

Part C – Decision Under Appeal

The decision under appeal is the Ministry of Social Development and Poverty Reduction (“the Ministry”) Reconsideration Decision dated August 13, 2024, which determined the Appellant was not eligible for the Persons with Disabilities (“PWD”) designation because she did not meet three of the five criteria. The Ministry was satisfied she met the age and duration criteria but was not satisfied that she met the following criteria:

- Severe mental or physical impairment;
- Impairment directly and significantly restricts daily living activities; and,
- Help needed with daily living activities as a result of significant restriction.

The Ministry found it had not been demonstrated that the Appellant is 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. As there is 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 (“the Act”), section 2

Employment and Assistance for Persons with Disabilities Regulation (“the Regulation”), sections 2 and 2.1

Relevant sections of the legislation can be found in the Schedule of Legislation at the end of this decision.

Part E – Summary of Facts

The hearing took place on August 30, 2024 as an in person hearing.

Background**Persons with Disabilities Designation Application (June 28, 2024)****Self Report (April 18, 2024)**

The Appellant describes her disability as follows:

- Chronic bilateral pinched nerves that stem from her neck down her arms and fingertips;
- She has itching tingling, numbness;
- X-rays show shifts in her spine (C4d C5 over C6); and
- Pain began 2020 to the present.
- She feels tired, physically weak, anxious, depressed, has trouble falling asleep and problems with memory and concentration. Her mood is directly correlated with her pain. Momentary relief from a type of treatment (e.g., massage) makes her happier, lighter and excited about life. She is also effective at managing stress.
- The Appellant cannot afford treatments at present. She says various professionals (physio, massage, acupuncture, etc.,) help her, but relief is ultimately a bandage.
- She has tried heat, cold, painkillers, resting, nerve flossing, yoga, some gentle muscle training (which helps) along with countless other methods recommended by professionals, all of which she has given above average effort to obtain limited results.
- She is only 25 years old. Applying for PWD is her last resort. She desires to succeed in this world but has no physical ability to do so. She has tried different jobs over four years, each one leaving her more hurt than if she were not working at all. This includes jobs where she stands or sits, but she gets flares (of pain) doing nothing, too. It has taken her four years to come to terms with the challenges of living with her disability.

In response to the question “How does your disability affect your life/ability to take care of yourself?” the Appellant reports:

- It affects her life tremendously.
- Physically: She went from being able to effortlessly lift 100s of pounds to now. She needs two hands to lift a small cast iron pan, or her wrist and arm flare up. She needs three pillow to sleep at night, yet she still struggles to sleep and wakes up in even more pain in the morning. Her body tenses when she sits, stands, or does

something or does nothing. She feels constant pulling in her muscles, joint pain, and nerve sensations.

- Emotionally: Her mood has gravely shifted since her pain started. She used to be full of energy and radiance, but now feels depressed constantly. Her motivation has fallen away. She lost most of her friendships. She feels irritable most of the time.
- Mentally: She feels as though she is going insane, as no matter what she does she is in perpetual pain. She is so young, yet so debilitated. She struggles with this truth most of her day. This has caused her to become very anxious and hopeless. She struggles to focus and remember things.
- Ultimately, she can take care of herself, but it is hard and requires the full capacity of her energy each day. Not only does she find it impossible to work because of this, but she can no longer do the things she loves. She can no longer dance, train, or become a registered massage therapist which has always been her dream. She feels tired and tapped out.

Medical Report (April 24, 2024, completed by the Appellant's doctor ("Dr. A"))

Diagnosis

- Cervical Radiculopathy (Chronic) – onset 2020.

Health History

- Dr. A states:

Patient suffers bilateral arm/hand pain, shooting in nature and some neck pain, L>R, for 4 years. Pain unremitting over four years, average severity 6/10. Will have flares above baseline pain to 8/10 pain about every two weeks that will last hours to days. Pain makes it not possible for patient to lift more than 15 lbs, perform repetitive movements with her arms, affects everything and causes difficulty with writing. Living with chronic pain also causes depression symptoms, affecting patient's ability to concentrate and to motivate herself to go about her day.

- Dr. A says the Appellant has not been prescribed any medications that interfere with her ability to perform daily activities, nor does she require any prosthesis or aids.

Degree and Course of Impairment

- Dr. A writes "Uncertain. Further specialist consultation is pending."

Functional Skills

- Appellant:
 - Can walk on a flat surface 4+ blocks unaided.
 - Can climb 5+ stairs unaided.

- Can lift 2 – 7 kg.
- Can remain seated 1 – 2 hours.
- Has no difficulty with communication.
- Has cognitive emotional function deficits in the areas of:
 - Emotional disturbance (e.g., depression anxiety);
 - Motivation (loss of initiative or interest); and,
 - Attention or sustained concentration.
- Dr. A reports that the Appellant notes a distinct relationship between pain and mental health, challenges with being unable to enjoy her activities or exercise, and feelings of hopelessness.

