

Part C – Decision Under Appeal

The Appellant appealed the Reconsideration Decision of the Ministry of Social Development and Poverty Reduction (the “Ministry”) dated May 6, 2024, denying him a Persons with Disabilities (“PWD”) designation (the “Reconsideration Decision”).

The Ministry determined that the Appellant met the first 2 of 5 legislated criteria, specifically the age and duration requirements. The basis for the denial was that the Ministry was not satisfied that the information met 3 of the established criteria:

- 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
- 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 *Employment and Assistance for Persons with Disabilities Regulation*.

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

Section 2.1

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 person (with one panel member attending remotely) as requested by the Appellant. An advocate attended with the Appellant (consistent with the notice filed). A witness for the Appellant attended and, after giving evidence, remained to provide support to the Appellant. The Ministry was represented and attended remotely.

Background and Relevant Information

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

2024-February-22: The Ministry received the Appellant's application for PWD designation. It included Persons with Disabilities Designation Application forms as follows:

- Section 1 – Applicant Information dated 2024-January-03 that included:
 - Under “Disabling Condition” seeking a description of the applicant’s disability:
 - The Appellant described having broken his neck in 3 spots, a rotator cuff injury, lower back problems, and ripped ligaments from above the knee down to his toes.
 - He described previously having to use crutches after an MVA, refusing to go on disability but returning to work in 2017 until 2021 when he “ripped” his shoulder, and then later needing reattachment of a severed index finger.
 - He also described his financial distress and the impact on his life.
- Section 2 – Medical Report dated 2024-January-10 (the “Medical Report”) and signed by the Appellant's medical general practitioner (the “Doctor”) of 18 years. It shows the Appellant's diagnoses, health history, and the assessment of functional skills and restrictions to daily living activities.
- Section 3 – Assessor Report dated 2024-January-10 (the “Assessor Report”) signed by the Doctor. The Assessor Report was predominantly on one form, but a second form of the same date provided a small number of additional information (although largely blank). That information is combined and addressed as one single form below.

2024-February-28: The Ministry denied the Appellant's application.

2024-April- 22: The Appellant submitted a Request for Reconsideration that the Ministry accepted based upon late receipt of notice of the denial. It included:

- A note from the Appellant outlining his belief that there was a lack of “fair consideration to my physician’s written reporting”, seeking consideration of the

attached further evidence (below). The note described the Appellant's disabling conditions, their effects and impact on his physical functioning, and assistance required stating:

... I do receive considerable supports from my roommate, [the witness] and community service providers, [local] community services... and [local foodbank. My mental and physical conditions make assistance and instrumental daily activities, such as planning, staying on schedule, and following process for accessing resources (which are particularly important given my barriers of ability to obtain or maintain employment income) necessary. The community navigator [named], has assisted with much of these processes and written communication (including this request). [My roommate] assists with day-to-day organization and planning, as well as daily tasks where my energy levels or pain management meet their limitations (that is when pain incurred in the normal body movement required to complete tasks or my exhaustion becomes too much to continue). The need to seek, request, and accept this level of support demonstrates further the limitations of my health conditions in performing daily required and expected tasks.

- Two WorkSafe BC letters dated 2022-December-08 (the "WorkSafe BC Letters") summarizing discussion about the Appellant's permanent disability benefits for separate injuries as follows:
 - left shoulder injuries with a functional impairment calculation of 21.87% after inclusion of an age adaptability factor, and calculation of loss of earnings, and
 - left hand injuries with a functional impairment calculation of 2.53% after inclusion of an age adaptability factor, and calculation of loss of earnings.
- An undated *Medical Examination for Impairment Assessment* by a physician from records, enclosed with the 2022-December-08 letter.

2024-May-06: The Ministry completed its Reconsideration and again denied the Appellant a PWD designation with reasons in which it determined that the Appellant met the age and duration criteria but:

- Did not have a severe mental or physical impairment.
- The impairment does not significantly restrict his ability to perform daily living activities.
- The Appellant did not require significant help to perform daily living activities.

It also found that the Appellant had not demonstrated being a person in a prescribed class eligible for the PWD designation on alternative grounds, as set out in section 2.1 of the Regulation.

