

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the Ministry) Reconsideration Decision dated March 20, 2019, which found that the Appellant did not meet three of the five statutory requirements of Section 2 of the *Employment and Assistance for Persons with Disabilities Act* (EAPWDA) for designation as a person with disabilities (PWD). While the Ministry found that the Appellant met the age requirement and had an impairment which was likely to continue for at least two years, it was not satisfied that the evidence establishes that:

- The Appellant has a severe physical or mental impairment;
- The Appellant's daily living activities (DLA) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and,
- As a result of these restrictions, the Appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

PART D – RELEVANT LEGISLATION

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 the time of the Reconsideration Decision included the PWD Application comprised of a Self Report (SR) dated October 24, 2018, a Medical Report (MR) dated December 17, 2018 and completed by the Appellant's General Practitioner (GP) who has known the Appellant since August 2018 and who has seen the Appellant 2-10 times in the past year, and an Assessor Report (AR) dated December 17, 2018 completed by the GP.

The evidence also included a Request for Reconsideration (RFR) completed by the Appellant on March 7, 2019 in which the Appellant states that:

- His condition is getting worse and it stops him from working;
- Both of his doctors and his specialist feel that he has a condition which keeps him from living a normal life;
- Some days are better than others but most are bad;
- His condition is not only affecting his physical state but also his mental state; and,
- The stress, anxiety and depression from dealing with his terminal illness is bad, but is made worse by the added pressure of having to survive, function and be a father after having been denied approval for the PWD designation.

Diagnoses

In the MR, the GP diagnosed the Appellant with Chronic Myeloid Leukaemia (CML) with an onset of 2007, and Asthma and Attention Deficit Disorder without Hyperactivity, both with unknown dates of onset.

Physical Impairment

In the MR, the GP states that the Appellant has been using a drug designed to treat CML that "*works by slowing or stripping the growth of cancer cells*", the side effects of which include "*nausea, vomiting, headaches and tiredness*" and which "*decreases bone marrow function ... reduction in red blood cells, white blood cells and platelets*". With respect to functional skills, the GP reports that the Appellant can walk 2 to 4 blocks unaided on a flat surface, climb 5 or more steps unaided, lift under 2 kg (adding "*hands give way*"), and has no limitation with respect to how long he can remain seated. Where asked to provide any additional information considered relevant to understanding the significance of the Appellant's medical condition, the nature of his impairment and the impact the impairment has on his daily functioning, the GP states that the Appellant was hospitalized in another country before he moved to Canada, that the drug he is taking as treatment for his CML has side effects, and that, while that drug is currently keeping the cancer at bay, there is no guarantee that it will continue to do so.

Where asked in the AR what physical impairments impact the Appellant's ability to manage DLA, the GP has written that the Appellant sometimes has pain in his feet. Regarding mobility and physical ability, the GP indicates that, while he is independent in walking, he sometimes takes significantly longer than

normal due to pain in his feet, that he sometimes has to use the railing when climbing stairs, that, while independent in standing and lifting, he is sometimes limited by foot pain, and that he is independent in carrying and holding but tends not to lift anything heavy. Where prompted for additional comments, the GP writes "*due to fatigue and feet pain – walking may take longer*".

In the SR, the Appellant states that he always has issues with hand cramps (which he says are getting a lot worse), fatigue, nausea and dizziness. He says that he has difficulty in standing or holding things for long periods. He also states that he can easily injure himself due to weaker muscles from deteriorating muscle mass and a low immune system. He says that, while he rarely has hand cramps and weakness, they can "*come out of the blue*", and when he does experience them he drops things and has injured himself as a result. In the Request for Reconsideration he states that his condition is getting worse and that his medical professionals "*feel that (he is) living with a condition that disables (him) from living a normal life, some days are better than others but the majority are bad*".

Mental Impairment

In the MR, the GP states that the Appellant has no difficulties with communication but has significant deficits with cognitive and emotional functioning in the areas of emotional disturbance and attention or sustained concentration, adding the comment "*The underlying CML is depressing. The (CML) and the treatment are causing anxiety*".

