

Part C – Decision Under Appeal

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the Ministry) decision dated March 2, 2023 (the Decision) denying the Appellant persons with disabilities (PWD) designation.

The Ministry found that the Appellant met two requirements.

However, the Ministry found:

- The Appellant did not have a severe physical or mental impairment;
- The Appellant's daily living activities (DLA) aren't directly and significantly restricted; and,
- The Appellant doesn't need the significant help to do DLA because of significant restrictions.

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, section 2

Employment and Assistance for Persons with Disabilities Regulation, section 2

Employment and Assistance Act, section 22(4)

The legislation is in the Appendix at the end of this decision.

Part E – Summary of Facts

The information the Ministry had at the time of the Decision included:

- The Medical Report, dated November 24, 2022, completed by the Appellant's Doctor (the Doctor); and,
- The Assessor Report, dated November 24, 2022, also completed by the Doctor.

The Appellant chose not to complete a self-report or to state the reasons why he was asking the Ministry to reconsider its original decision. However, when the Appellant submitted his request for reconsideration, he included a one-page letter prepared by the Doctor and dated February 13, 2023 (the Letter). Information in the Letter is summarized in the appropriate sections of the discussion below.

Diagnoses

In the Medical Report, the Doctor says the Appellant has chronic back pain, depression, ankylosing spondylitis, and CAD (coronary artery disease). The Doctor does not provide the date of onset of any of these impairments.

Severe Physical Impairment

In the Medical Report, the Doctor says the Appellant's chronic back pain is getting worse, adding that the Appellant has progressive difficulties in walking and is gradually experiencing a reduction in the distance he can walk. The Doctor also says that the Appellant's ankylosing spondylitis causes further stiffness in his back.

The Doctor says the Appellant:

- Can walk 1 – 2 blocks without help on a flat surface, but walks slowly over that distance and must use rails for support;
- Climb 2 – 5 steps; and,
- Is unable to lift anything, adding "*feels dizziness*".

In the Assessor Report, the Doctor says the Appellant takes significantly longer than normal with all listed physical activities (walking indoors and outdoors, climbing stairs, standing, lifting, and carrying and holding). The Doctor also says that the Appellant is progressively getting worse in doing all physical activities, and is unable to lift, or to sit or stand for more than 20 – 30 minutes.

In the Letter, the Doctor says the Appellant "*has been diagnosed with chronic back pain which affects his bodily functions ... He cannot lift more than 10 lbs. for more than 5 – 10 minutes*".

Severe Mental Impairment

In the Medical Report, the Doctor says that the Appellant has significant deficits with cognitive and emotional functioning in the areas of emotional disturbance and attention and concentration.

In the Assessor Report, the Doctor says the Appellant's writing, speaking, reading, and hearing abilities are good.

In the Assessor Report, the Doctor also says that the Appellant's mental impairment has a major impact on his bodily functions, particularly with sleeping, adding "*sleep issues due to pain*". The Doctor says that the Appellant's mental impairment has a moderate impact on his emotional, attention/concentration, motivational and motor activity daily functioning. In the comments section, the Doctor says the Appellant has multiple stresses in his life that he is "*unable to manage*".

In assessing the Appellant's social functioning abilities, the Doctor says (with comments in *italics*) the Appellant needs continuous support or supervision in developing and maintaining relationships (*destroyed relationships*) and requires periodic assistance from another person in interacting appropriately with others (*has fixed ideas*). The Doctor also says the Appellant has marginal functioning with both his immediate and extended social networks.

In the Letter, the Doctor writes "*(The Appellant) is very emotionally labile and gets easily agitated and has very fixated ideas with very little flexibility leading to the disruption of close & extended relationships ... He has poor insight into his behaviour ... He gets easily restless and (is) not able to remain close to his long term relationships*".

Restrictions in the Ability to Perform DLA

In the Medical Report, the Doctor says the Appellant has been permanently prescribed medications that interfere with his ability to do DLA. The Doctor says that Elavil makes him sleepy.

