

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

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Poverty Reduction (“ministry”) dated January 30, 2023, in which the ministry denied the appellant designation as a person with disabilities (“PWD”) under the Employment and Assistance for Persons with Disabilities Act (“EAPWDA”). The ministry found that the appellant met the requirements for age (over 18) and duration (impairment to continue for at least 2 years). The ministry was not satisfied that:

1. the appellant has a severe mental or physical impairment;
2. the appellant’s impairment significantly restricts his ability to perform daily living activities continuously or periodically for extended periods; and
3. the appellant requires significant help or supervision of another person to perform daily living activities restricted by his impairment.

The ministry also found that the appellant is not in one of the prescribed classes of people 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 (“EAPWDR”). As there was no information or argument provided for PWD designation on alternative grounds, the panel considers that matter not to be at issue in this appeal.

### **Part D – Relevant Legislation**

EAPWDA, section 2  
EAPWDR, section 2

Full text of the legislation is provided in the Schedule of Legislation after the reasons.

**Part E – Summary of Facts**

The hearing took place by videoconference. The appellant attended the hearing with his spouse as a witness, advocate, and support person.

Evidence before the Ministry at Reconsideration:

The appellant is over 18 years of age. In support of his application, the appellant submitted a medical report dated October 8, 2022 and an assessor report dated October 11, 2022, both completed by a general practitioner, and a self-report. The appellant also provided:

- letter from the general practitioner dated January 11, 2023
- consult reports from a rheumatologist dated April 5, 2022 and May 31, 2022
- letter from a physiotherapist to the appellant's employer dated October 22, 2021
- consult reports from an orthopedic specialist dated May 14, 2021 and January 25, 2022
- assessment report from an osteoarthritis assessment team dated January 29, 2021
- operative report from a hospital dated January 23, 2020.

In the Request for Reconsideration, the appellant also provided an additional handwritten statement.

Medical Report, October 8, 2022:

The appellant has been a patient of the GP since April 2019, and the GP has seen him between 2 and 10 times in the past 12 months.

Diagnoses:

The GP provided diagnoses of bilateral knee pain (onset 2015), bilateral shoulder pain – calcific tendonitis, right wrist pain, fibromyalgia, and dizziness (onset 2021, cause not yet determined). They indicate that his knee pain became worse in 2019, and other Musculo-skeletal symptoms have progressed since then.

Health History:

The appellant's bilateral knee pain has become problematic despite a left knee replacement. He continues to have pain and muscle weakness in his left knee. He has been advised to continue with physiotherapy and activities as tolerated. He is not able to work as a forklift operator or warehouse worker because of left knee pain and weakness. He finds it "difficult to stand or walk for any significant duration" and he cannot walk more than a mile, or up to 20 to 30 minutes.

Bilateral shoulder pain is likely due to "repetition activity" and is aggravated with activity. Musculo-skeletal pain is aggravated with exertion and improves with rest. He is waiting for an MRI for right wrist pain.

He has diffuse Musculo-skeletal pain and weakness, and occasional cramps in his legs and arms. Symptoms of depression and anxiety compound his Musculo-skeletal discomfort. He has chronic fatigue and sleep difficulties.

The GP states that the appellant's conditions are moderately severe and prevent him from working.

*Functional Skills:*

The GP indicates that the appellant can walk 1 to 2 blocks on a flat surface, unaided, and uses a knee brace and walking stick. He can manage to climb up to 10 stairs unaided, and then must rest. He can lift 7 to 16 kg. and remain seated less than 1 hour.

They indicate that the appellant has significant deficits with cognitive and emotional function, in the areas of consciousness, executive function, memory, emotional disturbance and motivation. The GP comments that the appellant reports "mood issues", difficulties with concentration and attention, says it takes him longer to read and write and he is forgetful.

*Daily Living Activities:*

The GP indicates that the appellant's impairment directly restricts their ability to perform daily living activities. They note periodic restrictions in personal self care, basic housework, daily shopping and social functioning. They note continuous restrictions in mobility outside the home and management of finances.

The GP states that the appellant's restrictions are "mild-moderate." They explain that the appellant "can manage laundry/doing dishes/sweeping floors – he paces himself to complete this type of housework." They state that he needs assistance to put on socks or tie shoelaces. With respect to social functioning, they indicate that the appellant has become socially withdrawn, other than his immediate family, because of mood issues.

