

Part C – Decision Under Appeal

The Appellant appealed a Reconsideration Decision of the Ministry of Social Development and Poverty Reduction (the “Ministry”) dated March 21, 2024, that denied him a Persons with Disabilities (“PWD”) designation (the “Reconsideration Decision”).

The Ministry determined that the Appellant met only the first 2 of 5 legislated criteria to qualify. He met the age and duration requirements, but the Ministry was not satisfied that the remaining 3 criteria were met, specifically stating that:

- He did “not have a severe physical or mental impairment.”
- His “impairment does not significantly restrict [his]ability to perform daily living activities.”
- He did “not require significant help or supervision of another person to perform daily living activities restricted by [his] impairment.”

Additionally, the Ministry determined that the Appellant had not demonstrated being 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 but with the Ministry attending remotely. An advocate attended with the Appellant.

Background and Summary of Relevant Information

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

2024-January-04: 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 2023-November-15 that included saying:

I have COPD ... I... require 3 breaks when walking one city block. ... I need to take a break and rest [illegible] going up one flight of stairs. ... I avoid going out [where possible] ... I am constantly tired, I cough a lot throughout the evening, thus disrupting my sleep patterns.

- Section 2 – Medical Report dated 2023-December-20 that concludes with the statement: “This report (and attached documents) contains my findings and considered opinion at this time” (the “Medical Report”). It was signed by a medical practitioner (the “Doctor”) after one appointment.
- Section 3 – Assessor Report dated 2023-December-14 that concludes with the same statement, as above, designating it as opinion (the “Assessor Report”). It was signed by a Registered Social Worker (the “First Social Worker”) after one appointment .

2024-February-01: The Ministry denied the Appellant’s application.

2024-March-07: The Ministry received the Appellant’s Request for Reconsideration.

2024-March-21: The Ministry completed its Reconsideration and again denied PWD designation stating that the Appellant met the age and duration criteria but not the remaining 3 criteria regarding severity of impairment, restriction of daily living activities, and requirement for help. 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*.

The Reconsideration Decision addressed each of the 3 unmet criteria as follows:

3. SEVERITY OF THE IMPAIRMENT: Does the information from the application establish that the applicant has a severe physical and/or mental impairment?

In setting out the background the Ministry:

- **quoted the Doctor, from the Medical Report, as saying that the Appellant:**

...Has had progression of symptoms [of COPD and Interstitial Lung disease] and twice hospitalized for pneumonia. Actively severely limited by shortness of breath, fatigue, and cough.

He requires daily inhaled medication to maintain current activity.

- **noted that in the Assessor Report the First Social Worker:**

... indicates the physical impairments that impact your ability to manage daily living activities are [that] you have COPD and Interstitial Lung Disease.

- **described an issue with the Medical Report and Assessor Report stating:**

It is important to note that your application for Persons with Disabilities Designation is problematic because both the medical practitioner and social worker have indicated this was the first contact with you and would not have had an opportunity to develop an opinion based upon the history of contact, experience, observations, and knowledge of you.

Under the sub-heading “Physical functioning” the Ministry:

- identified a conflict between the Assessor Report indicating that the Appellant used a cane, and the Medical Report indicating no requirement of “aids for their impairment”;
- cited the Doctor in the Medical Report as saying:

- You can walk less than one block unaided on a flat surface.
- You can climb 5+ steps unaided.
- You can lift 15 to 35 lbs.
- There is no limitation on how long you can remain seated.

... Severe limitation of cardiorespiratory reserve, such that any physical exertion is limited.

... Would be unable to manage ADL's independently.

- indicated that the First Social Worker in the Assessor Report described the Appellant as “independently able to manage” lifting, carrying and holding, but using a cane in the community and having transportation difficulties; and
- concluded that “... the assessments provided by your medical practitioner and social worker speak to a *moderate* rather than a *severe* physical impairment” (italics in original).

