

### **Part C – Decision Under Appeal**

The decision under appeal is the Ministry of Social Development and Poverty Reduction’s (“ministry”) reconsideration decision dated November 28, 2022 denying persons with disabilities (“PWD”) designation. The ministry found that the appellant met the age (18 years or older) and duration (impairment to continue for at least 2 years) requirements. However, the Ministry did not find that:

- The appellant has a severe mental or physical impairment;
- The appellant’s impairment significantly restricts her ability to perform daily living activities; and
- The appellant requires significant help or supervision to perform daily living activities.

The ministry also found that the appellant was not one of the prescribed classes of persons eligible for PWD designation on the alternative grounds. As there is no information or argument on this point, the panel considers it not to be at issue in this appeal.

### **Part D – Relevant Legislation**

*Employment and Assistance for Persons with Disabilities Act*, SBC 2022, c. 41 section 2, 2.1 (the “Act”).

Employment and Assistance for Persons with Disabilities Regulation, B.C. Reg. 265/2002, section 2 (the “Regulation”)

The full text of these sections of legislation is set out in the schedule of legislation after this decision.

**Part E – Summary of Facts**

The hearing took place by videoconference. In attendance at the hearing were the panel, the appellant, the appellant's witness (who was a family member and stayed to provide support for the appellant after giving evidence), and a ministry representative.

**Evidence Before the Ministry at Reconsideration**

The appellant is over 18 years of age and has applied for PWD designation. In support of the application, the appellant submitted a PWD application that included a Medical Report, and Assessor Report, and a portion of the application form entitled Applicant Information that includes a hand-written self-report from the appellant. Included with the application materials were numerous medical reports.

In addition to the application materials, the ministry also received the appellant's Request for Reconsideration and further medical evidence in the form of a medical certificate, letter, and another medical report.

**New Evidence Provided on Appeal**

The appellant submitted a Notice of Appeal Form and further documentary evidence for consideration by the Tribunal. The documentary evidence included a medical letter from the appellant's orthopaedic surgeon, an updated medical certificate from the appellant's doctor, and several photographs of the appellant's ankle.

In addition, at the hearing, the appellant's parent provided evidence of the appellant's present medical condition and details regarding the amount of assistance the appellant needs to complete daily living activities. The appellant also provided further oral evidence at the hearing related to the severity of her physical impairment and her ability to complete daily living activities.

The ministry did not object to the submission of any of the new evidence. The panel finds that much of the oral testimony of the appellant and her mother summarized evidence already before the ministry at reconsideration and is argument in support of the appellant's appeal. However, where the testimony provided further detail the panel finds that the testimony was reasonably required for a full and fair disclosure of all matters related to the decision under appeal. The panel also finds that the additional documentation submitted by the appellant was also reasonably required for a full and fair disclosure of all matters related to the decision under appeal. Accordingly, the panel admits all the new information as evidence pursuant to section 22(4) of the *Employment and Assistance Act*.

**Summary of Relevant Evidence**Diagnoses and health history: Medical Report

The Medical Report was completed by the appellant's doctor. The doctor has been treating the appellant since January 2021 and has seen the appellant 2 – 10 times in the past 12 months. In the medical report the doctor diagnoses the appellant with left ankle with ORIF, chronic pain due to osteochondral defect of talar dome with an onset of 1995.

The doctor reports that this diagnosis is likely to continue for two years or more.

The doctor states the following about the appellant's health history:

- The appellant had a previous surgery in 1995 and developed chronic pain/stiffness;
- The appellant has pain flares approximately 25% of the time causing functional impairment, primarily impacting her mobility;
- The appellant intermittently uses crutches with pain flares/exacerbations;

With respect to functional skills, the doctor states that the appellant:

- can walk unaided 2 to 4 blocks on a flat surface but when pain flares is unable to mobilize at all (25% of the time);
- can climb 5+ stairs unaided but when pain flares is only able to ascend 3 stairs (25% of the time);
- has no limitations with lifting;
- has no limitations remaining seated;
- has no difficulty with communication; and
- has no significant deficits with cognitive and emotional function.

