

Part C – Decision Under Appeal

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the Ministry) decision dated January 19, 2023, denying Persons With Disabilities (PWD) designation.

The Ministry found the Appellant met the age (over 18) and duration (likely to last more than two years) requirements. However, the Ministry found the Appellant did not meet the requirements for:

- severe mental or physical impairment
- significant restriction on the ability to perform daily living activities
- needing significant help to perform daily living activities.

The Ministry found the Appellant was not one of the prescribed classes of persons eligible for PWD on alternative grounds. As there was no information or argument on this point, the Panel considers it not to be an issue in this appeal.

Part D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Act (Act), s. 2
Employment and Assistance for Persons with Disabilities Regulation (Regulation), s. 2
Employment and Assistance Act (EAA), s. 22(4)

Part E – Summary of FactsEvidence Before the Ministry at Reconsideration:

The information the Ministry had at the time of the decision included:

- Medical Report completed by the Appellant's Doctor (Doctor #1) on November 2, 2022
- Assessor Report completed by Doctor #1 on October 28, 2022
- The Appellant's Self Report and Request for Reconsideration
- Letter from Alberta Human Services stating that the Appellant was receiving Assured Income for the Severely Handicapped (AISH) from January 1, 2017 to May 31, 2022, when her file was closed.
- AISH Medical Report completed by Doctor #2 in Alberta, dated December 17, 2015
- Orthopedic consult reports from Doctor #3 in Alberta, dated November 5, 2009 and February 16, 2010
- Consult report from a Psychiatrist dated November 25, 2016

Medical Report:

Doctor #1 does not indicate on the Medical Report how long the Appellant has been their patient, or how frequently they have seen the Appellant in the past 12 months. (However, in the Assessor Report they state that they have known the Appellant since May 2016 and have seen her between 2 and 10 times in the past 12 months.)

Diagnosis:

Doctor #1 states that the Appellant has been diagnosed with post traumatic stress disorder, chronic pain disorder, multiple fractures due to motor vehicle accidents and depression, date of onset 2009. The Doctor also diagnoses narcolepsy, no date of onset indicated.

Health History:

Doctor #1 states:

[The Appellant] was involved in a severe motorcycle accident in 2009 that resulted in fractures of arms, legs. Following the accident, she developed severe mood disorder, poor coping skills, financial stresses and chronic pain problems.

The Appellant had been prescribed morphine for chronic pain, which caused drowsiness, poor concentration, and depressed mood. She stopped taking morphine in July 2022.

The Doctor indicates that the Appellant does not require any prostheses or aids for her impairment.

Functional Skills:

Doctor #1 indicates that the Appellant can walk 4+ blocks unaided on a flat surface, climb 5+ stairs unaided, lift 2 to 7 kg. and remain seated for 1 to 2 hours. They indicate that the Appellant has significant deficits with cognitive and emotional functioning, in the areas of executive function, emotional disturbance and motivation.

Daily Living Activities:

Doctor #1 states that the Appellant's impairment directly restricts her ability to perform daily living activities. They indicate that she is continuously restricted in daily shopping, stating "has difficulty shopping & carrying things home as [patient] doesn't drive." In answer to the question of what assistance the Appellant needs with daily living activities, Doctor #1 states "orthotics."

Assessor Report:

Mental or Physical Impairment:

Doctor #1 notes post traumatic stress disorder, chronic pain in the legs, and "adjusting to wet weather" in the community where the Appellant lives.

Mobility and Physical Ability:

Doctor #1 indicates that the Appellant is independent standing and walking indoors and outdoors. They indicate that the Appellant needs periodic assistance from another person to climb stairs, lift, carry and hold, but they do not explain what assistance is needed.

Cognitive and Emotional Functioning:

Doctor #1 indicates that the Appellant's mental impairment has a moderate impact on emotion, impulse control, and attention/concentration. They indicate that her impairment has a minimal impact on consciousness, executive function, memory, motivation, and motor activity. They do not provide any details of the impact on functioning in those areas.

Daily Living Activities:

Doctor #1 indicates that the Appellant is independent in all daily living activities listed on the form, including all aspects of social functioning.

Assistance Provided for Applicant:

Doctor #1 indicates that the Appellant receives help for daily living activities from Community Service Agencies. They do not explain what help the agencies provide.

Self Report:

The Appellant states that she was a passenger on a motorcycle that was involved in a highway crash in 2009. She says she sustained multiple fractures that resulted in permanent damage to both feet and her left hand and caused balance issues.

Describing how her disability affects her life and her ability to take care of herself, the Appellant states that it "simply makes things a bunch more trying." She says that weight bearing is very painful at times, her left hand "gives out" and she drops things. She says she takes more time to do things and tires easily. She says that "certain activities I cannot do for extended periods. I give it all a shot."

