

Part C – Decision Under Appeal

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the ministry) reconsideration decision dated February 24, 2023 denying persons with disabilities (PWD) designation. The ministry found that the appellant met the age (18 years or older) and duration (impairment to continue for at least 2 years) requirements. However, the ministry was not satisfied that:

- The appellant has a severe mental or physical impairment;
- The appellant’s impairment significantly restricts the ability to perform daily living activities; and
- The appellant requires significant help or supervision to perform daily living activities.

The ministry also found that the appellant was not one of the prescribed classes of persons eligible for PWD designation on the alternative grounds. As there is no information or argument on this point, the panel considers it not to be at issue in this appeal.

Part D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Act (the Act), sections 2 and 2.1

Employment and Assistance for Persons with Disabilities Regulation (the Regulation), section 2

The full text of these sections of legislation is set out at the end of this decision.

Part E – Summary of Facts

Evidence Before the Ministry at Reconsideration

- 1) The appellant's PWD application. The Medical Report and Assessor Report sections were completed by the appellant's general practitioner (the doctor) of four years, who had seen the appellant 2-10 times in the past 12 months. The appellant completed the Applicant Information (self-report) section.
- 2) The appellant's Request for Reconsideration, which included additional information from the appellant.

New Evidence Provided on Appeal and Admissibility

The appellant submitted a Notice of Appeal.

In addition, at the hearing, the appellant provided additional information about his medical conditions and their impact on his functioning.

The ministry did not object to the admission of the appellant's information. The panel found that the information provided in the appellant's Notice of Appeal and at the hearing directly related to PWD eligibility. Therefore, the panel found that the information was reasonably required for a full and fair disclosure of all matters at issue and was admissible under section 22(4) of the *Employment and Assistance Act*.

Summary of Relevant Evidence

Medical Report

Diagnoses:

- Chronic myofascial syndrome, back pain
- Chronic left ankle pain
- Depression
- Anxiety

Health History:

- Has low back and left ankle pain.
- Able to walk on a flat surface only 2 blocks.
- Unable to go down stairs.

- Unable to lift more than 15 lbs.
- Limp.
- Does not need prosthesis or aids.
- Chronic conditions minimally improved with treatments.
- Depression/anxiety interfere with memory, unable to remember new information, has decreased focus and problems with impulse control.

Functional Skills:

- Can walk 1 to 2 blocks on a flat surface.
- Can climb 5+ stairs unaided.
- Can lift 5 to 15 lbs.
- Can remain seated less than one hour.
- Has no difficulty with communication.
- Has significant deficits with cognitive and emotional function (executive, language, memory, emotional disturbance, impulse control, and attention or sustained concentration).

Assessor Report

The doctor stated that chronic severe back pain, left ankle pain and depression/anxiety are the impairments that impact the appellant's ability to manage daily living activities.

Ability to Communicate:

- Speaking and hearing abilities are good.
- Reading ability is poor ("unable to focus").
- Writing ability is satisfactory.

Mobility and Physical Ability:

- Walking indoors, walking outdoors, climbing stairs, and standing are managed independently.
- Lifting, carrying, and holding require continuous assistance from another person.

Cognitive and Emotional Functioning (impact on daily functioning):

- Major impact for emotion, impulse control, attention/concentration, executive, and memory.
- Moderate impact for other emotional or mental problems.
- Minimal impact for bodily functions, insight and judgement, motivation.

- No impact for consciousness, motor activity, language, psychotic symptoms, and other neuropsychological problems.

Daily Living Activities:

- Personal Care: independent with all listed tasks; the appellant is “slow” with dressing, grooming, and bed/chair transfers.
- Basic Housekeeping: laundry and basic housekeeping require periodic assistance from another person.
- Shopping: independent with going to and from stores, reading prices and labels, and paying for purchases. Carrying purchases home requires periodic assistance from another person.
- All listed tasks of Meals, Pay Rent and Bills, Medications, and Transportation are managed independently. For all Transportation tasks the appellant is “slow.”
- Social Functioning: periodic support/supervision is needed for the ability to deal appropriately with unexpected demands. All other listed areas are managed independently. Good functioning with immediate and extended social networks.

Assistance Provided:

- Help required for daily living activities is provided by family.
- The appellant does not have an assistance animal.

Self-Report

- As a result of a workplace injury in 2017, standing on his left ankle for short or long periods of time causes unbearable pain and a “honeycomb feeling” throughout the day. The pain has not gotten better in the last five years.
- Due to low back pain caused by multiple car accidents in 2021, he has difficulty bending, sitting, and picking up anything “with weight.” Injections in May 2022 eliminated most of the pain for about four months. However, in September 2022 lifting at work reinjured his back, making the pain more unbearable. Since then, injections have given no pain relief.
- The pain is 8/10 all day long, with restless sleep.
- He can take care of himself, but everything is painful, including sitting and standing. The pain is unbearable all day long.

Request for Reconsideration:

- He has had two ankle surgeries.
- He cannot stand for long periods of time, cannot jump on his left ankle at all, and cannot walk down stairs.

