

### **Part C – Decision Under Appeal**

The decision that is the subject of this appeal is the Ministry of Social Development and Poverty Reduction (Ministry) reconsideration decision of June 3, 2022, in which the Ministry determined that the Appellant was not eligible for Persons with Disabilities (PWD) designation, because he had not met all of the legislated criteria set out in section 2 of the *Employment and Assistance for Persons with Disabilities Act* (EAPWDA).

The Ministry first determined that the Appellant did not meet the criteria for PWD designation as a member of a prescribed class of persons. With respect to the legislated criteria, the Ministry determined that the Appellant had demonstrated that he has reached 18 years of age. The Ministry further determined that the Appellant had not demonstrated that his impairment, in the opinion of a medical practitioner or nurse practitioner, is likely to continue for at least two years. The Ministry also determined that the Appellant had not demonstrated that he has a severe mental or physical impairment; that his severe mental or physical impairment, in the opinion of a prescribed professional, significantly restricts his ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and as a result of direct and significant restrictions, he requires help to perform those activities.

### **Part D – Relevant Legislation**

*Employment and Assistance for Persons with Disabilities Act* (EAPWDA) – section 2

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR) – section 2

**Part E – Summary of Facts**

The Appellant submitted a PWD application in March 2022, which consisted of:

- A Self Report (SR) completed by the Appellant;
- A Medical Report completed by the Appellant's general practitioner (GP); and
- An Assessor's Report completed by the same GP.

In the SR, the Appellant states that his disability is a combination of medical problems that have worsened over the years. He is unable to walk any significant distance, due to the condition in his legs. Most of the time, he is unable to lift things. He cannot raise his arm above shoulder height, due to degeneration in his shoulders, particularly the left, which he associates with work and age. He states he has atrial fibrillation that causes dizziness and prevents him from engaging in strenuous activity. He is on several medications and awaiting a heart procedure.

In the MR, the GP provides the following diagnoses:

- Recurrent atrial fibrillation with an onset date of February 2021. The GP reports that this condition is recurrent on slight exertion despite maximum tolerable medication and requires the Appellant to lie down and wait for it to pass, which takes 10 minutes to an hour.
- Bilateral shoulder pain with an onset date of July 2021. The GP reports that this condition prevents overhead work and causes pain at night.
- Varicose vein pain with an onset date of January 2018. The GP reports that this condition causes constant leg pain despite stockings.
- Depression with an onset date of March 2021. The GP reports that this is caused by the Appellant's atrial fibrillation condition.

The GP assessed the Appellant's physical functioning in the MR and AR. The GP reports that he is able to:

- Walk one block;
- Climb 5 steps unaided;
- Lift 2-7 kg; and
- Sit without limitation.

The GP further reports the Appellant can walk and stand independently; requires periodic assistance with lifting, carrying, and holding; takes significantly longer to walk outdoors and climb stairs. The GP notes that the Appellant easily goes into atrial fibrillation. In terms of daily living activities (DLA), the GP reports that the Appellant is independently able to accomplish all activities relating to personal care, meals, paying rent and bills, and the applicable transportation activities. The GP reports that the Appellant requires periodic assistance with both basic housekeeping tasks (basic housekeeping and laundry) and one of five shopping tasks (carrying purchases home). The GP reports that the Appellant does not use assistive devices or an assistance animal and does receive assistance from family and friends.

In terms of cognitive and emotional functioning, the GP has completed the relevant sections of the MR and AR. The GP reports a significant deficit in the area of emotion, and minimal impacts to daily functioning related to emotion and motivation. The GP reports no difficulties with

communication, and assesses the Appellant's speaking, reading, writing, and hearing abilities as 'good'. The GP reports that the Appellant has good functioning within his immediate and extended social networks and is independent in all social functioning activities included in the PWD application.

The Ministry, in a decision dated May 9, 2022, determined that the Appellant was not eligible for PWD designation because he had not met all of the required criteria set out in the legislation.

The Appellant submitted a Request for Reconsideration dated May 19, 2022. In this request, the Appellant stated that he has multiple physical ailments, has been off work for a year and his doctor expects him to be off for another year. He further stated that these conditions will never heal, and he cannot meet his expenses living on 'welfare' and completing a medical assessment each year. He argued that he cannot return to the work he has been doing his entire life, due to his medical conditions, and does not have the training to engage in another type of employment.