Daily Living Activities (“DLA”)

- Dr. A reports the following activities are restricted continuously: meal preparation and basic housework, and that no restrictions are indicated for the other DLAs.
- Regarding the degree of restriction, Dr. A reports, “Patient unable to chop vegetables, lift pots or cook beyond simple meals. Unable to mop or vacuum.”
- Regarding assistance the patient needs with DLAs, the doctor reports: “Patient’s partner assists with all the above activities or she will only cook simple meals.”

Additional Comments

- Dr. A reports that the chronicity of the patient’s condition is challenging for the patient to cope with and leads to worsening of mental health. The combination of depression and chronic pain leads to the dysfunction noted above.

Frequency of Contact

- Dr. A indicates that they have known the patient since June 2015 and have seen her 2 – 10 times in the past year.

Assessor Report, April 18, 2024 (completed by a Registered Nurse (“the Nurse”), first contact with the Appellant).

Living Environment

- Nurse indicates that the Appellant lives with family, friends or a caregiver.

Mental or Physical Impairment

Brief Summary Mental or Physical Impairments:

- Nurse indicates that the Appellant needs two hands to lift a cast iron pan and has maximum lifting of 15 pounds, which causes weakness, fatigue, numbness, tingling, itching nerve pain (8/10), negative mood/emotions/focus.

Ability to Communicate

- Nurse indicates writing is poor, reading is satisfactory and speaking and hearing are good. Writing is indicated as weak, causing numbness, tingling, and pain.

Mobility and Physical Ability

- Nurse reports lifting and carrying take significantly longer than typical; no details are provided.
- Walking indoors and outdoors, climbing stairs and standing are independent.

Cognitive and Emotional Functioning

- Nurse reports Emotion (e.g., excessive or inappropriate anxiety: depression, etc.,) has a major impact on daily functioning.
- Bodily functions, attention/concentration, motivation, have a moderate impact.
- Memory and other emotion or mental problems have a minimal impact.
- No impact is reported for consciousness, impulse control, insight and judgement, executive (e.g., planning, organizing, sequencing, etc.,) motor activity, language, psychotic symptoms, other neuropsychological problems.

Daily Living Activities

-Personal Care

- Nurse indicates the Appellant is independent for all aspects of personal care.

-Basic Housekeeping

- Nurse indicates the Appellant is independent with Laundry, requires continuous assistance with Basic Housekeeping (vacuuming, mopping).

-Shopping

- Nurse indicates Appellant is independent with all aspects except requires continuous assistance for carrying purchases home if (they are) over 15 pounds.

-Meals

- Nurse indicates the Appellant is independent with all aspects of meals except she requires continuous assistance with food preparation, described as unable to cut veggies, modified cooking.

-Pay Rent and Bills

- Nurse indicates the Appellant is independent for all aspects.

-Medications

- Nurse indicates the Appellant is independent for all aspects.

-Transportation

- Nurse indicates the Appellant is independent for all aspects.

-Social Functioning

- Nurse indicates the Appellant is independent for all aspects.
- Nurse indicates the Appellant's mental impairment impacts the Appellant's relationship with her immediate social network (partner, family, friends) as marginal functioning - little significant participation/communication; relationships often minimal and fluctuate in quality.
- Nurse indicates the Appellant's mental impairment affects the Appellant's relationships with her extended social network (neighbourhood contacts, acquaintances etc.,) as marginal functioning - little more than minimal acts to fulfill basic needs.

Assistance Provided for Applicant

-Assistance provided by other people

- Nurse indicates the help required for DLAs is provided by family and friends.
- Nothing is indicated in response to the question, "If help is required but there is none available, please describe what assistance would be necessary."

-Assistance provided through the use of Assistive Devices

- Nothing is indicated.

-Assistance provided by Assistance Animals

- Nurse indicates no assistance animal.

Additional Information

- In response to the request to provide any additional information that may be relevant to understanding the nature and extent of the Applicant's impairment and effect on DLAs the Nurse states:

Scalene tension leading to shortness of breath. Not able to continuously sit or stand and needs to self-massage minimum of two hours/day, sporadically required unable to predict when pain will happen with greater intensity? Nerve pain and muscle tension exacerbate each other, therefore, muscle tension requires daily intense management with self massage.