- There is no pain management for his ankle due to nerve damage and arthritis.
- The car accidents caused extreme lower back pain for which there is no pain relief.
- The combination of very bad ankle and low back pain through the day has made his life very difficult.
- A head-on car accident left him with headaches, which he believes are from a concussion.

Notice of Appeal:

- The appellant confirms the chronology of his vehicle and workplace accidents.
- The specialist wants to book lower back surgery – the appellant would like to see the MRI first.
- The pain is unbearable.

Information at the Hearing:

The appellant stated that when he injured his ankle, he needed surgery which involved placing many screws and pins. Surgery to remove the hardware and the post-surgery treatment were delayed due to Covid-19. For five years he has suffered from ankle pain that feels like being hit with a hammer. He explained that the “honeycomb” feeling in his ankle is as though it is hollow – he believes this is due to “sac” damage and arthritis.

The appellant also provided details of the three vehicle accidents in 2021. He has had back pain for two years. Pain medication no longer helps. Although the first injection reduced the pain, the next 4-5 injections did not help. He is waiting for a new MRI and surgery to cauterize nerves in his back. He has difficulty making dinner, cannot play with his youngest child, and relies on his children to lift and carry laundry, groceries, and other things. Mornings are the worst, as he tries to stand. Every step is painful, and he constantly needs to move when sitting. The appellant stated that he did not know why the doctor did not include additional information about his medical conditions and their impact or information from the specialists.

The ministry reviewed the reconsideration decision but did not provide additional evidence. In response to the appellant’s concerns that the doctor had not provided all relevant information, the ministry explained that the appellant, if not successful on appeal, could submit a new PWD application. The ministry noted that the Assessor Report part of the PWD application can be filled out by other prescribed professionals listed in section 2 of the Regulation, which includes chiropractors and physical therapists, not just the appellant’s doctor. The ministry also noted that PWD eligibility is not based on a person’s

ability to work. The ministry stated that an application for Persons with Multiple Barriers to Employment (PPMB) is an option where inability to work is the main problem.

Part F – Reasons for Panel Decision**Issue on Appeal**

The issue on appeal is whether the ministry's decision that the appellant was ineligible for PWD designation was reasonably supported by the evidence or was a reasonable application of the legislation in the circumstances of the appellant. That is, was the ministry reasonable when determining that the requirements of section 2(2) of the Act were not met because:

- a severe mental or physical impairment was not established;
- the appellant's daily living activities were not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and
- it has not been established that daily living activities are significantly restricted and therefore it cannot be determined that significant help is required from other persons or a device to complete restricted activities.

Panel Decision**Severe Impairment – Physical or Mental**

Section 2 of the Act requires the Minister to be satisfied that the appellant has a severe physical impairment. "Severe" and "impairment" are not defined. The ministry considers the extent of any impact on daily functioning as shown by limitations with or restrictions on physical abilities and/or mental functions. The panel finds that an assessment of severity based on daily physical and mental functioning including any restrictions is a reasonable interpretation of the legislation. However, the panel notes that frequency and/or duration of impairment is not required in the assessment of severity by the legislation at this stage of the legislative test. The panel also notes that the legislation does not identify employability or financial limitations as considerations when determining PWD eligibility.

Physical Impairment

The appellant's position is that he has a severe physical impairment due to constant daily ankle and low back pain. The appellant states that although mornings are the worst, he has severe pain through the day that impacts all aspects of his functioning.

The ministry's position is that the information does not establish a severe physical impairment. The ministry notes that the appellant can independently walk 1-2 blocks and climb 5+ stairs. The ministry states that the appellant's ability to lift 5-15 lbs., is sufficient to meet basic functional requirements. The ministry found that the available information about the appellant's difficulty descending stairs did not indicate an overall severe physical impairment. The ministry notes that the appellant cannot remain seated for long periods of time but concludes that this does not confirm a severe degree of impairment.

The panel finds that the information from the appellant's doctor confirms that the appellant's low back and ankle pain result in limitations to the appellant's physical functioning. The panel finds that the reported functional skills for walking, climbing stairs, lifting, and sitting, when considered separately, may reasonably be viewed as not showing severe impairment.

However, the panel finds that when the limitations for these individual functions are considered together and in light of the constant pain the appellant experiences, the result is a severe impairment of physical functioning. For example, while the appellant can independently walk for up to 2 blocks, the appellant limps and is in constant pain. Further, the information indicates that the appellant is unable to find relief from pain by sitting, as the appellant can sit for less than an hour and needs to constantly shift position due to pain. Also of note is that although the appellant can climb 5+ stairs, both the doctor and the appellant confirm that the appellant cannot descend stairs, not just that it is difficult. The doctor confirms that the appellant's pain is severe and chronic, with minimal improvement from treatments, and the appellant describes his pain as unbearable.

The panel finds that the limitations to the appellant's overall physical functioning due to restrictions on the ability to walk, manage stairs, lift, and sit due to constant pain, show a severe physical impairment. Therefore, the panel finds that the ministry was not reasonable to decide that the appellant does not have a severe physical impairment.