In the Assessor Report, the Doctor says (with comments in *italics*) that the Appellant is restricted in doing the following DLA:

- **Perform personal hygiene and self care** – Takes significantly longer than normal with dressing, grooming, bathing, toileting, and transfers in and out of bed or a chair (*long (illegible) time due to pain*);
- **Perform housework to maintain the person's place of residence in acceptable sanitary condition** - Requires continuous assistance from another person or is unable to do laundry and basic housekeeping (*wife helps*);

- **Shop for personal needs** - Requires continuous assistance from another person or is unable to carry purchases home (*not able to* (illegible));
- **Prepare own meals** - Requires continuous assistance from another person or is unable to plan meals, prepare food, cook, or store food safely (*wife*);
- **Use public or personal transportation facilities** – Takes significantly longer than normal to get in and out of a vehicle and is unable to take public transit (*unable to reach the bus stop*);
- **Move about indoors and outdoors** – See Doctor’s comments in the “Severe Physical Impairment” section above;
- **Make decisions about personal activities, care, or finances** – Independent in taking medication as directed, but the Doctor has added the comment “*often needs more education*”;
- **Relate to, communicate or interact with others effectively** - See Doctor’s comments in the “Severe Mental Impairment” section above.

In the Letter, the Doctor says the Appellant takes three times longer than normal to do DLA.

Need for Help

In the Medical Report the Doctor says the Appellant does not require any prostheses or aids for his impairment but needs rails for support when climbing stairs.

In the Assessor Report, the Doctor says the Appellant lives with family and gets help with the meals and housework DLA from his wife.

In the Letter, the Doctor says that the Appellant is socially isolated and has no support system.

Additional Information Submitted after Reconsideration

Section 22(4) of the *Employment and Assistance Act* says that a panel can consider evidence that is not part of the record when the Ministry made a decision. But first the panel must feel that the new information impacts the Decision. Once a panel has determined if any new evidence can be admitted, it must decide if the Decision was reasonable considering the new evidence.

In the notice of appeal, the Appellant does not say why he disagrees with the Decision.

Evidence Presented at the Hearing

The Appellant attended and was also represented at the hearing by his wife (the Representative).

At the hearing, the Appellant said he was relying on the information provided by the Doctor because the Medical Report and the Assessor Report contained a lot of medical terminology he didn't understand. He said he had told his wife and his Doctor about his impairments, and his wife had provided additional information to the Doctor. He said it was apparent the Ministry found the information provided by the Doctor to be inadequate. The Appellant said that he didn't have anything else to say about why the Ministry decision was wrong, but he and his wife would answer any questions the Panel might have.

At the hearing, the Panel mentioned that the Doctor had said in the Letter, which was written three months ago, that the Appellant's physical impairments were getting worse and that he was gradually experiencing a reduction in his distance walked. The Panel asked the Appellant if there had been a noticeable reduction in the distance, he was able to walk over the past three months. In response, the Representative said that the Appellant thought it was important to exercise by walking every day. He used to walk 45 minutes a day, but he is no longer able to walk uphill. Now, if he walks more than a block, he finds that he is unable to walk for three days due to the pain. As a result, he has been taking shorter walks lately and resting on park benches. The Appellant also confirmed that he did not use a cane or other assistive device as an aid in walking.

Regarding other impacts to his physical abilities, the Appellant said that if he must sit for a long time it hurts, and that, while he is not a smoker and doesn't take drugs, his immune system is getting worse, and he has tried to contact the Doctor because he has been losing weight.

The Panel asked the Appellant to describe the sleep issues associated with his medication that the Doctor had referenced in the Medical Report that might be affecting his ability to do DLA. The Appellant said that he wakes up once or twice in the night because he has to use the bathroom, and that other medication he has been prescribed makes him sleepy.

In response to another question from the Panel about help with the DLA of housekeeping and meal preparation, the Representative said that the Appellant is unable to do any housework or meal preparation due to his back, and that she does it all. She said that if he bends for long, he gets lower back pain. The Representative also confirmed that the rails that the Appellant uses to climb stairs are standard stairway handrails.

The Panel also mentioned that the Doctor's information about the Appellant's lifting abilities was inconsistent – in the Medical Report the Doctor said that the Appellant could not lift anything, while in the Letter the Doctor said that he could not lift more than 10 lbs. for more than 10 to 15 minutes. In response, the Representative said that if she notices the Appellant trying to lift a heavy object, like a bag of soil, and then holding his back, she tells him not to try to pick it up.