In the section of the AR where the assessor is asked to identify the applicant's mental impairments that impact his ability to manage DLA, the GP has written "*lassitude and malaise*". In the section of the AR where the assessor is asked to indicate the level of ability to communicate, the GP has ticked "Good" for all areas (speaking, reading, writing and hearing), with no additional comments or explanation. In the section of the AR where the assessor is asked to indicate to what degree the applicant's mental impairment restricts or impacts his functioning, the GP has indicated a major impact on his emotions, a moderate impact on his sleep and attention/concentration (adding that he is taking medication for this), and no impact on consciousness, impulse control, insight and judgment, executive functioning, memory, motivation, motor activity, language, psychotic symptoms, or any other neuropsychological, emotional or mental problems. In the section of the AR where the assessor is asked to indicate the level of support or supervision required by the applicant, the GP has indicated that the Appellant is independent in all areas (making appropriate social decisions, developing and maintaining relationships, interacting appropriately with others, dealing appropriately with unexpected demands and securing assistance from others). In assessing how the Appellant's mental impairment impacts his relationship with his immediate social network (family and friends), the GP has ticked "good functioning", and "marginal functioning" with respect to how the Appellant's mental impairment impacts his relationship with his extended social networks, adding "*when in pain is tired from CML and medication side effect*".

In the SR, the Appellant states that he has suffered from anxiety, depression and insomnia since he was diagnosed with CML in 2007. Regarding his insomnia, the Appellant states that some days are good. He explains that he can go for a week or two without any issues but when he has a bad turn he cannot sleep for days and that once he went two and a half weeks without any sleep. He states that medication helps but that he is "*extremely slow and groggy the next day*", which also adversely affects his mood and appetite. He states that his depression and anxiety has gotten a lot worse over the years and that he

has been unable to hold down a job because he has to take excessive sick days due to his medical issues.

Restrictions in the Ability to Perform DLA

In the AR, the GP states that the Appellant is independent with respect to all listed DLA in the areas of personal care, basic housekeeping, shopping, meals, payment of rent and bills, medications and transportation, though he takes significantly longer with dressing, grooming and bathing, adding "*fatigue from the CML and medication causes (these activities) to take longer*", and that he gets help from his partner with laundry, basic housekeeping, going to and from stores and carrying purchases home, all of which take significantly longer than normal. The GP also states that meal planning and food preparation take significantly longer than normal due to fatigue and foot pain.

The Appellant does not identify any restrictions in his ability to perform DLA in the SR or the RFR.

Need for Help

In the MR the GP indicates that the Appellant does not require any prostheses or aids for his impairment.

In the AR, the GP states that the Appellant lives alone. In the section of the AR which asks who provides the help required for DLA, the GP indicates that his partner helps him with shopping, lifting, preparing meals and housekeeping.

The Appellant did not identify any help he requires in performing DLA in the SR or the RFR.

Additional Information Submitted after Reconsideration

In his Notice of Appeal (NOA) dated March 26, 2019, the Appellant states that he hasn't got all of the information from his doctors and that the Ministry hasn't looked at everything properly. He states that the information in his application reflects how he functions on his best days, not his worse ones, and that "*previous info from doctors*" indicates that he needs help and support from his partner to walk, eat and cook.

The hearing, originally scheduled for April 16, 2019, was adjourned 3 times. The first adjournment was granted to allow the Appellant time to obtain additional information from his specialist and his GP following appointments with both scheduled for late April 2019. The second adjournment was granted because the Appellant had spent several days immediately preceding the rescheduled hearing date in hospital and needed additional time to submit the additional written evidence. The third adjournment was granted because the additional written information was submitted by the Appellant to the Ministry rather than the Tribunal and the Ministry had not provided that additional evidence to the Tribunal for distribution to the Panel.

