

Part C – Decision Under Appeal

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the Ministry) decision dated January 24, 2023, denying persons with disability (PWD) designation.

The Ministry found the Appellant met the age (over 18) and duration (likely to last more than two years) requirements. However, the Ministry found the Appellant did not meet the requirements for:

- severe mental or physical impairment
- significant restriction on the ability to perform daily living activities
- needing significant help to perform daily living activities.

The Ministry found the Appellant was not one of the prescribed classes of persons eligible for PWD on alternative grounds. As there was no information or argument on this point, the Panel considers it not to be an issue in this appeal.

Part D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Act (Act), s. 2
Employment and Assistance for Persons with Disabilities Regulation (Regulation), s. 2
Employment and Assistance Act (EAA), s. 22(4)

Part E – Summary of Facts

The hearing began on March 21, 2023, and was adjourned because a letter the Appellant said he had given to the Ministry with the Notice of Appeal did not appear in the Appeal Record. The Panel adjourned the hearing so the Appellant could provide another copy of the letter. The hearing was re-scheduled for April 20, 2023, and was adjourned again because the Appellant was ill, and the person who was to appear as his representative was unable to attend for reasons beyond their control. The hearing resumed and was concluded on May 3, 2023.

Evidence Before the Ministry at Reconsideration:

The Appellant is over 18 years of age. In support of his application, he submitted a Medical Report and an Assessor Report completed by Nurse Practitioner #1, with notes and changes by Nurse Practitioner #2, and his Self Report.

Medical Report:

Both of the Nurse Practitioners state that they have seen the Appellant between 2 and 10 times in the past 12 months.

Diagnosis:

They list diagnoses of obesity (Nurse Practitioner #1 indicates onset 2019; Nurse Practitioner #2 indicates more than 20 years total) and mood disorder (onset 2018). They also note hypertension secondary to obesity and sleep apnea.

Health History:

Nurse Practitioner #1 states that the Appellant has morbid obesity and has struggled with unintended weight gain especially over the last 2 to 3 years. The diagnosis is compounded by major depressive disorder with symptoms described as “daily, severe.” Nurse Practitioner #1 records the Appellant’s height as 5 feet 10 inches, and his weight as 325 pounds; Nurse Practitioner #2 corrected the weight to 550 pounds, noting that the first recorded weight is incorrect.

Functional Skills:

Nurse Practitioner #1 indicates that the Appellant can:

- walk 1 to 2 blocks unaided on a flat surface
- climb 2 to 5 steps unaided
- lift 2 to 7 kilograms
- remain seated with no limitation

Nurse Practitioner #2 corrected the report to indicate that the Appellant can remain seated less than 1 hour.

Nurse Practitioner #1 indicated that the Appellant has significant deficits with cognitive and emotional function, identifying deficits in executive function, emotional disturbance, and motivation.

Assessor Report:

Nurse Practitioner #1 notes that the Appellant lives alone.

Mental or Physical Impairment:

Nurse Practitioner #1 repeats the diagnoses of morbid obesity and depression. Nurse Practitioner #2 adds the diagnosis of anxiety.

Mobility and Physical Ability:

They indicate that the Appellant takes significantly longer to walk indoors and outdoors, climb stairs, stand, lift, carry and hold, on a daily basis, due to obesity and deconditioning.

Daily Living Activities:

Nurse Practitioner #1 indicates that the Appellant's mental impairment has a major impact on motivation, a moderate impact on bodily functions, emotion and executive function, and minimal impact on motor activity. Nurse Practitioner #1 indicated no impact on impulse control, and Nurse Practitioner #2 noted that indication as an error, correcting it to indicate moderate impact on "food + emotion + impulse control."

Under Personal Care, Nurse Practitioner #1 indicates that the appellant takes significantly longer than typical for dressing, grooming, bathing, and regulating diet. They indicate that the Appellant takes significantly longer than typical for meal planning. Under Transportation, while Nurse Practitioner #1 indicates that the Appellant is independent getting in and out of a vehicle, Nurse Practitioner #2 comments "excessive time needed for mobility."

Under Social Functioning, Nurse Practitioner #1 indicates that the Appellant needs periodic support or supervision to develop and maintain relationships, although they do not add an explanation or description of the support or supervision needed. They indicate that the Appellant is independent in dealing appropriately with unexpected demands, but Nurse Practitioner #2 adds that the Appellant has poor impulse control and emotional dysregulation. They indicate marginal functioning with immediate and extended social networks.

