

Part C – Decision Under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Poverty Reduction (the ministry). The ministry decided that the appellant did not meet all of the requirements of section 2 of the *Employment and Assistance for Persons with Disabilities Act* (the Act) for person with disabilities designation (PWD). The ministry found that the appellant met the age and duration requirements, but did not meet the following:

- the appellant has a severe physical and/or mental impairment;
- the appellant's daily living activities are directly and significantly restricted either continuously or periodically for extended periods; and
- because of those restrictions, the appellant needs an assistive device, significant help or supervision from another person, or needs an assistance animal.

The ministry also found that the appellant is not qualified for PWD designation on alternative grounds, which includes: a person who is in palliative care; a person who got At Home Program payments through the Ministry of Children and Family Development; a person who gets or ever got Community Living BC for community living support; and a person who is considered disabled under section 42(2) of the *Canadian Pension Plan Act*.

Part D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Act (the Act), section 2

Employment and Assistance for Persons with Disabilities Regulation (the Regulation), section 2

The complete legislation is found at the end of this decision in Appendix A.

Part E – Summary of Facts**Evidence at the time of Reconsideration**

- 1 The appellant's PWD application that includes:
 - A Medical Report and an Assessor Report dated November 25, 2022. The reports were completed by the appellant's doctor who has known the appellant for 3 years (as the locum doctor in the medical practice the appellant attends). The doctor has seen the appellant once in the last 12 months prior to completing the PWD application.
 - The Assessor Report was completed by an office interview with the appellant and file/chart information, including consult reports.
 - The PWD application also included the appellant's self-report dated November 25, 2022.
- 2 Request for Reconsideration, dated March 8, 2023, which indicated, in part, the following:
 - It is difficult to walk up hills so when dropping off her child to school she waits at the top of the hill because she will not be able to walk back up.
 - For almost a month in the spring of 2022, the child was driven to school because the appellant could only walk ½ block due to bad symptoms.
 - The prescribed medication for her lung infections makes her very tired for the duration it's taken (which is 5-10 days).
 - Her ex-husband took time off from work when she was hospitalized because she was unable to function.
 - She also gets help from other family members and friends.
 - She cannot lift much weight and can only carry the weight of one grocery bag.
 - She uses a cart with wheels or a stroller to transport groceries.
 - When her symptoms are severe, she is unable to do anything without wheezing or being breathless.
 - She has used various medications and has a 'rescue' inhaler to use when she has a sudden and severe asthma attack.
 - Many times, when walking, she must stop and use the inhaler before continuing.
 - She uses 4 'puffs' of the inhaler daily to keep the symptoms mild but at least a few times per week she needs extra puffs because of symptoms of wheeziness or shortness of breath.
 - When symptoms are severe or she has a lung infection, she cannot walk at all without gasping for air. Even getting up to use the washroom requires an inhaler.
 - Although there are times when she is okay for a few weeks, severe symptoms come very suddenly and quickly.

The information in the PWD application said the following:

Diagnoses

In the Medical Report, the doctor diagnosed the appellant with Asthma (onset 2021).

Health History

The doctor said the following about the appellant's condition:

- “Can complete most day-to-day tasks when symptoms are minimal but with flares, ability to do things like walk child 10 minutes to school are significantly impaired”.
- “There have been at least 10 ER visits, some with short admissions, as a result of asthma and secondary infections”.
- The appellant has not been prescribed medications that interfere with the ability to perform daily living activities.
- The appellant does not require any prosthesis or aids for her impairment.

Degree and Course of Impairment

The appellant’s impairment is likely to last 2 or more years from the date of the PWD application. The doctor said “Currently optimizing with specialist. Will likely be long term chronic condition.

Physical Impairment

In the Medical Report, the doctor said the following about the appellant:

- She can walk 2-4 blocks unaided (1/2 block when symptomatic), and climb 5+ steps unaided.
- She can lift 15-35lbs (but cannot carry and walk) and can remain seated without limit.

In the Assessor Report, the doctor said the following about the appellant:

- She takes significantly longer to walk indoors and outdoors: “Takes 40% longer than prior to [symptom] onset”.
- She can independently climb stairs, stand and lift.
- She takes significantly longer to carry/hold: “Takes 40% longer and 50% of load than prior to [symptom] onset”.

