

Part C – Decision Under Appeal

The decision under appeal is the Ministry of Social Development and Poverty Reduction (“Ministry”) reconsideration decision dated April 3, 2024, denying persons with disabilities (“PWD”) designation.

The Ministry found the Appellant met the age (over 18) and duration (likely to last more than two years) requirements. However, the Ministry found the Appellant did not meet the requirements for:

- severe mental or physical impairment
- significant restriction on the ability to perform daily living activities
- needing significant help to perform daily living activities.

The Ministry found the Appellant was not one of the prescribed classes of persons eligible for PWD on alternative grounds. As there was no information or argument on this point, the Panel considers it not to be an issue in this appeal.

Part D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Act (“Act”), s. 2
Employment and Assistance for Persons with Disabilities Regulation (“Regulation”), s. 2
Employment and Assistance Act, s. 22(4)

Full text of the Legislation is in the Schedule of Legislation at the end of the decision.

Part E – Summary of Facts

The hearing took place by telephone. The Appellant's daughter attended as witness and support person.

Evidence Before the Ministry at Reconsideration:

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

- Medical Report and Assessor Report dated October 18, 2023, completed by the Appellant's Doctor.
- Letter from the Doctor dated March 21, 2024.

Medical Report:

The Doctor states that the Appellant has been their patient since 2018 and they have seen her between 2 and 10 times in the past 12 months.

Diagnosis:

The Doctor provides the following diagnoses:

- Thoracic outlet syndrome (onset as teenager)
- Fibromyalgia (onset January 2014)
- Transient ischemic attack (onset January 2022)
- Mood disorder and depression (onset January 2022).

Health History:

The Doctor states:

- *Patient with history of severe motor vehicle accident with residual cervical spine stenosis with resultant thoracic outlet syndrome. This leads to weakness and chronic pain of upper arms.*
- *Diagnosis of fibromyalgia with persistent general malaise and fatigue.*
- *Recent episodes of [transient ischemic attacks] with resultant weakness/vertigo.*

Degree and Course of Impairment:

The Doctor states: "*chronic progressive disorders with reduced mobility and generalized fatigue/weakness.*"

Functional Skills:

The Doctor indicates that the Appellant can:

- Walk unaided on a flat surface for 1 to 2 blocks

- Climb 2 to 5 stairs unaided
- Lift 5 to 15 lbs.

The Doctor indicates that the Appellant has no limitations in remaining seated, and no difficulties with communication. The Doctor indicates that the Appellant has significant deficits with cognitive and emotional functioning in the areas of emotional disturbance, motivation and attention or sustained concentration. They state: *"patient with chronic, progressive medical conditions with resultant major affective disorder (depression)."*

Assessor Report:

Mental or Physical Impairment:

The Doctor lists the following impairments:

- Fibromyalgia
- Thoracic outlet syndrome
- Chronic pain syndrome
- Depression
- Recent vertigo/possible TIA?

Mobility and Physical Ability:

The Doctor indicates that the Appellant needs periodic assistance from another person for walking indoors and outdoors, climbing stairs, lifting, carrying and holding. They add: *"Patient with thoracic outlet syndrome + fibromyalgia - affects all [activities of daily living] and results in longer to complete all [activities of daily living]."*

Cognitive and Emotional Functioning:

The Doctor indicates that the Appellant's mental impairment has a major impact on the following areas of functioning:

- Emotion
- Executive function
- Memory.

They indicate moderate impact on bodily functions, consciousness, insight and judgement, attention/concentration and motivation. They indicate minimal impact on impulse control and motor activity. They state: *"Patient with major affective disorder as a consequence of her physical conditions affecting outlined activities above."*

Daily Living Activities:

The Doctor indicates that the Appellant needs periodic assistance from another person and takes significantly longer than typical for:

- Personal care: dressing

- Basic Housekeeping and laundry
- Shopping: carrying purchases home.

The Doctor states: *"Fibromyalgia and [thoracic outlet syndrome] interfered with dressing – takes longer than normal to complete."* They go on to comment: *"Patient requires assistance from family members on a daily basis to help complete above activities as outlined."*

With respect to Social Functioning, the Doctor indicates that the Appellant needs periodic support/supervision for making appropriate social decisions, developing and maintaining relationships and dealing appropriately with unexpected demands. For those areas, the Doctor states: *"with depression – at times is socially withdrawn."* They indicate marginal functioning with immediate social network (partner, family, friends), commenting *"recent divorce"* and *"common-law partner helps when able."*

Assistance Provided for Applicant:

The Doctor indicates that help required for daily living activities is provided by family and friends.

