

Part C – Decision Under Appeal

The decision under appeal is the Ministry of Social Development and Poverty Reduction’s (“ministry”) reconsideration decision dated February 6, 2023 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 his 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 teleconference. In attendance at the hearing were the panel, the appellant, 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, an Assessor Report, and a portion of the application form entitled Applicant Information that includes a hand-written self-report from the appellant.

In addition to the application materials, the ministry also received the appellant's Request for Reconsideration, which included further self-report from the appellant.

New Evidence Provided on Appeal

The appellant submitted a Notice of Appeal and a medical letter from the appellant's rheumatologist for consideration by the Tribunal.

In addition, at the hearing, the appellant provided further evidence of his present medical condition, restrictions on his daily living activities, and details regarding the amount of assistance he needs to complete those 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 summarized evidence already before the ministry at reconsideration and is information 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 EvidenceDiagnoses and health history: Medical Report

The Medical Report was completed by the appellant's doctor. The doctor has been treating the appellant for approximately 1 year and has seen the appellant 2 – 10 times in the past 12 months. In the medical report the doctor diagnoses the appellant with:

- Ankylosing Spondylitis;
- Sjogren's Syndrome; and
- Total Knee Replacement.

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:

- Diagnosed with Ankylosing Spondylitis in 2007 and pain/dysfunction fluctuates mild to severe. Various treatments – lifestyle, exercise, nutrition, multiple medications;
- Sjogren's history less well known/established. Long standing history dry eyes/mouth affecting speech/eating, visual irritation/disturbance; and
- Knee replacement in 2019. Appellant has done well will with active rehabilitation – fluctuation pain/stiffness affects standing/walking/squatting tolerance.
- The appellant uses a cane intermittently for back pain/sciatica and knee pain.

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

- can walk 4+ blocks on a flat surface;
- can climb 5+ stairs unaided;
- has unknown limitations with lifting;
- can remain seated less than an hour, longer with supports in place;
- has no difficulty with communication;
- has no significant deficits with cognitive and emotional function; and
- fluctuates tolerance for sustained standing/walking/squatting depending on inflammatory and pain exacerbation.

With respect to daily living activities, the doctor states that the appellant is unrestricted with meal preparation; management of medications; management of finances; and social functioning. The doctor states that the appellant has periodic restrictions with the following daily living activities:

- personal self-care;
- basic housework;
- daily shopping;
- mobility inside the home;
- mobility outside the home; and
- use of transportation.

When asked by the medical report to explain the periodic restriction on these activities the doctor states the restriction is dependent on state of pain/inflammation flare up. During periods of flare up, any movement involving the thoracolumbar spine is limited – from putting socks on to walking and sitting.

The doctor states that the degree of restriction fluctuates between mild to severe. With respect to what assistance the appellant needs, the doctor states the appellant requires:

- regular pain management;
- heat;
- TENS;
- stretching;
- medication;
- Cane (when flared up); and
- Assistive devices such as a sock aid (when flared up).

The doctor also noted: "AS and its sequelae (pain/stiffness) affect [the appellant] on a daily basis. The symptoms fluctuate and can enter periods of relative stability. He is very diligent and proactive with both non-pharmacologic and pharmacologic strategies to control flares and optimize function, but this takes time and it can be costly."

Diagnoses and health history: Assessor Report

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 alone and experiences impairments in mobility due to pain and stiffness of spine, particularly affecting activities of daily living specifically requiring sustained activity/postures and end range movement. 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 requires periodic assistance and uses a cane;
- walk outdoors;
- climb stairs, but notes that the appellant periodically uses a cane, railing;
- stand, but notes the appellant requires periodic assistance and uses a cane;
- lift, but notes difficulty if heavy and prolonged; and
- carry and hold, but notes difficulty if heavy and prolonged.

With respect to cognitive and emotional functioning the doctor states that the appellant experience no impact in most areas listed, minimal impact with bodily functions, attention/concentration, motivation, and other issues and moderate impact with emotion. The doctor notes that there are periodic / fluctuations in mood with anxiety symptoms often associated with pain and stress.