*Additional Comments:*

The GP adds that the appellant's impairments are primarily physical (impaired knees and other Musculo-skeletal conditions) and are now starting to affect his mental health.

*Assessor Report, October 11, 2022:*

*Mental or Physical Impairment*

The GP indicates that the appellant's knee, shoulder and muscle pain "make it difficult for him to do everyday activities for any prolonged duration or he is unable to do it."

*Ability to Communicate*

The appellant's ability to communicate is good or satisfactory in the areas listed, except for reading, where the appellant says he has difficulty focusing.

*Mobility and Physical Ability*

The GP indicates that the appellant takes significantly longer than typical to walk outdoors, climb stairs and stand. He needs periodic assistance with lifting, carrying, and holding. The GP notes again that the appellant needs a walking stick and knee brace for walking, or needs some assistance from family members.

*Cognitive and Emotional Functioning*

The GP indicates that the appellant's mental impairment has moderate impact on five areas of daily functioning: emotion, attention/concentration, executive function, memory and "other emotional or mental problems" (no explanation of those other problems is provided). The GP indicates minimal impact on consciousness and again, "other emotional or mental problems".

*Daily Living Activities*

The GP indicates that the appellant needs periodic assistance to put on socks or tie shoelaces, and sometimes his partner needs to assist him to get out of bed. They indicate that he takes significantly longer than typical to do laundry and basic housekeeping, stating that, while he can do these activities, it takes him significantly longer than someone without knee pain. They indicate he needs periodic assistance with carrying purchases home from the store. He needs periodic assistance from another person to plan and prepare meals, and the GP notes that the appellant's partner assists with these tasks. His partner also assists with banking, budgeting and paying rent and bills.

*Assistance Provided for Applicant*

The GP indicates that family provides the help the appellant requires for daily living activities. They repeat that the appellant needs a cane and brace to help compensate for his impairment.

*Self-report*

The appellant provided a handwritten self-report with a 3 page addendum, in which he states:

- due to arthritis in his knee, he cannot walk more than a mile or go up 15 stairs without having to sit
- doing chores is very difficult because most of the time he cannot finish
- he is easily angered and frustrated because of these issues, and cannot concentrate
- fibromyalgia causes widespread pain in all his joints and muscles, and he cannot sleep more than four hours a night
- his anger and frustration affect his relationships with his family
- he cannot work or play sports
- he cannot fully care for his children because he has to sit and rest, and he cannot participate in activities with his children
- it is difficult to put clothes on, especially socks and shoes, and he has chosen to not wear socks since May 2022 because it is too frustrating to try to put them on
- he has trouble concentrating; for example, he walks into a room and forgets why, or he forgets something his spouse has told him
- he has constant knee, foot and joint pain and cramping
- his elbows, and sometimes his fingers, lock when he is holding things
- strenuous activity makes his muscles, particularly his calf muscles, pull
- he gets tension headaches and is sensitive to light
- he feels dizzy or lightheaded every day
- he has daily fatigue that means he does not do what needs to be done every day
- he has restless legs
- he has cognitive issues where he confuses his sentences, and says he has trouble reading, writing and listening because he struggles to concentrate and understand

- he feels anxious about doing things that may cause pain and require him to rest, which also causes strain with his family.

Letter from GP, January 11, 2023

The GP provided an additional letter in which they state that the appellant has physical impairments that affect his mobility, largely due to his bilateral knee condition. They go on to state:

- His left knee often feels 'tired' and he has considerable right knee pain
- He wears a knee brace 4-7 days a week and wears it for 3-4 hours daily
- The brace provides extra support for weight-bearing activity.
- When he is shopping, he will use a shopping cart for additional support
- He says his ability to walk up steps is now 3-5 steps at a time and then he requires a rest
- He can walk up a flight of 15 steps at his home, but this is taking longer to do
- His maximum duration of walking unaided is up to 30 minutes and then he requires a rest
- He needs periodic assistance from a family member for activities that require lifting and carrying and holding
- "His physical challenges are affecting his mental health (most of the time) – such that there is at least moderate severe impairment. He continues to have difficulty articulating his concerns. His partner largely handles financial and administrative tasks. While I recognize he has had persistent difficulties, I am not fully trained to determine functional abilities. I support his application for disability given the combination of physical and mental impairments."

