

Part C – Decision Under Appeal

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the ministry) reconsideration decision dated February 2, 2024 denying persons with disabilities (PWD) designation. The ministry found that the appellant met the age (18 years or older) and duration (impairment to continue for at least 2 years) requirements. However, the ministry was not satisfied that:

- The appellant has a severe mental or physical impairment;
- The appellant’s impairment significantly restricts the ability to perform daily living activities; and
- The appellant requires significant help or supervision to perform daily living activities.

The ministry also found that the appellant was not one of the prescribed classes of persons eligible for PWD designation on the alternative grounds. As there is no information or argument on this point, the panel considers it not to be at issue in this appeal.

Part D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Act (the Act), sections 2 and 2.1

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

The full text of these sections of legislation is set out at the end of this decision.

Part E – Summary of Facts

Evidence Before the Ministry at Reconsideration

- 1) The appellant's PWD application. The Medical Report and Assessor Report sections were completed by the appellant's general practitioner (the doctor), who had seen the appellant 2-10 times in the past 12 months. The appellant completed the Applicant Information (Self Report) section.
- 2) The appellant's Request for Reconsideration, which included additional information from the appellant.

New Evidence Provided on Appeal and Admissibility

The appellant submitted a Notice of Appeal.

For the written hearing, the appellant provided additional information about his medical conditions and their impact on his functioning.

For the written hearing, the ministry provided a submission stating that it was relying on its reconsideration decision. No additional evidence was provided by the ministry.

The ministry did not object to the admission of the appellant's information. The panel found that the information provided in the appellant's Notice of Appeal and appeal submission directly related to PWD eligibility. Therefore, the panel found that the information was reasonably required for a full and fair disclosure of all matters at issue and was admissible under section 22(4) of the *Employment and Assistance Act*.

Summary of Relevant Evidence

Medical Report

Diagnoses:

- Urethral fistula
- Sexual dysfunction
- Depression

Health History and Additional Comments:

- “Primary urologic and sexual dysfunction due to failed gender affirming surgeries. Both of these severe.”
- “Secondary mood disorder with personal and occupational dysfunction of at least moderate severity for better part of last 1-2+ years.”
- Longstanding history of intermittent depression and gender dysphoria. Improvement with gender affirming care. Significant deterioration after multiple failed urogenital procedures in past 2-3 years.
- Past year has been unable to work meaningfully, significant worsening in mood “sx” [which the panel understands means symptoms]

Functional Skills:

- Can walk 4+ blocks unaided on a flat surface.
- Can climb 5+ steps unaided.
- No limitations in lifting.
- Can remain seated with no limitation.
- No cognitive, motor, or sensory communication difficulties are identified.
- Has significant deficits with cognitive and emotional function (executive, emotional disturbance, motivation, and attention or sustained concentration). “Mood disorder with secondary cognitive dysfunction. Has been unable to sustain employment enough to support himself.”

Daily Living Activities:

- The doctor ticked “no” when asked if the impairment directly restricts the ability to perform daily living activities.

Assessor Report

No response is provided when asked to identify the impairments that impact the appellant’s ability to manage daily living activities.

Ability to Communicate:

- Speaking, reading, writing, and hearing abilities are good.

Mobility and Physical Ability:

- Walking indoors, walking outdoors, climbing stairs, standing, lifting, and carrying and holding are managed independently.

Cognitive and Emotional Functioning (impact on daily functioning):

- The doctor did not complete this section and drew a line through the page.

Daily Living Activities:

- All tasks of all listed daily living activities are managed independently (personal care, basic housekeeping, shopping, meals, pay rent and bills, medications, and transportation).
- The doctor indicates that all aspects of social functioning are managed independently, and that the appellant has good functioning with immediate and extended social networks. The doctor also drew a line through this section of the Assessor Report.

Assistance Provided:

- Urological appliance. "Has penile prosthesis, just removed secondary to infection, will be replaced."
- No assistance from other people or an assistance animal is indicated.

Additional Information:

- Overall impact of urologic procedures/complications has had a very negative impact on mental health, social functioning.
- Very challenging to maintain work/employment due to disrupted urination, leakage, and secondary mood issues.

Self Report

The appellant reports:

- A history of on-and-off anxiety and depression, which has recently become worse than ever before.
- Continued urinary problems after seven surgeries that have left him without a functioning urethra/urinary tract, and ongoing swelling and pain when walking.
- The surgeries and pain have resulted in the loss of sexual function and, relationships, and put a huge emotional tax on him – "my mental health is suffering."
- Often being unable to focus and feel good.