2024-May-24: Notice of Appeal to this tribunal was filed. It included:

- The "Reasons for Appeal", which states:

Because I've got a broken neck in 3 spots. Work safe wrote off my shoulder and arm. With a broken neck and migraines that's all documented I don't understand why I'm not getting disability right now. I'm going to lose my house.

- 2024-May-30 note entitled “NON-DRUG Rx – work fitness” from the Doctor (the “Rx Note”).

Admissibility of New Evidence

Under section 22(4) of the *Employment and Assistance 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.

Any testimony that is admitted as relevant and given weight to possibly affect the finding is specifically mentioned in the Panel’s reasons. The Panel specifically admits as evidence the following documents submitted by the Appellant at the hearing without objection by the Ministry:

- The Rx Note, which states:

This patient has many old injuries that affect his health. These include back injuries from mva, torn tendon injuries left lower leg, a foreign body (a sewing needle), left 2 and 3rd toe injury, left rotator cuff injury, cervical spine injury from mva, migraines, ADHD, osteoarthritis both hands, anxiety, insomnia, fatigue. I hope this information may help you.

- Two letters, provided shortly before the hearing, from a Registered Social Worker (the “RSW”) as follows arising from a referral from the Doctor (and community support workers) as follows (the “RSW Letters”):
 - 2024-April-22 letter detailing:
 - The Doctor’s diagnosis of “ADHD, generalized anxiety disorder, and chronic neck pain”
 - Physical limitations for which he received continuous assistance from “a neighbour in the building” only able to use one arm and has no feeling in one finger affecting ability to -
 - wash the floor
 - tie shoes
 - reach things, do laundry, or wash dishes
 - Cognitive limitations due to “ADHD as well as Anxiety which explains why he struggles with this level of impairment” with:
 - Support with transportation by “neighbour”.
 - Being “very disorganized” and difficulty completing forms.
 - Social functioning and isolation from hostility.
 - Forgotten bathing and grooming.
 - “Migraines/headaches approximately four times a week to the point of nausea, spinning, and holds fetal position in the dark until they are done. Has cold sweats. They last for many hours at a time.”

- Daily Living Activities - stating:

Basic Housekeeping – [Neighbour] lives in his building and does all of his cleaning all the time.

Transportation - used to ride a motorcycle and can no longer. Takes the bus when he can and often misses the bus and food goes bad. Often unable to drive due to pain and neck. Also asks friend [the witness] to support him. ...

Finances -... he would often forget to pay in time. Ex. Has had hydro shut off multiple times. He is currently in arrears of all house bills and needs support with finding financial options and prioritizing payments.

Shopping - ... uses his backpack but struggles to put it on and carry it. [The witness] does his shopping whenever possible to support him as he is physically restricted as well as forgets to get the things he needs ...

Communication - holding phone up to ear makes shoulder hurt ... adapt[s] with speaker phone. Due to ADHD, changes topics, goes off topic and is hard to concentrate on a task.

Medication Management - avoids pain medication due to fear of addiction. Often forgets medication until his ADHD is feeling unmanaged and he remembers he has forgotten to take it/purchase it.

Meals - Often (multiple days a week) forgets to eat and will get "grumpy" and realize its food he needs. He gets support from [the witness] to have adequate food in the home.

Social functioning - isolating, feeling a burden to those around him. Needs ongoing support from Social Worker to navigate resources and applications. Feels depressed and would rather stay home daily. Can become hostile to community members. Ex. the doctor.

- Help required with daily living activities – that the Appellant gets daily ongoing support from the witness, adding:

... comment that although not being able to work does not qualify you for PWD, it can reflect the severity of his physical and cognitive limitations he has experienced for the past few years and will continue to experience. ... In my opinion, there are significant and ongoing challenges he is facing in his day-to-day life that would qualify him for a PWD designation.

- 2024-June-13 letter providing an update since the prior letter, above:

- The Doctor's diagnosis of "ADHD, generalized anxiety disorder, and chronic neck pain"

Migraines -an average of 4 migraines per week lasting many hours and then followed by a day or so recovery. He has a prescription for medication, but it costs approximately \$30 per pill and approx. \$120/week and is unable to pay resulting in unresolved pain that lasts over 50 percent of his week. Today he missed his counselling appointment due to a migraine. He has a history of missed appointments and his friend was supportive in coordinating these for him.