Letters from Rheumatologist, April 5 and May 31, 2022

The rheumatologist confirms a longstanding history of bilateral wrist pain and stiffness, knee pain, stiffness and swelling, with symptoms becoming progressively worse since 2019. The rheumatologist confirms osteoarthritis of both knees, with left knee arthroplasty in 2020. They also confirm bilateral shoulder pain that is worse with activity. They indicate that the most likely causes of pain are osteoarthritis in his knee, calcific tendinitis of the shoulder, and central pain sensitization/fibromyalgia. Treatment options are limited.

Additional Medical Reports and Letters:

The letter from the physiotherapist proposes a trial of graduated return to work in 2021, with a handwritten note from the GP stating that the appellant was not able to resume full-time work because of considerable knee pain with increased hours.

The consult reports from the orthopedic specialist describe symptoms of pain, stiffness and swelling in the knees, made worse with activity, improving with activity moderation.

As part of its assessment, the osteoarthritis assessment team recommends that the appellant use a walking stick or pole in the left hand to offload the unstable left knee, in light of the right knee buckling.

The operative report confirms left knee arthroplasty in January 2020.

Additional Evidence:

Letter from Physiotherapist, February 8, 2023

The physiotherapist states that they have treated the appellant since April 2021 for post-surgical rehab of the left knee and progressing osteoarthritis of the right knee. They state that the appellant:

- has had “a progressive decline in mobility resulting in severe impairment mainly in his ability to walk, go up steps, complete household duties, take care of his children, and work.”
- can walk or stand for 10 minutes before needing to sit; he can walk with a walking stick for up to 15 minutes
- wears a knee brace for 6-8 hours a day, 5-6 times a week, which provides minimal relief of constant knee pain
- must “put two feet down per step” holding the railing when walking up stairs
- has constant swelling in both knees with minor activity
- has severe pain and buckling in the knees and has fallen as a result.

They indicate that:

- the risk of falling is a problem when the appellant is caring for his children
- the appellant’s spouse cooks meals because the appellant is not able to stand long enough
- the appellant’s “inability to mobilize as he likes has decreased his ability to assist with DLAs such as cleaning the house, vacuuming, carrying groceries, cooking, and most importantly childcare. I believe he exhibits severe physical impairment that affects all parts of his day and has continually worsened overtime.”

Evidence at the Hearing:

*Appellant’s Spouse:*

The appellant’s spouse stated:

- the appellant’s condition has worsened in the last 3 to 6 months
- it takes him double or triple the amount of time that it would take another person to do tasks
- he has to sit a substantial amount of the time
- two weeks ago he tried to stand, his right knee buckled and he ended up on the floor, unable to move, for 15 minutes, until the spouse was able to come to his aid
- they have to help him remember things like appointments
- he cannot chop vegetables because his hands cramp, and he cannot hold a knife
- since his recent fall, he was told by the doctor to get a four-point cane for greater stability
- he tried a return-to-work program 1½ years ago, but within a few weeks his knee was worse, and he was not able to continue.

In response to questions from the panel, the appellant's spouse stated:

- the spouse does all the sweeping and mopping, and most of the vacuuming, because the appellant cannot
- the spouse estimates they do 85% of the housework now
- the spouse has to take the laundry basket downstairs because the appellant cannot carry it
- the spouse has to deal with all the finances now because pain fogs the appellant's brain
- the appellant can go to the store to buy one item, but the spouse has to lift anything heavy and push the cart when it has a lot of items in it.

*Appellant:*

The appellant stated:

- he needs his spouse to be his advocate because he is "stuck in a fog" and not able to function
- he has stress due to pain, which causes him to be angry and frustrated easily
- it is hard for him to look after his children, and he cannot take them to the playground, run or ride a bicycle
- it takes him three to five minutes to go up a flight of stairs, and one flight of stairs feels like ten for him; then he has to sit down and rest
- it is not safe for him to lift more than 10 lbs. because if he pivots, his knee may buckle
- arthritis in his wrists makes it hard to lift a milk jug
- he cannot do outside chores at his house; cutting the lawn would take him 15 minutes 'before' and now would take 3 hours
- he is waiting for a pain assessment through the rheumatologist.

