussed it with him.

The ministry stood by its position at reconsideration.

Admissibility of additional information

The ministry did not object to the admissibility of the letter from the other doctor.

With the exception noted below, the panel finds that the information provided by the appellant in his testimony at the hearing and in the letter from the other doctor is in support of the information and records before the ministry at reconsideration. This information tends to substantiate the information provided by the diagnoses made by the GP in the MR and the information provided by the SW in her SW letter.

In particular, the other doctor's discussion of the appellant having chronic abdominal pain/nauea/vomiting for which no organic cause had been found but had been treated as symptoms of Irritable Bowel Syndrome is consistent with the GP's Somataform Disorder diagnosis (“a mental disorder which manifests as physical symptoms that suggest illness or

[REDACTED]

injury, but which cannot be explained fully by a general medical condition or by the direct effect of a substance, and are not attributable to another mental disorder" - *Wikipedia*) and the SW's description of his physical symptoms in her SW letter.

The panel therefore admits this information as evidence under section 22(4) of the *Employment Assistance Act*.

The panel does not admit as evidence those references in the letter from the other doctor related to help provided to the appellant, because little detailed information was before the ministry at reconsideration regarding help provided, either from the GP, the SW or the appellant.

[REDACTED]

PART F – REASONS FOR PANEL DECISION

The issue in this appeal is whether the ministry decision that determined that the appellant did not meet three of the five statutory requirements of Section 2 of the EAPWDA for designation as a person with disabilities (PWD) is reasonably supported by the evidence or is a reasonable application of the legislation in the circumstances of the appellant. Specifically, the ministry determined that the information provided did not establish that the appellant has a severe physical or mental impairment that, in the opinion of a prescribed professional,

(i) directly and significantly restricts his ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and,

(ii) as a result of those restrictions, he requires help to perform those activities.

The ministry determined that the appellant satisfied the other 2 criteria: he has reached 18 years of age; and his impairment in the opinion of a medical practitioner is likely to continue for at least 2 years.

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 is in a prescribed class of persons or 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 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.
- (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.

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) 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).

Analysis

Severity of impairment

The legislation is clear 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 applicant. The legislation requires that for PWD designation, the minister must be "satisfied" that the person has a severe mental or physical impairment. For the minister to be "satisfied" that the person's impairment is severe, the panel considers it reasonable for the ministry to expect that the information submitted by the independent and professional medical practitioner and prescribed professional (in this case the GP and the SW) completing the application provides the minister with a

comprehensive overview of the nature and extent of the impacts of the person's medical conditions on daily functioning. As the legislation requires the minister to make determinations regarding the degree of impairment, the degree of restrictions in the ability to perform DLA and the resulting degree of help required, it is therefore important that the MR and the AR include explanations, descriptions or examples in the spaces provided so that the minister has the information needed to make these determinations. Significant weight must also be placed on the evidence of the applicant, unless there is a legitimate reason not to do so. The reconsideration process provides the opportunity for the prescribed professionals and applicant to clarify or add to the information provided on application, and the panel hearing an appeal must consider any information provided on appeal, as long as the panel finds it admissible.

As the ministry noted in its decision, the diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a severe impairment. An impairment is a medical condition diagnosed by a medical practitioner (the GP) who, pursuant to section 2(a) of the EAPWDA, has confirmed that the condition will continue for at least 2 years and that, in the opinion of a prescribed professional (the GP and/or the SW), results in restrictions to a person's ability to function independently or effectively for a reasonable duration. To assess the severity of impairment, the ministry must consider the nature of the impairment and the extent of its impact on daily functioning. Considering the emphasis in the legislation on restrictions in the ability to perform DLA and help required, the panel finds the ministry's approach outlined above to be reasonable.

At several points in the reconsideration decision, the ministry noted that for the purposes of determining eligibility for PWD designation, an applicant's employability or ability to work is not taken into consideration. As the focus of the legislation in section 2(b) of the EAPWDA is on whether an impairment "directly and significantly restricts the person's ability to perform daily living activities ...", and as employability or ability to work is not listed in section 2(1) of the EAPWDR as a DLA, the panel finds that ministry was reasonable in not taking into account any reported employability restrictions. In other words, it is unreasonable to expect the ministry to assume that difficulty in attending or performing a job extends to other areas of daily functioning.

Severity of physical impairment

The position of the appellant, as set out in the SW letter, is that the information provided regarding the appellant waking up at least 2 to 3 times a week with severe physical complications and symptoms due to his COPD and stomach issues, including vomiting, diarrhea, chest pain, sweating and inability to eat, along with resulting frequent hospitalizations, clearly establishes that the appellant has a severe physical impairment.

The ministry's position is that based on the information provided, the appellant does not have a severe physical impairment. In reaching this conclusion, the ministry reviewed the information provided by the GP in the MR and by the SW in the AR and in her SW letter.