Request for Reconsideration (July 27, 2024)

As part of her Request for Reconsideration, the Appellant made the following submission:

- Since her original application, her doctor has confirmed a diagnosis of fibromyalgia, with an expected duration of more than two years.
- Completing the PWD application and Request for Reconsideration was an extremely vulnerable and triggering experience. She did not feel comfortable eliciting the degree to which her pain affected her mentally as she had not shared this, even with friends or family. Since filling out the form with her best guesses at the time, she has been assessing how she lives her day-to-day life and is now able to respond more accurately to each question.
- Regarding the extent of her impairment:
 - She has tested her ability to lift, and the limit is 5 pounds, not 15 as set out in her application. She initially said she needed to use two hands to lift a cast iron pan; the pan weighs 5 pounds and is very challenging. Previously she could carry 50-pound boxes great distances.
 - Her maximum for sitting is 30 minutes rather than 2 hours as reported in her application.
 - To avoid debilitating pain, she must lie down a minimum of three hours (a day in addition to sleep). Sitting standing, any form of movement is severely challenging and debilitating.
 - All her upper body muscles are perpetually aching and clenching, shooting and itching and always tingling. She has numbness and minimal sensation through her upper body, and minimal feeling in her finger/hand.
 - Every muscle in her upper body is tense and strained. Pain persists 24/7.
 - Preparing the handwritten component of the self report made her wrist tense up for three days. She cannot write.
 - She barely sleeps and requires three pillows otherwise her pain rises to 10/10.
 - Breathing is laborious. She cannot take a full breath because her neck muscles are too tight; (they) feel like rocks. She says this is related to function of all her organs, as every cellular process in the body requires blood flow and oxygen. This contributes to her pain, making her disoriented, lethargic and weak such that she has no energy to get out of bed or take care of herself.
 - The severity of her pain is baseline six, but can rise to ten, and is often eight. There is never any relief.
 - It feels like she literally has no strength. This carries into having no strength in her mental or emotional capacity too.

- Everything on the list of what causes flareups is a basic task. Her life is constant catching up to overlapping flareups (which is impossible). All while trying to mitigate everything she does. She must be 100% conscious of what she is doing at all times.
- Effect on wrists and arms:
 - She cannot use her wrists and hands at all. She feels surging pains for days once a flare up is triggered. All her tendons and ligaments feel torn and bruised.
 - Her wrists give out and drop whatever she is holding instantly if its over 5 pounds.
 - She used to be able to do everything in the kitchen like a normal person. She only eats what is easy and does not require preparation. She cannot cut a carrot without surging pains in her wrist and arm.
- Housekeeping:
 - She cannot mop, vacuum or deep clean at all. She can lightly wipe the counter. Doing dishes is too strenuous so others in her household do this for her.
 - She does not clean or cook. She has OCD, and she used to work for a professional cleaning company. This is hard on her.
- Need for help:
 - She needs someone to prepare meals, do housework, and help her with personal hygiene (to complete personal hygiene) because she can't do it on her own, but this isn't an option financially.
 - Her quality of life has depleted exponentially, more than her writing can detail.
 - She is courageous to be alive right now and to take care of herself to the best of her ability.
- She uses the following assistive devices:
 - Three pillows to fall asleep (without this she gets two hours of sleep but gets six if she uses them);
 - A lacrosse ball, a trigger point massage stick, a massage gun and a foam roller (all of which are mandatory in her ability to function day to day); and,
 - Wrist braces when she sleeps (to prevent severe pain in the morning).

- Physical vs mental impairment:
 - Her physical impairment is so painful it has become mental. The mental impairment is a side thing, though extremely severe for not being the main issue.
 - Her answers to the (Cognitive and Emotional Function) question are an extension of the severe effects her physical disability has caused her, but they almost qualify for disability on their own.
 - This shows how debilitating and unbearable (her physical impairment) is.
 - Going through each box on Section 4 (Cognitive and Emotional Functioning in the Assessor Report) she notes:
 - She has a major impact on sleep disturbance, emotion, motivation, tense motor activity.
 - Moderate impact on consciousness/alertness, executive, memory, motivation.
 - No impact on impulse control, judgement, language, psychotic symptoms, learning disabilities.
 - When she says she is anxious and depressed, she means severely anxious and severely depressed. She reports, sharp and harsh mood swings, depressed to the point where she can't get out of bed for days, brain fog so she can't put sentences together sometimes, connect thoughts, or her mind shuts down.
 - Extreme anxiety and inability to feel okay in public spaces, problems socializing and no interest in socializing.
- Comparison to her previous life:
 - Before her pain she used to be happy and excited about everything and now she has very little will to live because of how much pain she is in.
 - She used to have four large communities of friends, and now she has two friends because of how disturbed she is from her physical pain.
 - Her mood swings are out of control. She used to be patient and kind and now she feels bitter and has no patience for anyone. She no longer feels optimistic. She no longer feels joy. She feels numb physically and mentally. She feels hopeless. This is 24/7.
 - She is flared up and in pain 24/7. She never experienced anything like this in her life. She feels like she is going insane.
- She notes the Ministry's contention that the frequency and duration of these episodes have not been identified, and therefore it is not established they are

occurring periodically and for extended periods. She notes this is not asked for in the form and says they are not episodes, she feels them all the time, constantly.