Under the sub-heading “Mental functioning” the Ministry also found that the Appellant did not have a *severe mental* impairment. The Ministry:

- identified the conflict between the Doctor answering “No” to whether there were any significant deficits with cognitive and emotional functioning, and the First Social Worker indicating that there was one major, one moderate and one minor impact, with no difficulty with the tools of communication; and
- stated that in the Assessor Report the First Social Worker identified that the Appellant:
 - “can independently manage ... social functioning”
 - Has “very disrupted functioning with [his] immediate social network and marginal functioning with [his] extended social networks” but the First Social Worker did not indicate any help was required.

The Ministry also set out a “Criterion Summary” that is discussed further below.

4. DAILY LIVING ACTIVITIES: Does the information establish that the impairment directly and significantly restricts daily living activities continuously or periodically for extended periods?

Yes No

Referring to the Medical Report Section F the Ministry says that the Doctor indicates the Appellant has “Marked restrictions in all physical activities”.

It also compared the description of the daily living activities in the Medical Report with the Assessor Report . In the first form the Doctor indicated that the Appellant was continuously restricted for 7 of the 10 listed daily living activities. In the latter form the First Social Worker indicated the Appellant was independent in those physical activities but added:

... except for using an assistive device and taking longer than typical to manage going to and from stores, carrying purchases home, getting out of a vehicle, and using public transportation.

.... Client uses a cane in the community. Needs transportation to get home after grocery shopping. Can't carry groceries. [... Client can't] walk long distances, can't do stairs. Needs to sit and rest. Can stand for a max 15 minutes with assistance. Endures coughing fits.

[Section D Additional Comments – conjoined]

.... Client has COPD, pulmonary fibrotic changes and bronchiectasis. Client is currently homeless. His COPD is exasperated due to his living situation.

[Section F Additional Information]

The Ministry also set out a “Criterion Summary” that is discussed further below.

5. HELP REQUIRED WITH DAILY LIVING ACTIVITIES: Does the information establish that to perform the directly and significantly restricted daily living activities the person requires:

- an assistive device
- the significant help of another person; or
- the services of an assistance animal?

Yes No

The Ministry identified that:

- the Medical Report did not say what assistance was needed for the 7 daily living activities listed as continuously restricted ; and
- the Assessor Report says that the Appellant was independent but was restricted in daily living activities requiring the use of a cane and transportation.

The Ministry also set out a “Criterion Summary” that is discussed further below.

2024-March-26: Notice of Appeal was filed with this Tribunal. Attached as the “Reasons for Appeal” were:

- 2024-March-06 memorandum from the Appellant (the “March 6th Memo”) in which he:
 - Questioned the denial when approved for disability elsewhere in Canada, and “DRS and counsellor and front line staff agree”.
 - Identified that, where he used to live, he:
 - Took breaks halfway up each flight of stairs of 2-3 minutes increasing to 5 minutes and 10 minutes afterward and use of an inhaler.
 - Couldn’t climb the added stairs to access laundry facilities.
 - Had difficulty using the communal kitchen and store food.
 - Can lift 35 lb but not “carry it far or up any stairs”.
 - Used a cane, which he no longer had, after 2 were broken and 2 stolen.
 - Has coughing fits every night requiring a bathroom break and use of an inhaler.
- 2024-March-25 memorandum from the Appellant “To: Ministry SSD” (the “March 25th Memo”) outlining why he had to start living in a car, the attendant problems, and that he:
 - sleeps 2-3 hours at a time,
 - has limited access to hygiene facilities, and
 - has worsening health that he fears will end with hospitalization.

2024-June-28: The Appellant filed a submission (copied to the Ministry) with Appellant’s argument and 3 documents as follows:

- 2024-June-10 letter from the Doctor (the “Doctor’s Letter”) which included:

... [That the Appellant] experiences regular coughing fits 6-12 times throughout each day ... [and] is woken up by a coughing fit at least 3 times per night, which severely impacts his sleep and compounds his fatigue symptoms.

...he is completely physically incapacitated during a coughing fit. During, and for at least 5-10 minutes following... [The Appellant] is unable to manage any physical functioning or daily activities. Further, he relies on the continuous use of his prescription inhalers to allow him to do any of the following:

Walking: ...able to walk less than one block...[while] needing to take 2-3 breaks...

Stairs: ... able to do approximately 5 stairs before needing to rest ...[an ability] continuously impacted by this lung disease.

