

Part C – Decision Under Appeal

The decision under appeal is the Ministry of Social Development and Poverty Reduction (“the Ministry”) decision dated April 27, 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)

Full text of the Legislation is in the Schedule of Legislation at the end of the Reasons.

Part E – Summary of Facts

The hearing took place by teleconference. The Appellant attended with an interpreter, who joined from a separate location.

Evidence Before the Ministry at Reconsideration:

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

- Medical and Assessor Reports completed by the Appellant’s Doctor
- Appellant’s Self Report
- Appellant’s written statement in her Request for Reconsideration.

Medical Report:

The Doctor stated that the Appellant has been their patient for two or more years, and they have seen her eleven or more times in the past twelve months.

Diagnosis:

The Doctor states a diagnosis of left shoulder partial thickness rotator cuff tears, onset February 2022.

Health History:

The Doctor states:

- The Appellant was unable to work due to left shoulder pain because her job involves heavy lifting.
- The left shoulder injury caused pain in the Appellant’s right arm “due to overuse by compensation.”
- The Appellant has been prescribed “time off work & modified duties”, physiotherapy, referral to an Orthopedic Specialist for intraarticular steroid injections, and pain medication.
- The Appellant does not need any prostheses or aids for their impairment.
- The Appellant is unable to move her left shoulder despite all the treatments indicated.
- “Any use of left shoulder at work has caused significant pain and missed work to recover.”

Functional Skills:

The Doctor indicates that the Appellant can:

- Walk 4+ blocks unaided on a flat surface
- Climb 5+ stairs unaided
- Do no lifting from her left arm or shoulder
- Remain seated with no limitation.

They indicate that the Appellant has no significant deficits with cognitive and emotional functioning.

Daily Living Activities:

The Doctor indicates that the Appellant is periodically restricted in personal self care, meal preparation, basic housework, and daily shopping. They explain: “anything that requires use of her left arm gets affected if her left shoulder pain flares due to use/overuse. Moderate to severe restrictions depending on use of left arm.”

In answer to the question about the assistance the Appellant needs with daily living activities, the Doctor states that the Appellant needs help for cutting and mixing food when preparing meals, lifting groceries and household work.

Additional Comments:

The Doctor states that the Appellant’s inability to use her left shoulder fully has caused her to miss work and spend a lot on treatments. They also state that her condition has impacted the Appellant emotionally as it has caused her “a lot of distress and concerns,” affecting her mood and energy.

Assessor Report:

The Doctor also completed the Assessor Report. The Doctor indicates that the Appellant lives alone.

Mental or Physical Impairment:

The Doctor states that the Appellant has left arm pain due to a rotator cuff injury, limiting use of her left arm. They state that the Appellant is “sometimes unable to complete basic house chores due to this.”

Mobility and Physical Ability:

The Doctor indicates that the Appellant is independent in walking indoors and outdoors, climbing stairs and standing. They indicate that she needs periodic assistance from another person for lifting, carrying, and holding, “depending on the weight of the load.”

Cognitive and Emotional Functioning:

The Doctor indicates moderate impact on emotion, and no impact in the other areas of cognitive and emotional functioning listed on the form. They comment that “due to the physical limitation, her work has been affected resulting in financial stress causing anxiety and depression.”

Daily Living Activities:

The Doctor indicates that the Appellant is independent in personal care, meals, paying rent and bills, medications, transportation, and social functioning. They indicate that the Appellant needs periodic assistance from another person for basic housekeeping, laundry, and carrying purchases home from the store. They state: “Requires help with lifting and carrying anything heavy that needs both arms. Able to lift with R arm but continuous use of R arm also results in discomfort.”

Assistance Provided for Applicant:

The Doctor indicates that the Appellant’s child provides help required for daily living activities.

Self Report:

The Appellant states:

- She has a severe issue with her left rotator cuff, which she thinks was caused by moving heavy items and operating heavy equipment at work;
- Her main symptoms are severe pain and weakness in her left arm, shoulder and back;
- She also has fatigue, soreness on the left side of her arm and decrease in mobility in both arms;
- She compensates by using her right arm more, which results in more fatigue and weakness;
- She has had little improvement from treatments including steroid injections and physiotherapy;
- She also uses hot and cold compresses, massage machines and stretching exercises;
- She has sleep apnea;
- The effort of trying to engage in daily activities compounds over the day, so that by the end of the day she is very tired;
- Fatigue and pain continue through the next day and she often needs to take extended rests and time off to recover enough to complete everyday tasks and continue her employment;
- She needs help from others, such as her child, to do tasks she would normally have been able to do by herself;
- Everyday tasks requiring lifting, reaching, or sustained holding of any weight, in daily living activities such as cooking, laundry, sweeping, mopping, and folding clothes, quickly accelerate pain in her arms.