Request for Reconsideration:

- Impacts on daily activities include the use of public or personal transportation and the ability to move about indoors and outdoors, which are notably impeded by constant pain, discomfort.
- Phalloplasty swelling – even short walks cause swelling (frequent application of ice needed) and there is swelling when sleeping.
- Blood flow issues lead to frequent discomfort.
- Bleeding from a new opening.
- Non-functional urethra with an opening at phalloplasty base (after multiple unsuccessful surgeries) causes uncontrollable urine spraying and discomfort when urinating. Bags or containers are needed for urination.
- Difficulty urinating disrupts sleep and causes hygiene issues.
- Fourth surgery to correct urethral hole is upcoming, which will be followed by surgery addressing the incomplete bottom path of the urethra, and then implants for sexual functionality.
- On-and-off bladder pain due to complications.
- Donor arm site swells due to reduced blood flow, causing inconvenience, particularly during computer use.
- Non-functional genitalia (loss of sexual function) and urethra cause immense emotional distress.
- Ongoing struggle impacts mental well-being and everyday life. Antidepressants resulted in weight gain.
- Medications have worsened rather than improve his condition.
- Dealing with anxiety – avoid seeking physical connections with people altogether.
- Impossible to have normal movement and bathroom functions.

Notice of Appeal:

- His situation is severe in all terms.
- Currently (February 11, 2024) using a subpubic catheter, the sixth in the last seven years, and on post-surgery painkillers.
- Surgeries have irreparably damaged his urethra, and his bladder has never been the same.
- The surgeries and recurring waits for surgeries (6-14 months), have left him emotionally and physically drained and completely mistrustful of doctors.
- He was not informed of the potential complications and no longer feels like he is being helped. Mental thoughts swing from positive to suicidal due to severe anxiety.
- Ongoing infections spanning years.
- Prescribed medications have exacerbated weight gain and mental distress.

- Family alienation due to perceived mental illness.
- Severe depression, mood swings, and suicidal ideation.
- Cognitive impairment and memory issues resulting from repeated anesthesia for surgeries.

Appellant's submission for the written hearing:

- In addition to re-submitting most of the information included with his Notice of Appeal statements (with a few minor changes), the appellant provided an update as of February 24, 2023. This included photographs taken on this date. One photograph shows the phalloplasty surgery area, with circles drawn around two areas. The other two photographs show the donor arm area.
- Currently healing from another failed surgery. The catheter was removed two days ago, and a stricture happened yesterday, when standing to urinate - "suddenly blood is everywhere because it has popped open again with the pressure of the urine."
- Hand still swells up everyday (swells after 30-45 minutes of computer use).
- Phalloplasty still swells up if he has too much exercise because the blood flow doesn't seem to work.
- Continues to have multiple fistulas that effect the urethra.
- Anxiety is sometimes overwhelming.
- Last surgery caused so much stress that he had to attend the emergency room due to an arthritis attack.

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

The issue on appeal is whether the ministry's decision that the appellant was ineligible for PWD designation was reasonably supported by the evidence or was a reasonable application of the legislation in the circumstances of the appellant. That is, was the ministry reasonable when determining that the requirements of section 2(2) of the Act were not met because:

- a severe mental or physical impairment was not established;
- the appellant's daily living activities were not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and
- as it has not been established that daily living activities are significantly restricted, it cannot be determined that significant help is required from other persons or a device to complete restricted activities.

Panel Decision**PWD Designation – Generally**

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

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

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

Severe Impairment – Physical or Mental

Section 2 of the Act requires the Minister to be satisfied that the appellant has a severe physical or mental impairment. “Severe” and “impairment” are not defined. To assess the severity of impairment, the ministry considers the extent of any impact on daily functioning. The ministry looks at limitations with or restrictions on physical abilities and/or mental functions. The panel finds that an assessment of severity based on daily physical and mental functioning is a reasonable application of the legislation. However, the panel notes that frequency and/or duration of impairment is not required in the assessment of severity by the legislation at this stage of the legislative test. The panel also notes that the legislation does not identify employability or financial struggles as considerations for PWD designation.

Physical Impairment

The appellant’s position is that his situation is severe due to repeated failed surgeries over the course of seven years that have left him without a functioning urethra/urinary tract, difficulties urinating, repeated infections and catheterization, and ongoing swelling and pain.

The ministry’s position is that a severe physical impairment is not established because the doctor did not diagnose a physical health condition or limitations with physical functioning. The ministry acknowledges the appellant’s self-reporting of physical pain but that under the legislation, the primary source of information is the appellant’s doctor, who does not provide any information on the appellant’s physical functioning.

The panel finds that the ministry’s decision about severe physical impairment is not reasonable. The panel finds that the doctor diagnosed urologic and sexual dysfunction, which are physical health conditions. The doctor described these conditions as severe.