Headaches/Chronic Pain - he has ongoing headaches from his neck pain that are always present with flares. ...

Social- His one supportive relationship has ended, and he lacks even more support than he has needed. According to him, this is due to him "burdening" her with his care needs (she is a care aid), depending on her financially, and being unable to sexually perform...

Financial - he is close to having hydro cut off and ... at risk of losing his housing ...

Appellant Submissions

The Appellant, through his witness, testimony and his Advocate, reviewed that the witness has known the Appellant for about 30 years, the history of his injuries documented in the WorkSafe BC Letters, his MVA causing reinjury, limitations and support including that the Appellant:

- has continuous pain,
- has migraines at least 4 days a week and lasting for hours requiring isolation and cool, including putting his head on the side of the toilet to cool his head,
- has difficulty with household tasks relying upon the witness for basic housekeeping and laundry,
- relies upon the witness as his "Girl Friday",
- has mental health difficulties with mood which also causes him to isolate and caused the witness to leave (although she has returned) and other social problems,
- misses appointments, forgets tasks and self-care including hygiene, and
- has difficulty with loss of self-reliance and feeling "like a man".

Ministry Submissions

The Ministry reviewed the reasons in the Reconsideration Decision and then the new evidence. The representative stated that the Reconsideration Decision was reasonable based upon the evidence at the time, but that had the new evidence been available the decision would likely result in approval rather than denial.

The representative considered that with that evidence the Appellant met the criteria for a PWD designation. The representative specifically referred to the frequency and duration of the migraines as satisfying the criteria as severe impairment. Also cited were the Rx Note and the RSW Letters as support of an opinion that those impairments directly and significantly restrict the Appellant's daily living activities as required arising from this inability to perform basic housekeeping, forgetfulness to perform hygiene and grooming, and his 5 significant deficits in cognitive and social functioning. Finally, the representative considered that, as a result, there was sufficient evidence that the Appellant needs the assistance of a person to perform those activities.

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

The purpose of the Panel is not to redo the Reconsideration Decision under appeal or decide whether it agrees with the Ministry's decision. It is to decide whether the Ministry did, or did not, reasonably come to the decision it made. The standard applied is whether the applicable laws were reasonably applied and whether the evidence was also reasonably applied in the circumstances. However, any new or updated evidence the Panel admits is considered as if the Ministry knew it at the time. 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 that the Ministry was not satisfied that 3 of the 5 criteria were met. The 3 outstanding criteria were 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 the 3 criteria. The Panel accepts the 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.

Severe Physical and Mental Impairment

The Appellant's new evidence provides additional information from the Doctor and RSW, that the Panel considers changes the outcome, as does the Ministry's representative. Section 2(2) of the *Act* states that the Ministry must be satisfied that the Appellant "has a severe mental or physical impairment".

In the Reconsideration Decision, the Ministry preferred the information from the Doctor because it was more recent than the Work Safe BC Letters. The Ministry found that the Doctor's report failed to establish severe physical or mental impairment. The Ministry also found the resulting restrictions on daily living activities were inconsistent with severe impairment. However, both the Doctor and RSW identified migraines as among the impairments in addition to the permanent disabilities and chronic pain.

Considering the evidence the Panel finds that it was unreasonable for the Ministry to not be satisfied that the Appellant has a severe mental or physical impairment when the prescribed professional expressed that this was the case and identified that he suffers from physical injuries, ADHD, anxiety, migraines, and chronic pain syndrome. These were seen as comorbidities, not separated ailments, with the RSW stating that the Appellant's "ADHD as well as Anxiety ... explains why he struggles with [the described] level of impairment."

The Panel considers that it would be unreasonable to disregard the RSW's description of the "severity of [the Appellant's] physical and cognitive limitations ...[as] significant and ongoing challenges he is facing in his day-to-day life that would qualify him for a PWD designation.". The Panel also finds that it was unreasonable that the ministry was not satisfied based upon the frequency and duration of migraines alone, and the Panel endorses the Ministry representative's specific recognition that they satisfied the criteria.