On May 29, 2019 additional written evidence (May 29 Documents) was provided to the Tribunal comprising:

- A revised Assessor Report dated May 9, 2019 (AR#2), prepared by a Social Worker (SW) representing a social services agency in a community near the Appellant's home community which provides social support, information and referral services to individuals with a variety of

disabilities. At the time AR#2 was completed, the SW had known the Appellant for 2 weeks and had seen him 2-10 times. On page 1 of the May 26 submission the Appellant had written "*This is in addition to my Appeal – Extra info needed & been assessed by a Social Worker*"; and

- A Federal Government Medical Certificate For Employment Insurance Sickness Benefits (Medical Certificate) dated September 24, 2018, identifying the Appellant's medical diagnosis, the date of onset, the date that the Appellant became unable to work due to his medical condition (August 2018) and stating "*(Appellant) is presently finding it hard to do a full day's work due to fatigue & symptoms related to treatment*".

Where asked in AR#2 what physical impairments impact the Appellant's ability to manage DLA, the SW has written "*CML (type of cancer; 2007), severe arthritis in both wrists ... fatigue*". Regarding mobility and physical ability, the SW has ticked "Continuous Assistance from another person or unable" in all areas, adding the following explanations: Walking indoors – *10 min.*, Walking outdoors – *1-1 1/2 blocks*, Climbing stairs – *3-5 stairs*, Standing – *5-10 min.*, Lifting – *10-20 lbs.*, and Carrying and holding – *10-20 lbs., less than 5 m.* The SW has also added the following comments: "*After the limits above he must rest. 4-7 days per week he needs to stay in bed due to being weak and sick. It is unpredictable which days. Doesn't eat and can't sleep without sleeping pills. Extreme anxiety and depression. Constant problem with short-term memory and concentrating. Problem-solving is a challenge. No motivation to do a majority of activities and loss of interest. Extreme tension due to stress and anxiety.*"

In the section of AR#2 where the assessor is asked to identify the applicant's mental impairments that impact his ability to manage DLA, the SW has included anxiety and depression. In the section of AR#2 where the assessor is asked to indicate the level of ability to communicate, the GP has ticked "Good" for speaking, reading and hearing and satisfactory for writing, adding the explanation "*Challenge due to arthritis*" and the comment "*Arthritis causes barriers when writing*". In the section of AR#2 where the assessor is asked to indicate to what degree the applicant's mental impairment restricts or impacts his functioning, the SW has indicated:

- A major impact on his bodily functions (underlining "eating problems [*not eating*"] and sleep disturbance [*sleeping pills*"]), emotions (underlining excessive anxiety and depression), attention/concentration (underlining distractible, unable to maintain concentration, and poor short term memory), motivation (underlining lack of initiative and loss of interest);
- No moderate impacts;
- A minimal impact on consciousness (underlining drowsy) and executive functioning (underlining problem solving); and,
- No impact on the remaining functioning (impulse control, insight and judgment, memory, language, psychotic symptoms, or any other neuropsychological, emotional or mental problems).

In the section of AR#2 where the assessor is asked to identify areas where assistance is required by the applicant to manage personal care DLA, the SW indicates that the Appellant requires continuous assistance from another person and takes significantly longer than typical with dressing ("*90% of days unable due to fatigue / weakness / depression*"), grooming and bathing ("*4-5 times longer*") and

regulating diet (*"4-5 times longer given diet at hospital"*). In addition, the SW indicates that the Appellant requires periodic assistance from another person and takes significantly longer than typical with feeding himself (*"30% of days wrists hurt too much so unable"*), and that the Appellant is independent with transfers in and out of bed but takes significantly longer than typical (*"4-5 times longer"*).

With regard to laundry and basic housekeeping, the SW states that the Appellant requires continuous assistance from another person and takes significantly longer than typical, adding *"100% assisted by friend. 4-5 times longer"*.

Regarding the shopping DLA, the SW reports that the Appellant requires continuous assistance from another person and takes significantly longer than typical in going to and from stores and requires continuous assistance from another person in carrying purchases home, adding *"100% of trips assisted by friends. 4-5 times longer"*.

