

Part C – Decision Under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Poverty Reduction (“Ministry”) dated February 27, 2024. The Ministry decided that the Appellant did not meet all of the requirements of section 2 of the *Employment and Assistance for Persons with Disabilities Act* for person with disabilities designation (“PWD”). The Ministry found that the Appellant met the age, duration and severe mental or physical impairment requirements, but did not meet the following:

- the Appellant’s daily living activities are directly and significantly restricted either continuously or periodically for extended periods; and
- because of those restrictions, the Appellant needs an assistive device, significant help or supervision from another person, or needs an assistance animal.

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

Part D – Relevant Legislation

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

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

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

Part E – Summary of Facts

The appeal hearing was conducted as a written hearing on April 15, 2024.

Evidence at the time of Reconsideration

The Appellant's PWD application that includes:

- A Medical Report dated December 12, 2023 which was completed by the Appellant's doctor and who has seen the Appellant 11 times or more in the last 12 months of the PWD application. The doctor had known the Appellant for 3 years.
- An Assessor's Report dated December 11, 2023 which was completed by the Appellant's nurse and who has seen the Appellant 11 times or more in the last 12 months of the PWD application. The nurse has known the Appellant for 7 years. The Assessor's Report was completed by a home assessment and input from family/friends/caregivers.
- A Self-Report completed by the Appellant on November 12, 2023. In part, the Self-Report stated the following:
 - a) Symptoms change rapidly, most disabling symptom is the vision impairment, and also issues with balance, weakness in legs and left arm, reduced sensation w/pins and needles from sternum down to feet and in both hands, severe headaches (1-3/week) and extreme fatigue. At times, she struggles with reading, walking, balance and note dexterity is worse now due to neuropathy and weakness in hands;
 - b) frequent headaches (1-3/week), brain fog, struggle remembering how to do some basic things and forgetting things, the cognitive impairment is unpredictable, sometimes forget how to write different letters, word find, struggle with short term memory and critical thinking, and also struggles with depression and anxiety because of the symptoms that makes it challenging to work and perform essential activities.

The following reports were submitted with the PWD application:

- MRI of the brain dated July 7, 2023.
- Neurology consultation dated July 20, 2023.
- An assessment from the Appellant's neurologist dated August 23, 2023.
- Neurology consultation dated August 30, 2023.
- Imaging report of an MRI of the brain and spine dated December 29, 2023.

Request for Reconsideration dated February 10, 2024.

Diagnoses

In the Medical Report, the doctor diagnosed the Appellant with multiple sclerosis (“MS”), onset May 2023.

Health History

The doctor said the following about the Appellant’s condition:

- “The vision is impaired and preventing her from driving, working with computers. Computation is affected intermittently. The memory is somewhat affected. Has weakness and numbness in legs and arms, extreme fatigue is very limiting as well as the headaches. Urgency and frequency or voiding urine incontinence”.
- Medications and/or treatments that interfere with the ability to perform daily living activities have not been prescribed.
- No prostheses or aid are required for the impairment.

Degree and Course of Impairment

The Appellant’s impairment is likely to last 2 or more years from the date of the PWD application. “She was recommended to biological treatment, but she is still undergoing investigations. The response to treatment is unpredictable”.

Physical Impairment

The Medical Report, indicated the following about the Appellant:

- Can walk 4+ blocks unaided on a flat surface, can climb 5+ steps unaided, can lift 5-15lbs and can remain seated for 1-2 hours.

The Assessor’s Report indicated the following about the Appellant:

- Walking indoors, and standing are performed independently.
- Walking outdoors, climbing stairs, lifting and carrying/holding require periodic assistance.

Mental Impairment

The Medical Report indicated the following about the Appellant:

- There are cognitive difficulties with communication.
- There are significant deficits with cognitive and emotional function in the areas of executive, memory, emotional disturbance and attention/sustained concentration.

The Assessor Report indicated the following about the Appellant:

- Speaking and hearing are good.
- Reading and writing are satisfactory, “dependent on vision, when vision is impaired reading/writing is difficult”.

- There are moderate impacts on daily functioning with cognitive and emotional functioning in the areas of bodily functions and other psychotic symptoms.
- All other listed areas of cognitive and emotional function have minimal or no impacts.
- "Sleep disturbances due to neuropathy, bowel/bladder urgency and frequency, vision impairment, 'brain fog', coordination-balance issues".