The ministry noted that GP indicated that the appellant does not require any aid or prosthesis for his impairment, while the SW indicated that he requires a breathing device (tube for inhalers x3). The ministry also reviewed the assessments provided by the GP regarding basic functional skills (can walk 4+ blocks unaided, etc.), and those provided by the SW in the AR regarding

mobility and physical ability, with the appellant assessed as independent before walking indoors, walking outdoors and standing, and taking significantly longer than typical for climbing stairs, lifting, and carrying and holding, depending on the day. The ministry found this information to indicate that the appellant is periodically restricted. The ministry noted, however, that the SW did not indicate how often and how much longer than typical it takes to manage climbing stairs and carrying and holding, making it difficult to determine if this represents a significant restriction to his overall level of physical functioning.

The ministry also quoted the information provided in the SW letter regarding physical functioning, and concluded that the information provided demonstrates that the appellant experiences limitations to his physical functioning due to stomach issues and chest pain, and on those days he is unable to climb stairs or lift anything. However the ministry determined that the assessments provided speak to a moderate rather than the severe physical impairment.

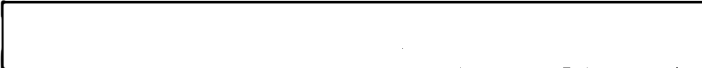
Panel finding

On reviewing the information provided, it is clear that there are two aspects that must be considered in determining the severity of the appellant's physical impairment. The first relates to his basic functional abilities – walking, climbing stairs, lifting, standing and remaining seated. The information provided by the GP in the MR (can walk 4+ blocks unaided, climb 5+ stairs, and lift 15 to 35 lbs.), and that provided by the SW in the AR (independent for walking indoors, walking outdoors and standing) and taking significantly longer than typical for climbing stairs, lifting and carrying and holding (“depending on day”), except for this latter caveat, does not point to a severe physical impairment.

The other aspect is the “depending on day” episodes of physical complications, with vomiting, nausea, and other symptoms. The SW reports that these occur at least 2 or 3 times per week and as result “he is on the couch.” (The panel notes that to some extent these physical complications may be due to the appellant's Somatoform Disorder, a mental health condition, but in the panel's view, in the context of the legislation, they can be considered as factors relating to physical impairment.)

In assessing the severity of this aspect of the appellant's impairment, the panel notes that the impacts of these episodes are described in terms of the appellant's ability to work – calling in sick or leaving work early. As the ministry noted, for the purposes of determining eligibility for PWD designation, an applicant's employability or ability to work is not taken into consideration. As the ministry also noted in terms of the lack of detail explaining “takes significantly longer than typical,” little information is provided that would give a clear picture as to how these episodes affect the appellant's ability to otherwise function independently or effectively: information on how long these episodes last, how they affect his daily functioning in such areas as personal self care, housekeeping and shopping, and the assistance required from other persons as a result.

Without information that would more fully describe the impacts of these episodes of vomiting and other complications, the panel finds that the ministry was reasonable in determining that a severe physical impairment has not been established



Severity of mental impairment

The appellant's position is that his GAD7 and PHQ9 questionnaire scores, the SW's assessments on how his mental health condition restricts his daily functioning, with major impacts in 3 areas and moderate impacts in 3 others, and the SW's description in her letter of how his depression and anxiety affect his daily life, taken together demonstrate that he has a severe mental impairment.

The position of the ministry, as set out in the reconsideration decision, is that based on the information provided, the ministry cannot determine that the appellant has a severe mental impairment.

In making this decision, the ministry repeated the relevant assessments and comments provided by the GP in the MR and by the SW in the AR. These included the GP's assessment that the appellant experiences significant deficits with cognitive and emotional functioning in 3 areas and how the SW assesses the degree to which these deficits restrict the appellant's cognitive emotional functioning, with major impacts in 3 areas and moderate impacts in 3 others. The ministry also noted the GP's comment that, "He is on medication for his anxiety and depression which help him." The ministry also noted that the GP indicated that the appellant does not have any difficulties with communication; however, the SW noted that his level of ability with reading and writing is poor. The ministry further noted that the GP indicated in the MR that the appellant's social functioning is not restricted, but noted, "Uncomfortable when in a group of people" and "He avoids social situations or gatherings." The ministry also noted the GP's reference to the GAD7 and PHQ9 questionnaires.

The ministry also reviewed the SW's assessments regarding social functioning, indicating the need for periodic support/supervision in three areas, noting that the SW did not describe the degree and duration of the support/supervision required, as requested on the application form. The ministry also noted that the SW reports that the appellant has good functioning with both his immediate and extended social networks and that the SW commented that the support/supervision the appellant requires in order to maintain in the community is "supportive housing option would be beneficial."