As the doctor was also completing the Assessor Report, the doctor did not comment on the appellant's ability to perform daily living activities in the Medical Report.

Diagnoses and health history: Assessor Report

As mentioned above, the Assessor Report was completed by the same doctor that completed the Medical Report. In the Assessor Report the doctor states that the appellant lives with family, friends or caregiver and experiences mobility impairments that impact walking and ascending stairs. The doctor states that the Appellant's ability to communicate is good.

With respect to mobility and physical ability the doctor states that the appellant is independently able to:

- walk indoors, but notes that the appellant uses crutches and takes significantly longer than typical when experiencing a pain flare (25% of the time);

- walk outdoors, but notes that the appellant uses crutches and takes significantly longer than typical when experiencing a pain flare (25% of the time);
- climb stairs, but notes that the appellant uses crutches and takes significantly longer than typical when experiencing a pain flare and needs periodic assistance going down stairs (25% of the time);
- stand;
- lift; and
- carry and hold.

The doctor stated that the section of the Assessor Report relating to cognitive and emotional functioning is not applicable to the appellant and as a result the doctor did not complete this section of the report.

With respect to daily living activities, the doctor reports that the appellant is independent in all areas, including social functioning. However, the doctor notes that:

- the appellant needs railing supports to get in and out of the shower due to the step;
- the appellant needs periodic assistance from another person to perform laundry, basic housekeeping, going to and from stores and carrying purchases home during pain flares (25% of the time);
- the appellant needs crutches during pain flares (25% of the time); and
- The appellant has pain flares requiring reduced weight-bearing on the left ankle 25% of the time and requires crutches and help from another individual to mobilize.

The doctor noted that the appellant does not have a mental impairment.

The doctor stated that the appellant requires help to perform daily living activities from family and friends and uses crutches to mobilize 25% of the time, as well as orthotics daily and a night ankle splint as needed.

#### Diagnoses and health history: Self-Report

The appellant stated that she was involved in an accident in 1995 where she sustained a spiral fracture of the ankle resulting in having 3 pins placed to put her ankle back together. She reports having severe joint pain, stiffness, inflammation and swelling of the ankle daily. The appellant states that she is not able to stand for periods of time and her condition worsens with weight bearing of any kind. She states that she is unable to have gainful employment due to poor strength and range of motion and often needs assistance using stairs and getting in and out of the shower as she cannot put weight on one side of her body. She reports using crutches to assist her when she has daily flare ups and states that while she has been prescribed medication it only provides temporary relief.

Medical evidence provided with the PWD application

The following documents were enclosed with the appellant's PWD application:

- X-ray report, dated October 17, 2018;
- CT report, dated August 10, 2019;
- Orthopaedic surgeon report, dated November 20, 2019;
- Orthopaedic surgeon report, dated January 14, 2020;
- Orthopaedic surgeon report, dated March 4, 2020; and
- Orthopaedic surgeon report, dated April 8, 2022.

The orthopaedic surgeon ("specialist") diagnoses the appellant with post-traumatic osteoarthritis to her left ankle and outlines that since 2017 the appellant has experienced increasing pain, weakness, restricted motion, instability, and swelling in her ankle that improves with rest and is worse with repetitive activity and sports. The specialist states that the appellant has daily pain and discomfort.

The Xray and CT reports support the specialist and doctor's diagnosis.

Evidence provided with Request for Reconsideration

The following documents were provided to the ministry with the appellant's Request for Reconsideration:

- Medical certificate from the appellant's doctor, dated November 6, 2022;
- Letter from the appellant's orthopaedic surgeon, dated October 6, 2022; and
- MRI scan report, dated September 12, 2022.

The medical certificate from the appellant's doctor states that the appellant's specialist finds that the appellant's severe ankle degeneration is unlikely to resolve with medical intervention and while she may get partial benefit from a future surgery there is also the risk of worsening pain and function. The doctor further noted that:

- the appellant suffers from baseline chronic pain on a daily basis and only mobilizes/walks when absolutely necessary;
- 90% of the time the appellant will be sedentary so as to avoid weightbearing on her left ankle;
- the appellant uses crutches if she feels unstable with weightbearing;
- the appellant uses a handrail for showering;
- the appellant needs an additional person to accompany her with lifting and carrying groceries; and
- the appellant is able to walk unaided, but the reason she is functionally impaired is secondary to severe pain.