Lifting/Holding/Carrying: ... able to lift up to 30 lbs ... for a very short period and not in a safe manner as he is unable to bend to lift... unable to carry anything over 5-7 lbs ... for any meaningful amount of time.

Standing: ... only stand for 5-10 minutes

Transfer: ...takes significantly longer (approximately 5 times) to transfer to and from a chair or vehicle to avoid getting lightheaded.

...

Personal Care: ... would benefit from the continuous use of a shower seat and grab bars to keep him safe while bathing. [He] reports that dressing takes him 10 times longer than it did previous to his disabilities.

Shopping: ...He requires the continuous assistance of others to get to/from the store and carry his groceries. ...

Meals:...motivation and energy levels [render him] continuously unable to do meal planning or food preparation tasks at least four days per week...

... I find [the Appellant] to have a severe disability, which continuously impacts his ability to complete several daily living activities, to the extent that he requires the assistance of others and would benefit from the use of a cane, grab bars, potentially other mobility supports bracket shower seat and bracket. He will likely require the use of continuous supplementary oxygen as his disease progresses.

- **2024-June-21 letter (the "Second Social Worker Letter") from a Registered Social Worker (the "Second Social Worker") which reiterated the information from the Doctor and added:**

Housekeeping and laundry: ...

- ... unable to lift and carry a full laundry basket without assistance ... often avoids laundry tasks.
- ... takes several breaks to catch his breath when cleaning...

Meals: ...

- ... currently relies on a community food kitchen to provide all of his meals.
- 2024-June-25 email from the Second Social Worker stating that the Appellant had 9 consultations with social workers (including with her - 2 by phone and one in-clinic) “all of which have allowed us to gather more fulsome information on the extent of [the Appellant’s] disabilities”.

Appellant Submissions at Hearing

The Appellant, through his advocate, presented his case.

The Appellant reviewed the support for the Appellant’s diagnosis in the Medical Report and the Assessor Report and the circumstances of obtaining the Doctor’s Letter and Second Social Worker’s Letter. The Appellant stated that the letters should be admitted and given greater weight than earlier evidence because they are more recent and the latter arose from multiple consultations with social workers. The Appellant addressed the unmet criteria highlighting the new evidence as satisfying the deficiencies the Ministry identified. This included the following:

Criterion 3. Severity of the Impairment (quoting excerpt from the Doctor’s Letter)

[The Appellant’s] primary symptoms include shortness of breath, chronic fatigue, and malaise. [He] experiences regular coughing fits 6-12 times throughout each day, which he struggles to recover from. He is incapacitated during these fits until he is able to expel enough mucous and phlegm to allow him to catch his breath. Each of these coughing fits lasts up to 5 minutes, after which he must rest for at least another 5 minutes before he can resume any functionality

Criterion 4. Daily Living Activities

The additional evidence:

- confirms that the Appellant is continuously restricted in 7 out of the 10 daily living activities with “marked restrictions in all physical activities”; and
- detailed the number of minutes or how many times longer it takes to perform daily living activities.

Criterion 5. Help Required with Daily Living Activities

There is no conflict between the Medical Report and the Assessor Report concerning use of devices and help of others because of the following.

- At the time the Appellant didn’t have them through breakage and theft, so the Doctor was correct to say that on that day he didn’t use what he didn’t have, but the Doctor did say he would benefit from them.

- The Doctor's Letter specifically identified that the Appellant would benefit from assistive devices (cane, shower seat and grab bars) and from the help of other people including for transportation and grocery delivery.
- The First Social Worker indicated the use of a cane, need for transportation for shopping, and corroboration in the Doctor's Letter resolves any previously perceived conflict.

The Appellant also cited *Hudson v. British Columbia (Employment and Assistance Appeal Tribunal)*, 2009 BCSC 1461 (*Hudson*) as holding, among other things:

- There is no statutory requirement that more than two daily living activities be restricted.
- Evidence must be reviewed in full, including narrative portions, and failure to tick a specific box should be considered in the broader context.
- For a person to have a severe impairment that directly and significantly restricts their ability to perform daily living activities, it is sufficient that:
 - 2 or more daily living activities are affected in that manner; and
 - either the medical practitioner or the assessor confirms that restriction; or
 - read together they confirm that restriction.
- Any ambiguity in the interpretation of the *Act* must be found in favour of the applicant.

