

**Part C – Decision Under Appeal**

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the “Ministry”) reconsideration decision dated August 23, 2023 (the “Decision”) denying the Appellant Persons with Disabilities (PWD) designation.

The Ministry found that the Appellant only met the age (over 18) requirement.

However, the Ministry found:

- The Appellant had not established that in the opinion of a medical practitioner or nurse practitioner, her health condition is likely to continue for two years or more;
- The Appellant did not have a severe physical or mental impairment;
- The Appellant's daily living activities are not directly and significantly restricted; and,
- The Appellant does not need significant help to do daily living activities because of significant restrictions.

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 (the Act), Section 2*  
*Employment and Assistance for Persons with Disabilities Regulation, Section 2*  
*Employment and Assistance Act, Section 22(4)*

The full wording of this legislation is set out in the Schedule of Legislation at the end of this decision.

**Part E – Summary of Facts**

The hearing took place in person on October 16, 2023.

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

- The Medical Report, dated Jan. 5, 2023 completed by the Appellant's Doctor (the "Doctor");
- The Self Report, dated March 30, 2023 and completed by the Appellant;
- The Assessor Report, dated April 4, 2023 also completed by the Doctor;
- The EMG/Nerve Conduction Study Report (pages 1,2 of 3), dated June 23, 2023 and completed by the Specialist;
- The Appellant's request for reconsideration (the "Reconsideration Request"), dated July 31, 2023, which explains why she wanted the Ministry to reconsider its original decision; and
- The Medical Note dated July 31, 2023 and completed by a Locum for the Appellant's Doctor (the "Locum").

Information in the Reconsideration Request is summarized below.

**MEDICAL REPORT*****Diagnosis***

In the Medical Report, the Doctor says the Appellant has a diagnosis of migraine headaches with an October 2021 onset.

***Health History***

The Doctor provides a brief summary regarding the severity of the Appellant's impairment and indicates: "Frequent (2-3 per week) and severe migraines despite multiple medication trials. [The Appellant] has presented to the emergency department for this reason. Unable to perform ADL [Activities of Daily Living]/care for dependents during these times. [The Appellant] has pursued education upgrades in order to be employable but unfortunately could not complete studies due to headaches". The Doctor notes further that the Appellant is not on medication or receiving treatment that interferes with daily living activities and does not require any aids or prostheses for her impairment.

***Duration***

The Doctor indicates "No" in response to whether the impairment is likely to continue for two years or more and explains further: "Pending neurology consult and pending further therapies ...anticipated wait time is currently 18 months".

***Functional Skills***

In the Medical Report, the Doctor confirmed the Appellant's limitations exist in all domains during times of headache, which can last 24-72 hours in duration 2-3 times/week at its worst".

The Doctor says the Appellant can:

- Walk 4+ blocks unaided on a flat surface;
- Climb 5+ stairs unaided;
- Lift without limitations; and
- Remain seated without limitations in duration.

The Doctor further indicates that the Appellant has no difficulties with communication and does not have significant deficits with cognitive and emotional function.

***Daily Living Activities***

The Doctor indicates that the Appellant's impairment restricts all identified daily living activities and requires her husband's and sponsor/family's assistance; the restrictions are periodic and, "Only during headache hours". Finally, the Doctor clarifies that social functioning is impacted in that the Appellant is, "[In] Bed confined in a dark room".

**ASSESSOR REPORT*****Mental or Physical Impairment***

The Doctor says the Appellant's mental or physical impairments are "severe and frequent migraine headaches (2-3/week)".

***Ability to Communicate***

The Appellant is noted to have "good" communication abilities in all domains with, "Periodic inability to communicate when suffering from a migraine (average duration 24 hours)".

***Mobility and Physical Ability***

The Doctor says the Appellant's impairment restricts all areas of her mobility and physical abilities except standing. For all other activities, the Appellant requires "periodic assistance" from another person. A footnote in this section of the Assessor Report states that periodic assistance, "refers to the need for significant help for an activity some of the time as would be the case where a person required help due to the episodic nature of the impairment".

***Cognitive and Emotional Functioning***

The Doctor does not indicate any major impacts in daily cognitive and emotional functioning and notes that the Appellant's impairment has no impact on her impulse control; insight and judgement; attention/concentration; nor on her executive, memory, and language abilities. The Appellant's impairment does not impact her related to psychotic symptoms or other emotional or mental problems.