Daily Living Activities

The Medical Report said the following about the Appellant:

- Continuous assistance is required for meal preparation, basic housekeeping and daily shopping.
- Periodic assistance is required for personal self-care, mobility inside the home, mobility outside the home and use of transportation.
- Management of medication, managements of finances and social functioning are performed independently.
- The doctor said the following about the daily living activities which require periodic assistance "unpredictable, worse with fatigue".
- "Help from husband in all aspects of activities of daily living".

Additional comments from the doctor: "the daily functioning is impaired as a result of inability to drive, minimal ability to perform household duty. The symptoms are unpredictable and worsen after minimal physical activity".

The Assessor Report said the following about the Appellant:

- All listed tasks under personal care, basic housekeeping, meals, pay rent/bills, and medications are performed independently.
- Under shopping, the Appellant requires continuous assistance with going to/from stores "unable to drive due to vision impairment", and periodic assistance with reading prices/labels. All other listed tasks under shopping are performed independently.
- Under transportation, getting in/out of a vehicle and using public transit requires periodic assistance. The task of using transit schedules and arranging transportation is performed independently.
- "Occasional assistance required when legs are very weak".
- The section on social functioning was left blank by the nurse.

The nurse provided the following additional comments: excessive fatigue, vision impairment, weakness in legs and arms, loss of sensation in hands and lower body,

neuropathy that is disruptive especially to sleep, difficulty with memory/thought processes 'brain fog', frequent headaches, and periodic balance issues/mobility issues.

Help

The Medical Report indicated that there is no requirement for any prostheses or aids for the Appellant's impairment. The Appellant's husband helps with all aspects of daily living activities.

The Assessor Report said the following about Appellant:

- She lives with family, friends, or a caregiver.
- The section about assistance from devices was left blank by the nurse.
- The Appellant does not receive assistance from assistance animals.
- Help with required daily living activities is provided by family and friends.

Evidence At Appeal

A Notice of Appeal was submitted on February 5, 2024. In it the Appellant stated that "In my last appeal letter I detailed the reasons that I feel I should be considered eligible for disability assistance. To summarize, my multiple sclerosis diagnosis has caused me to have severe physical and mental impairment which make employment very unmanageable at this time. The disease is progressing rapidly, and my symptoms are worsening. I did attach my updated MRI report as well as a list of my current symptoms in my last appeal document".

The panel found that the Notice of Appeal is the Appellant's argument and accepted it accordingly.

Additional Evidence

Prior to the hearing the Appellant submitted the following:

- An email dated March 14, 2024 which stated "In my last appeal I outlined symptoms that I'm experiencing and my reasoning for requesting reconsideration, as well as sending my updated MRI report which showed the rapid progression of my disease that I had referred to. I did have an appointment with my neurologist last week where she expressed concerned (sic) for the rapid progression of my disease and corresponding symptoms. It requires so much assistance from my support group just to get by and function day to day; I'm really not sure how I could work with my symptoms and the unpredictability day to day. I feel very fortunate to have such great friends and family, but I am also struggling in my daily life greatly and am

exhausting resources that I never would have expected or dreamed that I would have to utilize for something like this awful disease. If there are additional documents that would be helpful, I would of course do everything I can to provide them. I'm not sure if there will be anything helpful in the neurologist's report, but I could request access to it and forward it when it becomes available if it would provide any further clarity".

- Neurology consultation report dated March 7, 2024. The report described a conversation between the Appellant and her neurologist regarding her symptoms and modes of therapy.

Admissibility of Additional Information

The Ministry did not object to the admission of any additional information the Appellant submitted but did state the following: "The information provided in the written submission and neurology consultation does not provide information about the frequency and severity of restrictions and how much help is needed on a day-to-day or week-to-week basis for daily living activities".

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

The panel found that the additional information submitted prior to the hearing (the March 14, 2024 email and March 7, 2024 neurology consultation) provided additional detail or disclosed information that is required for a full and fair disclosure of all matters related to the decision under appeal. The panel has admitted this new information in accordance with s. 22(4) of the *Employment and Assistance Act*. However, the panel places little weight on the March 7, 2024 as it did not speak to the Appellant's ability to perform her daily living activities or whether help was required to perform daily living activities, which are at issue on this appeal.

Part F – Reasons for Panel Decision

The issue on appeal is whether the Ministry's reconsideration decision, which found that the Appellant is not eligible for designation as a PWD, was reasonably supported by the evidence or was a reasonable application of the legislation.

Panel Decision

In the reconsideration decision, the Ministry found that the Appellant does have a severe physical impairment. Therefore, the panel will not provide an analysis of the evidence regarding physical and mental impairment.