The Ministry, in a reconsideration decision dated June 2, 2022, determined that the Appellant was not eligible for PWD designation because he had not met all of the required criteria set out in the legislation. This is the decision at issue in the current appeal.

Additional information before this panel on appeal consisted of the following:

#### Notice of Appeal

The Appellant submitted a Notice of Appeal dated June 10, 2022, to the Employment and Assistance Appeal Tribunal. In the Notice of Appeal, the Appellant selected a written hearing and provided the following reasons for appeal: *Prior to surgery it was unknown what the outcome might be. Since surgery my medical conditions have changed/worsened. On my new application my injury will be over 2 years of recovery.*

#### Appeal Submissions

By way of written appeal submissions, the Appellant provided a second copy of his Notice of Appeal accompanied by:

- a completed copy of his Persons with Persistent Multiple Barriers (PPMB) application dated May 19, 2022;
- an X-Ray report for both shoulders, dated June 25, 2021, indicating bilateral acromioclavicular joint arthropathy; and
- a cardiology report, dated March 3, 2022, indicating paroxysmal atrial fibrillation.

In response to the Appellant's written appeal submissions, the Ministry provided a 2-page letter dated July 4, 2022, in which the Ministry recognized that the PPMB application contained a confirmation by the Appellant's medical practitioner that his medical condition(s) will continue for at least 2 years. As a result, the Ministry determined that this criterion had now been met for the purposes of assessing his eligibility for PWD designation in accordance with EAPWDA section 2(2)(a). In addition, the Ministry confirmed its reconsideration decision position that the Appellant had not met the remaining legislated requirements for PWD designation.

Following receipt of the Ministry's written submissions, the Appellant contacted the Tribunal and requested that his hearing be held by way of teleconference rather than by way of written hearing. This request was granted. As a result, this appeal panel received also oral submissions from both the Appellant and the Ministry.

At the hearing, the Appellant explained that he had had a very difficult time receiving information and assistance from the Ministry when he attended their local office. He explained that he was told, even prior to applying, that his application would likely be refused and that most people are not successful until their second or third attempt. He explained that he had been refused benefits for medication and travel to specialist appointments several hours away from his home community, both in relation to his heart condition. The Appellant clearly stated that he disagrees with the Ministry's reconsideration decision and feels that they are taking an extreme position in relation to his situation and denial of his application for PWD designation. He explained that he feels there is more than enough information provided by his medical practitioner in the PWD application to support approval by the Ministry. He expressed his frustration with the process and his opinion that the Ministry's reconsideration officers should be able to figure out for themselves, in relation to the frequency of assistance he requires, that grocery shopping is not a daily activity but other activities such as dishwashing are daily activities. He also explained that he lives alone and does receive some help from family but needs to be independent and is not interested having nurses around to help him. He reported that he has now had the operation and his symptoms have slightly improved. He still has atrial fibrillations, but they occur less frequently than before the operation. Also, his DLA have improved, and he feels more confident around the house.

At the hearing, the Ministry representative summarized and explained the Ministry's reconsideration decision. The Ministry representative also explained that one's ability to work and one's financial need are not considerations included in the legislation and cannot be considered in relation to one's eligibility for PWD designation. The Ministry representative, in response to the Appellant's questions, also explained that people with heart conditions can qualify for PWD designation and that the Ministry's reconsideration officers do not have discretion to extrapolate or make assumptions in relation to the information provided in, or missing from, PWD applications.

### **Admissibility**

The panel finds that the information provided in the Appellant's Notice of Appeal, written appeal submissions, and hearing testimony is admissible in accordance with section 22(4)(b) of the *Employment and Assistance Act*. The panel finds that the information provided by the Appellant is updated and more detailed information relating to the medical conditions described in his PWD application accompanied by his arguments about why this information should have resulted in approval of his application.

The panel finds the Ministry's updated position in relation to the 'duration' criterion in their written appeal submission is admissible in accordance with section 22(4)(b) of the *Employment and Assistance Act*. The panel further finds that the Ministry's oral hearing submission does not require an admissibility determination as the information provided by the Ministry representative consisted only of explanation of information previously provided in the reconsideration decision and appeal submission.