Assistance Provided for Applicant:

They indicate that family and friends provide help required for daily living activities. Nurse Practitioner #2 adds that the Appellant has been referred to a nutrition specialist with post support and indicates that the Appellant needs "home adjustments for bariatric size."

Self Report:

The Appellant states:

- His disabling condition is morbid obesity
- He also suffers from sleep apnea, osteoarthritis, “hypoventilation syndrome”, gout, Haglund’s Deformity, chronic stress, debilitating anxiety, major depressive disorder, plantar fasciitis, and Type 2 diabetes
- When he gets out of bed in the morning he can barely walk because of pain in his legs
- He has pain even when sitting still, and when he moves the pain can be so severe it brings him to tears
- He has “zero flexibility” which is a major compromise of his mobility and function
- He has difficulty concentrating and is “constantly excessively tired” because of lack of sleep due to sleep apnea
- As a child, he had a rare blood disease that caused all his joints to swell, especially his feet and knees
- He has bunions, “lumps and abnormalities” on his feet due to osteoarthritis
- His anxiety is debilitating, causing panic attacks, and afterwards he is left feeling “spent, weak, tired and very surprised I’m actually still alive.”
- His depression is related to his obesity
- It takes courage for him to appear in public, as he sees people look at him with disgust because of his weight.
- He has suicidal thoughts daily
- His weight affects his hygiene, and he has “giant cysts” under his belly

Additional Evidence:

The Appellant provided:

- A Doctor’s report diagnosing severe sleep apnea, recommending urgent assessment
- A letter from Nurse Practitioner #2 stating:
 - *“[The Appellant] no longer has a home, he will be residing with his mother for continued support with his daily living as well as support to maintain his mental health and ability to participate in daily life. While he is currently independent with these, he relies heavily on his social support network to sustain his financial, mental, and physical well-being.”*
 - The difference in recorded weight in the Medical Report was due to limitations on the scale in the clinic.
 - He suffers from major depressive disorder also presenting with anxiety
 - He has extremely poor sleep and poorly controlled hypertension.

Appellant:

At the hearing, the Appellant said:

- He lives with his mother now, for help with daily living activities
- He spends his days sitting in a small bedroom
- His mother does his laundry, makes food, and takes him to appointments

- He cannot sleep, which affects his brain, so he cannot do normal things
- He cannot do any tasks because of his weight:
 - he cannot put his socks on
 - he cannot take a shower because he does not fit in it
 - he has difficulty sitting or standing for long
 - he does not fit in 90 percent of vehicles
 - he is not able to the toilet easily or clean himself afterwards, and uses a special toilet seat
- He has now had all his teeth removed because of his diabetes.

Admissibility of Additional Evidence:

The Ministry did not object to the admissibility of the additional written and oral evidence.

The Panel finds that the additional evidence is reasonably required for the full and fair disclosure of all matters in the appeal. Therefore, the Panel finds that the additional evidence is admissible under EAA s. 22(4).

Part F – Reasons for Panel Decision

The issue on appeal is whether the Ministry's decision denying the Appellant PWD designation is reasonably supported by the evidence or is a reasonable application of the legislation. The Ministry found the Appellant met the age (over 18) and duration (likely to last more than two years) requirements. However, the Ministry found the Appellant did not meet the requirements for:

- severe mental or physical impairment
- significant restriction on the ability to perform daily living activities
- needing significant help to perform daily living activities.

Appellant's Position:

The Appellant says that he meets all the criteria for PWD designation due to severe mental and physical impairments. The Nurse Practitioners confirm diagnoses of morbid obesity, severe sleep apnea, diabetes, and hypertension, as well as major depressive disorder and anxiety. He maintains that he is not able to do any daily living activities. He has had to move in with his mother for support with all his daily living activities.

Regarding the changes to the Medical and Assessor Reports, the Appellant says that Nurse Practitioner #1 spent a hurried 10 minutes completing the forms before leaving on vacation. He points to the 200 pound discrepancy in recording his weight as an example of their errors. He says that the evidence of Nurse Practitioner #2 is more accurate and reliable, as that person spent more time with him and has given a more considered opinion.

Ministry Position:

The Ministry maintains that the Appellant does not have severe mental or physical impairments. The Ministry acknowledges that the Appellant has pain and reduced mobility due to his medical conditions but maintains that the range of functional skills recorded by Nurse Practitioner #1 does not indicate a severe impairment of physical functioning. The Ministry says that the Appellant can walk and climb stairs and does not require any aids. While he takes longer than typical, the Nurse Practitioner did not indicate how much longer. Therefore the Ministry says it cannot determine if there is a severe degree of impairment.