In the Self-Report the appellant said the following about her disability:

- “Over the last year, I’ve been in the hospital several times with pneumonia and other lung infections”.
- “Some days I am not able to walk very far or do very much around the house”.
- “I am able to walk my [child] to and from school most of the time but there are days its hard, even times I kept him home from school because I didn’t think I could walk that far”.

Mental Impairment

In the Medical Report the doctor said the following about the appellant:

- There are no difficulties with communication.
- There are no significant deficits with cognitive and emotional function.

In the Assessor Report, the doctor said the following about the appellant:

- Speaking, reading, writing and hearing are good.
- The section about cognitive and emotional functioning was left blank.
- In the daily living activities, the section about social function was left blank with the comment: “N/A”.

In the Self-Report the appellant did not say anything about a mental impairment.

Daily Living Activities

In the Assessor Report, the doctor said the following about the appellant:

- All listed tasks for all listed daily living activities are completed independently except the following: 1) laundry and basic housekeeping takes significantly longer to complete (Takes 30% longer to complete); 2) under the daily living activity of shopping, the task of carrying purchases home requires an assistive device (“uses a cart/stroller”).
- The section about social function was left blank with the comment: “N/A”.

In the Self-Report the appellant said the following about her disability:

- “Overall, I can do basic day to day things as long as I don’t overdo it and rest often, but some days I am only able to do the bare minimum”.

Help

In the Medical Report the doctor said that no prosthesis or aids are needed for her impairment.

In the Assessor Report, the doctor said the appellant gets help from family and friends and assistance with transporting her child when her symptoms flare up. The doctor also said that the appellant uses a cane/stroller to transport as she cannot carry a large load. The appellant does not require the assistance of an assistance animal.

In the Self-Report the appellant stated that her ex-husband, other family and friends provide help when she needs it.

Evidence on Appeal

The appellant submitted a Notice of Appeal dated March 30, 2023. In the Notice of Appeal, the appellant said that: “My condition is very severe at times, sometimes for prolonged periods of time. It makes my daily living difficult, and I do struggle a lot with day-to-day chores and activities. I have been in the hospital more than 10 times in the past 18 months with pneumonia and other infections. I frequently need to use a rescue inhaler to help breath and wheeziness. I am auto immune (I was diagnosed with psoriasis at age 4). I catch a lot of colds and I am sick more often that not, and infections will affect me for weeks at a time”.

The panel found that the information in the Notice of Appeal is the appellant’s argument.

Evidence Prior to the Hearing

Prior to the hearing, the appellant submitted a 1-page letter from her respiratory specialist. The letter is dated May 18, 2023. The specialist stated, in part, the following:

- “She had repeat CT scan that showed resolution”.
- Echocardiogram was normal and Spirometry as normal.
- “Clinically she is much better, she has had no flareups. She tells me that her baseline peak flows are 300-350 L/min which is less than the 420 L/min that was noted at her asthma RT education session. Occasionally she will drop to 200-250 L/min. She takes at least 2 relief puffs per day, nocturnal symptoms approximately once per week”.
- “Overall doing better but there is still room for improvement”.
- “Airspace disease. Resolved on CT, no further follow-up required from this perspective”.

Evidence At the Hearing

The ministry did not attend the hearing. After confirming that the ministry did receive the Notice of Hearing, the hearing proceeded without the ministry representative.

At the hearing, the appellant stated, in part, the following:

- She has asthma and is sick a lot. Her day-to-day living is difficult.
- Some days are okay and other days are very symptomatic.
- She needs help with kids on those days and relies on others, even for her own stuff.
- She uses a puffer if walking.
- It is difficult to live day to day and therefore she cannot hold down a job.

When asked questions, the appellant stated the following:

- Things have improved a bit and there is no permanent damage to her lungs but she still has symptoms.
- She is not as sick as often but sometimes her symptoms can flare up.
- She was prescribed new medication because she still experiences symptoms.
- Smoke and smog make her symptoms worse.
- She experiences bad symptoms 5 times per month and day to day life is difficult. During these times she cannot walk even ½ block. But she has symptoms on a daily basis.
- She has really bad (severe) asthma attacks every 2-3 months and it takes about 10 days to recover from them.
- She uses a cart all the time to carry loads.

