

### **Part C – Decision Under Appeal**

Under appeal is a decision of the Ministry of Social Development and Poverty Reduction (the “Ministry”) dated January 31, 2024 (the “Reconsideration Decision”) denying the Appellant Persons with Disabilities (“PWD”) designation.

The Ministry determined that the Appellant met the first 2 of 5 criteria, specifically the age and duration requirements. The basis for the denial was that the Ministry was not satisfied on the information (then) provided that:

- the Appellant has a severe mental or physical impairment,
- in the opinion of a prescribed professional, that impairment directly and significantly restricts the Appellant’s ability to perform the daily living activities set out in the legislation, and
- lacking meeting the criteria above, that the Appellant requires significant help from other persons or a device.

Additionally, The Ministry found no evidence that the Appellant was one of the prescribed classes of persons who may be eligible for the PWD designation on alternative grounds under Section 2.1 of the Regulation (defined below).

### **Part D – Relevant Legislation**

This decision cites:

*Employment and Assistance for Persons with Disabilities Act* (the “Act”):

Section 2

*Employment and Assistance for Persons with Disabilities Regulation* (the “Regulation”):

Section 2

Text of the above legislation is attached at the end of the decision.

## Part E – Summary of Facts

### Hearing Proceeding

The hearing was held in writing as requested by the Appellant. The Appellant and Ministry both provided written submissions for the hearing held on March 18, 2024.

### Background and Relevant Information

The following is a summary of the key dates and information related to this Appeal:

2023-December-29: The Appellant submitted a PWD designation application. It included Persons with Disabilities Designation Application forms as follows:

- Section 1 – Applicant Information dated 2023-September 28. The self-report in this section stated:

I have very painful varicose veins and my legs are always swollen and painful. To the point that I cannot stand for too long period my ankle and knee are always painful and tender to touch. I cannot even sit down for too long. In addition to that I have severe arthritis that affects my neck, back, shoulders and lower back.

I can still take care of myself, regardless of all pain. I cannot walk outside alone sometimes because I am very tired and depressed all the time.

- Section 2 – Medical Report dated 2023-December 21 (the “Medical Report”) and signed by the Appellant’s general practitioner (the “Doctor”).

The Medical Report shows the Appellant was diagnosed with osteoarthritis and varicose veins, and that routine use of compression stockings to alleviate pain and swelling in legs and that the impairment would continue for more than two years. In the “Functional Skills” section the Appellant was described as able to walk more than four blocks unaided, unknown capability to climb stairs unaided, able to lift 5 to 15 lbs, normal limitation on remaining seated, no difficulty communicating and no cognitive or emotional function deficits.

In the Daily Living Activity section, the Appellant was only shown as having periodic restrictions in basic housekeeping, daily shopping, mobility inside the home, and mobility outside the home. No restriction was shown for

personal care, use of transportation, management of finances or social functioning, and unknown ability to prepare meals. No explanation of “periodic” was provided, where requested on the form. It also referred to attached notes (see below).

- Section 3 – Assessor Report dated 2023-December 21 and signed by the “Doctor (the “Assessor Report”).

The Assessor Report identifies the impairment as “Chronic pain, generalized, more severe over knees, shoulders limiting prolonged activities outside of residence. It shows the following:

- “Ability to Communicate” is good.
- “Mobility and Physical Ability” lists the Appellant as independent walking indoors but “noticeably longer [compared] to before” for “ walking outdoors, climbing stairs, and standing, and needing “Periodic Assistance” for lifting, and carrying and holding (although unexplained).
- “Mental and Physical Impairment” lists the Appellant as “Moderate Impact” for Emotion but “No Impact” for bodily functions, consciousness, impulse control, insight and judgement, attention/ concentration, executive functions, memory, motivation, motor activity, language, psychotic symptoms, and others.
- “Daily Living Activities” list the Appellant as:
  - being “Independent” for personal care, reading prices and labels, making appropriate choices, and paying for purchases, safe food storage, medication, and transportation.
  - requiring “Periodic Assistance” for laundry and going to/from stores, meal planning, food preparation, cooking, paying rent and bills,
  - requiring continuing assistance for “Basic housekeeping” and “carrying purchases home”,
  - but no entries for “Social Functioning”, and
  - requiring the help of family for daily living activities including:

... help from family members for cleaning the house or major chores. Reports needing assistance from family when walking outside as gets tired easily.

- Under “Additional Information” the Doctor referred to “attached documents” as providing additional information. Also included were “Specialists consult notes and investigation results”.

The “attached notes” to the Medical Report and Assessor Report included a physician’s letter, medical reports from an internist and MRI scan, and blood tests; all unable to identify the source of the Appellant’s symptoms.

2024-January 2: The Appellant was advised of the Ministry’s denial of eligibility for PWD designation.

2024-January 24: The Appellant submitted a Request for Reconsideration.

2024-January 31: The Ministry completed its review of the Appellant’s Request for Reconsideration and again denied the Appellant a PWD designation.

2024-February-06: Notice of Appeal to this tribunal was filed.