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

- the appellant is not independent with dressing and uses an assistive device – sock aid/reacher;
- the appellant is not independent with transfers in/out of bed and uses an assistive device, taking significantly longer (20-40 minutes) when pain/stiffness flare;
- the appellant is not independent with transfers on/off chair and uses an assistive device (handhold) periodically;
- the appellant takes significantly longer with laundry and periodically avoids when flare up;
- the appellant takes significantly longer with basic housekeeping and periodically avoids when flare up;
- the appellant takes significantly longer with carrying purchases home and periodically avoids in flare up;
- the appellant takes significantly longer with food preparation requiring period increased time – standing/stooping ;
- the appellant uses an assistive device and takes significantly longer with getting in and out of a vehicle, stating that this is periodic and the appellant is slow, uses hand hold assistance; and
- the appellant avoids using public transit when flared.

The doctor stated that the appellant requires help to perform daily living activities from family and friends. The appellant is able to use adaptations and pace his activity resulting in the appellant being independent. The doctor notes that the appellant uses a cane for balance/support with spinal and knee pain flare and a reacher/sock aid for spinal stiffness.

When given the opportunity to provide additional comments in the Assessor Report, the doctor wrote that the appellant’s “functional impacts are experienced daily; however, his capacity to complete tasks, particularly with efficiency, fluctuates depending on pain/stiffness intensity (worse with “flare ups)”. The doctor also states that “there are periods when independent function is very difficult despite his efforts given the natural fluctuations of Ankylosing Spondylitis”.

Diagnoses and health history: Self-Report

In the self-report set out within the PWD application, the appellant states:

- he experiences thoracic spine pain that makes it hard to stand still and hard to sit without a heat pad and/or a TENS machine against his spine;
- the pain causes debilitating fatigue that makes it difficult for him to work full-time hours;

- his sleep is greatly affected by his autoimmune conditions and he can only sleep a few hours before waking and needs sleep medication to get back to sleep;
- he experiences frequent dry eyes and skin due to Sjogren's syndrome and has to apply moisturizer and drink water throughout the night making it so his bladder is very full by morning;
- he experiences intense pain in his SI joint at night and is often woken by the pain;
- the sleep disturbances contribute to his anxiety and cause brain fog;
- when he experiences a flare in his SI joint he will often need to use a cane in the morning to get to the bathroom;
- when his joints flare he needs to use an assistive device to put on his socks; and
- when his SI joint flares he experiences great difficulty getting into his car.

With the Request for Reconsideration the appellant provided further self-report stating:

- he has been suffering from Ankylosing Spondylitis since he was 18 years old and the pain has intensified over the last 2 years;
- Ankylosing Spondylitis is a systemic autoimmune disease and the pain and fatigue fluctuates several times per day;
- he experiences severe pain in his SI joint on a "near daily basis" to the point it wakes him up and he cannot get back to bed without walking for 30 minutes and taking pain medication and CBD oil;
- when the pain is intense he often has to use a cane to get to the bathroom from bed and sometimes must resort to crawling;
- while the spinal pain in his SI joint improves with movement, movement then triggers pain in his thoracic spine, which feels like a knife plunging between his shoulder blades;
- as the pain intensifies he feels debilitating fatigue;
- the only remedy is to recline with a back support and/or TENS machine and to take pain medication and CBD oil and this only provides a partial remedy;
- he now experiences pain and fatigue on a daily basis and is unable to work full-time

New evidence

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

- Letter from the appellant's rheumatologist, dated March 3, 2023

The letter from the appellant's rheumatologist provided more information how Ankylosing Spondylitis affects the appellant. He stated that the appellant:

- experiences ongoing severe pain,
- has difficult sleeping;
- has difficulty ambulating even short distances with a cane;

- is unable to work;
- has pain that is exacerbated when sitting or standing; and
- has severe fatigue that affects his ability to function.

The appellant also provided oral evidence at the hearing and stated that he experiences pain flares daily and that he is only able to move because he knows that his condition will worsen if he does not. He stated that when able to, he pushes through the pain to get things done but that for a good portion of every day his ability to do his daily living activities is restricted. He stated that 3 to 5 mornings a week he experiences debilitating pain and is unable to get out of bed for about 20 – 40 minutes. When he is able to get finally get up, he must use a cane to get to the bathroom and sometimes he cannot even do that and must drag his body “army style” across the floor. He said that he regularly uses a cane to get around his house. He stated that he relies on his brother to carry in groceries. When he needs to perform his other daily living activities, he doesn’t have help available. He waits until the pain is tolerable to complete the tasks. He stated that he does not get everything that needs to be done everyday.