However, the Doctor indicates that the Appellant's impairment does minimally impact her bodily functions, consciousness, and emotion. The report also indicates minimal impact with other neuropsychological problems; other neuropsychological problems are not explained in further detail.

Finally, the Doctor indicates that the Appellant has moderate impact in two areas of her daily cognitive and emotional functioning because of her impairment, which are motivation and motor activity.

***Daily Living Activities***

The Doctor indicates that the Appellant's impairment allows independent activity with only Personal Care, and Medications—Taking as directed and safe handling and storage. Otherwise, the Appellant requires periodic assistance from another person—provided by her family and refugee sponsor—for all other daily living activities:

- Basic Housekeeping: Laundry, Basic Housekeeping
- Shopping: Going to and from stores; Reading prices and labels; Making appropriate choices; Paying for purchases; and Carrying purchases home.
- Meals: Meal planning; Food preparation; Cooking; and Safe storage of food.
- Pay Rent and Bills: Banking; Budgeting; and Pay rent and bills.
- Medications: Filling/refilling prescriptions'
- Transportation: Getting in and out of a vehicle; Using public transit; and Using transit schedules and arranging transportation.

The Doctor comments that the Appellant is, "Unable to perform tasking during migraine periods (2-3 times per week, average duration 24 hours)."

The Appellant is independent in all areas of Social Functioning with good functioning in her relationship with her immediate social network (partner, family, friends). However, the Appellant's impairment impacts her social functioning with her extended social networks

(neighbourhood contacts, acquaintances, storekeepers, public officials, etc.) and is indicated as marginal functioning—little more than minimal acts to fulfill basic needs.

### ***Assistance Required/Provided***

As noted above, the Appellant's impairment requires the assistance of another person for help with daily living activities. The Appellant does not have an Assistance Animal and the Doctor has not indicated that the Appellant uses any assistance equipment or devices.

### **APPELLANT'S SELF REPORT**

In her March 30, 2023 Self-Report, the Appellant describes her disability as severe migraines 3-4/week from January 2023. She says that the migraines affect her so badly with symptoms that include being very weak, depressed, and some confusion. She needs [her environment] quieter, has trouble concentrating, and her attention [abilities] are reduced—she is unable to read or see sometimes because she feels really dizzy. When the migraines occur, she must be in a dark room and not in lit or [public] places.

The Appellant also says that severe migraines affect her life and ability to take care of herself. She notes that she really suffers especially in morning and later afternoon; when she has a migraine, she cannot do much at home and must just be alone. The Appellant indicates that because she could not focus or read much, her studies were affected, and she had to leave her education program. When she reads or is thinking a lot, she starts to have a migraine, and she feels overwhelmed and tired which makes it impossible for her to do what she wants to do. The Appellant also says that she has missed scheduled meetings or appointments because of migraines. Finally, the Appellant comments that as relates to her migraines, "My husband is supportive and my kids. They want me to rest and feel better when I get one".

### **EMG/NERVE CONDUCTION STUDY REPORT**

In the June 23, 2023 Report, the Specialist identifies that the Appellant was seen at the EMG lab for paresthesia's [numbness, tingling] in her right arm. The Specialist indicates that their assessment finds, "[The Appellant] has severe migraines and chronic daily headaches. This explains all of her symptoms including her dizziness, paresthesia's, allodynia over the scalp and arm, throbbing head pain, fluctuating nausea and photophobia...[and] she is having intractable daily headaches..." The Specialist notes she is taking the medications Topiramate in the morning and Amitriptyline at night, and she has been getting neck injections but, "currently her symptoms are worse than ever. She is just able to function and manage her household...".

**LOCUM'S MEDICAL NOTE**

In the July 31, 2023 medical note provided by the Locum for the Appellant's Doctor, the Locum states the severity of the Appellant's symptoms has progressed since the time of initial [Persons with Disabilities] application and include:

- When having a bad migraine (typically 5h/d, 5d/wk), is unable to walk due to Right-sided weakness, and fell down due to severity;
- Is unable to hold cup due to shaking—not able to feed herself;
- The Appellant has to lie in bed until the migraine improves; and
- Is unable to work due to needing to lie in bed, unable to read/study due to eyes will not focus when the migraine is ongoing.