The Panel also finds it unreasonable for the Ministry to have not been satisfied that the Appellant has a severe mental impairment given the Doctor's identification that the Appellant suffered "significant deficits with cognitive and emotional function" in the 5 identified areas coupled with an express diagnosis of ADHD and anxiety. The 5 identified areas were:

- Emotional disturbance (e.g. depression, anxiety),
- Motivation (loss of initiative or interest),
- Impulse control,
- Motor activity (goal oriented activity, agitation [underlined by Doctor], repetitive behaviour), and
- Attention or sustained concentration.

The Panel can find no basis or rationale upon which the Ministry was not satisfied that this number and level of "significant deficits with cognitive and emotional function", as identified by the Doctor, were not a severe mental impairment. Accordingly, the Panel finds that the Ministry's determination that the Appellant does not have severe mental or physical impairment is not reasonably supported by the evidence.

Restrictions in the Ability to Perform Daily Living Activities

The next criterion at issue is whether it was reasonable for the Ministry to not be satisfied that "in the opinion of a prescribed professional" the impairment "directly and significantly restricts the person's ability to perform daily living activities either (A) continuously, or (B) periodically for extended periods". Here the Ministry stated, in its reasons:

Considering your medical history, it is reasonable to expect that you would encounter some restrictions to your ability to perform daily living activities and require assistance as a result. However, the ministry finds

there is not enough evidence to confirm that your impairment *significantly* restricts your ability to perform your daily living activities *continuously or periodically for extended periods*.

That reason misstates the standard. The standard is whether the Ministry is satisfied that a prescribing professional had the opinion, not that the Ministry had the opinion. There was nothing in the evidence to suggest that the prescribing professionals did not hold their stated opinions in good faith or were not opinions within the scope of their profession. Viewed as a whole, the evidence is overwhelming that the Appellant requires reminders about hygiene, assistance with some dressing, assistance and reminders with organization, appointments, and taking of medication, assistance with basic housekeeping, washing dishes and laundry, when suffering migraines, and relief or accommodation with isolation. In the Panel's view, using a foot on a towel to wash floors and using a stick to unload laundry (whenever the Appellant remembers to do such things) is not independence and requires assistance.

Accordingly, the Panel finds that it was unreasonable for the Ministry's determination that the Appellant's severe mental or physical impairment did not significantly restrict his ability to perform daily living activities continuously or periodically for extended periods.

Help to Perform Daily Living Activities

Each of those daily living activities requires, in the opinion of a prescribed professional, the assistance of a person. The RSW described the Appellant as "requiring ongoing assistance", and at that time receiving "continuous assistance" from the witness. The witness's testimony that upon her return to the Appellant's house, she found that it required substantial housekeeping (and as of the hearing, still required more). This highlights the need for support and is enhanced by the indeterminate nature of that relationship.

The RSW's statement that the Appellant's "significant and ongoing challenges" rise to the level to "qualify him for a PWD designation" is not determinative of whether the Appellant is granted that designation. However, it discloses that the RSW, as a prescribed professional, has the opinion that the impairments directly and significantly restrict the Appellant's daily living activities as discussed above, and that help of another person is required to perform those daily living activities. Considering the evidence, it is unreasonable for the Ministry to not be satisfied that a prescribed professional holds that as a professional opinion.

Conclusion

In the Panel's view, the Ministry did not reasonably apply the legislation in its Reconsideration Decision by misapplying the standard under section 2(2)(b) of the Act. The panel also finds that considering the previous and new evidence together it was

unreasonable for the Ministry to have found that the Appellant did not meet the final 3 of the 5 criteria, specifically that:

- the Appellant did not suffer from a severe physical or mental impairment,
- the Ministry was not satisfied that in the opinion of a prescribed professional, the impairment directly and significantly restricts the Appellant's ability to perform the daily living activities set out in the legislation, and
- as a result of those restrictions the Appellant did not require help to perform daily living activities.

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 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

Kent Ashby

Signature of Chair

Date (Year/Month/Day)

2024/06/18

Print Name

Jan Broocke

Signature of Member

Date (Year/Month/Day)

2024/06/18

Print Name

Wes Nelson

Signature of Member

Date (Year/Month/Day)

2024/06/18