In the section of the AR asking for additional comments relating to personal care, housekeeping and shopping, the SW states *"Friend was assisting him daily with personal care, basic housekeeping and shopping because he is so physically weak. Can be in bed up to 3 weeks."*

With respect to meal-related DLA, the SW indicates that the Appellant requires continuous assistance from another person in meal planning, food preparation and cooking, with the further explanation *"100% of meals assisted by friends"*. Regarding the medications DLA, the SW states that the Appellant requires periodic assistance from another person in filling/refilling prescriptions, adding *"30% of time medication is too expensive"*, and, with respect to the transportation DLA, the SW reports that the Appellant requires continuous assistance from another person and takes significantly longer than typical in getting in and out of a vehicle (*"100% of time help is needed. 4-5 times longer."*), and requires continuous assistance from another person in using public transit (*"Walking to bus stop is too far"*).

In the section of the AR asking for additional comments relating to the meals, paying rent and bills, medications and transportation related DLA, the SW writes *"Standing to cook and prepare food is too difficult due to being physically weak, wrists being in pain or too depressed, so friends cook for him. Constantly needs assistance with transportation, due to low immune system he cannot use the public bus. Severe swelling in feet, lower legs and around eyes is a side effect that is common"*.

In the section of AR#2 where the assessor is asked to indicate the level of support or supervision required by the applicant, the SW has indicated that the Appellant is independent in making appropriate social decisions but requires periodic assistance in developing and maintaining relationships (*"low no motivation"*) and interacting appropriately with others (*"low interaction, will not try to problem-solve"*) and requires continuous support/supervision in dealing appropriately with unexpected demands (*"anxiety is too overwhelming. flustered"*) and securing assistance from others (*"will not ask"*). In assessing how the Appellant's mental impairment impacts his relationship with his immediate social network (family and friends), the SW has ticked "marginal functioning" (*"Family is too distant"*), and has also ticked "marginal functioning" with respect to how the Appellant's mental impairment impacts his relationship with his extended social networks, adding *"minimal due to anxiety"*.

With respect to need for help, the SW states that the Appellant lives with a friend, adding *"needing to move closer for treatment"*, and that the help required for DLA is provided by family, friends and health

authority professionals with the additional comment "*Family (emotional support), friends including one who was a live-in care-aide*". In the section of AR#2 asking to describe the equipment or device that is needed if equipment is required but not currently being used, the SW writes "*If not bed ridden, needs cane for support when walking*".

Where asked to provide any additional information that may be relevant to understanding the nature and extent of the Appellant's impairment and its effect on his DLA, the SW writes "*Every day his health is deteriorating, higher white blood cells, clots in his feet. Daily he needs assistance for personal care, housekeeping, shopping, cooking, or getting his medication. Without the assistance things would not be done. On permanent disability in (his previous home Country) 2007. In May 2015 he moved to Canada to be closer to family*".

On May 30, 2019 the Appellant submitted additional written evidence (May 30 Documents) to the Tribunal containing:

- Duplicate pages of the AR#2 summarized above; and
- Part of a one page Ministry Medical Report – Employability form (Employability Form) dated December 19, 2018 and completed by the GP, indicating the Appellant's medical condition (CML), an expected duration of more than 2 years (additional comments are not completely copied), and identifying the following restrictions: "*(Patient) reports periodic frequent swelling of hands & feet (with) associated pain which prevents him from standing and operating scissors.*"

At the hearing, the Appellant explained his medical condition as diagnosed by his GP in the MR and stated that he had spent two years in hospital in his previous home Country, following which he was "on disability" in his previous home Country before moving to Canada in 2015.

The Appellant said that he self-administers chemotherapy medication every day and will never be in a position to not have to take daily medications. He explained that he must also take medications to address the side effects of his chemotherapy medication, some of which are not covered by the Medical Services Plan (MSP) and can cost up to \$100 per dose. In response to a question from the Ministry as to whether he had asked his GP about "special authority", a process under which MSP would waive some of the conditions and restrictions regarding whether a particular treatment might be covered by the plan, the Appellant stated that he had asked his GP for this but that some of the medications he took to deal with the side effects of his chemotherapy medication are not covered by MSP.

The Appellant explained that after arriving in Canada in 2015 it took him a year to find a specialist physician and that he has had trouble finding a family physician, having had several since arriving in Canada, the GP being his most recent one. He also said that he has only seen the GP a couple of times and she does not know him well.

