

Part C – Decision Under Appeal

The decision under appeal is the reconsideration decision (the “Reconsideration Decision”) of the Ministry of Social Development and Poverty Reduction’s (the “Ministry”), dated December 12, 2023. In the Reconsideration Decision, the Ministry determined that the Appellant was not eligible for designation as a Person with Disabilities (“PWD”) under section 2 of the *Employment and Assistance for Persons with Disabilities Act*.

The Ministry was not satisfied that:

- the Appellant had a severe physical impairment.
- in the opinion of a prescribed professional, the Appellant’s impairment directly and significantly restricted her ability to perform daily living activities either continuously or periodically, for extended periods; and
- as a result of such restrictions, the Appellant requires help to perform those activities.

The Ministry also determined that 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 (the “Regulation”) – sections 2(1), 2(2), and 2.1

A full text of the above-described legislation appears at the end of Part F of this decision.

Part E – Summary of Facts

The information before the Ministry at the time of the Reconsideration Decision included the following:

- the Ministry's letter to the Appellant, dated October 25, 2023 (the "Ministry Letter"), denying her application for the PWD designation;
- the Ministry's Person with Disabilities Designation Denial Decision Summary, dated October 25, 2023, which determined that the Appellant met only the age and duration requirements for a PWD designation;
- the Appellant's Application for the PWD designation (the "Application"), which included:
 - the Appellant's Applicant Information (the "Self Report"), dated September 19, 2023, in which the Appellant described "Chronic pain, depression, mobility issues, and anxiety" as her disabling conditions;
 - the Medical Report, dated September 19, 2023 (the "Medical Report"), completed by the Appellant's doctor (the "Doctor");
 - the Assessor Report, dated September 25, 2023 (the "Assessor Report"), completed by the Appellant's social worker (the "Social Worker");
- the Appellant's Request for Reconsideration, dated October 25, 2023, with which the Appellant included a handwritten note setting out the following:
 - she does not believe that her condition was accurately described in the form;
 - she was not in a proper mental frame of mind when completing the form;
 - she had no assistance with preparing the form, had recently been hospitalized, and was emotionally distrustful;
 - she has some impairment with her physical capacity and mobility;
 - her chronic pain prevented her from driving and performing some daily living tasks;
 - her disability was "primarily within my severe cognitive and attentional impairments";
 - she has depression with psychotic features which was severely debilitating;
 - she has chronic pain, sporadic hallucinations, depression, anxiety, and suicidal ideation
 - she is unable to cook for herself, clean, and complete appropriate self care tasks;
 - she requires her children to plan her schedule; and
 - she did not believe that she was able to properly express herself during her assessment because it was difficult to come to terms with her condition.

In the Appellant's Notice of Appeal, which was undated, the Appellant set out, in handwritten form, that:

- she would like for her case to be further considered;
- she was in the process of having a social worker report on her condition; and
- her previous report was done while in the hospital.

The Application

The Self Report

The Appellant's self-report contained only her basic information and a reference to "chronic pain, depression, mobility, issues, anxiety" as her disabling condition.

The Medical Report

In Part A of the Medical Report, the Doctor diagnosed the Appellant with a somatoform disorder but no specific physical conditions.

In Part B of the Medical Report, referenced only the Appellant's hospitalization from September 6, 2023 to September 19, 2023. The Doctor also checked the box that the Appellant had not been prescribed any medications or treatments that interfere with her ability to perform daily living activities and did not require prostheses for her impairment.

In Part D, the Doctor confirmed that the Appellant's impairment was likely to continue for two or more years.

In terms of functional skills, the Doctor confirmed that the Appellant could:

- walk 4 or more blocks unaided on a flat surface;
- climb 5 or more steps unaided;
- live with no limitations; and
- remain seated for less than one hour.

The Doctor also confirmed that the Appellant had no significant deficits with emotional disturbance and attention or sustained concentration. The Doctor also notes that the Appellant's daughter had to drive the Appellant and do her grocery shopping.

The Assessor Report

In section B of the Assessor Report, the Social Worker set out that the Appellant had a somatoform disorder, depression with psychotic features, and chronic pain possibly related to her somatoform disorder.