Locum letter on behalf of Appellant's doctor (July 26, 2024)

Confirms the Appellant has been diagnosed with fibromyalgia. This is a chronic diagnosis and will last longer than 2 years.

Reasons for Appeal (August 15, 2024)

The Appellant states:

*I do not believe the ministry read my appeal. Also, nowhere is it stated that my pain only occurs every two weeks. In my appeal, I even took the liberty of writing three sentences *in a row* stating that my pain lasts 24/7 because I thought that part (and every part) would be looked over.*

Appellant Submission of Doctor Letter (August 27, 2024)

The Appellant submitted a letter from her current doctor (Dr. B) who has taken her over as a patient (as her former doctor (Dr. A) had too many patients). The letter includes the following information:

- The Appellant has unremitting pain that is present 24 hours a day with no relief.
- She is able to lift 2.5 pounds with one hand. She tends to avoid lifting altogether due to pain. She is able to lift 5 pounds with two hands, which causes severe pain. The Appellant gets worsening of her pain if she lifts anything. This can cause a flare of pain.
- She finds it painful to sit with maximum of 30 minutes of sitting. Anything except lying down causes pain, can stand for up to 30 minutes. She gets pain flares if she does anything other than lying down.
- She is unable to use a knife or chop anything due to pain. She is unable to do any basic housework. She struggles to maintain personal hygiene. She is unable to handwrite. She is unable to use her hands and wrists functionally. She gets 4 – 6 hours of sleep per night which causes significant daily fatigue. She has poor activity tolerance due to pain in her neck causing pain with breathing.
- She needs three pillows to sleep, four different massage tools and needs to massage for four hours per day to avoid 10/10 pain. She uses wrist braces which are mandatory for her to sleep.

- The Appellant's partner assists with all home activities including cleaning, cooking, preparing food and laundry. He carries everything from the car.
- The Appellant is diagnosed with depression that is directly related to chronic pain. She sometimes stays in bed for several days and has little desire to leave the house. She has little desire to communicate or socialize. She has mood swings, irritability and anger. She is unable to maintain personal relationships and has no desire to. Depression has a major impact on her memory, cognition, focus and emotion. It also has a major impact on her sleep. The sleep disturbance affects her alertness. She has brain fog that affects her ability to string thoughts together. She also has related anxiety with severe difficulty being in public spaces.
- Prior to having fibromyalgia, the Appellant was very active: she was strength training regularly and was able to lift up to 200 pounds at the gym. She could carry 50 pounds, could stand or sit all day. She states she had no chronic joint or muscle pain. She loved to cook and clean. She was optimistic and felt joy. She was social and had dozens of healthy personal relationships. All of her symptoms have progressed yearly since being diagnosed in 2020.
- The information was gathered from a patient interview. The doctor submits the information establishes a severe physical and mental impairment. It shows her impairment does directly impair her DLAs continuously. It also establishes she does use assistive devices and requires significant help from another person.

Hearing Submissions - Appellant

At the hearing the Appellant reiterated the points set out in Request for Reconsideration, adding:

- She has very recently separated from her partner who was her primary source of support. She is now living with her parents.
- Her diagnosis of depression is recent. Her doctor has recommended treatments that she is considering.
- Her depression manifests itself in physical symptoms, aggravating her fibromyalgia, which in turn aggravates her depression.
- She can only sit a maximum of 30 minutes and stand a maximum of 30 minutes, that is, she must change her position.
- She does not need help walking or toileting, she is able to drive.

- Her mental impairment has compromised her social function, making her unable to maintain relationships.
- Her pain makes her lash out at everybody. She has no friends beyond her spouse.
- She has anxiety and difficulty in public places, she doesn't want to leave the house.
- She does not take any prescribed medications for pain relief, as she is scared about side effects but does use products such as Tylenol.
- Her pain is unremitting but flares up depending on her activities.
- The Appellant described the three pillows she requires for sleep as non prescription, and her wrist braces as non prescription.
- Most nights she gets four to six hours of sleep.
- The Appellant also expressed a number of concerns regarding what is required to meet the definition of a significant impairment and commented on the limited nature of information that can be collected from the PWD application form. She states that Dr. A and the Nurse agree with her on this point.

-Hearing Submissions - Ministry

At the hearing, the Ministry representative reviewed the Reconsideration Decision, setting out the Ministry's reasoning for its findings.

- The representative also reviewed Dr. B's letter of August 27 (see above). The representative commented that if the Ministry had received the letter at reconsideration, the Appellant would likely have been found to meet the requirements for designation as persons with disabilities.
- When asked, the representative said wrists braces would be considered a support rather than an assistive device.