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

Restrictions in the ability to perform Daily Living Activities

Section 2(2)(b)(i) of the Act requires that the Minister must be satisfied that in the opinion of a prescribed professional, a severe mental or physical impairment directly and significantly restricts the Appellant's ability to perform daily living activities either continuously or periodically for extended periods. While other evidence may be considered for clarification or support, the Ministry's decision is based on the evidence from prescribed professionals. The term "directly" means that there must be a connecting link between the severe impairment and the restriction. The direct restriction must also be significant. Finally, there is a part related to time or duration – the direct and significant restriction must be either continuous or periodic. If periodic, it must be for extended periods. So, in the cases where the evidence shows that a restriction happens periodically, it is appropriate for the Ministry to ask for evidence about the duration and frequency of the restriction to be "satisfied" that it is for extended periods.

The Appellant argued that that due to complications from her physical impairment she is unable to function and complete her daily living activities.

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

In its reconsideration decision, the Ministry noted that the Medical Report indicated no assistive devices and significant fatigue, daily functioning impaired, continuous restrictions with meal prep, basic housework and daily shopping, periodic restrictions with

personal self-care, mobility, and use of transportation, and the restrictions can be unpredictable and worse with fatigue. They report that the Appellant receives help from her spouse in all aspects of DLA's.

However, when reviewing the assessment completed by the nurse through a home assessment, the information does not demonstrate direct and significant restrictions to daily living activities because they do not report how much longer it takes than average with basic mobility and physical ability and to perform each of daily living activities, and report minimal help needed or being provided with daily living activities. Therefore, the prescribed professional does not demonstrate there are significant restrictions with daily living activities continuously.

Although it is noted the symptoms can be unpredictable, with periodic assistance required with some of the daily living activities, without detailed information about the frequency and severity of restrictions and how much help is needed on a day-to-day or week-to-week basis, we are unable to establish that there are direct and significant restrictions periodically for extended periods of time.

As previously stated, the Ministry found that the March 7, 2024 neurology consultation did not provide information about the frequency and severity of restrictions and how much help is needed on a day-to-day or week-to-week basis for daily living activities

Therefore, the ministry found that there was not enough evidence to confirm that in the opinion of a prescribed professional, the severe impairment leads to direct and significant restrictions in the ability to perform daily living activities continuously or periodically for extended periods.

The panel reviewed the Ministry's reconsideration decision and the evidence as it was presented on this appeal. The panel finds that the Ministry's analysis and conclusion to deny PWD designation is not reasonably supported by the evidence or a reasonable application of the legislation.

The panel considered the Medical Report which indicated that the Appellant requires periodic assistance with personal self-care, mobility inside/outside the home, and use of transportation. The doctor indicated that the need for periodic assistance is unpredictable and worsens with fatigue. The panel finds that this evidence is not sufficient to meet the legislative requirements because it does not completely answer if the Appellant requires periodic assistance for extended periods or if the restriction is significant.

The panel also considered that the doctor indicated, by way of check marks, that the Appellant requires continuous assistance with meal preparation, basic housekeeping and daily shopping. The PWD application defines continuous assistance as “refers to needing significant help most or all of the time for an activity”. Therefore, the panel finds that the doctor confirmed that the Appellant’s ability to perform three daily living activities are directly and significantly restricted continuously. That is, the evidence supports that the Appellant has met the legislative requirements.

The Ministry argued that in the Assessor’s Report, the nurse did not demonstrate that there are significant restrictions with daily living activities continuously or periodically for extended periods. The panel notes that in *Ministry to Hudson v. Employment and Assistance Appeal Tribunal*, 2009, the Supreme Court of BC made several findings with respect to the eligibility criteria for designation as a person with disabilities. One finding was that “Either the medical practitioner or the assessor confirms that a person’s severe impairment directly and significantly restricts their ability to perform daily living activities. There is no statutory requirement for confirmation from both”. As previously indicated, in the case of the Appellant, the doctor has confirmed a continuous restriction with meal preparation, basic housekeeping and daily shopping.

The panel notes that as the superior court in British Columbia, the Supreme Court’s decision in *Hudson* is binding on the Health Assistance Branch, reconsideration adjudicators, and the Employment and Assistance Appeal Tribunal in making any decision as to whether an applicant meets the definition of ‘person with disabilities’ in the Employment and Assistance for Persons with Disabilities legislation.

For these reasons, the panel finds that the ministry was not reasonable when it found that the appellant does not have a severe physical or mental impairment that directly and significantly restricts daily living activities continuously or periodically for extended periods as is required by Section 2(2)(b) of the Act.

Help to perform Daily Living Activities

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

The Appellant stated that due to her physical impairment she needs help with daily living activities.