The ministry then quoted verbatim that part of the SW letter regarding mental impairment, and concluded:

"Ministry note: For the purposes of determining eligibility for Person with Disabilities designation, an applicant's employability or ability to work is not taken into consideration.

The ministry finds there is not enough information provided by your medical practitioner, social worker and your self-report to determine that you have a severe mental impairment."

Panel finding

The panel has reservations regarding the adequacy of the reasons provided by the ministry.

The ministry has a policy on administrative fairness, which states, "The ministry must provide substantive reasons to clients when communicating decisions. Ministry staff must offer to

provide the substantive reasons in writing when communicating decisions.”

This ministry policy is consistent with the common law duty to provide reasons in certain circumstances, as explained in the Supreme Court of Canada's decision in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817. As L'Heureux-Dubé J. wrote on the Court's behalf:

43 In my opinion, it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision. The strong arguments demonstrating the advantages of written reasons suggest that, in cases such as this where the decision has important significance for the individual, when there is a statutory right of appeal, or in other circumstances, some form of reasons should be required... The profound importance of an H & C [*Humanitarian and Compassionate*] decision to those affected... militates in favour of a requirement that reasons be provided. It would be unfair for a person subject to a decision such as this one which is so critical to their future not to be told why the result was reached.

Given the H&C aspects of the legislation, with a result critical to the future of the appellant, and with a statutory right of appeal, the panel finds that this duty to provide reasons applies to the reconsideration decision under appeal and its determinations regarding each criterion.

The *adequacy* of reasons was addressed in *Harley* (2006 BCSC 1420 Harley-EAAT), which cited *VIA Rail Canada Inc. v. National Transportation Agency* (2000), 193 D.L.R. (4th) 357, 2 F.C. 25:

[21] The duty to give reasons is only fulfilled if the reasons provided are adequate. What constitutes adequate reasons is a matter to be determined in light of the particular circumstances of each case...

[22] The obligation to provide adequate reasons is not satisfied by merely reciting the submissions and evidence of the parties and stating a conclusion. Rather, the decision-maker must set out its findings of fact and the principal evidence upon which those findings were based. The reasons must address the major points in issue. The reasoning process followed by the decision-maker must be set out and must reflect consideration of the main relevant factors.

In the panel's view, the ministry's decision regarding severity of mental impairment reads as mainly reciting the submissions and evidence of the appellant, then stating a conclusion that he did not meet the criterion. The ministry did not address at least one major point at issue: what weight to give to the GP's identification of significant deficits in cognitive and emotional function in three areas and the SW's assessments of the degree to which these deficits restrict cognitive and emotional functioning, with major impacts in 3 areas and moderate impacts in 3 others. Further, the ministry provided little commentary that would explain what reasoning process was followed in coming to its conclusion – a discussion on how and why the information provided fell short of establishing a severe mental impairment.

For these reasons, the panel finds, because of a breach of procedural fairness in failing to provide adequate reasons for its determination, that the ministry was unreasonable in

concluding that a severe mental impairment has not been established

Direct and significant restrictions in the ability to perform DLA

The position of the appellant is set out in his Notice of appeal: "I believe contrary to your decision that my impairments significantly restricts [*sic*] my ability to perform daily living activities continuously and/or periodically for extended periods of time."

The ministry's position, as set out in the reconsideration decision, is that it is not satisfied that the appellant has a severe impairment that, in the opinion of a prescribed professional, directly and significantly restricts his ability to perform the daily living activities set out in the legislation.

The ministry reached this decision after reviewing the information provided by the GP in the MR and by the SW in the AR, as summarized below.

In the MR, the GP indicates the appellant has not been prescribed any medication/treatment that interferes with his ability to perform daily living activities. The GP also indicates that the appellant's impairment does not restrict his ability to perform the listed daily living activities. Additionally, the GP does not indicate the appellant requires assistance with daily living activities

In the AR, the SW indicates that the appellant is able to manage all aspects of his DLA with the exception of taking significantly longer than typical to manage the following tasks: Regulating diet, Basic housekeeping, Going to and from stores, Reading prices and labels, Making appropriate choices when shopping, Carrying purchases home, Meal planning, Cooking, Filling/refilling prescriptions, Taking medication as directed, and Safe handling and storage of medication.

The ministry also noted the SW's comments: "Depending on the day and pain threshold can be independent to requiring more time and assistance," and "Needs to be reminded regarding medication otherwise fairly independent."

The ministry acknowledged that the appellant has certain limitations depending on the day and pain threshold and takes longer than typical managing some aspects of his daily living activities. However, how much longer than typical it takes him to manage are not described so as to determine if they represent a significant restriction to his overall level of functioning.