Admissibility

The Panel determined the additional information from the Appellant, including the written submission, and the oral testimony provided by the Ministry is reasonably required for a full and fair disclosure of all matters related to the decision under appeal and therefore is admissible as evidence under Section 22(4) of the *Employment and Assistance Act*. The Panel notes that neither party objected to the admission of the other's additional evidence.

Part F – Reasons for Panel Decision

The issue on appeal is whether the Ministry's Reconsideration Decision was reasonably supported by the evidence or was a reasonable application of the legislation in the circumstances of the Appellant. That is, did the Ministry reasonably determine the Appellant was not eligible for the PWD designation, because it was not satisfied that she met the following criteria:

- Severe mental or physical impairment;
- Severe impairment directly and significantly restricts DLAs, in the opinion of a prescribed professional; and,
- Assistance required with DLAs as a result of significant restriction.

The Panel's role is not to replace the Ministry decision with its decision or decide whether it agrees with the Ministry. Rather, it must focus on whether the decision was reasonable. However, in deciding whether the Ministry's determination was reasonable, the Panel may admit new evidence under Section 22(4) of the *Employment and Assistance Act* and consider the new evidence as if the Ministry had it at the time of reconsideration.

In its assessment of whether the Ministry was reasonable, the Panel is guided by *Hudson v. British Columbia (Employment and Assistance Appeal Tribunal)*, 2009 BCSC 1461 (Hudson), which requires that the Panel consider the totality of the evidence about the Appellant's impairments (for example, not whether particular boxes were ticked). Additionally, there is no need for all DLAs to be restricted. It is sufficient if the Panel can determine that, in the opinion of a prescribed professional, two or more DLAs are directly and significantly restricted continuously or periodically for extended periods, as set out in the *Act*.

Appellant Position

The Appellant summarizes why she should be designated as PWD as follows:

- All of the requirements (for designation as PWD) pertain to her, indisputably and absolutely.
 - Her disability is expected to last two or more years.
 - She requires significant assistance from other people.
 - She uses assistive devices.
 - It is a full-time job for her to keep herself from being bed-ridden.
 - She dreads participating in society. She is severely reduced and prevented from doing so.
 - She can't take care of herself on her own. She mentally breaks down on a daily basis.

- She is significantly restricted in her DLAs.
- She has had this for four years. That is a long time.
- She has cervical radiculopathy, and crippling anxiety and depression, and all together, these heavily restrict her ability to live, in all aspects, every single day.
- Her symptoms, both mental and physical, are very severe, and have progressively gotten worse each year. She believes this will continue for the rest of her life; fibromyalgia is incurable and life-long.
- Her capacity with mobility, personal decision making, medication management, use of transportation and financial management do not mean she doesn't have a significant and debilitating impairment.
- She believes the PWD application form does not permit her or her health professionals to accurately or adequately set out how her disability affects her physical and mental life.

Ministry Position

The Ministry found the Appellant met the age and duration requirements for designation as PWD. The Appellant is over 18 years old and her doctors confirmed a diagnosis of Fibromyalgia and Cervical Radiculopathy that are chronic conditions and will last longer than two years.

Severity of Impairment

The Ministry determined a *severe* physical impairment had not been established. Instead, with the Medical and Assessor Reports of the assessments of functional skills and report of flare-ups with pain about every two weeks, the Ministry determined a moderate physical impairment had been established. The Ministry was unable to conclude there is a severe physical impairment in ability to function independently or effectively given the assessments. There is no report by the prescribed professionals of the Appellant taking significantly longer with basic mobility or stairs and no limits with standing. Dr. A and the Nurse report the Appellant can lift 15 pounds, with no report of her requiring help with basic mobility and physical ability except that noted with lifting heavier items, heavier housework, and with chopping vegetables. Although Dr. A and the Nurse indicate the Appellant can get flare-ups that last hours or days, it is unclear about the frequency, severity and duration of the flare-ups as they are not reflected on the assessment of mobility and physical ability nor are the flare-ups reflected on the assessment of each of the Appellant's DLAs when it comes to the help needed and restrictions to basic function

and ability to perform DLAs during the flare-ups. Therefore, the Ministry was unable to conclude there is a severe physical impairment.

The Ministry determined a severe mental impairment was not established. Dr. A did not include a diagnosis of any mental disorder or brain injury. Dr. A notes a direct relationship between pain and mental health but did not report restrictions in ability to perform DLAs because of the mental impairment. Although Dr. A noted deficits with emotional disturbance, motivation and attention or sustained concentration as well as feelings of hopelessness, only restrictions in meal prep and basic housework related to the physical impairment are reported.