The Ministry also acknowledges that the Appellant has limitations to cognitive and emotional functioning due to mood disorders but says that the Appellant's mental function is not severely impaired. The Ministry says that the Appellant is independent "in almost all aspects of daily living activities related to personal activities, care, finances and social functioning."

The Ministry also says that the information provided does not indicate direct and significant restrictions in daily living activities. The Ministry says that, while the Assessor Report indicates that the Appellant takes longer to complete some activities, the report does not say how much longer, and therefore the Ministry cannot determine if the length of time is a significant restriction. The report also says that the Appellant needs assistance with some aspects of social functioning but does not say how often or for how long the Appellant needs assistance.

Therefore, the Ministry says that it cannot determine that the Appellant is restricted periodically for extended periods. The Ministry maintains that there is not enough evidence to confirm that the Appellant has a severe impairment that significantly restricts the Appellant's ability to perform daily living activities continuously or periodically for extended periods.

Therefore, as it has not been established that daily living activities are significantly restricted the Ministry says it also cannot determine that the Appellant needs significant help with restricted activities.

Panel Decision:

PWD Designation – Generally

The legislation provides the Ministry with the discretion to designate someone as a PWD if the requirements are met. In the Panel's view, PWD designation is for persons who have significant difficulty in performing regular self-care activities.

Some requirements for PWD designation must have an opinion from a professional, and it is reasonable to place significant weight on these opinions. The application form includes a Self Report. It is also appropriate to place significant weight on the Self Report and evidence from the Appellant, unless there is a legitimate reason not to do so.

The Panel will review the reasonableness of the Minister's determinations and exercise of discretion.

Severe Mental or Physical Impairment

"Severe" and "impairment" are not defined in the legislation. 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 physical and mental functioning including any restrictions is a reasonable application of the legislation.

A medical practitioner's description of a condition as "severe" is not determinative. The Minister must make this determination considering the relevant evidence and legal principles.

With respect to the Medical and Assessor Reports, the Panel accepts the Appellant's explanation for the changes and corrections on the forms, and where the statements and opinions of Nurse Practitioner #1 differ from those of Nurse Practitioner #2, the Panel places greater weight on the evidence of Nurse Practitioner #2. Where the information on the form is unchanged by Nurse Practitioner #2, the Panel accepts the information and opinions as those of both Nurse Practitioners.

1. Physical Impairment:

The Appellant suffers from morbid obesity – at 5 feet 10 inches tall, he weighs 550 pounds. The Nurse Practitioners indicate that the Appellant takes significantly longer than typical to do every activity requiring mobility or physical ability, due to obesity. Since the reconsideration decision,

the Appellant has had to leave his residence and move in with his parent, because he cannot look after himself day-to-day. In addition, the Panel observed the Appellant during the hearing, and noted that he appeared to be bedridden and unable to stay sitting upright during the hearings, on either of the days he attended.

The Appellant reported other diagnoses of osteoarthritis, “hypoventilation syndrome”, gout, Haglund’s deformity and plantar fasciitis. The Panel finds that the Ministry was reasonable in considering only the conditions diagnosed by the Nurse Practitioners. The Panel finds that the other medical conditions of sleep apnea, diabetes and hypertension, reported in the Medical and Assessor Reports and the additional letter from Nurse Practitioner #2, add to the physical impairment due to morbid obesity, as the Appellant’s energy is further reduced.

In addition to the evidence the Ministry had at reconsideration, the Panel has reviewed the additional letter from Nurse Practitioner #2 and has observed the Appellant and considered his oral evidence, including his description of what is involved in simply mobilizing to get out of bed in the morning or perform basic hygiene. Considering the whole of the evidence, the Panel finds that the Appellant has a severe physical impairment due to morbid obesity.

2. Mental Impairment:

The Appellant’s mental and physical impairments cannot be neatly divided into compartments. The Appellant’s depression is related to his morbid obesity, and the effects of his physical condition on his ability to function contribute to his depressed mood and anxiety.

The Nurse Practitioners’ opinion that the Appellant’s depression and anxiety are severe is not determinative, but neither is it to be ignored. The Panel considers the Appellant’s description of his daily functioning in light of their assessment that the symptoms of major depressive disorder are daily and severe. The Appellant describes frequent panic attacks that leave him exhausted. He thinks of suicide every day. He has only marginal functioning with immediate and social extended networks, and depression has a major impact on his motivation. He has moderate impacts in four other areas of daily cognitive and emotional functioning. His condition appears to have worsened since the reconsideration decision, as the Panel notes the Appellant’s evidence that he has moved in with a parent for support and spends his days alone in a small bedroom.