**APPELLANT'S RECONSIDERATION REQUEST**

In the Appellant's July 31, 2023 Reconsideration Request, she states that, "Since my initial application my condition has worsened". The Appellant notes that her migraines are now happening multiple times in the day where previously she had only occasional migraines. She says that when she has a migraine, she is only able to sit in a dark room—she is severely limited in her daily life. The Appellant indicates that her balance is affected; she cannot prepare meals for her family; she is unable to work or study; and she relies heavily on her family to take care of daily tasks. The Appellant also comments that in addition to [migraine] pain, she is experiencing other pains and a significant loss of sleep which has further adverse effects for her.

**Additional Information submitted after Reconsideration**

Section 22(4) of the *Employment and Assistance Act* says that a panel can consider evidence that is not part of the record when the Ministry made the Decision. But first the panel must feel that the new information is relevant. Once a panel has determined if any new evidence can be admitted, it must decide if the Reconsideration Decision was reasonable considering the new evidence.

**Notice of Appeal**

In the notice of appeal, the Appellant says she, "has very bad migraines, [and] can't work, [and] can't study. The migraines affect her every day, sometimes up to 5 days. Numbness also bothers her. [She] has 4 children to support. Everything is so expensive, [and] income assistance is not enough. Mostly [ she] relies on family to do everything including housework".

**Evidence presented at the hearing**

At the hearing, the Appellant stated that she is experiencing really bad migraines which have gotten significantly worse from the time of her original PWD application. As recently as two weeks prior to this hearing, the Appellant needed to go to the Emergency Department because of a migraine and the effects it has on her body and functioning. The Appellant described the pain she experiences on the right side of her body extending from the top of her head all the way to her feet. Along with muscular pain and numbness and tingling, the Appellant's migraines can also cause her to have pain in her eyes with blurred vision and seeing zig zags. In response to questions from the Panel, the Appellant said that she has been suffering from migraines for more than seven years now. The Appellant shared that she has been on oral migraine medication(s) for at least the last two years and has recently started a new medication (Fremanezumab) that she receives by injection. With regard to additional tests, the Appellant says she is scheduled to have an MRI in December but she does not yet have an appointment at the Headache Clinic.

The Ministry did not object to the admissibility of the Appellant's additional oral evidence.

The Panel admitted the Appellant's verbal information about the duration of her migraines, her visual symptoms, her new medication treatment, and pending medical test, as new evidence. The Appellant's information provides additional clarity about her medical history and experiences with her impairment. The information was determined to be reasonably required for a full and fair disclosure of all matters related to the decision under appeal, pursuant to section 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 determined that the Appellant was not eligible for Persons with Disabilities designation pursuant to the Regulation, was reasonably supported by the evidence or was a reasonable application of the legislation in the circumstances of the Appellant. The Ministry found the Appellant met the age (over 18) requirement. However, the Ministry found the Appellant did not meet the requirements for:

- duration (likely to last more than two years);
- severe mental or physical impairment;
- significant restriction on the ability to perform daily living activities; and
- needing significant help to perform daily living activities.

Relevant sections of the legislation are set out after the Reasons of the Panel.

**Position of the Appellant**

The Appellant says that the Ministry decision denying her PWD designation is not correct given she has been having migraines for at least seven years and given the severity of her symptoms and the suffering she experiences; the Appellant feels extremely weak after a migraine. The Appellant stressed that the pain and muscle tightness she feels is severe; the numbness and weakness that she also feels means she is unbalanced and doesn't feel safe to walk and do activities alone. The Appellant's symptoms have gotten worse and her ability to function independently has changed from her original application date. As an example, the Appellant had a migraine two weeks ago and went to the Emergency Department where she stayed overnight. She was unable to move much at all and could not open her jaw for about two or three days.

The Appellant states that her impairment makes her life very difficult. Her migraines are unpredictable and don't follow a schedule; at times the Appellant can have migraines every day that last less than an hour, or they may progress to lasting many hours to days and include nausea and vomiting. As a result, the Appellant now must rely more on her husband and oldest child to assist with her daily living activities. Due to the change in severity of her migraines, the Appellant's functioning has changed from primarily independent to requiring assistance with most things. As examples, the Appellant says her husband and son must help her with housekeeping activities, and she is no longer able to independently do the banking because of memory difficulties and forgetfulness.