In answer to questions from the panel, the appellant stated:

- he can drive for 10 to 15 minutes; for any longer distances, his spouse drives
- it takes him 5 minutes to get dressed, and he needs help from his spouse for socks and shoes, and sometimes shirt and pants
- before his knee surgery, the appellant did all the cooking, 70% of the laundry, as well as sweeping and mopping; he also did a lot of the shopping and childcare
- the knee brace keeps his knee from buckling, and he wears it 5 to 7 days a week, 6 to 8 hours a day; it is uncomfortable, and can be a hindrance to moving, so he does not wear it all the time
- he uses the walking stick if he walks more than 10 to 15 minutes, but still does not walk more than 1 mile.

Admissibility of Additional Evidence:

The ministry did not object to the admission of the additional letter from the physiotherapist, or the additional oral evidence of the appellant and his spouse at the hearing.

The panel finds that the additional evidence is admissible under section 22(4) of the Employment and Assistance Act. The letter from the physiotherapist provides additional information about the

appellant's medical condition and functional limitations. The oral evidence of the appellant and his spouse provides additional detail about the appellant's impairment, his ability to perform daily living activities, and the help he receives from others. Therefore, the panel finds that the additional evidence is reasonably necessary for the full and fair disclosure of all matters relating to the decision under appeal.



**Part F – Reasons for Panel Decision**

The issue on appeal is whether the ministry's reconsideration decision, in which the ministry found the appellant to be ineligible for PWD designation under the EAPWDA, was reasonably supported by the evidence or was a reasonable application of the legislation in the appellant's circumstances. The ministry found that the appellant met the requirements for age (over 18) and duration (impairment to continue at least two years). The ministry was not satisfied that:

- the appellant has a severe mental or physical disability;
- the appellant's impairment, in the opinion of a prescribed professional, directly and significantly restricts his ability to perform daily living activities either continuously or periodically for extended periods; and
- as a result of restrictions caused by the impairment, the appellant requires an assistive device, the significant help or supervision of another person, or the services of an assistance animal to perform daily living activities.

**Appellant's Position:*****Severe Mental or Physical Impairment***

The appellant maintains that the cumulative effects of osteoarthritis, calcific tendinitis in his shoulder, wrist pain, fibromyalgia and dizziness result in a severe physical impairment. He has constant joint and muscle pain, and periodic muscle cramping. His right knee can buckle without warning. He can only sleep 4 hours a night due to pain, and is constantly fatigued. He is limited in the distance he can walk. He says it takes him considerably longer to climb stairs, and he has to rest if he climbs one flight. He points to his inability to return to work as a forklift driver, and the difficulties he has when trying to care for his children.

The appellant also says that his physical impairment has affected his mental health. His doctor has identified depression and anxiety. He says he gets angry and frustrated easily, and he has difficulty concentrating and remembering things. He also feels anxious about activities that may cause pain.

***Daily Living Activities:***

The appellant says that he is significantly restricted in his ability to perform daily living activities. He says that he cannot do basic housework, in particular sweeping, mopping and vacuuming. It takes him significantly longer to do other household chores because of pain and fatigue. The appellant says that he cannot cook meals because he cannot stand long enough, and he cannot hold a knife to chop or cut food because his fingers cramp. He says he is restricted in moving indoors and outdoors because of restrictions in his ability to walk and climb stairs.

***Help with Daily Living Activities:***

The appellant says that his spouse helps with the daily living activities that the appellant cannot do. Specifically, he says that his spouse prepares meals, does most of the housework, helps

him get out of bed and dress, and drives the vehicle for trips over 15 minutes. She has assumed responsibility for finances because of his problems with concentration and memory. He also uses a walking stick because his knee may buckle, and he wears a knee brace for 6 to 8 hours, most days.

### Ministry's Position:

#### *Severe Mental or Physical Impairment*

The ministry maintains that the functional assessments in the medical and assessor reports do not indicate a severe overall physical impairment in the appellant's ability to function independently. The ministry notes that the appellant is independent walking indoors, can walk 1 – 2 blocks unaided, and can lift at least 20 lbs. While the GP indicates that the appellant takes significantly longer than typical walking outdoors and climbing stairs, they do not indicate how much longer. The ministry points to a statement in the rheumatologist's April 5, 2022 letter, indicating that the appellant was "ambulating normally." The ministry notes that the appellant is independent walking indoors. While the GP says the appellant needs periodic assistance for lifting, carrying and holding, they do not indicate the frequency or duration of that assistance, which makes it difficult for the ministry to determine the severity of the impairment. While the GP indicates that the appellant needs assistive devices, the ministry questions the need when it appears that the appellant can manage functional skills at a reasonable level.