Doctor's Letter, March 21, 2024:

The Doctor states: *"This confirms that the above patient is unfit for employment at this time. She is awaiting Specialist appointment, and only once cleared by them, will she be fit to return to work."*

Additional Evidence:

Appellant's Daughter:

At the hearing, the Appellant's daughter said:

- She had to go pick up the Appellant from her place of work when the Appellant lost all her motor skills.
- She helps the Appellant by doing things like driving her places, walking her dog and helping her get dressed.
- Sometimes the Appellant cannot take phone calls because she does not comprehend what is being said.
- The Appellant needs help with most day-to-day skills, and the doctors have not figured out what is wrong.

In answer to questions from the Panel, the Appellant's daughter said:

- How much longer than typical the Appellant takes for mobility depends on how her day is going.
- The Appellant may fall randomly when walking down the stairs.
- It takes the Appellant quite a while to get her shoes on, and sometimes she cannot grip the key to open the door or hold a toothbrush.
- The Appellant cannot bend to get into the daughter's small car so they have to use the Appellant's SUV.
- The Appellant's mental impairment affects her in every way – the day after she has had a conversation, she will forget that she had it.
- It seems that sometimes the Appellant's "brain doesn't work" – she "blacks out", or she thinks she is talking but is only saying gibberish, or she goes to grab something and cannot do it.
- Being unable to do simple things affects the Appellant's mental health.
- The Appellant has moved into an RV on the property where the daughter lives, and the daughter helps her with activities every day.
- The Appellant has good days and bad days – in an average week, the Appellant has 4 or 5 bad days.
- The daughter is "constantly" coming to help the Appellant and gets 5 to 10 calls a day to come help her with different activities.

Appellant:

At the hearing, the Appellant said:

- She had to stop working one day when her "motor skills stopped" and her speech became slurred. Her employer called her daughter to come pick her up.
- Some days she wakes up and cannot move her hands.
- She does not drive because she is worried about her legs, her hands, and her vision.
- She cannot work, she does not have enough money to pay her bills, and she had to move out of the house she rented for many years, because she could not afford the rent on income assistance.
- Financial stress triggers her symptoms.
- She knows what she is trying to say, but can't say the words, and cannot remember what was said ten minutes ago.

In answer to questions from the Panel, the Appellant said:

- The Doctor does not know if her symptoms are from a head injury she suffered in a motor vehicle accident when she was a teenager, or some other cause.
- She has been waiting a year for an appointment to see a neurologist, to get a diagnosis.

- If she walks more than a block or two, she may end up having to call her daughter to come get her, because she gets dizzy, or forgets where she is.
- She cannot carry groceries; her daughter has to lift them for her.
- She cannot vacuum, and for laundry, she can put clothes into the washer, but cannot lift them into the dryer or hang them up to dry.
- Her ex-husband used to help, now her daughter helps, and she has lost her social network because of her mental impairment.

Admissibility of Additional Evidence:

The Ministry did not object to the additional oral evidence of the Appellant and her daughter. The evidence provides further details about the Appellant's mental and physical impairments, and the help she receives to perform daily living activities. Therefore, the Panel finds that the additional evidence is reasonably required for the full and fair disclosure of all matters in the appeal. Therefore, the Panel finds that the additional evidence is admissible under the Employment and Assistance Act, s. 22(4).

Part F – Reasons for Panel Decision

The issue on appeal is whether the Ministry's decision denying the Appellant PWD designation is reasonably supported by the evidence or is a reasonable application of the legislation. The Ministry found the Appellant met the age (over 18) and duration (likely to last more than two years) requirements. However, the Ministry found the Appellant did not meet the requirements for:

- severe mental or physical impairment
- significant restriction on the ability to perform daily living activities
- needing significant help to perform daily living activities.

Appellant's Position:

The Appellant says that she meets the criteria for PWD designation. She says that her physical and mental impairments are severe, she struggles to perform many daily living activities, and she needs significant help from her daughter to perform those activities. The Appellant says that she needs disability assistance because she cannot work, she is not able to pay her bills, and she could not afford the rent on her previous home.

Ministry Position:*Physical Impairment:*

The Ministry maintains that the Appellant's physical impairment is moderate, rather than severe. The Ministry notes that the Doctor does not describe how often the Appellant needs assistance from other people, or how much longer than typical the Appellant takes, for the aspects of mobility listed on the Assessor Report. Therefore, the Ministry says it cannot determine if those limitations are a significant restriction to the Appellant's overall level of functioning.

Mental Impairment:

The Ministry acknowledges that the Appellant experiences depression because of her physical condition but says that the information provided does not establish a severe mental impairment.