The appellant’s information is consistent with the doctor’s evidence of disrupted urination and leakage (and current infection necessitating removal of penile prosthesis). He provides a comprehensive description of the causes of the urinary problems and the resulting impact on his urinary functioning. He further describes the need for ongoing medical management of symptoms including swelling and infection.

The panel recognizes that the doctor has not identified limitations with respect to the physical functional abilities listed in the Medical and Assessor Reports. However, the panel notes that these functional abilities are not set out in the legislation and finds that they do

not reflect all functional abilities. Accordingly, the panel does not consider the listed physical functional skills and abilities to be an exhaustive means by which to assess physical impairment. In forming this view, the panel notes that the PWD application defines “impairment” as including a loss or abnormality of anatomical or physiological structure or function causing a restriction in the ability to function independently, effectively, appropriately, or for a reasonable duration.

The panel finds that the appellant’s detailed evidence respecting his urological functioning following multiple unsuccessful surgeries and the doctor’s confirmation of severe urologic dysfunction establish a loss of physiological function that restricts the ability to function effectively and appropriately. In other words, the panel finds that the evidence shows a severe urinary functional impairment and therefore, establishes a severe physical impairment.

Mental impairment

The appellant’s position is that his mental health is worse than ever due to the impact of repeated failed surgeries. He suffers from anxiety, severe depression, mood swings, and suicidal ideation which impact his relationships and ability to work .

The ministry’s position is that the information shows that the appellant experiences limitations to cognitive and emotional function, but they do not *severely* impair mental function. In particular, the doctor did not identify impacts on daily cognitive and emotional functioning (the relevant page was crossed out by the doctor). The doctor indicated that all activities related to making decisions about activities and personal care are managed independently. Additionally, no issues with the ability to communicate were reported.

The panel finds that the ministry’s decision was reasonable. The doctor diagnosed a mood disorder which has resulted in “personal and occupational dysfunction of at least moderate severity.” Additionally, the doctor states that the overall impact of urologic procedures/complications has had a very negative impact on the appellant’s mental health, social functioning. However, when asked to identify specific impacts on daily cognitive and emotional functioning, the doctor identified none and struck out the relevant page of the PWD application. Additionally, the doctor reported that the appellant has good communication and social functioning abilities (and also struck out the page in the Assessor Report respecting social functioning).

The panel acknowledges the appellant’s evidence about his mental health and social functioning. However, the panel finds that because the doctor does not confirm any

specific impacts on daily mental functions and assesses good communication and social functioning, the ministry was reasonable to decide that a severe mental impairment is not established.

Restrictions in ability to perform daily living activities

A prescribed professional must provide an opinion that the applicant's impairment restricts the ability to perform daily living activities. In *Hudson v. Employment and Assistance Appeal Tribunal* [2009 BCSC 1461], the BC Supreme Court determined that at least two daily living activities must be restricted in a way that meets the requirements of the Act, and that not all activities need to be restricted.

The restrictions to daily living 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 daily 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 decide if a periodic restriction is for extended periods, it is reasonable to look for information on the duration or frequency of the restriction.

The requirements for restrictions to daily living activities are set out in subsection 2(2)(b)(i) of the Act. Specific activities are listed in section 2(1) of the Regulation. The Medical Report and Assessor Report also list activities, and though they do not match the daily living activities in the Regulation exactly, they generally cover the same activities. The Medical Report and Assessor Report give the professional the opportunity to provide additional details on the applicant's restrictions.

The inability to work is not listed as a daily living activity and is only relevant to the extent it impacts the listed activities.

The appellant's position is that the symptoms of his urological condition, including pain and discomfort, notably impact daily activities including the use of public or personal transportation and the ability to move about indoors and outdoors.

The ministry's position is that the information from the doctor does not show that the appellant's ability to manage daily living activities is significantly restricted either

continuously or periodically for extended periods. The ministry noted that the doctor indicated that there are no prescribed medications or treatments that interfere with the ability to do daily living activities and that the appellant is independent with all daily living activities.

Section 2(2)(b)(i) of the Act requires that the ministry be satisfied that in the opinion of a prescribed professional, a severe mental or physical impairment directly and significantly restricts the appellant's ability to perform daily living activities either continuously or periodically for extended periods. While other evidence may be considered for clarification or support, the ministry's determination as to whether it is satisfied, is dependent upon the evidence from prescribed professionals. The term "directly" means that there must be a causal link between the severe impairment and restriction. The direct restriction must also be significant.

The panel notes that the only information from a prescribed professional about the appellant's ability to perform daily living activities is from the doctor.