Admissibility of Additional Information

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

In this case, the panel determined that additional information submitted prior to the hearing and at the hearing is information that allows for a full and fair disclosure of all matters related to the decision under appeal and has admitted this information as evidence in accordance with s. 22(4) of the *Employment and Assistance Act*.

Part F – Reasons for Panel Decision

The issue on 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 legislation.

Panel Decision**Severe Impairment**

In the reconsideration decision, the ministry was not satisfied that the information given showed that the appellant has a severe physical or mental impairment. The ministry is of the opinion that to show that an impairment is severe, the information has to be weighed against the nature of the impairment and how it impacts functioning either physically or mentally. Having a diagnosis of an impairment does not mean that the condition is severe or that the person is qualified for PWD. The information has to show that the impairment, which is caused by a medical condition, restricts a person's ability to function on their own or effectively. The ministry has to look at the impairment and see if it impacts daily functioning. The ministry depends on the information in the PWD application and any other information that is given. The panel finds that the ministry's approach to determine severity is reasonable.

The panel also notes that the ability to work is not a consideration for PWD eligibility because the ability work is not a requirement of section 2(2) of the Act and is not listed as a daily living activity.

Physical Impairment

The appellant said that her asthma causes difficulty to manage day to day and impacts all aspects of her life. She stated that her condition can be severe for prolonged periods of time.

The ministry said that based on the information provided in the PWD application, the appellant does not meet the legislative requirements of severe physical impairment.

In the reconsideration decision, the ministry pointed out what the doctor said in the Medical Report about the appellant's health history which included information regarding the appellant's flare ups of symptoms that leave her unable to walk. The ministry concluded that the doctor did not describe the frequency or duration of flares which result in significant impairments to walking. The ministry also stated that the frequency or duration was not described in the self-report and request for reconsideration.

In the reconsideration decision, the ministry pointed out what the doctor said in the Medical Report about the appellant's physical functioning. That is, the appellant can walk 2-4 blocks unaided (when not symptomatic and ½ block when the symptomatic), climb 5+ steps unaided, can lift 15-35 lbs (but not carry while walking) and no limitations to how long the appellant can remain seated. The ministry concluded that the doctor did not describe the frequency or duration of periods of being symptomatic and can walk less than 1 block unaided. The ministry also stated that the ability to walk 2 to 4 blocks unaided, climb 5+ steps unaided, lift 15 to 35 lbs, and remain seated without limitation, is not considered indicative of a severe impairment of physical functioning. The ministry said that, although doctor said the appellant cannot carry 15

to 35 lbs with walking, the doctor did not clarify the amount of weight the appellant can carry / hold while walking. The ministry also concluded that the ability to lift 15 to 35 lbs is considered sufficient ability to lift a wide variety of household and shopping items.

In the reconsideration decision, the ministry noted what the doctor said in the Assessor Report about severe recurrent asthma exacerbations that limit the ability to perform any exertional activity when having a flare. The ministry also noted that the doctor said that it takes the appellant 40% longer to walk indoors/outdoors and with carrying/holding it takes 40% longer and 50% of the load than previously. The ministry noted that the doctor did not describe the frequency or duration of flares which limit the ability to perform exertional activity. The ministry also concluded that taking 40% longer to perform an act of mobility or physical activity is not considered indicative of a severe impairment of physical functioning (note: 40% longer is less than twice as long). It was also noted that the doctor did not describe the amount of weight the appellant can carry / hold.

The ministry concluded that, based on the assessments of the doctor in the PWD application, the supplementary medical records, and the self-reports, a severe impairment of physical functioning has not been established.