The Appellant was described as having a good level of speaking, reading, writing, and hearing as far as her ability to communicate was concerned.

With respect to cognitive and emotional functioning, the Social Worker described the Appellant's impairment as having the following impacts:

- no impact to impulse control, memory, motivation, motor activity, language, other neuropsychological problems, and other emotional or mental problems;
- minimal impact to consciousness, insight and judgement, attention/concentration, and executive functioning;
- moderate impact to bodily functions; and
- major impact to emotion and psychotic symptoms.

In section C of the Assessor Report concerning daily living activities, the Social worker described the Appellant as:

- independent in all areas of personal care (dressing, grooming, bathing, toileting, feeding self, regulating diet, and transfers, both in and out of bed and on and off chairs);
- independent in all areas of basic housekeeping (laundry and basic housekeeping);
- needing periodic assistance from another person in all areas of shopping (going to and from stores, reading prices and labels, making appropriate choices, paying for purchases, and carrying purchases home), with a comment that the Appellant's "daughter assists with this process";
- independent in all areas of meals (meal planning, food preparation, cooking, and safe storage of food);
- independent in all areas of paying rent and bills (banking, budgeting, and paying rent and bills);
- independent in medications (filling/refilling prescriptions, taking as directed, safe handling and storage); and
- independent with getting in and out of a vehicle but needing periodic assistance from another person with using public transit and using transit schedules and

arranging transportation, with a comment that the Appellant “requires support from her daughters to navigate tasks outside her home”.

In terms of social functioning, the Appellant was described as being independent in all areas listed in the Assessor Report and having good functioning with respect to her relationship with her immediate social network and her extended social networks.

Part D of the Assessor Report addresses assistance provided for an applicant. There, the Social Worker described the Appellant as receiving help from family. The Appellant was not described as requiring assistance through the use of any equipment or devices nor did the Appellant require assistance from an animal.

In Part E of the Assessor Report, the Social Worker wrote that the Appellant’s “mental health impairs her daily functioning due to the somatic symptoms she experiences. The belief that she has physical symptoms which cause chronic pain are very distressing to her and lead to anxiety, depression, and suicidal ideation.”

Prior to the hearing of the appeal, the Appellant submitted an updated letter from the Social Worker, dated January 23, 2024 (the “Letter”).

In the Letter, the Social Worker wrote that the Appellant has required “continuous and ongoing support from her daughter in order to maintain a level of mental health that allows her to function in her day to day activities, complete ADL’s, grocery shop, and navigate the community.” The Social Worker added that the Appellant “has not been able to sufficiently attend to these tasks and functions (sic) independently for over a year and a half.” The Social Worker also noted that the Appellant’s illness “makes it difficult for her to seek and maintain employment due to the chronic pain she experiences.”

At the hearing of the appeal, the Ministry did not object to the admissibility of the Letter. The Letter directly addresses the matter of the Appellant’s ability to perform daily living activities, the reasons for her limitations in carrying out her daily living activities, and the extent to which the Appellant requires help with her daily living activities. As such, the panel admits the Letter as evidence that is not part of the record but which is 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*.

Evidence at the Hearing

The Appellant

At the hearing of the Appeal, the Appellant stated that she felt that she needed to submit something setting out the duration and frequency with which she received help from her daughter.

The Appellant noted that the Social Worker was the only professional person who could speak to that issue. The Appellant described again, as set out in the handwritten note provided with the Request for Reconsideration, that she had initially been reluctant to divulge the extent to which her mental health was impacting her life, as she had completed the application at a time when she had been taken to hospital under the *Mental Health Act* and was in a distrustful state of mind.

The Appellant confirmed that her daughter does all driving for her due to chronic pain. At bigger stores, the daughter does 90% of the Appellant's shopping. The Appellant described not wanting to go into stores due to anxiety, which was affected by pain.

The Ministry

The Ministry reiterated that the Appellant had met only three of the five required criteria under the *Act*. From the Ministry's perspective, the information did not satisfy the requirement that the impairment significantly restrict the Appellant's daily living activities on a continuous or periodic basis.

The Ministry's position is that for restrictions to be significant on a continuous or periodic basis for extended periods, the restrictions must be at least 51% of the time.