Ministry Submissions

The Ministry reviewed the reasons in the Reconsideration Decision and then the new evidence. The Ministry stated that had the new evidence been available when the Reconsideration Decision was made it would likely have approved the application.

The Ministry considered that with that evidence the Appellant met the criteria for a PWD designation. The Ministry specifically referred to the use of a cane, the frequency and duration of the coughing fits, and to the specific number of minutes or how many times longer tasks take to perform 7 of 10 listed daily living activities as cited by the Appellant.

The Ministry also acknowledged that the decision was problematic where it stated that an important issue was that the prescribed professionals were presenting opinions formed after only one meeting with the Appellant.

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. Evidence that the Panel admits is admitted on that basis.

Neither party objected to the admissibility of the other's evidence identified. The Panel admits as evidence the 2024-March-06 and 2024-March-25 memos submitted with the Notice of Appeal, and those submitted by the Appellant on 2024-June-28, specifically the email, the Doctor's Letter, and the Second Social Worker's Letter.

Any testimony that is admitted as relevant and given weight to possibly affect the finding is specifically mentioned in these reasons.

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 of the Appellant. 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, as set out in section 2(2) the *Act*, are summarized as follows:

Criterion 3. - the Appellant has a severe mental or physical impairment,

Criterion 4. - 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

Criterion 5. - the Appellant requires help from a device, or significant help from other persons, to perform the daily living activities .

This discussion will focus on the 3 criteria. The parties did not contest 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*. The Panel does not address these.

Analytic Approach -Background

The Ministry's analytic approach and the criteria used in the Reconsideration Decision are properly disclosed in that decision, but the Panel finds that not all conform to the legislation governing persons with disabilities designation.

The first concern is found in the following statement (underline added):

It is important to note that your application for Persons with Disabilities Designation is problematic because both the medical practitioner and social worker have indicated this was the first contact with you and would not have had an opportunity to develop an opinion based upon the history of contact, experience, observations, and knowledge of you.

The Panel finds no basis for the Ministry to add a burden onto the applicant (and the prescribed professional) to have an unspecified multiple of visits. This is particularly problematic where it is common to have infrequent visits or not have a regular health care provider.

It is necessary and implicit in the *Act* that the opinions of prescribed professionals are treated as expert opinions and their professionalism is relied upon. Indeed, under section 2(2)(a) and (b) of the *Act*, the requirement is that the Ministry be satisfied that "in the opinion of a prescribed professional" certain diagnoses, conditions or restrictions exist, showing that the criteria are met.

The Panel finds no support in any of the enactments for the Ministry, on the stated circumstances, to consider the opinions as unprofessionally or inexpertly given and to disregard them irrespective of the number of visits. As professionals and experts, the prescribed professionals are duty bound to only provide opinions after determining that they have sufficient information. The fact that an opinion was provided after one appointment is an unreasonable basis, alone, to question its validity, or to disregard it (however where comparing opinions it may reasonably be a factor).

The Panel finds no basis for the Ministry to give its own or reject the medical opinion unless it is invalidated or inadequate. Without providing an exhaustive description, an opinion may be invalid or inadequate where it is patently unreasonable, or fails to state an opinion but provides only information that is insufficient or unsupported to disclose the expert's opinion. The latter is not rare, where the Section 2 – Medical Report and Section 3 -Assessor Report are substantially incomplete when read together.

None of those issues were suggested here. For clarity, however, there are factors that the Ministry may weigh to be "satisfied that ... in the opinion of" the specified expert(s) the patient's impairments directly and significantly restrict their ability to perform daily living activities as required to meet the criteria. This arises where there is inconsistency or insufficient information set out in opinions provided as part of the evidence. These issues might reasonably be resolved by consideration of factors such as the number, frequency or recency of contacts. However, as set out in *Hudson*, the opinion of only one specified expert is required to satisfy the legislative criteria, so conflict between 2 experts need not always be resolved and may be considered in the broader context of the evidence.