Although the Nurse reports a mental impairment has major impacts on daily functioning related to emotion and moderate impacts to bodily functions, attention/concentration and motivation, they do not report any mental impairments related to ability to perform DLAs. Instead, the Appellant is reported to be independent with things like personal care, shopping, paying rent and bills, taking medications as prescribed, meal planning, and using public transit and schedules as well as all decisions related to social functioning.

The Ministry acknowledged the Appellant's self-report of feeling severely anxious and depressed, irritable, lacking motivation, severe mood swings, brain fog and feelings of hopelessness most of the time. However, the Ministry emphasized a severe mental impairment was not reported by the prescribed professionals.

The Ministry determined only a mild mental impairment had been established given the assessments, report of no mental disorder or brain injury, no significant restrictions to ability to perform DLAs and minimal to no help reported because of a mental impairment.

Daily Living Activities

The Ministry was not satisfied that the Appellant has a severe impairment that, in the opinion of a prescribed professional, directly and significantly restricts her ability to perform DLAs either continuously or periodically for extended periods. The Ministry explained the term "directly" means that there must be a causal link between the severe impairment and the restriction. The direct restriction must also be significant. The Ministry acknowledges that legislation does not specifically require frequency and duration of the Appellant's restrictions to be explained, however, the Ministry finds this information valuable in determining the significance of the restrictions.

The Ministry notes in the Medical Report, Dr. A reports no assistive devices are needed. Dr. A reports the Appellant has continuous restrictions with meal preparation and basic housework, is unable to lift more than 15 pounds, has difficulty writing and chopping vegetables and performing repetitive movements with her arms. They note chronic pain leading to disfunction, and pain and depressive symptoms affecting ability to concentrate and motivate herself. However, Dr. A reported no restrictions to any other DLAs, like personal care, paying rent and bills and social functioning. The Ministry states it is difficult to establish direct and *significant* restrictions to DLAs continuously or for extended periods.

The Ministry notes in the Assessor Report, the Nurse says the Appellant has nerve pain, limits with lifting, weakness, numbness and tingling in hands and some mental impairment. For DLAs, however; the Nurse assesses the Appellant as independent with almost all DLAs and does not report the Appellant takes significantly longer to complete DLAs. The only assistance identified is with some meal preparation, basic housekeeping (vacuuming, mopping, tub) and if the Appellant needs to carry over 15 pounds. The Ministry did not find this demonstrated direct and significant restrictions to ability to perform DLAs continuously or periodically for extended periods.

The Ministry acknowledged the Appellant's fluctuation in pain levels. However, they found the assessments in the Medical Report and Assessor Report do not demonstrate significant restrictions to DLAs, frequently for extended periods. Although they note the Appellant's pain can be severe for hours and sometimes days, there is not enough detail or evidence to confirm that *in the opinion of a prescribed professional*, the Appellant is *directly* and *significantly* restricted in her ability to perform DLAs continuously or periodically for extended periods.

Assistance Required with Daily Living Activities

The Ministry found the Appellant did not meet this requirement, noting that Dr. A reports that the Appellant needs no assistive devices nor the services of an assistance animal. Neither Dr. A nor the Nurse report the Appellant requires the significant help of another person with DLAs. Moreover, as it was not established that DLAs are significantly restricted, it cannot be determined that significant help is required from another person or a device to perform DLAs. Although the Appellant indicates she needs some assistive devices, this was not reported by the prescribed professionals.

Panel Reasons*Severe Mental or Physical Impairment*

Section 2(2) and (3) of the *Act* set out the requirements for the Minister to designate a person as PWD. One requirement is that the Minister is satisfied that the person has a severe mental or physical impairment. The Panel notes, “severe” and “impairment” are not defined in the legislation. The Ministry considers the extent of any impact on daily functioning as shown by restrictions on mental or physical abilities. The Panel finds that an assessment of severity based on physical and mental functioning, including any restrictions, is a reasonable application of the legislation.

At reconsideration, the Ministry found the Appellant’s physical impairments (functional) to be moderate rather than severe as required by legislation. They noted, Dr. A indicated no impairment in basic mobility and physical ability other than lifting heavy items, and said the Appellant has pain flare ups about every two weeks, but did not provide detail regarding frequency, duration and severity of flare ups. The Panel notes the August 27 letter provided by Dr. B indicates the Appellant’s pain is 24 hours a day, or continuous. She is only able to lift two and half pounds with one hand, 5 pounds with two hands and can get a flare of worse pain if she lifts anything. The Appellant’s ability to sit or stand is limited to 30 minutes, and she can get flares of pain if she does anything other than lying down. As the Appellant is limited in ability to sit, stand and lift and has constant pain aggravated with worsening pain stemming from light activity, the Panel finds substantial evidence to show that her physical impairment is severe. Accordingly, the Panel finds that the determination in the Reconsideration Decision that the Appellant did not have a severe physical impairment was unreasonable based upon the new evidence.