**Part F – Reasons for Panel Decision**

At the outset of the hearing, the panel confirmed with the Ministry representative, that the Ministry is now of the opinion that the Appellant meets the ‘duration’ criterion as set out in section 2(2)(a) of the EAWPDA. As the parties now agree that the Appellant has demonstrated he meets this criterion, there are three outstanding legislated criteria that the Ministry found had not been met at reconsideration, that are the subject of this appeal.

Therefore, the issue in this appeal is whether the Ministry’s reconsideration decision, in which the Ministry determined that the Appellant did not meet the remaining three of five statutory requirements of Section 2 of the *EAPWDA* for PWD designation, is reasonably supported by the evidence or is a reasonable application of the legislation in the circumstances of the Appellant. Specifically, the Ministry determined that the information provided by the Appellant did not establish that:

- the Appellant has a severe mental or physical impairment;
- the Appellant’s severe mental or physical impairment, in the opinion of a prescribed professional, directly and significantly restricts his ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and
- as a result of those restrictions, he requires significant help or supervision of another person to perform those activities.

The Ministry also found that it has not been demonstrated that the Appellant is in one of the prescribed classes of persons who may be eligible for PWD designation on the alternative grounds set out in section 2.1 of the Employment and Assistance for Persons with Disabilities Regulation. As there was no information or argument provided by the Appellant regarding alternative grounds for designation, the panel considers this matter not to be at issue in this appeal.

**Severity of impairment**

The legislation requires that for PWD designation, the minister must be “satisfied” that the person has a severe mental or physical impairment. The legislation makes it clear that the determination of severity is at the discretion of the minister, considering all the evidence, including that of the Appellant. Diagnosis of a serious medical condition or the identification of mental or physical deficits does not in itself determine severity of impairment.

**Severity of physical impairment**

In the reconsideration decision, the Ministry determined the Appellant does not have a severe physical impairment. In making this determination, the Ministry noted that the Medical Practitioner (MP) has indicated that the Appellant suffers from several medical conditions. However, the Ministry went on to note that the GP has indicated that the Appellant is able to walk one block; climb five steps without assistance, lift 2-7 kilograms and has no limitation in remaining seated. The Ministry recognized that the Appellant is reported to be independent in walking and standing and reported to require periodic assistance with lifting, carrying, and holding. The Ministry concluded that this assistance would be required for items weighing greater than 2 to 7 kilograms and determined that this range should permit the Appellant to complete his DLA. The Ministry acknowledged that the Appellant reportedly takes longer to walk outdoors and climb stairs as he goes into atrial fibrillation easily. However, the Ministry found

they were unable to form a clear picture of the impairment because the GP had failed to include additional detail about how much more time is required for these activities. The Ministry concluded that the information provided in the PWD application and request for reconsideration did not establish a *severe* physical impairment.

At the hearing, the Appellant explained that he has now had his heart surgery and is beginning to feel somewhat more confident in his activities as compared to before surgery. In response to a panel question as to whether he felt worse, the same or better since the surgery he responded: "a little better". He stated that he still suffers from atrial fibrillation, and he does not yet know whether the procedure will be deemed a success. In his argument, the Appellant did not dispute the accuracy of the reports provided by the GP but disagrees with the Ministry's interpretation of the information provided in those reports. He argued that he does qualify based on the information provided and disagrees with the Ministry's assessment that the doctor has not provided a clear enough picture. The Appellant expressed his opinion that the Ministry is not being fair in its assessment. He further argued that he has a disability, and he cannot afford basic things, including travel to doctor's appointments and medications.

The panel finds that the Ministry's determination was reasonable. The panel notes the Ministry's approach to assessing severity in light of the diagnoses provided, nature of the impairment and extent of the impacts on functioning as evidenced by restrictions/limitations to functioning, ability to perform DLA and help required. Given the focus on restrictions and help required in the legislation, the panel finds the Ministry's approach to assessment on reconsideration and the conclusions on this criterion to be reasonable. The panel notes that the GP's assessments of the Appellant's functional capacity and mobility and physical ability assessments in the MR and AR indicate that the Appellant is primarily independent, a fact confirmed by the Appellant himself, but that he must take care not to trigger atrial fibrillation and that he requires periodic assistance for some tasks. The panel finds that the Ministry's determination, that a severe physical impairment has not been established, is reasonably supported by the evidence.