Request for Reconsideration:

The Appellant states:

- She has continuous, radiating pain in her left arm and back, with accompanying weakness, fatigue, aching and significant limitation in mobility;
- Sometimes when the arm and shoulder issue flares, she is “immobilized in pain for a period of usually a week because [she] can’t do anything due to the severity of the pain”;
- Holding a cell phone in her hand for five minutes causes increased aching and pain;
- The combined effect of left arm and shoulder pain and sleep apnea means that she gets very little comfortable sleep and has little energy to do daily tasks;
- She has persistent pain and stiffness in her right arm, which has been strained because she cannot bear any weight with her left arm;
- At times she cannot open doors, drawers, and cabinets;
- With minor flare up of pain, she cannot reach for items at shoulder or waist height;
- She needs constant assistance, which she receives from her youngest child;
- Her youngest child does the following tasks that the Appellant can no longer do:
 - Sweeping
 - Mopping
 - Getting and putting away groceries
 - Cooking
 - Laundry
 - Throwing out garbage;

- Another child and their spouse also help with tasks such as:
 - Meal preparation
 - Carrying bags
 - Shopping for groceries
 - Running errands;
- She struggles with self-care activities such as dressing and driving for long periods;
- She has had to take time off work, or leave work early, because the work regularly causes flare ups;
- She can barely work a four-hour shift, but she persists because she needs the income.

Additional Evidence:

Appellant:

At the hearing, the Appellant said:

- She cannot pay her bills with the amount of money she receives from the Ministry;
- She finds it hard to explain how much pain she has.

In answer to questions from the Panel, the Appellant said:

- She can only use her right hand to cook;
- Her youngest child is 19 years old, and lives with her;
- Her youngest child helps her to clean the house once a month;
- She works one four-hour shift a week at a food court vendor, where she is limited to taking orders at the front counter, on her doctor's orders;
- At the end of the work day her pain is worse, and then she must rest for two days for the pain in her arm, back and legs to settle down
 - During that time, she has to stay in bed, rest and not do anything.

Admissibility of Additional Evidence:

The Ministry did not object to the additional oral evidence of the Appellant.

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 she has severe pain and limited mobility in her left arm and shoulder. Compensating for that limitation has caused pain and soreness in her right arm, back and legs. When she has a flare up of pain, she is not able to do anything for between two days and a week. Her pain and fatigue, and financial stress because of her inability to work, also affect her mental health, and make her anxious and depressed. Her family has to help her with daily living activities she cannot do, including most housework, meal preparation and any other activity that requires reaching, lifting, and holding items. Therefore, the Appellant maintains that she meets the criteria for PWD designation.

Ministry Position:

The Ministry maintains that the Appellant's physical impairment is moderate, rather than severe. While the Ministry acknowledges that the Appellant has limitations to physical functioning due to limited range of motion and pain in her left arm, they note the information from the Doctor about the Appellant's ability to walk, climb stairs, stand remain seated, with no restrictions noted for those activities, and says that the information provided does not establish a severe overall impairment. While the Appellant and the Doctor report that the Appellant is not able to work, the Ministry maintains that employability is not one of the considerations for PWD designation.

The Ministry argues that there is no diagnosis of a mental health condition to indicate a severe mental impairment. They also note that the Doctor indicates only one impact on cognitive and emotional functioning, that being a moderate impact on emotion, with anxiety and depression related to financial stress. Therefore, the Ministry says that the information provided does not establish that the Appellant has a severe mental impairment.

The Ministry also says that the information provided does not indicate direct and significant restrictions in daily living activities. Therefore, 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.

- *Physical Impairment:*

The Appellant cannot use her left arm or shoulder due to the injury to her rotator cuff. She has pain and discomfort not only in her left arm and shoulder, but also in her right arm due to overuse, as she compensates for being unable to use her left arm. The Appellant reports constant radiating pain in her left arm and back. The Doctor describes the restriction as moderate to severe, and states that the Appellant cannot do any activity that requires reaching or lifting with her left arm. Her weekly four-hour shift with light duties, as a front counter worker at a food court vendor, causes pain to flare up in her arms, back and legs. When she has a flare up of pain, she has to go to bed and rest for anywhere between two days and a week. During that time, she cannot do anything, describing herself as “immobilized.”