At reconsideration, the Ministry determined the Appellant had only a mild mental impairment. The Ministry noted in the Medical Report, Dr. A did not indicate any mental disorder or brain injury. Although Dr. A indicated deficits with emotional disturbance, motivation and attention as well as feelings of hopelessness, only physical restrictions in DLAs were reported. Similarly, in the Assessor Report, the Nurse indicated major impairment with emotion and moderate impairment with bodily functions, attention/concentration and motivation, but no restrictions related to DLAs stemming from mental impairments were reported.

In the August 27, letter Dr. B states that the Appellant is diagnosed with depression that is directly related to chronic pain. The Appellant sometimes stays in bed for several days and has little desire to leave the house, communicate or socialize. She has mood swings,

irritability, and anger. She is unable to maintain personal relationships. Depression has a major impact on her memory, cognition, focus, and emotion as well as a major impact on sleep. She has anxiety with difficulty being in public places. As the Appellant has a medical diagnosis of a mental health disorder of depression, causing her isolation, difficulty sleeping, communicating and concentrating, the Panel finds substantial evidence to show that she has a severe mental impairment. Accordingly, the Panel finds the determination in the Reconsideration Decision that the Appellant did not have a severe mental impairment was unreasonable based upon the new evidence.

Daily Living Activities

The Panel considered whether in the opinion of a prescribed professional, the Appellant's severe mental and physical impairment directly and significantly restricts her ability to perform DLAs, continuously or periodically for extended periods. As stated above, the Ministry was not satisfied that the Appellant has such restrictions. The Panel considered the DLAs found in Section 2(1)(a) and (b) of the Regulation relative to the question of whether the Ministry made a reasonable decision on each of the criteria.

Prepare own meals:

In the Medical Report, Dr. A says the Appellant is continuously restricted with meal preparation, unable to chop vegetables, lift pots or cook beyond simple meals. In the letter, Dr. B indicates she cannot chop or use a knife, due to pain. She is unable to use her hands functionally. She has poor activity tolerance due to her neck pain, which also causes her difficulty with breathing. Dr. B states that the Appellant's partner helps her with preparing food and cooking. The Appellant subsequently stated that she was now living at home and her parents were providing this help. The Appellant says that prior to having fibromyalgia, she loved to cook and clean. Given the information provided by Dr. A and Dr. B, their opinions, as prescribed professionals, are clear. The Panel finds that in the opinion of a prescribed professional the Appellant meets the requirement of this DLA being directly and significantly restricted continuously or periodically for extended periods, as set out in the *Act*. The Panel finds the Ministry did not make a reasonable decision on this criterion.

Manage personal finances:

In the Medical Report and the Assessor Report, the Appellant is said to have no limitations with managing personal finances. The Panel finds the Ministry made a reasonable decision on this criterion.

Shop for personal needs:

In the Medical Report, Dr. A indicates the Appellant has no restrictions with daily shopping. In the Assessor Report, the Nurse indicates the Appellant is independent with all aspects of shopping except requiring continuous assistance with carrying purchases home if they are over 15 pounds. Dr. A indicates her partner would help her with this. In the letter, Dr. B says the Appellant is limited to carrying 5 pounds with two hands. The Appellant would therefore be continuously restricted with carrying any purchases over 5 pounds. The Panel finds that in the opinion of a prescribed professional, the Appellant meets the requirement of this daily living activity being directly and significantly restricted continuously or periodically for extended periods, as set out in the *Act*. The Panel finds the Ministry did not make a reasonable decision on this criterion.

Use public or personal transportation facilities:

In the Medical Report and the Assessor Report, the Appellant is said to have no limitations with use of public or personal transportation facilities. The Panel finds the Ministry made a reasonable decision on this criterion.

Perform housework to maintain the person's place of residence in acceptable sanitary condition:

In the Medical Report, Dr. A says the Appellant is unable to mop or vacuum, noting the Appellant's partner assists with mopping and vacuuming. In the Assessor Report, the Nurse says the Appellant requires continuous assistance with basic housekeeping such as vacuuming and mopping. In the letter, Dr. B indicates that the Appellant is unable to do any basic housework. Her partner assists with all home activities including cleaning, cooking, preparing food and laundry. He carries everything from the car. The Appellant says she cannot take care of herself on her own. The Panel finds substantial evidence to show that, in the opinion of a prescribed professional, the Appellant is restricted with this aspect of DLAs and that it is continuous. The Panel finds the Ministry did not make a reasonable decision on this criterion.

Move about indoors and outdoors:

In the Medical Report and the Assessor Report, the Appellant is said to have no limitations with moving indoors and outdoors. The Panel finds the Ministry made a reasonable decision on this criterion.