Finally, the Appellant says her request for PWD designation should also be granted because her migraines prevent her from completing her education and from working; her inability to do these things make her very sad. Her migraines require the Appellant to



isolate in a dark room and she needs to just be alone. The Appellant had been attending school, but her migraines were triggered or got worse with reading or thinking a lot. The Appellant's impairment means that it is difficult to schedule things and keep appointments; she misses meetings because of her migraines. Not being able to work means that things are difficult for the Appellant and her family; everything is so expensive and income assistance is not enough. For these reasons, the Appellant says she should be granted PWD designation.

### **Position of the Ministry**

At the hearing, the Ministry relied on the reasons stated in its reconsideration decision and summarized its findings as follows:

#### *Duration*

The Ministry says that at reconsideration, upon further review of the information submitted, it determined that the Appellant's impairment does not meet the minimum expected duration requirement as required by legislation. The Ministry relies on the Medical Report where the Doctor clearly indicated "No" to the question, "Is the impairment likely to continue for two years or more from today". The Ministry acknowledged that the Appellant's Locum Doctor indicates her condition has gotten worse, but the duration remains uncertain and/or unstated by the Locum. The Ministry finds, "Based on the information provided by the medical practitioners, it has not been established that in the opinion of a medical practitioner or nurse practitioner, your health condition is likely to continue for two years or more."

#### *Severe Physical or Mental Impairment*

The Ministry advises that with regard to PWD designation, impairment is defined as a loss or abnormality of psychological, anatomical, or physiological structure or function causing a restriction in the ability to function independently, effectively, appropriately, or for a reasonable duration. The Ministry also notes that the PWD application does not consider employability or vocational abilities.

#### Physical Impairment

The Ministry found that the Appellant did not have a *severe* physical impairment. However, based on the information provided, the Ministry determined that the Appellant had established that she has a moderate physical impairment given that her severe migraines are now typically five days per week lasting five hours per day. The Ministry considered that when she has a migraine, the Appellant is unable to complete daily living activities and tasks; requires periodic assistance with basic mobility and physical ability; and the Doctor reports that a migraine impacts 'all domains' including the care of dependents. The

Ministry clarified that although care of dependents is not a condition under the legislation, it had been taken into consideration when making an informed decision in respect to the current level of impairment on the Appellant's ability to function independently or effectively.

The Ministry found that it was difficult to establish anything more than a moderate physical impairment. In the Ministry's view, the information provided by the Appellant at reconsideration shows an adequate level of independence regarding physical functionality outside of the episodes reported. The Ministry says that given the amount of time left in a typical day and week where the Appellant has no limits with physical functioning and that she is reported to be fully independent and requires no help during these times, the Ministry makes a finding of a moderate physical impairment. Furthermore, without additional detail from her Doctors about the frequency and duration, including how often each month on average the migraines are lasting longer than five hours in a day, the evidence identifies a moderate physical impairment.

#### Mental Impairment

The Ministry determined that based on the available information, the Appellant does not have a *severe* mental impairment. Although the Ministry recognized that the Appellant has frequent migraines, they said that there is minimal impairment to the Appellant's base level of mental functioning including her cognitive and mental abilities and ability to complete daily living activities. The Ministry says this does not reflect a severe mental impairment.

The Ministry further noted that the Appellant and her Doctors did not report cognitive or emotional function deficits; no major impacts on daily functioning; minimal impacts to bodily functions, consciousness, emotion and neuropsychological problems; and indicated the Appellant experiences moderate impacts only with motivation and motor activity. The Ministry assessed that the Appellant did not have a severe mental impairment given this evidence together with the fact that she has good social functioning with her immediate networks.

Finally, the Ministry says that given the amount of time that the Appellant is not affected by migraines, a *severe* mental impairment has not been demonstrated that impacts her ability to function independently or effectively. Although the Ministry recognizes that the Appellant reports that she is unable to perform most tasks during migraine periods—five days/week and five hours long—the Ministry maintains that a severe mental impairment has not been confirmed.

### *Restrictions to Daily Living Activities*

The Ministry says it must rely on the medical opinion and expertise from the Appellant's Doctors and other prescribed professionals to determine that her impairment *directly* and *significantly* restricts her ability to perform daily living activities either continuously or periodically for extended periods. The Ministry found that because it has not been demonstrated that the Appellant has a severe mental or physical impairment, it cannot be established that the impairment directly and significantly restricts her ability to perform the daily living activities set out in the legislation. As such, the Ministry is not satisfied that the Appellant has a severe impairment that, in the opinion of a prescribed professional, directly and significantly restricts her ability to perform daily living activities.