The ministry says that the appellant does not have a severe mental impairment. The ministry says that the appellant does not have a diagnosis of a mental health condition. While some cognitive and emotional deficits are noted, the GP does not note major impacts in any area of cognitive and emotional functioning. The ministry notes no severe restrictions in communication and minimal effect on daily living activities.

#### *Daily Living Activities*

The ministry maintains that the appellant is not directly and significantly restricted in performing daily living activities. The ministry points out that the appellant is noted to be independent in the majority of daily living activities listed in the Assessor Report, and social functioning is not restricted to a significant degree. At reconsideration the ministry maintained that there was no description of the frequency or duration of any assistance that might be needed.

Addressing the additional evidence, the ministry acknowledges that the physiotherapist confirms that the appellant's mobility has declined. However, the ministry maintains that the physiotherapist does not give enough information about how much extra time it takes the appellant to perform daily living activities, so the ministry cannot determine if the appellant takes significantly more time.

#### *Help with Daily Living Activities*

The ministry acknowledges that the GP reports that the appellant gets help from family and uses a walking stick and knee brace. However, the ministry maintains that, as it cannot be

determined that the appellant's ability to perform daily living activities is directly and significantly restricted, it cannot be determined that significant help is required.

*Additional Comments:*

At the hearing, the ministry stated that, if the oral evidence of the appellant and his spouse was confirmed by a prescribed professional, the ministry would be compelled to change the reconsideration decision that denied the appellant PWD designation.

Panel Decision:

To find a person eligible for PWD designation under the EAPWDA, the ministry must be satisfied of all the requirements in section 2 of the Act. In this case, the ministry was not satisfied:

1. that the appellant had a severe mental or physical impairment,
2. that, in the opinion of a prescribed professional, the impairment directly and significantly restricted the appellant's ability to perform daily living activities and
3. that, in the opinion of a prescribed professional, as a result of those restrictions, the appellant required help to perform those activities.

The panel notes the comments of the ministry at the hearing, that if the appellant's description of his impairment and resulting restrictions to daily living activities was confirmed by a prescribed professional the ministry would be compelled to change its decision denying the appellant PWD designation.

*Severe Mental or Physical Impairment*

*Physical Impairment*

The panel finds that the appellant has a severe physical impairment.

The panel notes that the term "severe mental or physical impairment" is not defined in the legislation, and that "the Tribunal should interpret the [EAPWDA] with a benevolent purpose in mind" (*Hudson v. British Columbia (Employment and Assistance Appeal Tribunal)*, 2009 BCSC 1461, "Hudson"). The panel finds that in light of the evidence of the GP, the rheumatologist and the physiotherapist, and the additional evidence of the appellant, summarized above, the ministry's determination that the appellant does not have a severe physical impairment is not reasonably supported by the evidence.

The appellant suffers from osteoarthritis, calcific tendinitis, and fibromyalgia, affecting his joints and muscles, leaving him in constant pain, and limiting his ability to walk, stand, lift, carry and hold. Symptoms become worse with activity, with the result that he has to limit his activities and rest frequently, for extended periods. It is difficult for him to stand or walk for any significant time. Pain interferes with his sleep and leaves him chronically fatigued.

His GP described his symptoms as moderately severe in October 2022, and has confirmed that the appellant's condition is getting progressively worse. The appellant's spouse confirmed that

his condition has worsened in the last 3 to 6 months. They describe a recent incident where the appellant's knee buckled as he tried to get up from a seat. The appellant fell to the floor and was unable to get up until his spouse was alerted and came to help him. They say that it takes the appellant two or three times as long as typical to do tasks, and he has to sit a substantial amount of the time.

The physiotherapist describes "a progressive decline in mobility resulting in severe impairment", explaining that the appellant can walk or stand for 10 minutes before needing to sit and rest; with a walking stick, the appellant can walk for 15 minutes.