In response to a question from the Panel, he stated that he had applied for a CPP disability pension but did not qualify because he had not worked long enough in Canada.

Regarding discrepancies between the evidence contained in the AR and AR#2, the Appellant stated that one day he can feel fine and the next day he can be bed ridden. He said that the GP had filled out the AR based on the severity of his impairments and the impact on his DLA on his best days, and that the

AR was completed by the GP while interviewing the Appellant, whom she didn't know well, over the phone. In addition the GP left some sections of the AR blank. The SW, on the other hand, had completed AR#2 based on the Appellant's worse days and had provided details regarding the frequency and severity of impairments following an observation of and interview with the Appellant in both the SW's office and a home visit by the SW. On the Appellant's worse days, which occur every other day or at least twice a week, he stated that he can't stand for long and has to be helped to use the washroom. He also said that on his worse days he can't move his fingers due to swelling in his hands. In addition, he has a special diet and needs help preparing his meals. He stated that he is separated from his partner and is temporarily living with friends, on whom he relies to provide help with his DLA. He explained that he is currently on a waiting list for accommodation in a community care facility, but that he won't be eligible for that accommodation unless he is designated as a PWD. He stated that his health has deteriorated further in the interval between when the AR was completed in December 2018 and when the AR#2 was completed by the SW in May 2019.

Regarding his need for assistive devices, the Appellant confirmed that he now uses a cane (as indicated in AR#2) whereas he didn't use a cane when the GP completed the AR, and that in his previous residence he had a handrail in the bathroom but that he doesn't have one in his current temporary residence.

At the hearing, the Ministry relied on its Reconsideration Decision and stated that the new evidence in AR#2 would have been taken into account if the Ministry had had that information at the time of the Reconsideration Decision and, while it could not determine whether or not the Ministry's decision would be any different in light of the new evidence, encouraged the Appellant to re-apply for his PWD designation, providing AR#2 as Section 3 of any new application.

Admissibility of Additional Information

Section 22(4) of the *Employment and Assistance Act* (EAA) provides that panels may admit as evidence (i.e. take into account in making its decision) the information and records that were before the Ministry when the decision being appealed was made and "*oral and written testimony in support of the information and records*" before the Ministry when the decision being appealed was made – i.e. information that substantiates or corroborates the information that was before the Ministry at reconsideration. Because a panel can accept oral and written testimony in support of the information and records before the Ministry when the decision was made, there is limited discretion for a panel to admit new evidence. Accordingly, instead of asking whether the decision under appeal was reasonable at the time it was made, panels must determine whether the decision under appeal was reasonable based on all admissible evidence, including any new evidence admitted under EAPWDA Section 22(4).

At the hearing, the Ministry did not object to the admittance of the new evidence per se, but pointed out that the evidence in AR#2 was largely in conflict with what the GP had written in the AR, and that this new evidence was not information that the Ministry had when it made its decision in March 2019.

The Panel notes that the evidence provided by the GP in the AR was not based on a physical examination of the Appellant, did not contain explanations or comments, and was provided in a brief telephone interview of the Appellant by a prescribed professional who had not known the Appellant for long. On the other hand, the written evidence contained in AR#2 and the verbal evidence presented by

the Appellant at the hearing relate directly to the impact of the GP's diagnosis of both a physical and a mental impairment and, in the Panel's opinion, should be assigned greater weight because the AR#2 evidence, unlike the evidence contained in the AR, was based on a detailed interview and physical examination by the SW. Therefore, the Panel considered the written information in the NOA, the additional evidence include in the May 29 Documents and the May 30 Documents, together with the verbal evidence presented at the hearing, to be evidence *in support of* the information and records that were before the Ministry at reconsideration, and therefore admitted the additional information in accordance with Section 22(4)(b) of the EAA.