The MRI scan report and October 6, 2022 letter from the specialist confirms the appellant's diagnosis. The letter from the specialist also goes over possible treatment options while noting that "this is not something that is repairable".

### New evidence

On appeal, the appellant submitted the following new evidence prior to the hearing of the appeal:

- Letter from the appellant's orthopaedic surgeon, dated January 13, 2023;
- An updated medical certificate from the appellant's doctor, dated February 13, 2023;
- Four colour photographs of the appellant's ankle.

The letter from the appellant's specialist provided more information about possible future surgery on the appellant's ankle and highlighted that while surgery is an option that it is not a guaranteed solution and could well make the appellant's condition worse rather than better.

The updated medical certificate from the appellant's doctor provided an update from the earlier medical certificate and the doctor stated that:

- The appellant's current symptoms have worsened;
- The appellant's pain is now constant;
- The appellant is unable to bear weight;
- The appellant uses crutches to mobilize;
- The appellant always needs assistance carrying items, buying groceries, and with any housework and cleaning;
- The appellant relies on family members to help her; and
- The appellant's functional impairment is now constant, rather than intermittent.

The photographs submitted showed the appellant's ankle with significant swelling.

At the hearing, the appellant's parent stated that she provides help to the appellant due to the ankle pain the appellant experiences and that this pain is getting worse as time goes on. She stated that she used to have to help with only a few things, but now the appellant needs help daily. The appellant's parent stated that the appellant needs help with getting groceries, cooking, and cleaning and stated that the appellant now cannot move without the assistance of crutches.

The appellant also provided oral evidence at the hearing and stated that her condition has worsened since her initial application for PWD designation due to a breakdown of cartilage and worsening arthritis in her ankle. She reported that she is not able to function independently or effectively anymore and cannot do laundry, housework, grocery shopping, or cooking and needs help carrying items. She further stated that she needs a

handrail in the shower and that pain is now constant and that she is not able to bear weight at all on her ankle and as a result now remains sedentary unless absolutely necessary. The appellant stated that it is not that she cannot move but rather that she is unable to move because of the pain she experiences.

**Part F – Reasons for Panel Decision****Issue on Appeal**

The issue on appeal is whether the ministry's decision that the appellant was ineligible for PWD designation was reasonably supported by the evidence or was a reasonable application of the legislation in the circumstances of the appellant. That is, was the ministry reasonable when determining that the requirements of section 2(2) of the EAPWDA were not met because:

- a severe mental or physical impairment was not established;
- the appellant's daily living activities were not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and
- it has not been established that daily living activities are significantly restricted and therefore it cannot be determined that significant help is required from other persons or a device to complete restricted activities.

**Panel Decision**Physical impairment

The appellant's position is that she has a severe physical impairment and meets the criteria for PWD designation. She states that she has significant chronic ankle edema and pain that make it impossible for her to obtain gainful employment or perform many day-to-day activities. The appellant further submits that recently her condition has worsened and that she cannot do laundry, housework, grocery shopping, or cooking and needs help carrying items. She further stated that she needs a handrail in the shower and that pain is now constant and that she is not able to bear weight at all on her ankle and as a result now remains sedentary unless necessary.

The appellant submits that it is not that she cannot functionally move but rather that she is unable to move because of the pain she experiences when she does and states that she feels that the ministry missed this distinction when it relied on her doctor's functional assessment of her mobility when making its decision about her entitlement to PWD designation. The appellant further relies on the updated medical evidence provided on appeal, particularly the medical certificate provided by her doctor, and states that this shows that her impairment has progressed. She now experiences both constant pain and constant loss of functionality.