The Ministry argued that the Appellant does not require assistive devices or the use of assistance animals. The panel finds that the legislation does not require the uses of such to meet the legislative requirement, if the need for the significant help or supervision of another person is established.

The Ministry argued that since the legislative requirements regarding direct and significant restriction to daily living activities was not met, the need for help cannot be met. The panel finds that since a direct and significant restriction to daily living activities was met, the Ministry's analysis is no longer reasonable.

The Ministry argued that "In respect to significant help of another person, the prescribed professionals report help is needed; however, do not demonstrate significant help of another person is required to perform [daily living activities]". When considering the evidence, the doctor has indicated that the Appellant's husband provides help with all aspects of daily living activities and that this help is continuous. The nurse also confirmed that the Appellant receives help from family, friends and caregivers. In her submission prior to the hearing, the Appellant stated that "It requires so much assistance from my support group just to get by and function day to day" and "I feel very fortunate to have such great friends and family but I am also struggling in my daily life greatly and am exhausting resources that I never would have expected or dreamed that I would have to utilize for something like this awful disease". The panel finds that this evidence establishes that the Appellant requires help with her daily living activities. The panel also finds that since the husband helps the Appellant with *all* aspects of her daily living activities, that help is deemed to be significant.

Therefore, the panel finds that the Ministry did not reasonably conclude that it cannot be determined that the Appellant requires help to perform daily living activities as required by section 2(2)(b)(ii) of the Act.

Conclusion

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

Appendix A

The criteria for being designated as a PWD are set out in Section 2 of the EAPWDA as follows:

Persons with disabilities

2 (1) In this section:

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

"daily living activity" has the prescribed meaning;

"prescribed professional" has the prescribed meaning.

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

(a) in the opinion of a medical practitioner or nurse practitioner is likely to continue for at least 2 years, and

(b) in the opinion of a prescribed professional

(i) directly and significantly restricts the person's ability to perform daily living activities either

(A) continuously, or

(B) periodically for extended periods, and

(ii) as a result of those restrictions, the person requires help to perform those activities.

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

(a) a person who has a severe mental impairment includes a person with a mental disorder, and

(b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires

(i) an assistive device,

(ii) the significant help or supervision of another person, or

(iii) the services of an assistance animal.

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

The EAPWDR provides as follows:

Definitions for Act

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

(a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following

activities:

(i) prepare own meals;

(ii) manage personal finances;

(iii) shop for personal needs;

(iv) use public or personal transportation facilities;

(v) perform housework to maintain the person's place of residence in acceptable sanitary condition;

(vi) move about indoors and outdoors;

(vii) perform personal hygiene and self care;

(viii) manage personal medication, and

(b) in relation to a person who has a severe mental impairment, includes the following activities:

(i) make decisions about personal activities, care or finances;

(ii) relate to, communicate or interact with others effectively.

(2) For the purposes of the Act, "**prescribed professional**" means a person who is

(a) authorized under an enactment to practise the profession of

(i) medical practitioner,

(ii) registered psychologist,

(iii) registered nurse or registered psychiatric nurse,

(iv) occupational therapist,

(v) physical therapist,

(vi) social worker,

(vii) chiropractor, or

(viii) nurse practitioner, or

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

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

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

Alternative grounds for designation under section 2 of Act

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

(a) a person who is enrolled in Plan P (Palliative Care) under the Drug Plans Regulation, B.C. Reg. 73/2015;

(b) a person who has at any time been determined to be eligible to be the subject of payments made through the Ministry of Children and Family Development's At Home Program;

(c) a person who has at any time been determined by Community Living British Columbia to be eligible to receive community living support under the *Community Living Authority Act*;

(d) a person whose family has at any time been determined by Community Living British Columbia to be eligible to receive community living support under the *Community Living Authority Act* to assist that family in caring for the person;

(e) a person who is considered to be disabled under section 42 (2) of the *Canada Pension Plan*

Part G – Order

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

The Panel Confirms the Ministry Decision Rescinds the Ministry Decision

If the ministry decision is rescinded, is the panel decision referred back
to the Minister for a decision as to amount? Yes No

Legislative Authority for the Decision:

Employment and Assistance Act

Section 24(1)(a) or Section 24(1)(b)

Section 24(2)(a) or Section 24(2)(b)

Part H – Signatures

Print Name

Neena Keram

Signature of Chair

Date: 2024/04/17

Print Name

Kulwant Bal

Signature of Member

Date: 2024/04/17

Print Name

Mary Chell

Signature of Member

Date: 2024/04/17