The Panel asked the Appellant to explain if his physical impairments impacted his mental impairments in any way. The Representative said that the Appellant's physical problems caused stress and the stress is not easy for him to manage. The Representative said the Appellant is not eating well, and the Doctor told the Appellant to see a counsellor if he feels he needs to see one. The Representative said the Appellant doesn't talk much about his problems to anyone other than the Doctor and thinks a counsellor wouldn't be able to help.

The Panel also asked the Appellant to explain how the Appellant's mental impairments disrupted his close and extended relationships. The Representative provided an example. The Representative said that one of their daughters, who had not yet completed her education, wanted to get married, which was hard for the Appellant to accept.

At the hearing, the Ministry summarized the reasons for the Decision. The Ministry also stressed that no information was provided in the Medical Report or the Assessor Report about how much longer it takes to do the DLA that the Doctor had said it takes him significantly longer than typical. The Panel mentioned to the Ministry that the Letter said that it takes him three times as long, and the Ministry said that taking three times as long to do an activity is not considered evidence of a *severe* physical impairment.

The Ministry said that the Appellant's PWD application did not include enough information for it to determine that a significant impairment exists. In addition, there were no other medical reports submitted with the application; for example, psychiatric reports. When asked by the Panel if other medical reports from specialists were normally required to be included in a PWD application, the Ministry said they were not necessarily required but, in this case, they would have been helpful because the Doctor had not provided enough information in the Medical Report and the Assessor Report.

The Ministry also said not enough information was included with the PWD application about the Appellant's support requirements for social functioning activities or why support was needed.

The Ministry concluded by saying that the Decision is based on information provided by a prescribed professional, and if more detail had been provided by the Doctor to help the Ministry determine that the legislated requirements had been met, the Decision might have been different.

Admissibility of New Evidence

No new written evidence was provided after the Decision. New evidence presented at the hearing was information about:

- How the Appellant's sleep was affected by his medication;

- Whether the Appellant's walking abilities had changed since the Letter was written in February 2023; and
- Details about why the Appellant is continuously unable to do basic housekeeping and food preparation.

The Ministry did not object to the Panel considering any of the new evidence presented at the hearing.

The Panel decided that all the new information should be considered because it all has an impact on the Decision. The Panel assigns all the new information significant weight.

Part F – Reasons for Panel Decision

The issue in the appeal is whether the Decision was reasonable based on all the evidence or whether the legislation was reasonably applied in this case. In other words, was it reasonable for the Ministry to determine that:

- The Appellant doesn't have a severe mental or physical impairment;
- The Appellant's DLA aren't directly and significantly restricted either continuously or periodically for extended periods due to the severe impairment; and,
- It couldn't be determined that the Appellant needs help to do DLA.

ANALYSIS**Severity of Impairment**

Neither "*impairment*" nor "*severe*" are defined in the legislation. The Cambridge Dictionary defines "*impairment*" to be "*a medical condition which results in restrictions to a person's ability to function independently or effectively*" and defines "*severe*" as "*causing very great pain, difficulty, worry, damage, etc.; very serious*".

"*Impairment*" is defined in the Medical Report and the Assessor Report as "*a loss or abnormality of psychological, anatomical, or physiological structure or function causing a restriction in the ability to function independently, appropriately or for a reasonable duration*". The Panel considers the Ministry's definition of "*impairment*" to be a reasonable definition of the term in considering an applicant's eligibility for the PWD designation.

In determining PWD eligibility, the Ministry must consider all relevant evidence, which includes the Appellant's evidence. That said, the legislation says that the Ministry must make its decision based largely on the prescribed professionals' opinion.

The Ministry has determined that both the duration of the impairment criterion and the Appellant's age criterion have been met, so they are not at issue in this appeal.

Physical Functioning

The Appellant's position is that his physical impairments significantly restrict his physical functioning, but his Doctor must be relied upon to provide the necessary information because the Appellant is not medically trained.

The Ministry's position is that taking three times as long as typical to do a DLA is more an indication of a moderate physical impairment, particularly because the Appellant's ability to communicate is good, he doesn't need any assistive devices, and he is able to lift up to 10 lbs.