Although the Ministry recognizes that the Appellant's migraines cause significant restrictions five days/week for five hours/day, they say that the restrictions are not continuous, the Appellant is independent with basic personal care, and continuous help is not required with any of the Appellant's daily living activities. Similarly, the Appellant and her Doctors have also not demonstrated direct and significant daily living activities' restrictions periodically for extended periods of time. From the Ministry's perspective, there remains significant time during the remaining days and week for the Appellant to complete the rest of her basic daily living activities and she should not require significant help each day or week.

Finally, the Ministry recognizes that the Appellant's migraines are reported to last up to 72 hours/episode, but they remain unable to confirm that her impairment *directly* and *significantly* restricts her ability to perform daily living activities either continuously or periodically for extended periods. Unfortunately, because her Doctors or other prescribed professional(s) have not indicated how often this occurs—whether weekly, monthly, or just occasionally—the Ministry has difficulty determining the frequency of the longer episodes. Without clear medical information to explain the duration and frequency, the Ministry is unable to verify that the longer episodes happen frequently and result in direct and significant restrictions to the Appellant's ability to do her daily living activities for extended periods of time.

### *Assistance Required*

The Ministry found that because it had not been established that daily living activities are significantly restricted, it cannot be determined that significant help is required from others or from an assistive device. In addition, the Ministry notes that the Assessor Report states the Appellant does not require help from an assistive device or an assistance animal. Although the Appellant requires periodic help from others because of the

frequency of her migraines, the Ministry says the reported duration of five days/week for five hours/day supports the finding that the Appellant requires a *moderate* amount of help from others but does not demonstrate significant help is required to complete her daily living activities.

## **Analysis**

### *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—the daily living activities. An applicant’s inability to work and financial need are not among the daily living activities referenced in either the Regulation or the Medical Report and Assessor Report and are only relevant to the extent that they have an impact on an applicant’s ability to carry out the listed daily living activities. If the inability to work is a major reason for applying for PWD designation, there are other potential Ministry programs such as Persons with Persistent Multiple Barriers to Employment (PPMB) or federal government programs such as Canada Pension Plan disability benefits.

The requirements for PWD designation include having an opinion from a prescribed professional outlined in the Medical and/or Assessor Report. Per the legislation, it is reasonable and necessary 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.

### Duration

The Appellant indicates that she has been having migraines for more than seven years and that recently, the migraines are getting worse rather than improving. The Locum’s July 31, 2023 medical note also confirms that there has been a change to the Appellant’s symptoms, but the Locum does not provide any information about the expected length of time the (worsening) impairment might last. The Doctor indicates in the Medical Report that the migraines began in 2021 and also clearly noted that the Appellant’s impairment is *not* expected to continue for two years or more. The Doctor says that further consult and therapy wait times is “18 months”. The Doctor’s comments are not clear as to whether it is expected that the Appellant’s impairment will resolve within, or at, 18 months, or some other duration after further consult and therapy wait times. Similarly, the differences

between the Appellant's and the Doctor's evidence about the onset of the Appellant's migraines—2016 versus 2021—do not assist in determining the expected duration of the impairment. As such, based on the “No” response in the Medical Report, the Panel finds that the Ministry was reasonable in determining that the Appellant's impairment is not expected to continue for more than two years, and that the Appellant has not met the duration condition for PWD designation.

### 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.

#### *1. Physical Impairment:*

With respect to whether the Appellant's migraines represent a severe physical impairment, the Panel finds that the Ministry was reasonable at reconsideration in determining that the Appellant had a moderate physical impairment and not a *severe* physical impairment.

While the Appellant clearly suffers physical affects from her migraines, the Medical and Assessor Reports nor the additional Specialist Report and Locum note, do not confirm a *severe* physical impairment. The Ministry considered that due to her severe migraines now typically occurring five days per week lasting five hours per day, the Appellant had established a moderate physical impairment. In the January 5, 2023 Medical Report, the Doctor notes that when experiencing a migraine, the Appellant is restricted in areas of basic mobility and physical function and requires periodic assistance due to her impairment. However, at hearing, the Appellant stated that she now requires much more frequent, continuous assistance with her physical activities and function. Unfortunately, there is insufficient information to confirm a severe physical impairment; the Medical and Assessor Reports do not reflect the Appellant's current evidence of the impact on and severity of the impairment on the Appellant's mobility and physical function. It is reported that the Appellant may be impacted up to five hours per day, five days per week; with that it remains that basic mobility and physical function are unaffected by migraines most of her awake hours in the 24-hour day. Without further description about the current frequency, duration, and impact, a severe physical impairment cannot be established.