In this matter, the Panel finds no basis for the Ministry to:

- diminish and not give due weight to the prescribed professionals' opinions due to the opinions arising from single visits, or

- substitute its assessment of the information in the opinions rather than, as specified in the *Act*, to determine whether it was satisfied that the prescribed professionals held the opinions that certain requirements were met.

That finding applies to the assessment of Criterion 3, 4, and 5.

Analytic Approach – Criterion 4. Daily Living Activities

The third analytic approach of concern pertains to section 2(2)(b)(i) of the *Act*. There the assessment is to be whether the Minister is also satisfied that a person, who has been found to have a severe mental or physical impairment, is:

- (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...

In the Reconsideration Decision the Ministry presents it differently.

- In the heading for Criterion 4 it asked – as the evaluative criteria:

Does the information establish that the impairment directly and significantly restricts daily living activities continuously or periodically for extended periods?

- In the “Criterion Summary” for that assessment it stated:

The ministry relies on the medical opinion and expertise from your medical practitioner and social worker 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. ...

Those expressions problematically suggest that the Ministry is conducting its own evaluation of the evidence and impact, rather than whether it is satisfied that “in the opinion of the prescribed professional” those restrictions exist. There is no evidence to support that the Ministry is considering whether an opinion is invalid, or inadequate within the parameters discussed above such as whether the evidence discloses the opinion of the prescribed professional, need to resolve conflict between opinions etc.

These suggest that the Ministry is not conducting the assessment as empowered by the *Act*.

Analytic Approach – Criterion 5. Help Required with Daily Living Activities

The fourth analytic approach of concern pertains to assessment of Criterion 5 under section 2(2)(b)(ii) of the *Act*. It is the last criterion in the sequence and is that the Ministry is satisfied that “in the opinion of a prescribed professional ... as a result of [the directly and

significantly restricted daily living activities] the person requires help to perform those activities.”

Both Criterion 4 and 5 are established if the Ministry is satisfied that a specified third party has a specific opinion. However, in the Reconsideration Decision the Ministry presents the assessment differently.

- In the heading for Criterion 5 it asked – as the evaluative criteria:

Does the information establish that to perform the directly and significantly restricted daily living activities the person requires:

- an assistive device
- the significant help of another person; or
- the services of an assistance animal?

- In the “Criterion Summary” used for Criterion 5 the Ministry stated:

It has not been established that daily living activities are significantly restricted either continuously or periodically for extended periods (criterion 4); therefore, it cannot be determined that significant help is required from other persons or an assistive device or assistance animal. The use of a simple assistance device such as a cane does not establish a significant restriction to physical functioning.

Again, it shows the Ministry changing the assessment from whether the Minister is satisfied about an opinion to instead conducting its own evaluation of the evidence and impact. It also inserts a quantitative measure on the level of reliance on an “assistive device” (and possibly for an assistance animal) which does not exist in the *Act*. The quantitative measure is only applicable to help needed from another person as underlined below. The *Act* states in section 2(3) (with underlining added):

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

(a)...

(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.

While Criterion 5 is dependant upon Criterion 4 also being met the standard is not that significant help is required in all categories under section 2(3)(b). Nor does it invoke assessment of Criterion 4 again as disclosed by the statement: “assistance device such as a cane does not establish a *significant* restriction to physical functioning.” That quoted phrase is from the Reconsideration Decision (with the emphasis shown) as part of explaining why it determined Criterion 5 was not met.

The Panel finds that here, the Ministry considered factors beyond those it was empowered to assess under section 2(3)(b) of the Act.

Panel's Analysis of Criterion 3. Severity of the Impairment

In this matter, the Appellant is diagnosed with COPD, an Interstitial Lung Disease, and an inguinal hernia. The Ministry determined these physical impairments were moderate based upon the Medical Report and Assessor Report.

While Criterion 3 is whether the Ministry is satisfied on the evidence, the evidence from the Doctor and the First Social Worker disclosed the severity of the Appellant's diagnosis and symptoms, and his significant functional deficits. The Panel finds that it was unreasonable for the Ministry to give little or no weight to that information. Giving that little to no weight was found in the Ministry's description of the information as problematic because it arose after first appointments. Irrespective of the finding above, the Panel also finds that, considering the new evidence, it would not be reasonable for the Ministry to be unsatisfied that the Appellant has a severe mental or physical impairment.