Request for Reconsideration:

In her Request for Reconsideration, the Appellant added to her Self Report, stating that the injuries from the motorcycle accident are devastating and “impact [her] ability to function ‘normally’ on a daily basis.” She states that everything she does is impacted.

AISH Medical Report, December 22, 2015:

In the report prepared for Alberta Health Services, Doctor #2 states that the Appellant has been their patient since July 2009.

Diagnosis:

They give a primary diagnosis of muscular-skeletal disorders, indicating multiple fractures of both feet and arm, with scar tissue, and a secondary diagnosis of post-traumatic stress disorder. They indicate that the Appellant is using “special boots to support feet” and “occasional cane use.”

Activities of Daily Living:

Doctor #2 indicates a moderate degree of impairment, defined on the form as “*The person is more limited in that they need assistance to complete activities of daily living and they may be somewhat housebound; however, they are capable of continuing involvement in community, social and recreational activities.*”

Prognosis:

Doctor #2 indicates that the Appellant’s medical condition is likely to be permanent, and “once older it will likely worsen.” They state that the Appellant’s condition has “reached a plateau.”

Orthopedic Consult Reports, 2009/10:

Doctor #3 confirms that the Appellant sustained multiple fractures of her feet, ribs and left hand, when she was thrown from a motorcycle at approximately 120 kmh. They describe surgeries, treatment and rehabilitation following the accident.

Psychiatrist Report, November 25, 2016:

The psychiatrist gives a diagnosis of post-traumatic stress disorder. They describe the Appellant’s struggles with “what has been described as narcolepsy.” They state:

- the Appellant says she can fall asleep without warning, even when driving
- the Appellant has flashbacks to the accident, nightmares, and insomnia, with significant daytime sleepiness
- the Appellant has “a significant amount of pain that is crippling to the point that even being on Fentanyl and recently on Morphine she is unable to control that”
- the Appellant struggled walking and used a cane
- there was “noticeable significant pain that she was experiencing even when walking and sitting”
- they prescribed medication for narcolepsy

Additional Evidence:

Appellant:

At the hearing, in answer to questions from the Panel, the Appellant said:

- Her physical impairment affects her standing and walking
- Her left heel was “broken in half” in the accident and the tops of her feet were damaged, which puts her balance off, and her feet “splay one way”
- The injury to her feet also makes weight-bearing hard
- She has canes but tries not to use them
- She falls over when she is not walking on a level surface, or when she bends down, or tries to turn quickly
- With the damp weather in the community where she lives, she is experiencing more arthritic pain in her feet and her hand
- Her left hand gives out because two fingers were broken and “the knuckles came off” in the accident, leaving her with nerve damage in her left hand
- Regarding Doctor #1’s statement that her motivation is affected, she feels that “the motivation is there”, but she gets very tired, which makes her discouraged and frustrated
- She continues to take the medication prescribed by the psychiatrist for narcolepsy, and is scheduled for further investigation of that condition
- She does not drive because of her narcolepsy
- If she is too tired, she cannot do anything
- The help she receives from community agencies is financial and food aid
- She stopped taking morphine because of the side effects; when she was taking morphine she could do more physically, but less mentally
- Her condition is worse now than it was in 2015 and 2016 when Doctor #2 completed the report for AISH

Admissibility of Additional Evidence:

The Ministry did not object to the additional oral evidence of the Appellant at the hearing.

The Appellant’s oral evidence provides further information about the Appellant’s condition and her ability to function. The Panel finds that the additional evidence is reasonably required for the full and fair disclosure of all matters in the appeal. Therefore, the Panel finds that the additional evidence is admissible under EAA s. 22(4).

Part F – Reasons for Panel Decision

The issue on appeal is whether the Ministry's decision denying the Appellant PWD designation is reasonably supported by the evidence or is a reasonable application of the legislation. The Ministry found the Appellant met the age (over 18) and duration (likely to last more than two years) requirements. However, the Ministry found the Appellant did not meet the requirements for:

- severe mental or physical impairment
- significant restriction on the ability to perform daily living activities
- needing significant help to perform daily living activities.

Appellant's Position:

The Appellant says that she has severe mental and physical impairments. She says that the effects of the injuries she sustained in the motor vehicle accident in 2009 affect everything she does, every day. She has daily pain in her feet and hands, and the permanent condition of her feet leaves her liable to fall. The additional diagnosis of narcolepsy leaves her constantly tired, and liable to fall asleep without warning.