Daily Living Activities:

The Ministry says that the information provided by the Doctor does not establish that a severe impairment significantly restricts daily living activities continuously or periodically for extended periods. The Ministry notes that the Doctor does not describe how often the Appellant needs periodic assistance or how much longer it takes her to manage the daily

living activities the Doctor identifies as restricted due to impairments. Therefore, the Ministry says that it cannot determine if the Appellant has significant restrictions to her overall level of functioning.

Help with Daily Living Activities:

The Ministry says that, as it has not been established that daily living activities are significantly restricted either continuously or periodically for extended periods, it cannot be determined that the Appellant requires help to perform those 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. People often think of “disability” in terms of being able to work at employment. However, the ability to work at employment is not one of the considerations in determining PWD designation. When the inability to work is the major reason for applying for PWD designation, the Panel encourages applicants 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 Mental or Physical Impairment

“Severe” and “impairment” are not defined in the legislation. The Ministry considers the extent of any impact on daily functioning as shown by limitations with or restrictions on physical abilities and/or mental functions. The Panel finds that an assessment of severity based on physical and mental functioning including any restrictions is a reasonable application of the legislation.

A medical practitioner's description of a condition as "severe" is not determinative. The Minister must make this determination considering the relevant evidence and legal principles.

1. Physical Impairment:

The Panel finds that the Ministry was not reasonable in its determination that, based on the information in the Doctor's reports, the Appellant's physical impairment is moderate rather than severe.

The Doctor provides diagnoses of thoracic outlet syndrome, fibromyalgia, vertigo, depression, chronic pain syndrome and fibromyalgia. The Appellant may be experiencing transient ischemic attacks. She is waiting for a consultation with a neurologist to provide further diagnoses.

The Doctor identifies symptoms of weakness and pain in the upper arms, persistent fatigue, weakness and vertigo. They say that thoracic outlet syndrome and fibromyalgia affect all activities of daily living, and as a result the Appellant takes longer to complete all activities. At reconsideration the Ministry acknowledged that the Appellant required significant assistance from another person and takes significantly longer than typical for all aspects of mobility listed on the Assessor Report, except standing. However, the Ministry noted that the Doctor did not provide details of how much longer the Appellant takes, or what assistance she needs, to manage mobility.

At the hearing, the Appellant and her daughter provided additional details of the impairments identified by the Doctor. The Appellant calls on her daughter 5 to 10 times a day for help with everything from putting on her shoes, to opening a door. The Appellant says that some days, she wakes up and cannot move her hands. The Appellant's daughter says that the Appellant needs help with "most day-to-day skills", everything from tying her shoes to using a key to open a door. While the Doctor indicated that the Appellant can walk 1 to 2 blocks, the Appellant explained that, if she walks more than that, she would have to call someone to come pick her up, because she gets dizzy. While the Doctor indicated that the Appellant can climb 2 to 5 stairs, the Appellant's daughter explained that the Appellant also falls down stairs "randomly". The Panel finds that it would not be reasonable to consider the level of physical function the Doctor indicates, without also considering the Doctor's statements about the Appellant's vertigo, which significantly restricts her ability to move about indoors and outdoors.

Considering the whole of the evidence of the Appellant's level of functioning, including the additional oral evidence at the hearing, the Panel finds that the Ministry's determination that the Appellant's physical impairment is moderate, is not reasonable.

2. Mental Impairment:

The Panel finds that the Ministry was not reasonable in its determination that the information provided does not indicate a severe mental impairment.

The Doctor has identified a major affective disorder, specifically depression, with major impact on emotion, executive function, and memory. They indicate moderate impact on bodily functions, consciousness, insight, judgement, attention, concentration, and motivation. Again, the Appellant and her daughter have provided additional detail about the mental impairments identified by the Doctor. They describe the Appellant's inability to remember conversations, or going out for a walk and forgetting where she is.

There are some inconsistencies between the Doctor's diagnoses and the assessment of daily living activities that might be expected to be affected by a severe mental impairment. For example, the Doctor indicates that the Appellant is independent in paying rent and bills, managing medications and planning meals. At reconsideration, the Ministry appears to have placed greater weight on the assessment of these daily living activities, when determining the severity of the Appellant's mental impairment.

The Panel finds that the additional evidence at the hearing provides further detail about the extent of the mental impairment identified by the Doctor. The Panel places greater weight on the consistency between the Doctor's diagnoses, the indication of major impacts on emotion, memory and executive function, and the evidence of the Appellant and her daughter. For example, the Doctor indicates major impact on memory; the Appellant and her daughter confirm that the Appellant may not remember a conversation that happened 10 minutes ago. The daughter says that sometimes her mother cannot manage a phone call because she does not understand what is being said. They both say that it seems sometimes the Appellant's "brain doesn't work". The Doctor also indicates that the Appellant has only marginal functioning with her immediate social network. It is clear that the Appellant is only able to function with frequent support from her daughter every day.