In making this finding the Panel considered that the Appellant has the 3 diagnoses, and the severity is indicated in the identified sections of the Medical Report below:

- C-Health History" (showing symptoms and intensity of management of them)
 - ... Activity severely limited by shortness of breath, fatigue, and cough.
 - He requires daily inhaled medication to maintain current activity.
- E-Functional Skills" – "Functional Skills Comment":
 - Severe limitation of cardiorespiratory reserve, such that any physical exertion is limited.

The Panel also considered the functional impairment. In the Medical Report the Doctor stated the following in the identified sections:

- "F- Daily Living Activities"
 - "Yes" – in response to: "Does the impairment directly restrict the person's ability to perform Daily Living Activities?"
 - "Yes" with "Continuous" restriction for 7 of the 10 listed daily living activities (which corresponds to a majority of the defined list of "Daily Living Activities" in section 2(1) of the Act – and is more than one as required by Hudson).
 - "Marked restrictions in all physical activities", in the additional comments regarding the degree of restriction.

- “G-Additional Comment” re “additional information ... relevant to an understanding of the significance of the person’s health condition, the nature and extent of [his] impairment...”:
 - *“Would be unable to manage ADL’s independently”.*

In the Doctor’s Letter the Appellant’s “Functional Skills” are presented with numerical limits for multiple daily living activities. These are quoted above as the Doctor’s opinion and include stating that the Appellant has a “severe disability, which continuously impacts his ability to complete several daily living activities” and requires help. Additionally, the Appellant is described as physical incapacitated for 5-10 minutes from 6-12 times a day, even without considering the other stamina related restrictions.

The Assessor Report from the First Social Worker and the Second Social Worker Letter, together provide similar confirming information.

Given the foregoing, the Panel finds it is unreasonable for the Ministry to not be satisfied that the Appellant had a severe physical impairment.

As to severity of mental impairment, again, as an evaluation under Criterion 3 the question is whether the Ministry is satisfied on the evidence that the Appellant has a severe mental impairment. The best evidence is in the Assessor Report describing the Appellant’s cognitive and emotional function as being affected in 3 of the listed impacts as “Major” (Bodily functions- with sleep disturbance underlined), “Moderate” (Motivation), and “Minimal” (Insight and Judgement). The impact on relationships was identified as “very disrupted functioning” with the immediate social network. The information is open to the Ministry’s interpretation under Criterion 3 and, in the Panel’s view, its analysis falls within the range of reasonable outcomes. Accordingly, the Panel finds that it was reasonable for the Ministry to decide that it was not satisfied that Criterion 3 was met in respect of mental impairment.

Panel’s Analysis of Criterion 4. Daily Living Activities

Based upon Criterion 3 being met, in assessing Criterion 4 the question for the Panel is whether it was reasonable that the Ministry was not satisfied that “ in the opinion of a prescribed professional” the physical or mental impairments:

- (i) directly and significantly restricts the person's ability to perform daily living activities either
 - (A) continuously, or
 - (B) periodically for extended periods...

As discussed above the Panel finds the Ministry’s analytical approach to Criterion 4 was in error and not a reasonable application of the enactment. Irrespective of that the Panel

finds that, considering the new evidence, that it is unreasonable for the Ministry to have not been satisfied that the Appellant has a severe mental or physical impairment.

In terms for whether the Reconsideration Decision was reasonably supported by the evidence the Panel finds that it was not. While there was conflict between the Medical Report and the Assessor Report on the level of independence, the finding by the Panel is based upon also considering the new evidence. Considering all the evidence it is clear that the Doctor and the Second Social Worker have, and express, an opinion that meets the criteria in section 2(2)(b) of the *Act*, namely that the appellant's daily living activities are restricted either continuously or periodically for extended periods. The new Doctor's Letter provides an express opinion:

It is my professional opinion that [the Appellant's] impairments restrict his functional skills, including his ability to: walk, climb stairs, lift, carry, and stand. effectively, appropriately, or for a reasonable duration. [He] has had success with a cane in the past and would benefit from the continuous use of a new one to help him with all areas of mobility and with all activities requiring mobility, after which he must rest for at least another 5 minutes before he can resume any functionality.