At the reconsideration, the ministry maintained that the evidence established only a moderate impairment of function, noting that the Medical Report and the Assessor Report did not provide details of the frequency and duration of the limitations noted in those reports. The additional evidence of the appellant and his spouse provides further detail of the functional limitations set out in the reports of the doctors, as does the more recent letter from the physiotherapist.

At the hearing, the ministry commented that it was not clear why the appellant needed assistive devices to walk, when it appeared that he was managing functional skills at a reasonable level. The panel finds that two doctors and a physiotherapist have advised the appellant to use assistive devices because, in fact, he is not managing functional skills at a reasonable level.

The appellant and his spouse spoke of his difficulties in caring for his children, and his inability to return to paid employment. However, under the EAPWDA, neither childcare nor employability are considered when determining eligibility for PWD designation, which is governed by the criteria in the legislation.

Viewing the evidence as a whole, including the additional written and oral evidence, the panel finds that the appellant has a severe physical impairment and therefore, the ministry's determination was not reasonable.

### *Mental Impairment*

The GP has noted that the appellant has symptoms of depression and anxiety due to ongoing Musculo-skeletal pain. They identify difficulties with mental function including memory, concentration, and motivation. The appellant describes "brain fog" and confusion, and his spouse confirms his problems with memory and attention. His spouse has taken over management of finances as a result.

The GP has identified mild to moderate impact in six areas of cognitive and emotional functioning listed in the Assessor report. The panel finds that, while the appellant's mental health issues are significant, and affect his day-to-day functioning, it is a moderate, rather than a severe, impairment. The panel finds that the ministry's determination that the mental impairment is in the mild to moderate range, is reasonably supported by the evidence.

### *Daily Living Activities*

Under section 2(2)(b)(i) of the EAPWDR, if the ministry is satisfied that a person has a severe mental or physical impairment, the ministry must also be satisfied that, in the opinion of a prescribed professional, the appellant's ability to perform daily living activities is directly and significantly restricted by the severe impairment, either continuously or periodically for extended periods. Not all daily living activities must be directly and significantly restricted. However, in *Hudson* the court stated that "there must be evidence from a prescribed professional indicating a direct and significant restriction on at least two daily living activities."

Under the EAPWDR section 2(1)(b), for a person who has a severe physical or mental impairment, "daily living activities" means:

- prepare own meals;
- manage personal finances;
- shop for personal needs;
- use public or personal transportation facilities;
- perform housework to maintain the persons place of residence in acceptable sanitary conditions;
- move about indoors and outdoors;
- perform personal hygiene and self-care;
- manage personal medication.

The categories of daily living activities in the ministry forms do not match exactly the categories in the legislation. However, the panel finds that, in the medical report and the assessor report, and the February 8, 2023 letter from the physiotherapist, prescribed professionals have confirmed significant restrictions in the appellant's ability to perform the following daily living activities set out in the EAPWDR, periodically for extended periods, because of the severe physical impairments described above, with additional details provided by the appellant and his spouse:

- Prepare own meals: In the assessor report, the GP states that the appellant needs periodic assistance with meal planning, food preparation and cooking. The physiotherapist states that the appellant cannot stand long enough to finish cooking a meal. The appellant's spouse describes his inability to chop vegetables because his fingers cramp and spasm; the appellant indicates he has gone from doing most of the cooking, to doing none. While the GP indicates in the medical report that the appellant is not restricted in meal preparation, the panel places greater weight on the GP's statements in the assessor report, because those statements are consistent with the evidence of the physiotherapist, the appellant and his spouse.
- Perform housework to maintain the person's residence in acceptable sanitary condition: the GP states that the appellant takes significantly longer than typical to do basic housekeeping, due to knee pain. The physiotherapist states that the appellant's physical impairment is severe and has decreased his ability to clean the house and vacuum. The appellant and his spouse state that he is not able to sweep, mop or vacuum, and the appellant's spouse must do the portions of housework that require lifting and carrying, such as carrying a laundry basket.

- Move about indoors and outdoors: The GP states that the appellant cannot stand or walk for any significant duration; he takes significantly longer than typical to walk or climb stairs, is able to walk only 1 or 2 blocks on a flat surface, and climb one flight of stairs, after which he has to rest. The physiotherapist states that the appellant must wear a knee brace most days, between 6 and 8 hours, to prevent his knee from buckling. The appellant and his spouse provide additional detail of his limitations – for example, the recent incident when his knee buckled, and he was not able to get up off the floor. He must use a walking stick for support.