Panel Decision

Regarding a physical impairment, the legislation says the Ministry must be satisfied that the impairment is *severe*, and that it must *directly* and *significantly* restrict someone's ability to do their DLA either continuously or periodically for extended periods. This assessment must be made by a "*prescribed professional*", which includes a doctor.

The Ministry has designed two reports to measure physical impairment based on someone's ability to function physically. The two reports are the Medical Report and the Assessor Report. In this case, both reports were completed by the Doctor. The Medical Report and Assessor Report ask the prescribed professional to say if the person applying for PWD has any restrictions with physical functions, and to explain the restrictions or provide comments to give more detail, such as how any restrictions impact the applicant's physical abilities.

The Panel notes that the Doctor did not provide much detail about the Appellant's restrictions in his physical functioning, other than that he was able to walk on a flat surface, climb stairs, lift objects and sit, though in each case these activities were limited. Specifically, the Doctor said the Appellant could walk 1 - 2 blocks, climb 2 - 5 steps, lift up to 10 lbs., and sit for 20 - 30 minutes. None of these activities needed the use of assistive devices.

The Panel notes that the Doctor says the Appellant has to use the handrail when climbing stairs, but a handrail is not an assistive device. The term "*assistive device*" is defined in the legislation as "*a device designed to enable a person to perform a (DLA) that, because of a severe mental or physical impairment, the person is unable to perform*". A handrail is not an assistive device "*designed to allow*" someone to climb stairs. It is a safety feature designed to ensure that anyone, with or without a disability, can safely walk up or down a flight of stairs.

The Panel also notes that the Doctor said in the Medical Report that the Appellant's walking ability is progressively declining. But at the hearing, the Representative said that the Appellant is still able to walk one block unaided on a flat surface. Based on this new information, the Panel concludes Appellant's physical activity restrictions have not significantly deteriorated in recent months, as he was able to walk 1 - 2 blocks when the Doctor completed the Medical Report in November 2022.

The Ministry's conclusion that some restrictions in physical functioning, even though it takes longer to do them than typical, more closely represents a moderate impairment than a significant one is considered by the Panel to be reasonable.

The Panel finds that the Ministry's conclusion that the Appellant does not have a severe physical impairment is reasonably supported by the evidence.

Mental Functioning

The Appellant's position is that his physical disabilities cause him stress which has a big impact on his social functioning, but he is not willing to seek counselling or other professional advice to help him with his relationships.

The Ministry's position is that a mild to moderate mental impairment function has been demonstrated by the evidence presented when the Decision was made because most the Appellant's cognitive functioning is not reported to be affected.

Panel Decision

Regarding a mental impairment, the legislation says the Ministry must be satisfied that the impairment is *severe*, and that it must *directly* and *significantly* restrict someone's ability to do their DLA either continuously or periodically for extended periods. This assessment must be made by a "*prescribed professional*".

The legislation doesn't define what mild, moderate or severe cognitive deficits are. In the Medical Report and the Assessor Report, prescribed professionals are asked to say how particular mental skills are affected by a mental impairment to help the Ministry assess their severity.

The Doctor, as a prescribed professional, is best qualified to assess the severity of a person's impairments. The Panel notes that the Doctor says, in the Medical Report, that the Appellant has significant deficits with cognitive and emotional functioning in the areas of emotional disturbance and attention and concentration, and diagnosed the Appellant with depression. In the Letter, the Doctor describes the Appellant as being "very emotionally labile". The Doctor also says that the Appellant:

- "Gets easily agitated and has very fixated ideas with very little flexibility leading to the disruption of close & extended relationships";
- "Has poor insight into his behaviour; and,
- "Gets easily restless and (is) not able to remain close to his long term relationships".

The Panel finds that these descriptions cannot reasonably be found to describe anything less than a severe mental impairment.

The Panel also finds that the Ministry's conclusion that a severe mental impairment can only be demonstrated when most of the areas of an applicant's cognitive functioning are affected is not reasonable. The legislation does not put a limit on the number of areas in which an emotional or cognitive deficit must exist before it is considered severe.

For these reasons, the Panel finds that the Ministry's conclusion that the Appellant does not have a severe mental impairment is not reasonably supported by the evidence.

Restrictions in the Ability to Perform DLA

The Appellant's position is that his physical impairments have a significant impact on his ability to do the DLA of housekeeping, meal preparation, and moving around indoors and outdoors.