In the Assessor Report, the frequency and duration of the restrictions were not described as being at least 51% of the time.

However, the Ministry advised that because the Letter described help being needed "continuously" that might satisfy its requirement that the Appellant's daily living activities be restricted at least 51% of the time and the availability of the Letter may have resulted in the Ministry reaching a different conclusion in the Reconsideration Decision.

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

The issue in this appeal is whether the Ministry was reasonable in its determination that the Appellant was not eligible for a PWD designation because the Ministry was not satisfied that:

- the Appellant has a severe physical impairment;
- in the opinion of a prescribed professional, the Appellant’s impairment directly and significantly restricted her ability to perform daily living activities either continuously or periodically for extended periods; and
- as a result of such restrictions, the Appellant requires help to perform those activities.

Panel Decision***Applicable Legal Principles***

The Act sets out the various criteria that must be met in order for a PWD designation to be made. These criteria are set out in section 2(2) of the Act:

- a person must be 18 years of age;
- the Ministry must be satisfied that the person has a severe physical or mental impairment;
- the opinion of a nurse or medical practitioner must be that the impairment is likely to continue for at least 2 years;
- the opinion of a prescribed practitioner must be that the person’s daily living activities are directly and significantly restricted continuously or periodically for extended periods; and
- as a result of the person’s restrictions, the person requires help to perform daily living activities.

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/or mental functioning, including any restrictions, is a reasonable

application of the relevant section of the Act. However, by itself, a medical practitioner's description of an applicant's condition or impairment as "severe" is not determinative. The Ministry must make its determination of severity on a consideration of all the relevant evidence and legal principles.

Restriction to Daily Living Activities

The Act requires that a prescribed professional provide an opinion that an applicant's impairment restricts one's ability to perform daily living activities. In the B.C. Supreme Court decision of *Hudson v. Employment and Assistance Appeal Tribunal*, 2009 B.C.S.C. 1461, the court held that at least two daily living activities had to be restricted for the requirements of the Act to be satisfied but that not all of the enumerated activities needed to be restricted.

Section 2(1) of the Regulation specifically references the following daily living activities in respect of persons with a severe physical or mental impairment:

- preparing one's own meals;
- managing personal finances;
- shopping for personal needs;
- using public or personal transportation facilities;
- performing housework to maintain one's place of residence in acceptable sanitary condition;
- moving about indoors and outdoors;
- performing personal hygiene and self care; and
- managing personal medication.

For persons with a severe mental impairment only, section 2(1) of the Regulation specifically references the following daily living activities:

- making decisions about personal activities, care or finances; and
- relating to, communicating or interacting with others effectively.

The above daily living activities are also referenced in both the Medical Report and the Assessor Report, providing professionals who complete those reports with the opportunity to describe the extent of any restrictions to an applicant's daily living activities and to provide more detail about the restrictions. While the daily living activities in the Medical Report and Assessor Report do not match the daily living activities referenced in the Regulation exactly, they generally cover the same 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.

The restrictions to daily living activities must be significant and caused by the impairment.

The restrictions to daily living activities must also be continuous or periodic for extended periods, as per section 2(2)(b)(i) of the Act. Continuous means the activity is generally restricted all the time. A periodic restriction must be for an extended period. This means, generally, that the restriction is either frequent or, if not as frequent, occurs for longer periods of time. This can mean a daily living activity is restricted most days of the week or for an entire day on days where a person cannot perform the daily living activity without help or support. To determine whether a restriction is periodic for extended periods, it is reasonable to look for information on the duration or frequency of the restriction.

Help

Help is defined in section 2(3)(b) of the Act as one or more of:

- the use of an assistive device;
- the significant help or supervision from another person; or
- the services of an assistance animal.

Application of Legal Principles to the Appellant

Severity

In the Reconsideration Decision, the Ministry determined that that the Appellant did have a severe mental impairment. The Ministry was not satisfied, however, that the Appellant had a severe physical impairment.

In both the Medical Report and the Assessor Report, the Appellant's physical functioning is described at the high end of the range. Moreover, the Medical Report did not include a diagnosis of any physical impairment at all and, in her written submission with the Request for Reconsideration, the Appellant set out that "I believe it is necessary to note that my disability is primarily within my severe cognitive and attentional impairment."