This was supported by the Doctor stating specific number of minutes or how many times longer tasks take to perform functional skills, and 7 of 10 listed daily living activities being continuously restricted (where the Panel notes that, according to *Hudson*, 2 would be sufficient). This includes stating that the Appellant:

- is incapacitated from coughing fits for 10 minutes 6 to 12 times each day, during which he must use his hand to physically retract a painful inguinal hernia;
- has significantly decreased capacity for physical exertion;
- needs 2-3 breaks to walk a block;
- is unable to safely hold anything over 5-7 lbs for any meaningful time;
- takes 10 times longer than normal to dress;
- is unable to carry a laundry basket;
- requires help from others to get to/from shopping and to carry purchases;
- is unable to make meals at least 4 days a week; and
- takes approximately 5 times longer to transfer to and from a chair or vehicle to avoid getting lightheaded.

In view of the extensive list of hinderances, the Panel finds that the Ministry was unreasonable to consider that the appellant not having met the legislated standards for restrictions to daily living activities.

Panel's Analysis of Criterion 5. Help Required with Daily Living Activities

As discussed above the Panel finds the Ministry's analytical approach to Criterion 5 was in error to the extent that it considered that the help from an assistive device must be "significant" rather than that, in the opinion of a prescribed professional, "the person requires":

- (i) an assistive device,
- (ii) the significant help or supervision of another person, or
- (iii) the services of an assistance animal.

In terms for whether the Reconsideration Decision was reasonably supported by the evidence the Panel finds that it was unreasonable of the Ministry to not find Criterion 5 was met. This is because the description of the benefit offered by the devices recommended by the doctor as for safety made it clear that they were required. Even the apparent use by the Ministry of "significant" as a measure, the compromise to safety is significant. That need was also reinforced by the statement that the Appellant is physically incapacitated for 5-10 minutes from 6-12 times a day, even without considering the other stamina related restrictions.

Additionally, the evidence disclosed the opinion of the Doctor was that the Appellant required an inhaler for each of the many coughing fits, and to "maintain current activity" already at a state where the Doctor states that Appellant "Would be able to manage ALRs' independently." This identifies that the opinion was that the inhaler is a required "Assistive Device" necessary for breathing and to perform a daily living activity. Treating an inhaler, in this circumstance, as an assistive device is consistent with the definition in section 2(1) of the Act which states:

"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;

The First Social Worker also identified assistance of friends was needed and, in several places that:

Client uses a cane in the community. Needs transportation to get home after grocery shopping. Can't carry groceries.

The Second Social Worker described the "nature of assistance [the Appellant] requires" stating that the Appellant:

- Personal Care: would benefit from the continuous use of grab bars and a shower seat to assist with this activity [showering].
- Housekeeping and laundry:would benefit from the continuous support of others or a service in order to effectively complete his housekeeping tasks.
- Shopping:would benefit from the support of a grocery delivery service or program [substantial?]

- Meals: currently relies on a community food kitchen to provide all of his meals. - [substantial?]

Again, some of these are safety related and others link assistance to the 7 daily living activities listed in the Medical Report as continuously restricted.

Considering all the above, the Panel finds that it is unreasonable for the Ministry to have not been satisfied that in the opinion of at least one of the prescribed professionals, the Appellant required at least one of the following – all of which were expressly or implicitly stated as required: the use of a cane, the use of an inhaler, use of showering safety aids, and the significant help of another person.

Also, the Panel finds that the Ministry's analytical approach did not reasonably apply the enactment when the Ministry provided its opinion on the information to the exclusion of the opinion of the prescribed professional when assessing Criterion 4.

Concluding Decision

The Appellant is **successful** on appeal, the Panel having found that the Reconsideration Decision is not:

- (a) reasonably supported by the evidence; and
- (b) a reasonable application of the applicable enactment in the circumstances of the person appealing the decision.

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)

2024/07/23

Print Name

Emily Drown

Signature of Member

Date (Year/Month/Day)

2024/07/23

Print Name

Corrie Campbell

Signature of Member

Date (Year/Month/Day)

2024/07/23