She received disability benefits in Alberta under the AISH program until she moved to British Columbia. While she realizes that the benefits do not transfer from one province to another, her condition is the same, and she does not understand why she would not qualify for disability benefits here.

Ministry Position:

The Ministry maintains that the Appellant's physical impairment is moderate, rather than severe. The Ministry says that it places greater weight on the more recent information in the Medical and Assessor Reports completed in October 2022. While the Ministry acknowledges that the Appellant has limitations due to chronic pain in her legs and hand, the Ministry maintains that the functional skills reported by Doctor #1 speak to a moderate, rather than a severe, physical impairment.

The Ministry also maintains that the information provided does not establish that the Appellant has a severe mental impairment. They argue that Doctor #1 does not indicate a major impact on any areas of cognitive and emotional functioning. Further, the Ministry argues that the level of independence reported by Doctor #1 does not indicate severe impairment.

The Ministry also says that the information provided does not indicate direct and significant restrictions in daily living activities. Therefore, the Ministry says it also cannot determine that the Appellant needs significant help with restricted activities.

The Ministry points out that the criteria for AISH benefits in Alberta are different from the criteria for PWD designation in British Columbia. Employability and financial need are not considerations for the Ministry when determining eligibility for PWD designation.

Panel Decision:*PWD Designation – Generally*

The legislation provides the Ministry with the discretion to designate someone as a PWD if the requirements are met. In the Panel's view, PWD designation is for persons who have significant difficulty in performing regular self-care activities. If the inability to work is the major reason for applying for PWD designation, the Panel encourages the applicant to speak to the Ministry about other potential programs such as Persons with Persistent Multiple Barriers to Employment (PPMB).

The Appellant expressed frustration that, having received AISH benefits, which provide financial and health benefits for people who meet certain criteria and have a "severe handicap", she may not qualify for PWD designation in British Columbia. The Panel notes that, according to the AISH program information the Appellant provided, the AISH program defines a "severe handicap" as a functional impairment that "causes substantial limitation in the person's ability to earn a livelihood." A limitation in the ability to earn a livelihood is not one of the criteria for PWD designation.

Some requirements for PWD designation must have an opinion from a professional, and it is reasonable to place significant weight on these opinions. The application form includes a Self Report. It is also appropriate to place significant weight on the Self Report and evidence from the Appellant, unless there is a legitimate reason not to do so.

The Panel will review the reasonableness of the Minister's determinations and exercise of discretion.

Severe Mental or Physical Impairment

"Severe" and "impairment" are not defined in the legislation. 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 application of the legislation.

A medical practitioner's description of a condition as "severe" is not determinative. The Minister must make this determination considering the relevant evidence and legal principles.

Severe Mental or Physical Impairment:

The Appellant sustained multiple fractures in a motor vehicle accident in 2009, resulting in ongoing chronic pain in her feet and hands. In addition to chronic pain disorder, her doctors have diagnosed post-traumatic stress disorder, depression, and narcolepsy. The combination of post-traumatic stress disorder, narcolepsy and chronic pain leaves the Appellant tired and prone to falling asleep without warning. The appellant is unable to have restful sleep at night due to flashbacks and nightmares and frequently needs to nap during the day as a result. Pain

management is an ongoing struggle for the Appellant. She has had to discontinue morphine because of the side effects, making a trade-off between mental and physical functioning.

While the AISH Medical Report and the Psychiatrist's Report are from 2015 and 2016, the Panel notes that the doctors did not expect improvement in the Appellant's condition – if anything, the prognosis is that her condition will worsen as she gets older. While Doctor #1's reports do not provide much detail of the Appellant's impairments, they do not indicate an improvement from the earlier reports. The Appellant provides additional information about the impairments the doctors identify.

The Panel finds that the Ministry was not reasonable in its determination that, based on the information in the Doctor's reports, the Appellant's physical impairment is moderate rather than severe. The Panel finds that the Appellant has a severe physical impairment due to chronic pain and narcolepsy, exacerbated by post-traumatic stress disorder that also affects her sleep and contributes to her constant fatigue.

Mental Impairment:

The Panel has considered the Appellant's narcolepsy as part of her physical impairment rather than mental impairment. The Panel acknowledges the diagnoses of depression and post-traumatic stress disorder. Doctor #1 indicates that the Appellant has significant deficits in cognitive and emotional functioning but assesses the impact of those deficits as moderate or minor. The Appellant does not describe significant difficulties in mental functioning. Therefore, the Panel finds that the Ministry was reasonable in its determination that the information provided does not indicate a severe mental impairment.

Restrictions to Daily Living Activities ("Activities"):

A prescribed professional must provide an opinion that the applicant's impairment restricts the ability to perform the daily living activities ("Activities") listed in the legislation. At least two Activities must be restricted in a way that meets the requirements. Not all Activities, or even the majority, need to be restricted.