Mental impairment

The appellant's written and oral submissions did not address mental impairment.

The ministry's position is that although the doctor reports limitations to mental and emotional functioning due pain, anxiety and depression, severely impaired mental functioning is not shown. The ministry notes that the appellant independently manages all decision-making activities related to personal care and finances, as well as all but one aspect of social functioning. The ministry also notes that although the doctor indicates

difficulty with reading, the appellant independently manages shopping tasks and banking and medications, which require some reading skills.

The panel finds that the doctor reports significant deficits and a major impact on daily functioning in many areas of mental and emotional functioning. The doctor also provides additional commentary about problems with focus, which impacts reading, and with memory. However, as the ministry notes, aside from needing periodic support to deal with unexpected demands, the doctor indicates that the tasks of daily mental and emotional functioning are managed independently. Specifically, the doctor indicates that the appellant independently manages decision-making tasks including those related to personal care, finances, shopping, and meals. The doctor also indicates that the appellant has good functioning with both immediate and extended social networks. The panel also notes that the appellant did not describe impacts on his mental and emotional functioning. For these reasons, the panel finds that the ministry was reasonable to decide that there was not enough information to show a severe mental impairment.

Restrictions in ability to perform daily living activities

The appellant's position is that everything he does is painful and that he needs help from his children with lifting and carrying.

The ministry's position is that there is not enough information to show that, in the opinion of a prescribed professional, the appellant's ability to manage daily living activities is significantly restricted either continuously or periodically for extended periods. The ministry stated that the frequency and duration of the periodic assistance needed for housekeeping and carrying purchases home was not described to determine if the help is needed for extended periods. The ministry also found that the appellant's abilities for walking, climbing stairs and lifting do not show the need for significant assistance with these tasks. The ministry stated that needing periodic assistance with shopping does not show a significant restriction in the appellant's overall ability to manage shopping, as all other shopping tasks are managed independently. Respecting social functioning, the ministry found that a significant restriction was not shown. The ministry noted that aside from needing periodic assistance to deal with unexpected demands, the appellant is otherwise independent, has good social functioning, and does not need assistance to live in the community.

Section 2(2)(b)(i) of the Act requires that the ministry be satisfied that in the opinion of a prescribed professional, a severe mental or physical impairment directly and significantly restricts the appellant's ability to perform DLA either continuously or periodically for

extended periods. While other evidence may be considered for clarification or support, the ministry's determination as to whether it is satisfied, is dependent upon the evidence from prescribed professionals. The term "directly" means that there must be a causal link between the severe impairment and restriction. The direct restriction must also be significant.

The panel notes that the only information from a prescribed professional about the appellant's ability to perform daily living activities is from the doctor. The panel finds that the information from the doctor is not sufficient to show that the restrictions with daily living activities are significant, continuously or periodically for extended periods. The doctor indicates that the appellant independently manages most tasks of daily living activities. For some of the independently managed tasks (personal care and transportation), the doctor indicates that the appellant is "slow" but does not indicate how much longer the appellant takes to determine if the restriction is significant. Where the doctor indicates that periodic assistance is needed (all tasks of basic housekeeping, carrying purchases home, and dealing with unexpected demands), information is not provided to determine if the help is needed for extended periods. The appellant reports that everything is painful and difficult, but he can take care of himself, with help from his children with lifting and carrying.

Based on the available information, the panel finds that the ministry was reasonable to decide that a prescribed professional has not confirmed direct and significant restrictions with daily living activities, continuously or periodically for extended periods.

Help to perform daily living activities

The appellant's position is that he needs help from his children with lifting and carrying.

The ministry's position is that the information does not show that help is needed due to significant restrictions in the ability to perform daily living activities.

The panel notes that direct and significant restrictions with daily living activities must first be shown to decide that help is needed as a result of significant restrictions. As the panel already found that significant restrictions with daily living activities were not shown, the panel also finds that the ministry was reasonable to decide that the help requirement is not met.

Conclusion

The panel finds that based on all of the available information, the ministry's reconsideration decision, which determined that the appellant was not eligible for PWD designation, was reasonably supported by the evidence. The panel confirms the decision. The appellant is not successful on appeal.

The panel acknowledges the appellant's concern that the medical information did not present the complete picture of his medical conditions and their impact on his functioning. The panel notes that the appellant may wish to re-apply for PWD designation or PPMB qualification if he obtains additional medical information from the doctor or other prescribed professional.

Relevant Legislation

Employment and Assistance for Persons with Disabilities Act

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 authorized under an enactment to practise the profession of

- (a) medical practitioner,
- (b) registered psychologist,
- (c) registered nurse or registered psychiatric nurse,
- (d) occupational therapist,
- (e) physical therapist,
- (f) social worker,
- (g) chiropractor, or
- (h) nurse practitioner.

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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

Jane Nielsen

Signature of Chair

Date (Year/Month/Day)

2023/04/10

Print Name

Erin Rennison

Signature of Member

Date (Year/Month/Day)

2023/04/10

Print Name

Sarah Bill

Signature of Member

Date (Year/Month/Day)

2023/04/10