The panel notes again the ministry's comment at the hearing that, if the evidence of the appellant and his spouse at the hearing was supported by the opinion of a prescribed professional, it would be compelled to change the decision denying the appellant PWD designation.

The panel finds that the evidence of the appellant and his spouse is confirmed by opinions of the prescribed professionals. Therefore, the panel finds that the ministry's determination that the appellant's ability to perform daily living activities is not directly and significantly restricted by a severe physical impairment, is not reasonably supported by the evidence.

#### *Help with Daily Living Activities*

Under section 2(3)(b) of the EAPWDR, a person requires help for a daily living activity if, in order to perform it, they require an assistive device, the significant help or supervision of another person, or the services of an assistive animal. At reconsideration, the ministry acknowledged that the appellant receives help from family and uses a walking stick and knee brace. However, the ministry determined that, as it was not established that daily living activities were significantly restricted, it could not be determined that the appellant required significant help.

The panel has found that the appellant's ability to perform daily living activities is directly and significantly restricted by a severe physical impairment. The GP, the physiotherapist and the osteoarthritis assessment team confirm the appellant's need for a walking stick, and the GP and physiotherapist confirm the need for a knee brace. The GP and physiotherapist also confirm that the appellant needs significant help from his spouse for housework and meal preparation. Therefore, the panel finds that the appellant requires help, in the form of assistive devices and significant help and support from another person, in relation to daily living activities.

#### Conclusion:

The panel finds that the ministry's determination that the appellant did not meet the criteria for designation as a PWD under the EAPWDA is not reasonably supported by the evidence.

The panel rescinds the reconsideration decision. The appellant is successful in the appeal.

Schedule – Relevant Legislation  
Employment and Assistance for Persons with Disabilities Act

**Persons with disabilities**

s. 2 (1) In this section:

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

"daily living activity" has the prescribed meaning;

"prescribed professional" has the prescribed meaning.

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

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

(b) in the opinion of a prescribed professional

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

(A) continuously, or

(B) periodically for extended periods, and

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

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

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

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

(i) an assistive device,

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

(iii) the services of an assistance animal.

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

## Employment and Assistance for Persons with Disabilities Regulation

### Definitions for Act

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

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

(i) prepare own meals;

(ii) manage personal finances;

(iii) shop for personal needs;

(iv) use public or personal transportation facilities;

(v) perform housework to maintain the person's place of residence in acceptable sanitary condition;

(vi) move about indoors and outdoors;

(vii) perform personal hygiene and self care;

(viii) manage personal medication, and

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

(i) make decisions about personal activities, care or finances;

(ii) relate to, communicate or interact with others effectively.

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

(a) authorized under an enactment to practise the profession of

(i) medical practitioner,

ii) registered psychologist,



(iii) registered nurse or registered psychiatric nurse,

(iv) occupational therapist,

(v) physical therapist,

(vi) social worker,

(vii) chiropractor, or

(viii) nurse practitioner, or

(b) acting in the course of the person's employment as a school psychologist by

(i) an authority, as that term is defined in section 1 (1) of the *Independent School Act*, or

(ii) a board or a francophone education authority, as those terms are defined in section 1 (1) of the *School Act*,

if qualifications in psychology are a condition of such employment.

(3) The definition of "parent" in section 1 (1) applies for the purposes of the definition of "dependent child" in section 1 (1) of the Act.

APPEAL NUMBER 2023-0042

**Part G – Order**

The panel decision is: (Check one)       Unanimous       By Majority

The Panel       Confirms the Ministry Decision       Rescinds the Ministry Decision

If the ministry decision is rescinded, is the panel decision referred back to the Minister for a decision as to amount?      Yes       No

**Legislative Authority for the Decision:**

*Employment and Assistance Act*

Section 24(1)(a)       or Section 24(1)(b)

Section 24(2)(a)       or Section 24(2)(b)

**Part H – Signatures**

Print Name  
Susan Ferguson

Signature of Chair

Date (Year/Month/Day)  
2023/March/05

Print Name  
Daniel Chow

Signature of Member

Date (Year/Month/Day)  
2023/March/05

Print Name  
Bob Fenske

Signature of Member

Date (Year/Month/Day)  
2023/March/05