PART F – REASONS FOR PANEL DECISION

The issue under appeal is whether the Ministry's Reconsideration Decision, which found that the Appellant is not eligible for designation as a PWD, was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the Appellant. The Ministry found that the evidence does not establish that the Appellant has a severe mental or physical impairment and that his DLA are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods. Also, the Ministry found that as a result of those restrictions, it could not be determined that the Appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

The criteria for being designated as a PWD are set out in Section 2 of the EAPWDA as follows:

Persons with disabilities

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 ability to perform daily living activities either

(A) continuously, or

(B) periodically for extended periods, and

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

(3) For the purposes of subsection (2),

(a) a person who has a severe mental impairment includes a person with a mental disorder, and

(b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires

(i) an assistive device,

(ii) the significant help or supervision of another person, or

(iii) the services of an assistance animal.

(4) The minister may rescind a designation under subsection (2).

The EAPWDR provides as follows:

Definitions for Act

2 (1) For the purposes of the Act and this regulation, "**daily living activities**",

(a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following activities:

- (i) prepare own meals;
- (ii) manage personal finances;
- (iii) shop for personal needs;
- (iv) use public or personal transportation facilities;
- (v) perform housework to maintain the person's place of residence in acceptable sanitary condition;
- (vi) move about indoors and outdoors;
- (vii) perform personal hygiene and self care;
- (viii) manage personal medication, and

(b) in relation to a person who has a severe mental impairment, includes the following activities:

- (i) make decisions about personal activities, care or finances;
- (ii) relate to, communicate or interact with others effectively.

(2) For the purposes of the Act, "**prescribed professional**" means a person who is

(a) authorized under an enactment to practise the profession of

- (i) medical practitioner,
- (ii) registered psychologist,
- (iii) registered nurse or registered psychiatric nurse,
- (iv) occupational therapist,
- (v) physical therapist,
- (vi) social worker,
- (vii) chiropractor, or
- (viii) nurse practitioner ...

Severity of Impairment

Neither the terms "*impairment*" nor "*severe*" are defined in the EAPWDA. The Cambridge Dictionary defines "*impairment*" in the medical context to be "*a medical condition which results in restrictions to a*

person's ability to function independently or effectively" and defines "severe" as "causing very great pain, difficulty, worry, damage, etc.; very serious".

A diagnosis of a severe impairment does not in itself determine PWD eligibility. Section 2(2) of the EAPWDA requires that in determining whether a person may be designated as a PWD, the Ministry must be satisfied that the individual has a severe physical or mental impairment with two additional characteristics: in the opinion of a prescribed professional, it must both be likely to continue for at least two years [EAPWDA 2(2)(a)] and it must significantly restrict a person's ability to perform DLA continuously or periodically for extended periods, resulting in the need for the person to require assistance in performing those activities [EAPWDA 2(2)(b)]. Therefore, in determining PWD eligibility, after assessing the severity of an impairment the Ministry must consider how long the severe impairment is likely to last and the degree to which the ability to perform DLA is restricted and help in performing DLA is required. In making its determination the Ministry must consider all the relevant evidence, including that of the Appellant. However, the legislation is clear that the fundamental basis for the analysis is the evidence from a prescribed professional – in this case the GP and the SW.

Physical Functioning

The Ministry's position is that the ability to walk 2–4 blocks unaided, climb 5+ steps unaided and remain seated without limitation is not considered indicative of a severe impairment of physical functioning and that some of the GP's evidence is contradictory, providing the example of the GP's assessment that the Appellant is limited in standing while stating that he is independent with standing elsewhere in the application. In addition, because the GP does not describe how much longer than typical the Appellant takes to undertake activities such as walking or climbing stairs, the Ministry's position is that a severe impairment of his physical functioning has not been established. The Appellant's position is that the GP's assessments in the MR and the AR were based on the Appellant's best days and were provided in an interview over the phone by a prescribed professional who did not know the Appellant well. The Appellant argues that the SW's assessments as provided in AR#2 provide more current information regarding his physical impairments on his worse days and should represent the assessment upon which his PWD eligibility is determined.

Panel Decision

In its Reconsideration Decision, the Ministry acknowledges that the Appellant has submitted a SR and states "*It is important to note that this information was reviewed in full and is considered in conjunction with the assessments provided by your medical practitioner*". However, the Panel notes that, while there is a significant amount of evidence provided by the Appellant in the SR regarding his disability and its impact on his life, nowhere in the Reconsideration Decision does the Ministry refer to this evidence or indicate why it did not assign any weight to it. The Panel finds that it was not reasonable for the Ministry to state that it reviewed the Appellant's evidence in full yet did not make any reference to any of that evidence or explain why it did not take it into account in assessing the severity of impairment to the Appellant's physical functioning in its Reconsideration Decision.