The panel's task is to determine if the ministry's decision is reasonable. The panel understands that the doctor indicated that when symptomatic, the appellant struggles to function. However, the panel also notes that the doctor stated that the appellant can complete most day-to-day tasks when symptoms are minimal and physical functioning is good when not symptomatic. This assessment was completed on November 25, 2022. On May 18, 2023 the specialist stated that the CT scan showed resolution for airspace disease, spirometry (a test to measure how well lungs work) was normal and the appellant is doing better overall though there is room for improvement. From this the panel is left to conclude that between November 25, 2022 and May 18, 2023 the appellant's condition has improved. The appellant also stated that things have improved a bit and there is no permanent damage to her lungs.

The appellant stated that she is sick a lot, her day-to-day living is difficult and some days she is very symptomatic and she needs help with kids on those days. She uses a puffer if walking and it is difficult to live day to day. However, these statements are different from the specialist's assessment and it has not been explained why the appellant would continue to be symptomatic to the point she cannot function if her airspace disease is resolved, lung function is normal and overall she is doing better.

Given all of the information, the panel finds that there is not sufficient information to determine that the appellant has a severe physical impairment. As a result, the panel finds that the ministry was reasonable when it found that the appellant does not have a severe physical impairment as is required by Section 2(2)(a) of the Act.

Mental Impairment

The appellant did not argue that she suffers from a mental impairment.

The ministry said that based on the information provided in the PWD application, the appellant does not meet the legislative requirements of severe mental impairment.

In the reconsideration decision, the ministry pointed out that in the medical report the doctor said that the appellant does not experience any significant deficits with cognitive and emotional functioning. The doctor said that the appellant does not have any difficulties with communication; and noted the level of ability with speaking, reading, writing, and hearing are good. With Social Functioning, in the Assessor Report the doctor does not indicate the requirement any support/supervision to manage any aspects of social functioning. The ministry determines that the information provided does not establish a severe mental impairment.

The panel finds that the analysis by the ministry of all of the evidence was reasonable. The panel notes that the doctor did not diagnose a mental condition that would cause a mental impairment. The doctor did not identify any deficits or impacts to cognitive or emotional functioning. It was said that there are no difficulties with communication, speaking, hearing, writing, or reading. The ER consult reports and the May 18, 2023 letter from the specialist made no reference to a mental health issue. From this information, it is difficult to find that the appellant has a severe mental impairment.

Given all of the information, the panel finds that the appellant does not have a severe mental impairment. As a result, the panel finds that the ministry was reasonable when it found that the appellant does not have a severe mental impairment as is required by Section 2(2)(a) of the Act.

Restrictions in the ability to perform Daily Living Activities

Section 2(2)(b)(i) of the Act requires that the minister must 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 daily living activities either continuously or periodically for extended periods. While other evidence may be considered for clarification or support, the ministry's decision is based on the evidence from prescribed professionals. The term "directly" means that there must be a connecting link between the severe impairment and the restriction. The direct restriction must also be significant. Finally, there is a part related to time or duration – the direct and significant restriction may be either continuous or periodic. If periodic, it must be for extended periods. Any examination of periodicity must also include how frequently the activity is restricted. If a restriction only happens once a year it is less likely to be considered periodic for extended periods than one that happens several times a week. So, in the cases where the evidence shows that a restriction happens periodically, it is appropriate for the ministry to ask for evidence about the duration and frequency of the restriction to be "satisfied" that this legislative criterion is met.

The appellant said that that due to her asthma she struggles to function day-to-day. Her ability to walk and carry objects is impacted. She cannot complete daily living activities for herself or her children.

The ministry said that it is not satisfied that the information in the PWD application shows that the impairment directly and significantly restricts daily living activities continuously or periodically for extended periods.

In its reconsideration decision, the ministry points out that in the Medical Report, the doctor said that the appellant has not been prescribed medication that would interfere with the ability to perform her daily living activities.

The ministry also noted that, in the Assessor Report, the doctor said the appellant can independently perform all listed tasks of all listed activities of daily living except laundry and basic housekeeping which take significantly longer to complete (30% longer) and that the appellant uses a cart or stroller to carry purchases home.

The ministry concluded that taking 30% longer to perform daily living activities is not indicative of significant restrictions to daily living activities. The ministry noted the use of a cart or stroller for carrying purchases is not considered using an assistive device, and therefore not indicative of significant restrictions to daily living activities. The doctor indicated the ability to walk 2 to 4 blocks unaided and lift 15 to 35 lbs. The ministry further noted that the doctor indicated independence with all but two listed areas of daily living activities.