## 2. *Mental Impairment*

In her Self-Report, at Reconsideration, at Appeal, and at hearing, the Appellant is consistent in identifying that because of her impairment, she is unable to read or focus and feels overwhelmed and tired. The Appellant is required to isolate and cannot speak; she just needs to be alone and feels sad about not being able to work, or to go to school, or to fully take care of her home and children. With the worsening symptoms from her migraines, the Appellant also says that due to difficulties with her memory and forgetfulness, she is now unable to independently complete more complex, executive cognitive activities such as banking. However, the Medical and Assessor Reports do not entirely reflect these limitations in her mental function. The Reports do not indicate cognitive or emotional function deficits; no major impacts on daily functioning; no impact on memory/attention/concentration/executive functions; and minimal impacts to bodily functions, consciousness, emotion and neuropsychological problems. Consistent with the evidence of the Appellant, the Reports did note that the Appellant experiences moderate impacts to motivation and motor activity.

The inconsistencies between the Appellant's current experience from what was reported by the Doctor in the Medical and Assessor Reports, make it difficult to confirm a severe mental impairment. Similarly, without additional information about the frequency and duration of the impact of the migraines on cognitive and emotional function from the prescribed professional, a severe mental impairment cannot be established. For these reasons, the Panel concludes that the Ministry was reasonable in determining that the Appellant does not have a severe mental impairment.

Finally, the Medical, Assessor, Locum, and Specialist Reports have not established that the Appellant has a severe physical or mental impairment. Although the Doctor and Specialist have stated as such, it is not sufficient for the prescribed professional(s) to simply declare that an impairment is severe. Despite the Specialist observing that the Appellant's symptoms "are worse than ever" and that she is "just able to function and manage..." , without further description about her abilities or her limitations, a severe impairment cannot be confirmed. Similarly, although the Locum describes the Appellant as bedridden, unable to read and focus, unbalanced, and unable to manage eating and drinking on her own when experiencing a migraine; the severity of the impact on the Appellant and her daily living activities is not clear. It is not evident how many of the symptoms occur with a migraine, how often any of these symptoms happen, or how long the symptom lasts.

### Restrictions to Daily Living 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.

The Activities that are considered are listed in the Regulation. Those Activities are:

- Prepare own meals
- Manage personal finances
- Shop for personal needs
- Use public or personal transportation facilities
- Perform housework to maintain the person's place of residence in acceptable sanitary condition
- Move about indoors and outdoors
- Perform personal hygiene and self-care
- Manage personal medication.

For a person who has a severe mental impairment, Activities also include:

- Make decisions about personal activities, care, or finances
- Relate to, communicate, or interact with others effectively.

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 inability to work and financial need are not listed as Activities and are only relevant to the extent that they impact listed Activities.

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 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 Doctor's Assessor Report indicates that the Appellant is independent only with Personal Care Activities and Medications—Taking as directed and Safe handling and storage. The Doctor indicates the Appellant requires periodic assistance with all other Activities including: Basic Housekeeping; Shopping; Meals; Pay Rent and Bills; Medications—Filling/refilling prescriptions; and Transportation. The Doctor further advises, "Unable to perform tasks during migraine periods (2-3 times per week, average duration 24 hours)". The Appellant indicates that given the current state of her migraines which happen more often and for longer periods and was not reflected in the Reports completed in January and April 2023 respectively; she now requires significant assistance from her husband, oldest child, and extended family to complete all the Activities.

However, without further clarification from the prescribed professional about the degree, frequency, or duration of the limitations and the extent of assistance required, it cannot be established that the Activities are *significantly* restricted. Although the Doctor indicates that a migraine episode can sometimes last up to 72 hours, it is not clear if this happens frequently, weekly, monthly, or just occasionally. It is then difficult to establish that these longer episodes are frequent and result in direct and significant restrictions to the Appellant's ability to perform and complete her daily living activities periodically for extended periods of time. In addition, although the Appellant also reports she is impacted by her impairment up to five hours per day, five days per week, it remains that daily living activities are unaffected by migraines most of her awake hours in the 24-hour day. From that, it has not been demonstrated that the Appellant requires either continuous assistance, or periodic assistance for extended periods of time, due to her impairment.