In answer to a question from the panel, the appellant stated that his pain is severe more often than not and when he is able to do something he is later incapacitated for the rest of the day. In answer to another question, the appellant stated that there are only a few hours each day where he is not in excruciating pain and is able to perform his daily living activities.

As stated above, the panel admits this new information as evidence pursuant to section 22(4) of the *Employment and Assistance Act*.

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 DecisionPhysical impairment

The appellant's position is that he has a severe physical impairment due to his Ankylosing Spondylitis and meets the criteria for PWD designation. He states that the ministry failed to consider the nature of his impairment and the fact that he experiences pain flares on and off throughout each day. The appellant notes that both his doctor and rheumatologist state that he experiences restrictions daily. The appellant submits that while he is able to complete many daily living activities, he is restricted most of the time given the nature of the cyclical pain: he wakes in pain most days, takes several hours to be able to move to get things done, is able to accomplish some tasks, but the movements create further pain that incapacitates him later in the day and throughout the night. He also states that the ministry's decision overlooks the impact fatigue plays in his inability to properly function. The appellant states that the new evidence from his rheumatologist should help clarify his actual restrictions.

The ministry explained the ministry's decision and stated that while the appellant experiences pain and stiffness, the functional assessment provided by the doctor in the Medical Report and Assessor Report was not indicative of a severe physical impairment. The ministry stated that although the appellant's mobility and ability to perform some daily living activities was restricted when he experienced pain flares/exacerbations, the functional assessment provided by the doctor was not indicative of a severe impairment as the appellant was noted to be largely independent. In particular, the ministry submitted

that while limitations to functioning were noted when experiencing a flare up, how often such flare ups were experienced was not described. The ministry also noted that employability or ability to work is not a factor taken into consideration.

With respect to the new evidence provided by the rheumatologist, the ministry stated that the appellant likely now met the criterion for having a severe impairment but stated that the other criteria relating to daily living activities and help were still unclear.

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 give adequate weight to the severity of the pain flares experienced by the appellant. The evidence before the ministry at reconsideration clearly stated that the appellant experiences a severe physical impairment – so much so that some mornings it takes 20-40 minutes to get out of bed, a cane must be used to walk, and the appellant is unable to use transportation. Further, while the ministry stated that there was insufficient explanation as to the periodicity of the flare ups, the medical evidence from 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 letter, the rheumatologist states that the appellant has severe ongoing pain and stiffness, has difficulty walking with a cane even short distances, and has severe fatigue that impacts his ability to function. The panel finds that the appellant's presentation of Ankylosing Spondylitis with regular pain severe enough to make it difficult to walk with a cane even short distances is a severe physical impairment. Accordingly, the panel also

finds the ministry's finding to the contrary unreasonable in light of the new evidence submitted on appeal.

Mental impairment

The appellant stated that the physical pain from his physical impairments increases his anxiety and causes brain fog. However, the appellant relied primarily on his physical impairment rather than any mental impairment and did not submit that the ministry erred in its finding that the appellant did not meet this criterion.

The ministry stated that while the information provided by the appellant's doctor demonstrates that the appellant experiences fluctuations in mood with anxiety symptoms associated with pain and stress, that the information does not establish a severe mental impairment.

The panel reviewed all the evidence submitted and notes that the doctor stated that the appellant experiences periodic fluctuations in mood with anxiety symptoms associated with pain and stress. The doctor also noted that the appellant was moderately impacted in the area of emotion, and minimally impacted in the areas of bodily functions, attention/concentration, motivation, and other emotional and mental problems. However, while the doctor made these findings, in the Medical Report the same doctor stated that the appellant does not experience significant deficits with cognitive and emotional functioning. Further, in the Assessor Report the doctor noted that social functioning is not restricted. The panel finds that the summary provided by the doctor illustrates a mild to moderate mental impairment and is not supportive of a finding of a severe 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 while he can perform most daily living activities independently, he is periodically restricted in his ability to perform many of the activities often enough that the ministry was unreasonable in stating that this criterion was not met. He submitted that 3 to 5 mornings per week it takes him 20 to 40 minutes to get out of bed and then he has to use a cane or crawl to the bathroom. He stated that after a few hours of mobility the pain moves from his SI joint to his thoracic spine and he is further incapacitated for the remainder of the day. The appellant submitted that he always needs his brother's assistance to carry in groceries and other heavy objects but otherwise completes daily living activities that are most urgent during the short window of each day where he is able to function without severe pain.