The ministry explained the ministry's decision and stated that while the appellant experiences ankle pain that the functional assessment provided by her doctor in the Medical Report, Assessor Report and various letters submitted to the ministry was not



indicative of a severe physical impairment. The ministry stated that although the appellant's mobility was restricted when she experienced pain flares/exacerbations that the medical evidence showed that this only occurred about 25% of the time and her doctor stated that she was able to walk 2-4 blocks, climb 5 or more steps without assistance, and had no limitations on lifting or remaining seated and was independent in walking indoors/outdoors, standing, lifting, carrying and holding most of the time. When asked about the November 2022 medical certificate provided at reconsideration that noted severe pain even if the appellant were technically able to walk unaided, the ministry argued that the certificate was not sufficiently clear about the frequency of impairment and support needed.

However, after considering the new evidence submitted by the appellant on appeal, the ministry stated that they felt that appellant now qualified for PWD designation as the updated medical certificate clearly showed a significant increase in the degree and frequency of the appellant's physical restrictions.

Section 2 of the Act requires the Minister to be satisfied that the appellant experiences a severe physical impairment. "Severe" and "impairment" are not defined. The ministry considers the extent of any impact on daily functioning as shown by limitations with or restrictions on physical abilities and/or mental functions. The panel finds that an assessment of severity based on physical and mental functioning including any restrictions is a reasonable interpretation of the legislation. However, the panel notes that frequency and/or duration of impairment is not required in the assessment of severity by the legislation at this stage of the legislative test.

The panel reviewed all the evidence submitted both on reconsideration and on appeal. As mentioned above, the panel notes that frequency and/or duration of impairment is not required by the legislation in the assessment of severity. The panel finds that while the ministry accurately summarized the doctor's opinion as set out in the Medical and Assessor Reports in the PWD application, the ministry failed to reasonably consider the doctor's statements in the November 2022 medical certificate provided on reconsideration. In this certificate the doctor states that the appellant suffers from "baseline chronic pain on a daily basis and only mobilizes/walks when absolutely necessary." The doctor then explains that, while the appellant is able to walk unaided, the reason she is functionally impaired is secondary to this severe pain. The doctor paints the picture of someone that has physical functionality but is unable to consistently make use of this functionality due to the chronic pain they experience daily. Considering this evidence, the panel finds that on reconsideration the ministry was not reasonable when it determined that the appellant did not have a severe physical impairment.

Further, the panel agrees with the ministry that the new evidence submitted on appeal clearly shows that the appellant has a severe physical impairment. In the updated medical certificate, the appellant's doctor states that the appellant's physical condition has deteriorated. The doctor describes that the appellant is unable to bear weight, is in constant pain rather than intermittent pain, and must use crutches to mobilize. The doctor further describes that the appellant always needs assistance with carrying items, buying groceries, and doing any housework and cleaning. She relies on family members to help her. The panel finds that constant ankle pain that makes it impossible to bear weight and that restricts the appellant's ability to perform many daily living activities is a severe physical impairment. Accordingly, the panel finds the ministry's finding to the contrary unreasonable in light of the new evidence submitted on appeal.

#### Mental impairment

The appellant did not make any submissions regarding mental impairment. The ministry found that the appellant's doctor did not provide a diagnosis that results in a mental impairment and did not identify any deficits to the appellant's cognitive or emotional functioning. Accordingly, the ministry stated that the information provided did not establish a severe mental impairment.

The panel reviewed all the evidence submitted and notes that the doctor clearly stated in the assessor report that the appellant does not have a mental impairment. Accordingly, the panel finds that the ministry was reasonable when it determined that the appellant does not have a severe mental impairment.

#### Restrictions in ability to perform daily living activities

The appellant's position is that she is unable to perform many day-to-day activities such as cooking, housework, and shopping due to chronic ankle pain and is unable to walk indoors or outdoors without the assistance of crutches. The appellant states that she needs significant help from others to complete these daily living activities and refers to the evidence provided by her parent that she states corroborates this.

The ministry explained the decision and stated that it is their position that the appellant is not significantly restricted in daily living activities. The ministry submits that the doctor reported the appellant independent with respect to all activities and only noted that 25% of the time the appellant required some assistance when experiencing pain flares/exacerbation. The ministry states that, while the appellant requires assistance occasionally, this does not confirm a significant restriction. However, after considering the new evidence submitted by the appellant on appeal, the ministry stated that they felt that the appellant now qualified for PWD designation as the updated medical certificate clearly showed a significant increase in the frequency of the appellant's physical restrictions.