Personal hygiene and self-care:

In the Medical Report and the Assessor Report, the Appellant is said to have no limitations with personal hygiene and self-care. Although Dr. B reports the Appellant struggles to maintain personal hygiene, the Panel does not find this meets the requirement of being significantly restricted in the opinion of a prescribed professional. The Panel finds the Ministry made a reasonable decision on this criterion.

Manage personal medication:

In the Medical Report and the Assessor Report, the Appellant is said to have no limitations with management of personal medication. Dr. B does not comment on this. The Panel finds the Ministry made a reasonable decision on this criterion.

For those with a severe mental impairment the following DLAs may be considered:

Relate to, communicate or interact with others effectively (Social Function):

In the Medical Report, Dr. A indicates no limitations with social functioning. In the Assessor Report, the Nurse indicates the Appellant is independent for all aspects of social functioning but indicates the Appellant's mental impairment impacts her relationship with her immediate social network (partner, family, friends), as marginal functioning - little significant participation/communication; relationships often minimal and fluctuate in quality. The Nurse also indicates the Appellant's mental impairment affects the Appellant's relationships with her extended social network (neighbourhood contacts, acquaintances...etc.,) as marginal functioning - little more than minimal acts to fulfill basic needs. In the letter, Dr. B says the Appellant is diagnosed with depression that is directly related to chronic pain. She sometimes stays in bed for several days and has little desire to leave the house. She has little desire to communicate or socialize. She has mood swings, irritability and anger. She is unable to maintain personal relationships and has no desire to. She has anxiety with severe difficulty being in public spaces. The Appellant states that, prior to her impairments she was social and had dozens of friends. The Panel finds that, in the opinion of a prescribed professional, the Appellant is directly and

significantly restricted with this aspect of DLAs either continuously or periodically for extended periods, as set out in the *Act*. The Panel finds the Ministry did not make a reasonable decision on this criterion.

Make decisions about personal activities, care or finances:

None of the prescribed professionals, nor the Appellant herself indicate she is unable to make decisions about her personal activities, care or finances. The Panel finds the Ministry made a reasonable decision on this criterion.

As set out above, the Panel finds the evidence shows the Appellant, *in the opinion of a prescribed professional* (emphasis added) does have significant restrictions on two or more DLAs either continuously or periodically for extended periods due to her severe mental and physical impairments. The Panel finds the Ministry's determination regarding this requirement to be not reasonable.

Need for assistance

In its Reconsideration Decision, the Ministry did not find the Appellant needed significant help from another person. The Panel notes in the Medical Report, Dr. A said her partner assists with all home activities including cleaning, cooking, preparing food and laundry, and everything from the car. The Appellant herself says she can't take care of herself on her own. The Panel took note of the Appellant's evidence at the hearing and her submissions which demonstrate the day-to-day assistance she requires. The Panel further notes the legislation requires that the help must be needed because there are significant restrictions on DLAs *in the opinion of a prescribed professional*. As the Panel has found more than two DLAs to be so restricted, the Panel finds the Appellant requires the significant help of another person to accomplish the restricted DLAs. Accordingly, it finds the Ministry was not reasonable in its determination that the Appellant did not meet this requirement.

Conclusion

The Panel found, with the additional evidence, the Appellant met all requirements for designation as PWD under section 2(2) and (3) of the *Act*. The Appellant is **successful** on appeal, the Panel having found the Appellant meets all five of the requirements for designation set out in the legislation.

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

Employment and Assistance for Persons with Disabilities Act

Persons with disabilities

2 (1) In this section:

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

"daily living activity" has the prescribed meaning;

"prescribed professional" has the prescribed meaning.

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

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

(b) in the opinion of a prescribed professional

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

(A) continuously, or

(B) periodically for extended periods, and

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

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

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

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

(I) an assistive device,

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

(iii) the services of an assistance animal.

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

Employment and Assistance for Persons with Disabilities Regulation

Definitions for Act

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

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

- (I) prepare own meals;
- (ii) manage personal finances;
- (iii) shop for personal needs;
- (iv) use public or personal transportation facilities;
- (v) perform housework to maintain the person's place of residence in acceptable sanitary condition;
- (vi) move about indoors and outdoors;
- (vii) perform personal hygiene and self care;
- (viii) manage personal medication, and

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

- (I) make decisions about personal activities, care or finances;
- (ii) relate to, communicate or interact with others effectively.

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

(a) authorized under an enactment to practice 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.

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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

Corrie Campbell

Signature of Chair

Date (Year/Month/Day)

2024/09/09

Print Name

Kent Ashby

Signature of Member

Date (Year/Month/Day)

2024/09/08

Print Name

Wes Nelson

Signature of Member

Date (Year/Month/Day)

2024/09/08