2024-March-05: The Appellant provided a written submission that included:

- 2024-January-18 “Letter in Support of Appeal for Disability Coverage” from the Doctor (the “Doctor Letter”),
- 2024-February-22: Letter from the Appellant as written submission with a post-script statement by the Doctor (the “Appellant Letter” and “Doctor Statement”), and
- 2024-February-23: Letter from a “Resource Assistant” at a “Disability Resource Centre” (with a copy also endorsed by the Appellant) (the “Advocate Letter”).

2024-March-11: The Ministry provided a written submission.

### **Appellant Submissions**

The Appellant’s Notice of Appeal states the following as the Reasons for Appeal:

I suffer from severe neck arthritis and severe varicose veins. I don't have the ability to stand on my feet for more than an hour. My doctors have clearly reported this situation. Moreover, according to the doctors, this situation recurs daily.

The Appellant’s written submission included the Doctor Letter and Advocate Letter.

The Doctor Letter included information that the Appellant was scheduled to see a vascular surgeon in February.

The Advocate Letter included the information in the Ministry's summary below and the Doctor Statement which states:

I agree that the foregoing statement is an accurate assessment of my patient's overall condition and her current circumstances. After reviewing this information, I can confirm that [the Appellant's] physical impairments will continue to persist, and are severe enough to restrict her daily living activities to the point where she requires significant assistance or takes considerably longer than normal to perform. If there are any discrepancies noted between the information contained in this letter and [the Appellant's] PWD application, then **this letter should take precedence.** [sic- bold text in original]

The Advocate Letter cited legislation and disagreement with the Ministry's conclusions and stressed the benevolent intent of the legislation as guiding interpretation. It also stated that the Appellant faces significant restriction in 5 areas and that *Garbutt v. British Columbia (Social Development)*, 2012 BCSC 1276 established that only 2 areas were required to satisfy the legislation.

### **Ministry Submissions**

The Ministry's written submission considered the Doctor Letter and the Advocate Letter.

The Ministry summarised the Doctor Letter information as follows (bullets in original):

- More information has been provided regarding the Appellant's ability to walk unaided (takes 2-3 times longer than normal and requires frequent stops), climb stairs unaided (can manage 5+ stairs with the use of a handrail, but takes at least 2-3 times longer with frequent rests due to pain), lift, carry, and hold items (can lift 5-15 pounds but generally avoids lifting altogether as it exacerbates pain in their neck, shoulders, and lower back), and sit (unable to sit for more than one hour without experiencing significant back pain).
- More information has been provided about the increased time it takes for the Appellant to complete daily living activities, with several tasks taking at least 3 times longer due to symptoms of their medical condition. This information suggests significant limitations in personal care, basic housekeeping, meal preparation, and shopping.

- As a result of the Appellant's symptoms and limitations in performing daily living activities, they require weekly assistance with shopping and basic housekeeping, as well as continuous help with cooking. They are unable to perform physical tasks that involve bending, lifting, or standing for long periods, such as cooking. They stay home most days due to their impairments and have difficulty motivating themselves to get through the day and be productive.

The Ministry concluded its submission stating:

Had the ministry had this information at the time of reconsideration, a different decision may have been reached.

### **Admissibility of New Evidence**

Under section 22(4) of the *Act*, the Panel may admit evidence that is reasonably required for a full and fair disclosure of all matters related to the decision under appeal.

The Panel admits as evidence the "Reasons for Appeal" stated by the Appellant, the Doctor Letter, the Appellant Letter and Doctor Statement. The remainder of the Appellant's submissions and the Ministry Submissions are considered as statements or argument. Where a certain statement is relevant, and given weight that might affect findings, it is specifically mentioned in the Panel's reasons.

**Part F – Reasons for Panel Decision****Purpose and Standard of Review**

The purpose of the Panel, here, is not to redo the Reconsideration Decision under appeal. It is to review and assess whether it satisfied a standard, or benchmark, of reasonableness - even if the Panel might disagree with the outcome. The standard applied is whether the applicable laws were reasonably applied and whether the evidence was also reasonably applied in the circumstances. The evidence considered, however, is not just the evidence known at the Reconsideration Decision but includes any new or updated evidence the Panel admits. That means this decision assesses the reasonableness of the Reconsideration Decision based upon what is known now.

**Discussion of Issues**

In the Reconsideration Decision the basis for the denial was on the information (then) provided for the Ministry to be satisfied of the 3 outstanding criteria that:

- the Appellant has a severe mental or physical impairment,
- in the opinion of a prescribed professional, that impairment directly and significantly restricts the Appellant's ability to perform the daily living activities set out in the legislation, and
- lacking meeting the criteria above, that the Appellant requires significant help from other persons or a device.

This discussion will focus on those issues and accepts the other age and duration criteria as having been met, and that the Appellant does not satisfy the alternate grounds for qualification under section 2.1 of the *Regulation*.

The Appellant's application includes considerable conflicting information and information from the Doctor that would, at the time, support the Ministry's decision but the Panel must consider that all in light of the new evidence.