#### *Severity of mental impairment*

In the reconsideration decision, the Ministry determined that the information provided does not establish a severe mental impairment. The Ministry noted that the GP reports that the Appellant's depression is a consequence of his atrial fibrillation condition and acknowledged the report of a significant deficit in functioning in the area of emotion. The Ministry went on to consider the GP's report of minimal impacts related to emotion and motivation. The Ministry noted that the GP reported no moderate or major impacts to cognitive and emotional functioning, no difficulties with communication and good abilities in speaking, reading, writing, and hearing. The Ministry also noted the GP's report of independence in all decision making activities related to making decisions regarding personal activities, care, and finances, as well as social functioning. The Ministry concluded that a severe impairment of mental functioning was not established by the evidence provided.

The panel finds that the Ministry's determination that a severe mental impairment has not been established was also reasonably supported by the evidence and a reasonable application of the legislation. The panel notes that the Appellant made no arguments in relation to the Ministry's findings in this area. He did not argue that the Ministry had misunderstood or unfairly assessed the information provided in these portions of the PWD application.

In assessing the Ministry's conclusions, the panel notes GP's assessments in the MR and AR indicated one deficit with respect to cognitive and emotional functioning. However, according to those same assessments, this deficit does not appear to manifest as an impairment of the Appellant's ability to function effectively or independently. The panel notes the GP's assessments relating to decision-making activities indicate that the Appellant is independent in all areas. The panel also notes that the Appellant has been assessed as entirely independent with respect to social functioning and without any communication difficulties. The GP does not provide any information regarding safety issues or support required to maintain in the Appellant in his community. The panel finds that the Ministry's determination, that a severe mental impairment has not been established, is reasonably supported by the evidence.

### **Direct and significant restrictions in the ability to perform DLA**

The legislation specifies that the Minister assess direct and significant restrictions in the ability to perform DLA in consideration of the opinion of a prescribed professional, in this case the GP. This does not mean that other evidence should not be considered, but it is clear that a prescribed professional's evidence is fundamental. At issue in this assessment is the degree of restriction in the Appellant's ability to perform the DLA listed in section 2(1)(a) and (b) of the EAPWDR. The panel notes that, according to the legislation, the direct and significant restriction in the ability to perform DLA must be due to a severe mental or physical impairment.

The Ministry was not satisfied that the Appellant has a severe impairment that, in the opinion of a prescribed professional, directly, and significantly restricts his ability to perform DLA. In reaching this conclusion, the Ministry noted that the GP's reports indicate that the Appellant requires periodic assistance with basic housekeeping tasks and carrying purchases home. The Ministry went on to note that the GP failed to report the frequency and duration of such assistance and found it was unable to determine that the Appellant was significantly restricted for extended periods. The Ministry also considered that the GP reported the Appellant's need to do things slowly to avoid triggering atrial fibrillation. Here, the Ministry went on to note that the GP failed to provide information about how much additional time is required for individual tasks and found the information provided to be insufficient to confirm that completing tasks slowly amounted to a significant restriction of DLA. The Ministry observed that the GP reported that the Appellant is independent with personal care tasks, most aspects of shopping, meals, finances, medication, transportation, and social functioning and notes the Appellant's statements that he is able to manage on his own. The Ministry was not satisfied that the Appellant has a "severe impairment that, in the opinion of a prescribed professional, directly and *significantly* restricts [his] ability to perform the daily living activities set out in the legislation."

At the hearing, the Appellant argued that the Ministry is taking an extreme position and he feels there is more than enough information provided by his medical practitioner in the PWD application to establish his disability. He expressed his opinion that the Ministry's reconsideration officers should be able to figure out for themselves, in relation to the frequency of assistance he requires, that grocery shopping is not a daily activity but other activities such as dishwashing are daily activities. He also explained that he does receive some help from family, is not interested having nurses around to help him, and needs his independence.