The ministry concluded its analysis by writing that, considering the appellant's medical history, it is reasonable to expect that he would encounter some restrictions to his ability to perform DLA and require assistance as a result. However, the ministry finds there is not enough evidence to confirm that his impairment significantly restricts his ability to perform DLA continuously or periodically for extended periods. The ministry therefore found that this the legislative criterion has have not been met.

Panel finding

The panel notes that, according to the legislation, the direct and significant restriction in the ability to perform DLA must be the result of a severe impairment, a criterion not established in this appeal, although the panel has found that the reasons provided by the ministry for severity of mental impairment were not adequate. However, this criterion can be assessed separately from the determinations for severity of mental and physical impairment, with the legislation – section 2(2)(b)(i) of the EAPWDA – requiring the minister to assess direct and significant restrictions to DLA in consideration of the opinion of a prescribed professional, in this case the GP or the SW. This does not mean that other evidence should not be factored in as required to provide explanation of the professional evidence, but the legislative language is clear that a prescribed professional's evidence is fundamental to the ministry's determination whether it is "satisfied." And for the minister to be "satisfied," it is reasonable for the ministry to expect that a prescribed professional provides a clear picture of the extent to which the ability to perform DLA is restricted, as assessed in terms of the nature and duration of help required, in order for the ministry to determine whether the restrictions are "significant." Any information submitted by the applicant or others could be useful in adding context and detail to the picture provided by the prescribed professional(s).

As the ministry noted in its decision, the GP assessed the appellant as not restricted in his ability to perform all DLA – in other words, it was the opinion of the GP that the appellant did not meet this criterion. In the AR, the SW assessed him as independent or taking significantly longer than typical for all aspects of DLA applicable to a person with a mental or physical impairment. However, as the ministry pointed out, for those tasks assessed as taking significantly longer than typical, the SW has not provided, as requested on the form, information on how much longer than typical it takes to do these tasks, nor has she given much in the way of explanation or description of why it takes the appellant longer to do them and the resulting need for any help.

Based on the appellant's testimony at the hearing, it appears to the panel that some of the "takes significantly longer than typical" assessments may be inaccurate or not convey the appellant's actual situation. For instance, for meal planning, the appellant stated that he does not do any meal planning because he never knows how he is going to feel, relying on instead on a diet of applesauce, crackers, peanut butter sandwiches and eggs. For shopping, the appellant stated that he avoided shopping as much as possible, but if he did go to a store, it might take him longer because he had to take time out to visit a washroom because he had to vomit. Such information for all other tasks assessed as "takes significantly longer than typical" might lead to different assessments, such as "unable" for meal planning, and in any event would provide a clearer picture for the ministry to assess the degree of restriction faced by the appellant in managing his DLA.

Without such information, and considering the degree of independence reported by the GP and SW, the panel finds the ministry was reasonable in determining this criterion not being met.

Help required

In the reconsideration decision, the ministry held that, as it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required.

Panel finding

Section 2(2)(b)(ii) of the EAPWDA requires that, as a result of being directly and significantly restricted in the ability to perform DLA either continuously or periodically for extended periods, a person must also require help to perform those activities. That is, the establishment of direct and significant restrictions under section 2(2)(b)(i) is a precondition of meeting the need for help criterion. Help is defined in subsection (3) as the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform a DLA.

The GP has not provided any information that the appellant requires help with his DLA. The SW has provided only minimal information: that he sometimes needs to be reminded about taking medication, that he is provided unspecified help from family, friends and health authority professionals, and that he would benefit from subsidized supportive housing, without any explanation as to why. The SW has also indicated the appellant requires periodic support/supervision for 3 aspects of social functioning, but as the ministry noted, she did not provide any explanation regarding the nature, degree or duration of such support/supervision.

With this lack of information, and since the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established, the panel finds that the ministry reasonably concluded that under section 2(2)(b)(ii) of the EAPWDA it cannot be determined that the appellant requires help to perform DLA.

Conclusion

The panel finds that the ministry's reconsideration decision, which determined that the appellant was not eligible for PWD designation because not all criteria had been met, was reasonably supported by the evidence. The panel therefore confirms the ministry's decision. The appellant is thus not successful on appeal.

PART G – ORDER

THE PANEL DECISION IS: (Check one) UNANIMOUS BY MAJORITY

THE PANEL CONFIRMS THE MINISTRY DECISION RESCINDS THE MINISTRY DECISION

If the ministry decision is rescinded, is the panel decision referred back to the Minister for a decision as to amount? Yes No

LEGISLATIVE AUTHORITY FOR THE DECISION:

Employment and Assistance Act

Section 24(1)(a) or Section 24(1)(b)

and

Section 24(2)(a) or Section 24(2)(b)

PART H – SIGNATURES

PRINT NAME

Richard Roberts

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2019 January 28

PRINT NAME

Robert Fenske

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019 January 28

PRINT NAME

Inge Morrissey

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019 January 28