The Panel notes that the Appellant describes issues related to sleep apnea. However, as the Doctor has not provided a diagnosis of sleep apnea and does not describe any impairment due to that condition, the Panel finds that the Ministry was reasonable in considering only the impairment arising from the rotator cuff injury.

However, the Panel finds that the Ministry was not reasonable in its determination that, based on the information in the Doctor’s reports, and the additional detail provided by the Appellant, the Appellant’s physical impairment is moderate rather than severe. The Panel finds that the Appellant has a severe physical impairment arising from the injury to her left arm and resulting

pain and limitation in her right arm and back, due to the need to compensate for that injury. The Panel finds that the degree of restriction described by the Doctor, the length of recovery after only light duties, and the inability to function during that recovery time, indicate a severe physical impairment.

- *Mental Impairment:*

The Doctor does not diagnose a mental condition, though they state that the Appellant has feelings of anxiety and depression because of financial stress. Although they note a moderate impact on the appellant's emotional state, the Doctor indicates no significant deficits with cognitive and emotional functioning. The Panel finds that the Ministry was reasonable in its determination that the information provided does not indicate 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 inability to work and financial need are not listed as Activities and are only relevant to the extent that they impact listed Activities.

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 Panel notes that there are inconsistencies between the Medical Report and the Assessor Report, as the Doctor has completed the sections about Activities in both reports. In the Medical Report, the Doctor indicates that the Appellant is periodically restricted in personal self care, meal preparation, basic housework, and daily shopping. In the Assessor Report, the Doctor indicates that the Appellant is independent in all Activities except laundry, basic housekeeping and carrying purchases home. The Appellant says that she is unable to do sweeping, mopping, getting and putting away groceries, cooking, laundry and throwing out garbage. She says she struggles with "basic self-care activities such as dressing." Her pain flares up regularly, particularly after a four-hour shift at the food court, and then, for between two days and one week, she is not able to do any Activities.

The statements in the Doctor's Medical Report are more consistent with the Appellant's written statements and oral evidence at the hearing. The Panel also notes that the Medical Report as a whole appears to have been completed more thoroughly than the Assessor Report, with more description and explanation of the Appellant's condition and her ability to perform Activities. Therefore, the Panel places greater weight on the Medical Report than on the Assessor Report, when determining if the Appellant is significantly restricted in performing Activities.

In the Medical Report, the Doctor provides the opinion that the Appellant is restricted in the following Activities:

- Prepare own meals
- Shop for personal needs
- Perform housework to maintain the person's place of residence in acceptable sanitary condition
- Perform personal hygiene and self care.

The Appellant has provided further details about the extent of those restrictions, including her inability to do any Activities when she frequently has flare up of pain and has to rest in bed for days.

At the hearing, the Ministry maintained that, for the Ministry to determine that she was restricted periodically for extended periods, the Appellant would have to be restricted at least 51% of the time. The Panel notes that this benchmark is not found in the legislation and would not find it reasonable to apply an arbitrary percentage in determining if an applicant is restricted for extended periods. In any event, the Panel finds that the Appellant is significantly restricted in performing Activities periodically for extended periods when her pain flares up, which happens on a weekly basis and lasts for at least two days. The Panel finds that the Ministry was not reasonable in determining that the Appellant's Activities are not significantly restricted either continuously or periodically for extended periods.

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.

The Panel has found that the Appellant's ability to perform Activities is directly and significantly restricted by a severe physical impairment. The Doctor confirms that the Appellant's family provides the help the Appellant needs to perform Activities. The Appellant's youngest child does the housework and helps with cooking, as the Appellant cannot cut or mix food. Other family members help with shopping, as the Appellant cannot lift or carry groceries. The Panel finds that the Appellant receives significant help from others to prepare meals, perform housework and shop for personal needs.

Conclusion:

The Panel finds that the Ministry's decision to deny the Appellant PWD designation 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.

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.

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)
2023/05/29

Print Name
Rick Bizarro

Signature of Member

Date (Year/Month/Day)
2023/05/29

Print Name
Katherine Wellburn

Signature of Member

Date (Year/Month/Day)
2023/05/29