The Ministry's position is that, because the Appellant can independently do most DLA without needing assistive devices, he does not have significant restrictions in his ability to do DLA. In addition, it is unclear why continuous assistance is provided with meals and basic housekeeping as the functional assessments appear to indicate that the Appellant would be able to do them on his own with minimal help.

Panel Decision

After assessing the severity of an impairment, the Ministry must consider how long the severe impairment is likely to last and how much the Appellant's ability to do DLA is restricted and if they need help with DLA.

The legislation says the Ministry must be satisfied that a prescribed professional has said that an applicant's severe impairment *directly and significantly* restricts their DLA, either *continuously or periodically for extended periods*. DLA appears in the Act in the plural ("*daily living activities*"), so at least two of the DLA must be significantly restricted.

"*Directly*" means that a severe impairment must itself be the cause of any DLA restrictions. A direct restriction must also be significant and either continuous or periodic. If periodic, it must be for extended periods.

As explained above, the Panel has found that, based on all the available evidence, the Appellant has a severe mental impairment but not a severe physical impairment. Because the legislation requires that the severe impairment be the condition that *directly* causes the inability to do DLA, there must be a link between the severe impairment and the activities that are restricted. At the hearing, the Appellant and the Representative said that the Appellant's DLA restrictions were the result of his physical limitations. Specifically, he is unable to do housekeeping, prepare meals or carry purchases home because he has physical impairments that restrict his mobility. No direct connection has been demonstrated between his severe mental impairments and his ability to do DLA.

Having considered all the available evidence, the Panel finds that the Ministry's conclusion that there is insufficient evidence to confirm that the Appellant's DLA are directly and significantly restricted because of a severe impairment is reasonable.

Help with DLA

The Appellant's position is that he needs help to do the DLA of housekeeping, meal preparation and carrying purchases home due to severe restrictions in his physical functioning.

The Ministry's position is that it cannot be determined that significant help is required from other person because it has not been demonstrated that living activities are significantly restricted.

Panel Decision

Help is defined in the legislation as the need for:

- An assistive device (like a cane, for example);
- The significant help or supervision of another person; or,
- The services of an assistance animal

to do one or more DLA.

The legislation also says that a person must need help to do DLA *as a result of direct and significant restrictions in their ability to perform DLA*. So direct and significant DLA restrictions must be the cause of the need for help.

The Panel notes that the Doctor says, in the Assessor Report, that the Appellant needs continuous support or supervision in developing and maintaining relationships. The Doctor also says that the Appellant needs periodic support in interacting appropriately with others (without describing how often this periodic support is required). At the hearing, the Representative said that the Doctor had recommended counselling, but the Appellant has decided not to get any. Regardless, neither developing and maintaining relationships nor dealing appropriately with others are listed among DLA in the legislation, and no connection could reasonably be made between these two social activities and the DLA that are restricted in the Appellant's circumstances.

The Panel finds that the Ministry's conclusion that it can't determine the Appellant needs significant help because his DLA are significantly restricted because of a severe impairment is reasonable.

Conclusion

Based on all the evidence and legislation, the Panel finds that the Decision was reasonably supported by the evidence and was a reasonable application of the legislation and therefore confirms the decision. The Appellant's appeal, therefore, is not successful.

Appendix – Relevant Legislation

The criteria for being designated as a PWD are set out in Section 2 of the Act as follows:

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 Employment and Assistance for Persons with Disabilities Regulation provides as follows:

Definitions for Act

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

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

activities:

(i) prepare own meals;

(ii) manage personal finances;

(iii) shop for personal needs;

(iv) use public or personal transportation facilities;

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

(vi) move about indoors and outdoors;

(vii) perform personal hygiene and self care;

(viii) manage personal medication, and

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

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

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

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

(a) authorized under an enactment to 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 ...

The *Employment and Assistance Act* provides as follows:

Panels of the tribunal to conduct appeals

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 2023-0116

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

Simon Clews

Signature of Chair

Date (Year/Month/Day)

2023/05/15

Print Name

Bill Haire

Signature of Member

Date (Year/Month/Day)

2023/05/15

Print Name

Erin Rennison

Signature of Member

Date (Year/Month/Day)

2023/05/15