Section 2(2)(b)(i) of the Act requires that the ministry be satisfied that in the opinion of a prescribed professional, a severe mental or physical impairment directly and significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods. While other evidence may be considered for clarification or support, the ministry's determination as to whether it is satisfied, is dependent upon the evidence from prescribed professionals. The term "directly" means that there must be a causal link between the severe impairment and restriction. The direct restriction must also be significant.

The panel reviewed all the evidence and finds that at the time of the reconsideration decision the ministry was reasonable to determine that this criterion was not met. The doctor indicated in the Medical and Assessor Reports that the appellant was independently able to perform daily living activities most of the time, noting that restrictions were only in place 25% of the time when there were pain flares/exacerbation. The November 2022 medical indicated the appellant lives independently, has a baseline chronic pain, is sedentary 90% of the time, uses crutches if she feels unstable, uses a shower handrail, and needs someone to accompany her with lifting and carrying groceries. The certificate also stated that the appellant can walk unaided but the reason she is functionally impaired is secondary to severe pain. There was no detail about how often the appellant felt unstable and must use crutches to move about indoors and outdoors. The certificate stated the appellant uses a shower rail but gave detail about a significant restriction to hygiene and self-care. There appears to be a significant restriction to grocery shopping but not to any other daily living activity. As a result, the panel finds that the ministry was reasonable to decide that the appellant was largely independent and that any restrictions noted by the doctor on performance of daily living activities were not significant.

However, in light of the new evidence set out in the updated medical certificate, the panel finds that the appellant's severe impairment does directly and significantly restrict her ability to perform daily living activities. The doctor states that the appellant is unable to walk without the assistance of crutches and remains sedentary most of the time to avoid movement that causes extreme pain. Further the doctor states that as a result of her chronic ankle pain the appellant is unable to perform housework or grocery shopping. Accordingly, the panel finds that when the new evidence is considered, the ministry's decision is unreasonable.

### Help to perform daily living activities

The appellant's position is that her ability to perform daily living activities is significantly restricted and she regularly requires both the help of another person and the use of assistive devices (crutches) to perform her daily living activities.

The ministry explained the decision and stated that although the doctor reported that the appellant received assistance from another person and used crutches, orthotics, and an ankle splint, that since it had not been established that daily living activities were significantly restricted that it could not be determined that help is required because of those restrictions. However, after considering the new evidence submitted by the appellant on appeal, the ministry stated that they felt this criterion was met.

The panel considered all the evidence and finds that at the time of the reconsideration decision the ministry was reasonable to determine that this criterion was not met since, as stated above, it had not been shown that the appellant's impairment directly and significantly restricted her ability to perform daily living activities. However, in light of the new evidence provided on appeal, the panel finds that the ministry's decision is unreasonable. It is clear that the appellant's ability to perform her daily living activities is directly and significantly restricted and the appellant requires significant help from other people for housework, cleaning, and shopping, and uses assistive devices (crutches) in order to walk indoors and outdoors. Without this assistance, the appellant could not perform these daily living activities.

### **Conclusion**

After reviewing the evidence submitted in this appeal, and particularly the new evidence submitted, the panel finds that the ministry's reconsideration decision, which determined that the appellant was not eligible for PWD designation was not reasonably supported by the evidence and therefore rescinds the decision. The appellant is successful on appeal.

## Schedule of Legislation

### ***Employment and Assistance for Persons with Disabilities Act***

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).

## Employment and Assistance for Persons with Disabilities Regulation

### 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, or....

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**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

**Legislative Authority for the Decision:**

*Employment and Assistance Act*

Section 24(1)(a)     or Section 24(1)(b)   
Section 24(2)(a)     or Section 24(2)(b)

**Part H – Signatures**

Print Name  
Emily C. Drown

Signature of Chair

Date (Year/Month/Day)  
2023/March/15

Print Name  
Margarita Papenbrock

Signature of Member

Date (Year/Month/Day)  
2023/March/16

Print Name  
Warren Fox

Signature of Member

Date (Year/Month/Day)  
2023/March/17