Regarding any Activities restricted by the Appellant's mental impairment, the Doctor's Assessor Report notes the Appellant has only marginal functioning with extended social networks. However, the Appellant does have good functioning with her immediate social network and is independent in all social functioning areas. The Appellant says she feels sad and experiences isolation and difficulty speaking when having a migraine. Despite reporting that she is impacted by her impairment up to five hours per day, five days per week, it remains that the Appellant's social functioning is unaffected by migraines most of her awake hours in the 24-hour day.

Given the above, the Panel finds that the Ministry was reasonable in its determination that the Appellant had not demonstrated that, in the opinion of a prescribed professional, the Appellant's physical and mental impairment directly and significantly restricts her ability to perform daily living activities either continuously or periodically for extended periods.



**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.

In the case of the Appellant, there is no indication from the Doctor or the Appellant herself that she requires an assistive device or the services of an assistance animal. As such, the only legislatively referenced help that could be relevant in the Appellant's circumstances is significant help or supervision from another person. The Appellant states she now requires significant, continuous help from her family and extended family, while the Doctor indicates periodic assistance is needed when experiencing a migraine. Although confirming that the Appellant receives help from her family and extended family, there is limited information about the degree and duration of help. The Ministry determined that the Appellant did not require *significant* help; she needs moderate help based on the evidence that she is impacted by her impairment up to five hours per day, five days per week, which leaves the Appellant able to function without assistance most of her awake hours in the 24-hour day.

The Panel finds that the Ministry was reasonable at reconsideration in determining that the Appellant requires moderate help. Additionally, as the Panel found that the Ministry was reasonable in determining that there was not enough information to confirm that the Appellant was 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 significant help to perform those Activities.

**Conclusion**

Although the Appellant describes that her impairment has changed in degree, duration, and severity from the time her Doctor completed her Reports, the legislation requires that the impairment is also confirmed with an opinion from a prescribed professional outlined in the Medical and/or Assessor Report. In the Appellant's case, the Ministry and the Panel must rely on the available opinions of the prescribed professional—the January 5, 2023 Medical Report and April 4, 2023 Assessor Report—to determine eligibility for PWD designation. Unfortunately, the inconsistency between the Reports and the current evidence of the Appellant, makes it difficult to determine the Appellant's impairment status based "on the opinion of a prescribed professional". Without further and current information and clarification about the frequency, duration, and impact including the

extent of assistance required by the Appellant as a result of her impairment, the conditions for PWD designation cannot be met. It is acknowledged that additional medical information—the Specialist Report and the Locum Note—was provided to support the Appellant’s evidence. However, beyond confirming that the migraines are severe and have changed, the information was too vague and did not provide the necessary clarification noted above as needed to confirm PWD designation.

The Panel determines that the Ministry’s August 23, 2023 reconsideration decision denying the Appellant PWD designation was reasonable. The Ministry determined that the Appellant met the age (over 18) requirement. The Panel finds that the Ministry’s decision that the Appellant did not meet the remaining criteria:

- duration (likely to last more than two years);
- severe mental or physical impairment;
- significant restriction on the ability to perform daily living activities; and
- needing significant help to perform daily living activities,

was a reasonable application of the legislation in the circumstances of the Appellant.

The Panel confirms the Ministry’s decision. This means the Appellant is not successful with her appeal.

## Appendix – Relevant Legislation

### ***EMPLOYMENT AND ASSISTANCE FOR PERSONS WITH DISABILITIES ACT***

The criteria for being designated as a PWD are set out in Section 2 of the Act 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).

***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 ...

***Employment and Assistance Act*****Panels of the tribunal to conduct appeals**

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.

2023-0293

**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

Carmen Pickering

Signature of Chair

Date (Year/Month/Day)

2023/10/24

Print Name

Robert Kelly

Signature of Member

Date (Year/Month/Day)

2023/10/24

Print Name

Linda Pierre

Signature of Member

Date (Year/Month/Day)

2023/10/24