The ministry concluded that, based on the assessments of doctor, the supplementary medical records, and the self-reports, the ministry finds there is not enough evidence to confirm that that appellant has a severe impairment that significantly restricts the ability to perform daily living activities continuously or periodically for extended periods. Therefore, the legislative criteria have not been met.

The panel finds that the ministry's analysis of the evidence and findings based on the evidence to be reasonable. In this case, the doctor indicated that the appellant takes 30% longer to complete her laundry and basic housekeeping. The panel notes that the appellant can still do these things and taking 30% longer to complete a task does not constitute a significant restriction. The panel also notes that the doctor stated that the appellant uses a cart or stroller to carry larger loads when having symptoms. However, the doctor did not indicate how often these symptoms arise.

The panel notes that the appellant provided some information regarding her ability to complete daily living activities. However, that information was focused on the ability to walk and carry purchases home. The appellant also stated that "overall, I can do basic day to day things as long as I don't overdo it and rest often, but some days I am only able to do the bare minimum". As already indicated, it has not been clearly established how often she can only do the bare minimum. Also, the panel notes that the legislation specifically requires that any direct and significant restriction to daily living activities be confirmed by a prescribed professional. The information provided by the doctor did not confirm as such.

The panel also considered the May 18, 2023 letter from the specialist and the multiple ER consult reports. However, this information did not in any way discuss the appellant's ability to complete her daily living activities.

Given all of the information, the panel finds that the appellant does not have a severe mental or physical impairment which directly and significantly restricts the ability to complete daily living activities. As a result, the panel finds that the ministry was reasonable when it found that there is

not enough information to establish that the appellant is directly and significantly restricted in the ability to complete daily living activities as required by section 2(2)(b) of the Act.

Help to perform Daily Living Activities

Section 2(2)(b)(ii) of the Act requires that, *because of direct and significant restrictions in the ability to perform daily living activities*, a person needs help to perform those activities. Help is defined as the need for an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform daily living activities.

The doctor and the appellant indicated that help is provided by the use of a cart and stroller, the appellant's ex-husband, other family and friends.

Direct and significant restrictions with daily living activities are a prerequisite of the need for help. The panel previously found that the ministry was reasonable in its decision that direct and significant restrictions in the appellant's ability to perform daily living activities have not been established. Therefore, panel also finds that the ministry reasonably concluded that it cannot be determined that the appellant requires help to perform daily living activities as required by section 2(2)(b)(ii) of the Act.

Conclusion

The panel finds that the ministry's reconsideration decision, which found that the appellant was not eligible for PWD designation, was reasonably supported by the evidence and is a reasonable application of the legislation, and therefore confirms the decision. The appellant is not successful on appeal.

Appendix A

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, or

(b) acting in the course of the person's employment as a school psychologist by

(i) an authority, as that term is defined in section 1 (1) of the Independent School Act, or

(ii) a board or a francophone education authority, as those terms are defined in section 1 (1) of the School Act, if qualifications in psychology are a condition of such employment.

Alternative grounds for designation under section 2 of Act

2.1 The following classes of persons are prescribed for the purposes of section 2 (2) [*persons with disabilities*] of the Act:

- (a) a person who is enrolled in Plan P (Palliative Care) under the Drug Plans Regulation, B.C. Reg. 73/2015;
- (b) a person who has at any time been determined to be eligible to be the subject of payments made through the Ministry of Children and Family Development's At Home Program;
- (c) a person who has at any time been determined by Community Living British Columbia to be eligible to receive community living support under the *Community Living Authority Act*;
- (d) a person whose family has at any time been determined by Community Living British Columbia to be eligible to receive community living support under the *Community Living Authority Act* to assist that family in caring for the person;
- (e) a person who is considered to be disabled under section 42 (2) of the *Canada Pension Plan*

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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 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

Neena Keram

Signature of Chair

Date: 2023/06/19

Print Name

Peter Mennie

Signature of Member

Date: 2023/06/19

Print Name

Adam Shee

Signature of Member

Date: 2023/06/19