The restrictions to Activities must be significant and caused by the impairment. This means that the restriction must be to a great extent and that not being able to do the Activities without a lot of help or support will have a large impact on the person's life.

The restrictions also must be continuous or periodic. Continuous means the activity is generally restricted all the time. A periodic restriction must be for extended periods meaning frequent or for longer periods of time. For example, the activity is restricted most days of the week, or for the whole day on the days that the person cannot do the activity without help or support. To figure out if a periodic restriction is for extended periods, it is reasonable to look for information on the duration or frequency of the restriction.

The Activities that are considered are listed in the Regulation. The Medical Report and Assessor Report also have activities that are listed, and though they do not match the list in the

Regulation exactly, they generally cover the same activities. The Medical Report and Assessor Report provide the professional with an opportunity to provide additional details on the applicant's restrictions. The inability to work and financial need are not listed as Activities and are only relevant to the extent that they impact listed Activities.

Doctor #1 identifies only one Activity as being directly and continuously restricted by the Appellant's impairment. That Activity is "daily shopping" (which corresponds with the Activity "shopping for personal needs" in the Regulation). Further, the Doctor's description – "has difficulty shopping and carrying things home as patient does not drive" – does not explain the Appellant's restriction, or the help she needs from others to do her shopping.

While Doctor #2 indicated in 2015 that the Appellant needed assistance to complete activities of daily living, they did not identify which activities that are restricted, so the Panel cannot determine if those activities of daily living correspond to Activities in the Regulation. Doctor #3 stated that the Appellant had difficulty walking and used a cane when they saw the Appellant in 2016, but Doctor #1 did not confirm that restriction or need for an assistive device in 2022. The Panel places greater weight on the medical evidence from the Doctor who has seen the Appellant more recently.

The Panel finds that the information provided by the Doctor does not confirm direct and significant restrictions to the Appellant's ability to perform at least two Activities. The Panel finds that the Ministry was reasonable in its determination that the limitations described in the Medical and Assessor Reports did not indicate a significant overall restriction in the Appellant's ability to perform Activities.

Help Required:

A prescribed professional must provide an opinion that the person needs help to perform the restricted Activities. Help means using an assistive device, the significant help or supervision of another person, or using an assistance animal to perform the restricted Activities. An assistive device is something designed to let the person perform restricted Activities.

As the Panel has found that the Ministry was reasonable in determining that the Appellant was not directly and significantly restricted in her ability to perform Activities, the Panel finds that the Ministry was also reasonable in determining that it could not find that the Appellant needs help to perform those Activities.

Additional Comments:

At the hearing, the Appellant's evidence suggested greater restrictions in her ability to perform Activities, than is described in the Medical and Assessor Reports. She also indicates that she is unable to perform Activities for long periods of time during the day due to narcolepsy, which is still being assessed. Those restrictions would suggest that the Appellant may need help to perform Activities, even if that help is not available to her now. The Panel also notes that the Appellant indicated she should be using a cane and has used a cane in the past. The Panel encourages the Appellant to discuss with her doctor the restrictions she faces in performing Activities, as well as the help she may need, and reapply for PWD designation if she has

evidence from a prescribed professional that confirms the restrictions and need for help or an assistive device.

Conclusion:

While the Panel finds that the Ministry's determination that the Appellant does not have a severe physical impairment is not reasonably supported by the evidence, the Panel finds that the Ministry was reasonable in determining that the Appellant did not meet the requirements that, in the opinion of a prescribed professional, the impairment directly and significantly restricts the Appellant's ability to perform Activities and that, as a result, the Appellant needs help to perform the Activities. Therefore, the Panel finds that the Ministry's decision to deny the Appellant PWD designation was reasonably supported by the evidence.

The Panel confirms the reconsideration decision. The Appellant is not successful in the appeal.

Schedule – Relevant Legislation

Employment and Assistance for Persons with Disabilities Act

Persons with disabilities

s. 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

s.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.

(3) The definition of "parent" in section 1 (1) applies for the purposes of the definition of "dependent child" in section 1 (1) of the Act.

Employment and Assistance Act

s. 22 (4) A panel may consider evidence that is not part of the record as the panel considers is reasonably required for a full and fair disclosure of all matters related to the decision under 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)

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

Part H – Signatures

Print Name
Susan Ferguson

Signature of Chair

Date (Year/Month/Day)
2023/03/22

Print Name
Mary Chell

Signature of Member

Date (Year/Month/Day)
2023/03/22

Print Name
Linda Pierre

Signature of Member

Date (Year/Month/Day)
2023/03/22