The Panel also notes that the Appellant gave evidence at the hearing to the effect that his health had deteriorated in the interval between completion of the AR in December 2018 and AR#2 in May 2019. The Panel finds that it is reasonable to assume that the further deterioration in the Appellants health in

recent months, together with the significant additional detail provided in AR#2 by the SW (which was based upon a face-to-face interview and a home visit with the Appellant and represents his functioning during his worst days) compared to that provided in the AR 5 months earlier by the GP (who provided his assessment based on a telephone interview and representing the Appellant's functioning on his best days) would explain the discrepancies between the evidence contained in AR#2 and the AR. For these reasons, the Panel assigns significantly greater weight to the assessments provided in AR#2.

The Panel notes that the SW's assessment of the Appellant's mobility and physical ability, as set out in AR#2, is that the Appellant requires continuous assistance from another person or is unable to do any of the listed activities, adding that after undertaking those activities he must rest, and 4-7 days per week he needs to stay in bed because he is too weak and sick to get out of bed. Given the information provided by the SW and the Appellant, the Panel finds that the evidence demonstrates that the Appellant has a severe physical impairment.

Therefore, after reviewing all of the evidence and noting the Ministry's failure to take into account the Appellant's evidence, the Panel finds that the Ministry was not reasonable in determining that a severe impairment of the Appellant's physical functioning has not been established.

Mental Functioning

The Ministry's position is that the cumulative impact to the Appellant's cognitive and emotional functioning is not considered indicative of a severe impairment of mental functioning and that, based on the assessments provided by the GP, a severe impairment of his mental functioning has not been established. The Appellant's position is that he has suffered from severe anxiety, depression and insomnia since he was diagnosed with CML in 2007.

Panel Decision

In its Reconsideration Decision, the Ministry states that the GP has assessed a major impact to one area of cognitive and emotional functioning, moderate impacts in two areas, minimal impacts in one area and no impact in ten areas, and concludes that "*the cumulative impact to cognitive and emotional functioning ... is not considered indicative of a severe impairment of mental functioning*" without explaining how it came to this conclusion. The Panel notes that the legislation does not define the difference between "major impact", "moderate impact" and "minimal impact", nor does it prescribe the number of each of these degrees of impact that must be observed for a severe impairment of mental functioning to exist. The Panel finds that it was not reasonable for the Ministry to state that it reached this conclusion without explaining *how* it reached this conclusion.

As stated in the Physical Functioning section of this decision above, the Panel notes that, while there is a significant amount of evidence provided by the Appellant in the SR regarding his mental impairment and its impact on his life, nowhere in the Reconsideration Decision does the Ministry refer to this evidence or indicate why it did not assign any weight to it. The Panel finds that it was not reasonable for the Ministry to state that it reviewed the Appellant's evidence in full yet did not make any reference to any of that evidence in the SR or explain why it did not take it into account in assessing the severity of impairment to the Appellant's mental functioning in its Reconsideration Decision.

As mentioned in the physical functioning section, the Panel assigns significantly greater weight to the assessments provided in AR#2 than the evidence provided by the GP in the AR for the reasons provided above. In AR#2, the Panel notes that the SW has assessed a major impact on the Appellant's bodily functions (in particular, eating problems and sleep disturbance), emotions (specifically excessive anxiety and depression), attention/concentration (indicating that he is distractible, unable to maintain concentration and has a poor short term memory), and motivation (lack of initiative and loss of interest). The Panel further notes that in the SR the Appellant states that he has had anxiety, depression and insomnia for 12 years. He also provided detail regarding the frequency of his periodic episodes of insomnia, explaining that he can go for a week or two without any issues but when he has a bad turn he can't sleep for days, and that once he went two and a half weeks without any sleep. He also stated that the medication he takes helps him sleep but that he is extremely slow and groggy the next day, which also adversely affects his mood and appetite, and that his depression and anxiety has gotten a lot worse over the years.