The panel finds that the Ministry's determination that the assessments provided do not establish

that a severe impairment significantly restricts the Appellant's ability to perform DLA continuously or periodically for extended periods was reasonable. The panel notes that the legislation specifies that direct and significant restrictions to DLA must be in the opinion of a prescribed professional. Although the Ministry's decision makers can make logical inferences from the information provided, their decisions must be based on the information provided by the prescribed professional. The decision makers do not have discretion to independently make assumptions or draw conclusions about how often DLA are completed, nor how often assistance is provided or required. The panel finds that the Ministry's decision was reasonable based on the evidence as the GP does not outline how restricted the activities are, or when and for how long they may be periodically restricted.

The panel notes here that the GP's reports are incomplete in several areas where the PWD application form specifies that additional information is to be provided by way of comments. For instance, in relation to mobility and physical ability activities that take 'significantly longer than typical' the form prompts the writer to 'describe how much longer' and the GP has failed to provide this information. Similarly, for the DLA assessment where assistance is required for a task, the form prompts the writer to 'include a description of the type and amount of assistance required' for each task. The GP has failed to provide any information in relation to each of the tasks where 'periodic assistance' is indicated. In response to a general prompt for "Additional Comments (including type and amount of assistance required and identification of any safety issues)", the GP has indicated only that the Appellant must do things slowly to avoid triggering atrial fibrillation. The panel finds that the GP has assessed the Appellant as being largely independent with performing DLA and has provided insufficient information regarding the degree and frequency of both restrictions and assistance for those DLA that are not assessed as independent.

The panel finds that a holistic view of the information provided by the GP demonstrates that the Appellant has some periodic assistance from family and friends, but there is no indication as to how frequently assistance is required (or provided). The panel finds that these assessments do not demonstrate direct and significant restrictions to DLA continuously or periodically for extended periods. In particular, the panel notes an insufficiency of information from the GP relating to these assessments. The panel also notes that the Appellant reports that he is able to manage on his own and is not interested in having nurses around to assist him. The panel concludes that the Ministry's determination that the evidence is insufficient to show that the Appellant's overall ability to perform DLA is significantly restricted either continuously or periodically for extended periods is reasonable.

### **Help required**

The legislation requires that, as a result of being directly and significantly restricted in the ability to perform DLA either continuously or periodically for extended periods, a person must also require help to perform those activities. The establishment of direct and significant restrictions under section 2(2)(b)(i) is a precondition of meeting the need for help criterion. Help is defined in subsection (3) as the requirement for an assistive device, significant help or supervision of another person, or the services of an assistance animal in order to perform a DLA. According to the legislation, at section 2(1), 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.*



In the reconsideration decision, the Ministry determined that as it had not been established that the Appellant's ability to perform DLA were significantly restricted, it cannot be determined that significant help is required.

While the information provided indicates that the Appellant does receive assistance from family and friends, the panel has concluded that the Ministry reasonably determined that direct and significant restrictions in the Appellant's ability to perform DLA have not been established. As such, the panel also finds that the Ministry reasonably concluded that under section 2(2)(b)(ii) of the EAPWDA it cannot be determined that the Appellant requires help to perform DLA. Therefore, the panel finds that the Ministry's conclusion that this criterion has not been met is reasonable.

**Conclusion**

The panel finds that the Ministry's reconsideration decision, determining that the Appellant had not met all of the legislated criteria for PWD designation, was a reasonable application of the legislation in the circumstances of the Appellant and was reasonably supported by the evidence. The panel confirms the Ministry's reconsideration decision. The Appellant is not successful on appeal.

**APPENDIX A**

The following section of the EAPWDA applies to this appeal:

**Persons with disabilities**

**2 (1)** In this section:

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

**"daily living activity"** has the prescribed meaning;

**"prescribed professional"** has the prescribed meaning.

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

- (a) in the opinion of a medical practitioner or nurse practitioner is likely to continue for at least 2 years, and
- (b) in the opinion of a prescribed professional
  - (i) directly and significantly restricts the person's ability to perform daily living activities either
    - (A) continuously, or
    - (B) periodically for extended periods, and
  - (ii) as a result of those restrictions, the person requires help to perform those activities.

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

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

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

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

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

The following section of the EAPWDR applies to this appeal:

**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.

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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

Jennifer Smith

Signature of Chair

Date (Year/Month/Day)

2022/07/08

Print Name

Inge Morrissey

Signature of Member

Date (Year/Month/Day)

2022/07/08

Print Name

Glenn Prior

Signature of Member

Date (Year/Month/Day)

2022/07/08