***Severe Mental or Physical Impairment***

Relevant to the issues is the provision under section 2(2) of the *Act* that the Ministry must be satisfied that the Appellant "has a severe ... physical impairment. Mental impairment was not at issue. At the Reconsideration Decision the Ministry was not satisfied based on the information.

"Severe" and "impairment" are not defined in the legislation but the Ministry considers the applicant's functional capabilities and the extent of any impact on daily functioning as shown by limitations with or restrictions on physical abilities and/or mental functions. The Doctor Letter updated information on the Appellant's condition and implicitly recognized the discrepancies while stating that where any were found the "letter should take

precedence". The Panel accepts the information and that statement and finds that new evidence replaces the earlier evidence to establish that the Appellant takes 2-3 times longer to walk and climb stairs, is unable to sit for longer than one hour without pain and is limited in lifting, carrying and holding due to pain. The limitation is to 5-15 pounds when unavoidable. The Panel finds that this establishes that the Appellant has a severe physical impairment.

*Restrictions to Daily Living Activities ("Activities"):*

At the Reconsideration Decision the Ministry was also not satisfied that in the opinion of the Doctor, any severe impairment directly and significantly restricted the Appellant's ability to perform the daily living activities set out in the legislation. At least two Activities must be restricted in a way that meets the requirements. The Activities that are considered are listed in the *Regulation*.

Of those listed the new information establishes that the Doctor was of the opinion that Appellant's impairment directly and significantly restricts the Appellant's ability to perform 2 or more of the listed Activities either continuously, or periodically for extended periods. Meeting those requirements is required under section 2(2)(b) of the *Act*. The new evidence established that the Appellant takes at least 3 times longer than normal to move about indoors, perform personal hygiene and self-care and takes longer or is unable to perform basic housekeeping, laundry duties, plan and cook (healthy) meals, and is unable to walk to shops or to shop.

The Panel finds that new evidence replaces the earlier evidence to establish that the Appellant had significant limitations in personal care, basic housekeeping, meal preparation, and shopping.

*Help Required with Daily Living Activities:*

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.

The Ministry determined that, as it had not been established that Activities are significantly restricted either continuously or periodically for extended periods, it also could not determine that the Appellant needs help to perform restricted Activities. However, based upon the Panel's findings above the need for assistance is relevant.

The new evidence establishes that, due to the Appellant's impairment and impact on Activities, the Appellant requires help. The evidence is that the Appellant requires continuous help with cooking and weekly assistance with shopping and basic



housekeeping to perform physical tasks involving bending, lifting, or standing for long periods. The Panel considers the weekly assistance to be periodic for extended periods.

Conclusion:

The Panel found above that the new evidence fulfills each of the 3 previously unsatisfied criteria (severity of impairment, daily living activities, and help required with daily living activities). Those findings are not determinative. Rather it is determinative that the Panel finds that the Reconsideration Decision was not reasonable when considering the new evidence.

The finding above is determinative and unaffected by the Panel finding that the Ministry, otherwise, reasonably interpreted and applied the enactments.

**Concluding Decision**

The Appellant is **successful** on appeal, the Panel having found that the Reconsideration Decision is not reasonably supported by the evidence.

Accordingly, the Panel **rescinds** the Reconsideration Decision.

## Appendix – Relevant Legislation

### *Employment and Assistance for Persons with Disabilities Act*

#### Section 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**

- (1) For the purposes of the Act and this regulation, "**daily living activities**",
- (a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following activities:
    - (i) prepare own meals;
    - (ii) manage personal finances;
    - (iii) shop for personal needs;
    - (iv) use public or personal transportation facilities;
    - (v) perform housework to maintain the person's place of residence in acceptable sanitary condition;
    - (vi) move about indoors and outdoors;
    - (vii) perform personal hygiene and self care;
    - (viii) manage personal medication, and
  - (b) in relation to a person who has a severe mental impairment, includes the following activities:
    - (i) make decisions about personal activities, care or finances;
    - (ii) relate to, communicate or interact with others effectively.
- (2) For the purposes of the Act, "**prescribed professional**" means a person who is
- (a) authorized under an enactment to practise the profession of
    - (i) medical practitioner,
    - (ii) registered psychologist,
    - (iii) registered nurse or registered psychiatric nurse,
    - (iv) occupational therapist,
    - (v) physical therapist,
    - (vi) social worker,
    - (vii) chiropractor, or
    - (viii) nurse practitioner, or
  - (b) acting in the course of the person's employment as a school psychologist by

- (i) an authority, as that term is defined in section 1 (1) of the *Independent School Act*, or
  - (ii) a board or a francophone education authority, as those terms are defined in section 1 (1) of the *School Act*,
- if qualifications in psychology are a condition of such employment.

**Alternative grounds for designation under section 2 of Act**

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

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

**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

Kent Ashby

Signature of Chair

Date (Year/Month/Day)

2024/03/19

Print Name

Rick Bizarro

Signature of Member

Date (Year/Month/Day)

2024/03/19

Print Name

Joe Rodgers

Signature of Member

Date (Year/Month/Day)

2024/03/20