The ministry explained the decision and stated that it is their position the appellant is not significantly restricted in daily living activities. The ministry submits that while the doctor reported periodic restrictions on a number of daily living activities and that other activities periodically take longer than typical to manage, without further evidence as to how often flare ups occur the ministry cannot find that the appellant's daily living activities are significantly restricted continuously or periodically for extended periods.

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. While the doctor indicated in the Medical and Assessor Reports that the appellant faced restrictions in ability to perform daily living activities when experiencing pain flare ups, there is no clear evidence set out by the doctor in either the Medical or Assessor Reports stating how often these flare ups occur. The appellant submitted that the doctor stated "AS and its sequelae (pain/stiffness) affect the appellant on a daily basis" and that this shows that the flare ups were occurring daily. However, throughout the doctor's evidence he refers to pain and stiffness separately from flare ups. Accordingly, the panel finds that the ministry reasonably determined that the evidence does not clearly indicate that the appellant experiences significant restrictions periodically for extended periods.

While the legislation requires the opinion of a prescribed professional that the appellant's ability to perform daily living activities is directly and significantly restricted, the PWD application form includes a self-report. The panel finds it appropriate to place weight on the self-report and evidence from the appellant unless there is a legitimate reason not to do so. In this case where the prescribed professional has clearly provided evidence that a number of the appellant's daily living activities are directly restricted by the pain the appellant experiences from Ankylosing Spondylitis when the appellant experiences flare ups, the panel finds it appropriate to consider the evidence of the appellant that these flare ups are experienced daily and often more than daily such that the appellant is often only able to perform these activities for a short period of time each day, if at all.

Taken together, the evidence of the appellant, his rheumatologist and his doctor shows that the appellant is restricted as follows for most of each day 3 to 5 days per week:

- the appellant is not independent with dressing and uses an assistive device – sock aid/reacher;
- the appellant is not independent with transfers in/out of bed and uses an assistive device, taking significantly longer (20-40 minutes) when pain/stiffness flare;
- the appellant is not independent with transfers on/off chair and uses an assistive device (handhold) periodically;
- the appellant takes significantly longer with laundry and periodically avoids when flare up;
- the appellant takes significantly longer with basic housekeeping and periodically avoids when flare up;
- the appellant takes significantly longer with carrying purchases home and periodically avoids in flare up;
- the appellant takes significantly longer with food preparation requiring period increased time – standing/stooping;
- the appellant uses an assistive device and takes significantly longer with getting in and out of a vehicle, stating that this is periodic, and the appellant is slow, uses hand hold assistance; and
- the appellant avoids using public transit when flared.

Accordingly, the panel finds that when the new evidence is considered, the ministry's decision is unreasonable with respect to this criterion and the appellant clearly is directly and significantly restricted in his ability to perform daily living activities periodically for extended periods.

Help to perform daily living activities

The appellant's position is that his ability to perform daily living activities is significantly restricted and he regularly requires both the help of another person (his brother) and the use of assistive devices (cane, sock aid/reacher) to perform his 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 a cane and sock aid/reacher it had not been established that daily living activities were significantly restricted. Therefore, it could not be determined that help is required because of those restrictions.

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 his 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 the appellant's ability to perform his daily living activities is directly and significantly restricted by his physical impairment and the appellant requires significant help from his brother with lifting heavy objects and carrying groceries and other objects. Further, the panel finds that the evidence shows the appellant uses assistive devices in order to walk indoors and outdoors (cane) and to dress (sock aid/reacher). Without this assistance, the appellant could not perform these daily living activities the vast majority of the time.

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 authorized under an enactment to practise the profession of

- (a) medical practitioner,
- (b) registered psychologist,
- (c) registered nurse or registered psychiatric nurse,
- (d) occupational therapist,
- (e) physical therapist,
- (f) social worker,
- (g) chiropractor, or
- (h) nurse practitioner.

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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/30

Print Name

Janet Ward

Signature of Member

Date (Year/Month/Day)

2023/March/30

Print Name

Mary Chell

Signature of Member

Date (Year/Month/Day)

2023/March/30