The panel finds that the doctor reported that the appellant's physical conditions have a very negative impact on his mental health, including significant worsening of mood and an impact on social functioning. However, the doctor also specifically indicated that all listed areas of social functioning are managed independently, and that the appellant has good functioning with immediate and extended social networks.

With respect to restrictions on the ability to do physical activities, the panel finds that the doctor identified severe urological dysfunction and leakage due to failed surgeries, and the appellant provided a detailed description of the resulting impacts on his ability to urinate. The panel notes that "toileting" is one of the listed functional aspects of the personal care daily living activity. However, the legislation requires that the ministry is satisfied that "in the opinion of a prescribed professional" the ability to perform daily living activities is significantly restricted. The doctor clearly indicated "no" in the Medical Report when asked if daily living activities are restricted. Additionally, in the Assessor Report the doctor did not identify any medical conditions as impacting daily living activities, and indicated that all listed aspects of all daily living activities, including toileting and other listed aspects of personal care, are managed independently. The doctor could have provided further commentary and/or indicated that individual aspects of daily living activities take significantly longer to perform, but did not. Based on the available information from the doctor, the prescribed professional, the panel finds it was reasonable for the ministry to not be satisfied that the doctor's opinion was that the appellant's ability to do his daily living activities is significantly restricted. Therefore, the ministry reasonably determined that this criterion was not met.

The panel notes that the doctor repeatedly identifies impacts that the appellant's physical and mental conditions have on the ability to work. As previously noted, the appellant may wish to contact the ministry about PPMB qualification, which directly relates to the inability to work.

Help to perform daily living activities

The appellant's submissions do not directly address the need for help with daily living activities.

The ministry's position is that the information does not show that help is needed due to significant restrictions in the ability to perform daily living activities.

The panel notes that direct and significant restrictions with daily living activities must first be shown to decide that help is needed as a result of significant restrictions. As the panel already found that significant restrictions with daily living activities were not shown, the panel also finds that the ministry was reasonable to decide that the help requirement is not met.

Conclusion

The panel finds that based on all of the available information, the ministry's reconsideration decision, which determined that the appellant was not eligible for PWD designation, is reasonably supported by the evidence.

The panel confirms the decision. The appellant is not successful on appeal.

Relevant Legislation

Employment and Assistance for Persons with Disabilities Act

2(1) In this section:

“assistive device” means a device designed to enable a person to perform a daily living activity that, because of a severe mental or physical impairment, the person is unable to perform;

“daily living activity” has the prescribed meaning;

“prescribed professional” has the prescribed meaning:

(2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act if the minister is satisfied that the person is in a prescribed class of persons or that the person has a severe mental or physical impairment that

- (a) in the opinion of a medical practitioner or nurse practitioner is likely to continue for at least 2 years, and
- (b) in the opinion of a prescribed professional
 - (i) directly and significantly restricts the person’s ability to perform daily living activities either
 - (A) continuously, or
 - (B) periodically for extended periods, and
 - (ii) as a result of those restrictions, the person requires help to perform those activities.

(3) For the purposes of subsection (2),

- (a) a person who has a severe mental impairment includes a person with a mental disorder, and
- (b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires
 - (i) an assistive device,
 - (ii) the significant help or supervision of another person, or
 - (iii) the services of an assistance animal.

(4) The minister may rescind a designation under subsection (2).

Employment and Assistance for Persons with Disabilities Regulation

Definitions for Act

2(1) For the purposes of the Act and this regulation, “daily living activities”,

- (a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following activities:
 - (i) prepare own meals;
 - (ii) manage personal finances;
 - (iii) shop for personal needs;
 - (iv) use public or personal transportation facilities;
 - (v) perform housework to maintain the person’s place of residence in acceptable sanitary condition;
 - (vi) move about indoors and outdoors;
 - (vii) perform personal hygiene and self-care
 - (viii) manage personal medication, and

- (b) in relation to a person who has a severe mental impairment, includes the following activities:
 - (i) make decisions about personal activities, care or finances;
 - (ii) relate to, communicate or interact with others effectively.

(2) For the purposes of the Act, “prescribed professional” means a person who is authorized under an enactment to practise the profession of

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

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Part G – Order

The panel decision is: (Check one) Unanimous By Majority

The Panel Confirms the Ministry Decision Rescinds the Ministry Decision

If the ministry decision is rescinded, is the panel decision referred back to the Minister for a decision as to amount? Yes 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

Jane Nielsen

Signature of Chair

Date (Year/Month/Day)

2024/03/10

Print Name

Margarita Papenbrock

Signature of Member

Date (Year/Month/Day)

2024/03/12

Print Name

Kevin Ash

Signature of Member

Date (Year/Month/Day)

2024/03/10