Therefore, the Panel finds that the evidence establishes that the Appellant has a severe mental impairment. Considering the additional evidence at the hearing, the Ministry's

determination that the Appellant does not have a severe mental impairment is not reasonably supported by the evidence.

Restrictions to Daily Living Activities (Activities):

A prescribed professional must provide an opinion that the applicant's impairment restricts the ability to perform the daily living activities ("Activities") listed in the legislation. The Activities that are considered are listed in the Regulation. Those Activities are:

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

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

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

At least two Activities must be restricted in a way that meets the requirements. Not all Activities, or even the majority, need to be restricted. The inability to work and financial need are not listed as Activities and are only relevant to the extent that they impact listed Activities.

The restrictions to Activities must be significant and caused by the impairment. This means that the restriction must be to a great extent and that not being able to do the Activities without a lot of help or support will have a large impact on the person's life.

The restrictions also must be continuous or periodic. Continuous means the activity is generally restricted all the time. A periodic restriction must be for extended periods meaning frequent or for longer periods of time. For example, the activity is restricted most days of the week, or for the whole day on the days that the person cannot do the activity without help or support. To figure out if a periodic restriction is for extended periods, it is reasonable to look for information on the duration or frequency of the restriction.

The Medical Report and Assessor Report also have activities that are listed, and though they do not match the list in the Regulation exactly, they generally cover the same activities. The Medical Report and Assessor Report provide the professional with an opportunity to provide additional details on the applicant's restrictions.

The Panel finds that the information provided by the Doctor confirms direct and significant restrictions to the Appellant's ability to perform the following Activities:

- Perform housework to maintain the person's place of residence in acceptable sanitary condition:
 - The Doctor indicates that the Appellant takes significantly longer than typical and needs periodic help from another person for laundry and basic housework.
 - The Appellant is not able to do basic household tasks such as operate a vacuum, take clothes from the washer to the dryer, or hang clothes to dry.
 - The Appellant's daughter comes 5 to 10 times a day to help the Appellant with most daily chores.
- Perform personal hygiene and self care:
 - The Appellant takes significantly longer than typical and needs periodic assistance from another person to get dressed.
- Move about indoors and outdoors:
 - The Doctor indicates that the Appellant takes significantly longer than typical, and needs periodic help from another person, for walking indoors and outdoors, climbing stairs, lifting, carrying, and holding.
 - The Appellant falls down stairs "randomly", and while she can walk around the block, she often has to sit down on the curb and call someone to pick her up because she gets dizzy or forgets where she is.

The Appellant's daughter advised that the Appellant needs more help, or takes more time to perform Activities, depending on whether she is having a bad day, and the Appellant has a bad day on average 4 or 5 days a week. Given that for the majority of the week the Appellant would be requiring the help of her daughter, the Panel finds that the Appellant's ability to perform these Activities is significantly restricted periodically for extended periods.

Considering the whole of the medical evidence, including the additional evidence provided by the Appellant and her daughter, the Panel finds that the Ministry was not reasonable in its determination that the Appellant is not directly and significantly restricted in her ability to perform Activities.

Help Required:

A prescribed professional must provide an opinion that the person needs help to perform the restricted Activities. Help means using an assistive device, the significant help or supervision of another person, or using an assistance animal to perform the restricted Activities. An assistive device is something designed to let the person perform restricted Activities.

The Panel has found that the Ministry was not reasonable in determining that the Appellant was not directly and significantly restricted in her ability to perform two or more Activities. The Panel also finds that the Ministry was also not reasonable in determining that it could not find that the Appellant needs help to perform those Activities.

The Doctor indicated that the Appellant receives help from family and friends to perform Activities. The Appellant's daughter described the daily help she provides to the Appellant, getting 5 to 10 calls a day for assistance. The Appellant has moved to the property where her daughter lives, so that her daughter can help her more easily. The Panel finds that the Appellant requires significant help from another person to perform Activities.

Conclusion:

The Panel finds that the Ministry's decision to deny the Appellant PWD designation was not reasonably supported by the evidence. The Panel rescinds the reconsideration decision. The Appellant is successful in the appeal.

Schedule – Relevant Legislation

Employment and Assistance for Persons with Disabilities Act

Persons with disabilities

s. 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

s.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.

Employment and Assistance Act

s. 22 (4) A panel may consider evidence that is not part of the record as the panel considers is reasonably required for a full and fair disclosure of all matters related to the decision under appeal.

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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
Susan Ferguson

Signature of Chair

Date (Year/Month/Day)
2024/05/11

Print Name
Richard Franklin

Signature of Member

Date (Year/Month/Day)
2024/05/11

Print Name
Melissa McLean

Signature of Member

Date (Year/Month/Day)
2024/05/11