In the Functional Skills section of the Medical Report, the only significant restrictions noted were with respect to sitting. The only daily living activities that were noted to be restricted were shopping, mobility, and transportation. Likewise, the Assessor Report indicated that the Appellant was independent with respect to all aspects of Ability to Communicate, Mobility and Physical Ability. While the Assessor Report referenced chronic pain, it also suggested a possible link to the somatoform disorder diagnosed in the Medical Report. In short, the evidence in the Medical Report and the Assessor Report regarding physical impairment is not especially compelling.

Likewise, the Letter primarily addresses the Appellant's daily living activities and the extent to which she requires help from others. It does not add to the Appellant's case insofar as her physical impairment is concerned. In view of the foregoing, the panel determines that the Ministry reasonably determined that the Appellant had not demonstrated that she has a severe physical impairment.

Restrictions on daily living activities

In the Reconsideration Decision, the Ministry determined that the Appellant had not shown that her daily living activities were significantly restricted. Part of the Ministry's reasoning was that neither the Medical Report nor the Assessor Report clearly described the frequency and duration of the restrictions to the daily living activities.

Both the Medical Report and the Assessor Report confirmed that the Appellant was restricted in transportation and shopping. As such, the Appellant has satisfied the requirement that two daily living activities be impacted. Unlike the Medical Report and Assessor Report, which did not specifically set out the frequency and duration of the Appellant's restrictions, the Letter does describe the Appellant as needing "continuous and ongoing support." This contrasts with the Assessor Report where the Appellant was merely described as requiring assistance periodically with using public transportation and shopping with a note, in both cases, referencing that the Appellant receives help from her daughter with each of those items.

The Regulation requires that the opinion of a prescribed professional confirm that an applicant's severe physical and mental impairment "directly and significantly restricts the person's ability to perform daily living activities continuously or periodically for extended periods."

The Letter is the opinion of a prescribed professional. In this case, the social worker is a prescribed professional. The Letter constitutes an opinion and that opinion is that the

Appellant's restrictions are "continuous and ongoing." This opinion is indicative of a significant restriction to the Appellant's daily living activities that is "continuous", as required by the legislation.

In the result, the panel finds that, with the addition of the Letter, the Ministry was not reasonable in its determination that that Appellant's Daily living activities were not significantly restricted as a result of her mental impairment.

Requirement of Help

In the Reconsideration Decision, the Ministry's conclusion that the Appellant did not require help was based on its finding that the Appellant had not satisfied it that her Daily living activities were significantly restricted.

The Appellant clearly has help from her daughter in carrying out those daily living activities that are restricted. The Regulation requires an opinion that it is a result of the significant restrictions in carrying out daily living activities that a recipient requires help.

Again, the information in the Medical Report and the Assessor Report was limited in this regard. The Letter, on the other hand contains an opinion that the Appellant requires the continuous support that she receives.

In view of:

- the Appellant's statements about the help that she receives; and
- the opinion contained in the Letter that the Appellant requires help,

the panel finds that the Ministry was not reasonable in its determination that the Appellant had not established the need for help with her daily living activities.

Conclusion

The panel finds that the Ministry was reasonable in its determination that the Appellant did not have a severe physical impairment.

The panel finds that the Ministry was not reasonable in its conclusion that the Appellant had not met the requirement that, in the opinion of a prescribed professional, her mental impairment directly and significantly restricts her ability to perform daily living activities

continuously or periodically for extended periods, and, as a result of those restrictions, she requires help to perform those activities.

The Reconsideration Decision is rescinded. The Appellant is successful in this appeal.

Relevant Legislation*Employment and Assistance for Persons with Disabilities Act*

Section 2

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

Section 2

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.

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

Section 2.1

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* (Canada).

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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

Adam Shee

Signature of Chair

Date (Year/Month/Day)

2024/02/15

Print Name

Bill Haire

Signature of Member

Date (Year/Month/Day)

2024/02/15

Print Name

Effie Simpson

Signature of Member

Date (Year/Month/Day)

2024/02/13