Considering the evidence as a whole, the Panel finds that the Appellant has a severe mental impairment.

Restrictions to Daily Living Activities (Activities):

A prescribed professional must provide an opinion that the applicant’s impairment restricts the ability to perform the daily living activities (“Activities”) listed in the legislation. The Activities that are considered are listed in the Regulation. Those Activities are:

- Prepare own meals
- Manage personal finances
- Shop for personal needs
- Use public or personal transportation facilities

- Perform housework to maintain the person’s place of residence in acceptable sanitary condition
- Move about indoors and outdoors
- Perform personal hygiene and self care
- Manage personal medication.

For a person who has a severe mental impairment, Activities also include:

- Make decisions about personal activities, care, or finances
- Relate to, communicate, or interact with others effectively.

At least two Activities must be restricted in a way that meets the requirements. Not all Activities, or even the majority, need to be restricted.

The restrictions to Activities must be significant and caused by the impairment. This means that the restriction must be to a great extent and that not being able to do the Activities without a lot of help or support will have a large impact on the person’s life.

The restrictions also must be continuous or periodic. Continuous means the activity is generally restricted all the time. A periodic restriction must be for extended periods meaning frequent or for longer periods of time. For example, the activity is restricted most days of the week, or for the whole day on the days that the person cannot do the activity without help or support. To figure out if a periodic restriction is for extended periods, it is reasonable to look for information on the duration or frequency of the restriction.

The Medical Report and Assessor Report also have activities that are listed, and though they do not match the list in the Regulation exactly, they generally cover the same activities. The Medical Report and Assessor Report provide the professional with an opportunity to provide additional details on the applicant’s restrictions. The inability to work and financial need are not listed as Activities and are only relevant to the extent that they impact listed Activities.

The Panel finds that the Appellant’s severe mental and physical impairments significantly restrict his ability to perform the following Activities:

- Use public or personal transportation facilities: the Appellant cannot fit in most private vehicles; Nurse Practitioner #2 indicates “excessive time needed for mobility” to get in and out of a vehicle;
- Move about indoors and outdoors: the Appellant takes significantly longer than typical to walk indoors and outdoors, climb stairs, stand, lift, carry and hold; he describes himself as unable to do anything;
- Perform personal hygiene and self-care: the Appellant cannot fit in most showers; he cannot clean himself adequately after using the toilet; Nurse Practitioners indicate that he takes significantly longer than typical to dress, groom and bathe himself;
- Make decisions about personal activities, care, or finances: the Appellant has poor impulse control, particularly around food, despite the effect on his physical condition ; his mental impairment has a major impact on motivation.

The Panel finds that the Ministry was not reasonable in its determination that there was not enough evidence to confirm that the Appellant's severe impairment significantly restricted his ability to perform Activities.

Help Required:

A prescribed professional must provide an opinion that the person needs help to perform the restricted Activities. Help means using an assistive device, the significant help or supervision of another person, or using an assistance animal to perform the restricted Activities. An assistive device is something designed to let the person perform restricted Activities.

As the Panel has found that the Ministry was not reasonable in determining that the Appellant was not directly and significantly restricted in his ability to perform Activities, the Panel also finds that the Ministry was not reasonable in determining that it could not find that the Appellant needs help to perform those Activities.

In the Assessor Report, the Nurse Practitioners indicate that the Appellant receives help from family and friends for daily living activities. Nurse Practitioner #2 states that the Appellant has moved in with his parent for support with those activities. The Appellant describes the significant help his parent gives, doing laundry, preparing food, and taking him to appointments. The Panel finds that the Appellant requires significant help from another person to perform Activities, and is receiving that help from his parent.

Conclusion:

The Panel finds that the Ministry's decision that the Appellant did not meet the following criteria:

- severe mental or physical impairment
- significant restriction on the ability to perform daily living activities and
- needing significant help to perform daily living activities

was 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.

Employment and Assistance Act

s. 22 (4) A panel may consider evidence that is not part of the record as the panel considers is reasonably required for a full and fair disclosure of all matters related to the decision under appeal.

APPEAL NUMBER 2023-0066

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)

2023/05/08

Print Name

Bob Fenske

Signature of Member

Date (Year/Month/Day)

Print Name

Shelly McLaughlin

Signature of Member

Date (Year/Month/Day)