Therefore, after reviewing all of the evidence and noting the Ministry's failure to take into account the Appellant's evidence provided in the SR, the Panel finds that the Ministry was not reasonable in determining that a severe impairment of the Appellant's mental functioning has not been established.

Restrictions in the Ability to Perform DLA

The Ministry's position is that because the GP does not describe how much longer than typical it takes the Appellant to perform DLA or the frequency of assistance provided, and because the GP has indicated that the Appellant is independent with all listed areas of social functioning, there is not enough evidence to confirm that the Appellant has a severe impairment that significantly restricts his ability to perform DLA continuously or periodically for extended periods. The Appellant's position is that the SW's assessments as set out in AR#2 provide detailed information regarding the frequency of periodic restrictions in his ability to perform DLA.

Panel Decision

Section 2(2)(b) of the EAPWDA requires that the Ministry be satisfied that a prescribed professional has provided an opinion that an applicant's severe impairment *directly* and *significantly* restricts his or her DLA, continuously or periodically for extended periods. In this case, the GP and the SW are the prescribed professionals. DLA are defined in Section 2(1) of the EAPWDR and are also listed in the MR and, with additional details, in the AR.

As mentioned previously, the Panel assigns significantly greater weight to the assessments provided in AR#2 than the evidence provided by the GP in the AR. In AR#2, the Panel notes that the SW has indicated that the Appellant requires continuous assistance from another person in meal planning, food preparation, cooking, in getting in and out of a vehicle and in using public transit, and requires periodic assistance from another person in filling/refilling prescriptions. The Panel further notes that details of the additional amount of time it takes to complete certain tasks, such as how much longer it takes the Appellant to get in and out of bed or to do laundry and basic housekeeping, are provided in AR#2. The Panel finds the evidence in AR#2 and the Appellant's evidence at the hearing regarding restrictions in his ability to perform a significant number of DLA to be specific, detailed, credible and compelling.

Therefore, after reviewing all of the evidence, the Panel finds that the Ministry was not reasonable in determining that the Appellant did not have a severe impairment that directly and significantly restricts his DLA, continuously or periodically for extended periods.

Help with DLA

The Ministry's position is that it cannot be determined that significant help is required because it has not been established that DLA are significantly restricted. The Appellant's position is that he is living with friends who he relies on to provide help with his DLA and that he now must use a cane as an assistive device when walking.

Panel Decision

Section 2(2)(b)(ii) of the EAPWDA requires that, *as a result of direct and significant restrictions* in the ability to perform DLA, a person requires help to perform those activities. Help is defined in subsection (3) as the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform one or more DLA.

As mentioned previously, the Panel assigns significantly greater weight to the assessments provided in AR#2 than the evidence provided by the GP in the AR. In AR#2, the SW states that the Appellant lives with a friend who is a live-in care-aide, providing him with assistance with many of his DLA, including personal care, housekeeping and shopping. At the hearing, the Appellant explained that he is separated from his partner and confirmed that he is now living with friends who provide him with help with a significant number of his DLA. He also explained that he is currently on a waiting list for accommodation in a community care facility, but that he won't be eligible for that accommodation unless he is designated as a PWD. Regarding his need for assistive devices, the Appellant also confirmed at the hearing that in recent months he has begun using a cane for ambulation on a regular basis. Therefore, after reviewing all of the evidence, the Panel finds that the Ministry was not reasonable in determining that the Appellant did not require help from another person or the use of an assistive device to perform one or more DLA.

Conclusion

Having reviewed and considered all of the evidence and relevant legislation, the Panel finds that the Ministry's Reconsideration Decision, which determined that the Appellant was not eligible for the PWD designation under Section 2 of the EAPWDA, was not reasonably supported by the evidence, and therefore rescinds the decision. The Appellant's appeal, therefore, is successful.

APPEAL NUMBER

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

Simon Clews

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2019/06/20

PRINT NAME

Kulwant Bai

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

PRINT NAME

David Handelman

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019/06/20