

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

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

The Ministry found that the Appellant met the age (over 18) and duration (impairment to last 2 years) 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);
- The Assessor Report, dated November 24, 2022, also completed by the Doctor;
- The Self Report, dated April 27, 2023, and completed by the Appellant;
- The Appellant's request for reconsideration (the Reconsideration Request), dated April 27, 2023, which explains why she wanted the Ministry to reconsider its original decision. Information in the Reconsideration Request is summarized in the appropriate sections of the discussion below.

**Diagnoses**

In the Medical Report, the Doctor says the Appellant has bilateral knee deformities and osteoarthritis. The Doctor does not provide the date of onset for either of these impairments. In the "Diagnoses" part of the Medical Report, the Doctor has also indicated that the Appellant had a knee replacement in August 2022.

**Severe Physical Impairment**

In the Medical Report, the Doctor says the Appellant has long-standing bilateral knee deformities and osteoarthritis, and that she has recently had a knee replacement, adding *"even after the knee replacement she still has significant mobility issues and needs (a) longer rehabilitation to recover and improve mobility. She has limitation in standing more than 30 minutes, sitting 1 - 2 hours (then had pain in the knee). Cannot walk for more than 30 minutes"*.

The Doctor says the Appellant can:

- Walk less than one block on a flat surface without help;
- Climb 2 to 5 steps;
- Lift 2 to 5 kg; and,
- Remain seated for 1 to 2 hours.

In the Assessor Report, the Doctor says (with comments in *italics*) the Appellant needs periodic assistance from another person when walking outdoors, and is independent with all other listed physical activities (climbing stairs [*limited to 2 - 5 stairs*], standing, and lifting, carrying and holding [*limited to 2 - 5 kg*]).

In the Self Report the Appellant said that in 2018 she started having really bad knee pain and saw a surgeon in 2019, following which she had a left knee replacement.

She said:

- Walking is very hard (she can't run);
- When she sits for a while it's hard to get up and get moving;
- She doesn't do stairs very well;
- Sometimes it feels like her right knee is going to collapse; and,
- Her knees start to hurt when she stands for a long time.

In the Reconsideration Request, the Appellant said that in 2018 she was working as a housecleaner, and had to find a different job because when she had to clean bathrooms on her hands and knees she experienced really bad knee pain. She said she has difficulties in her new job because she has to stand and walk all day at work and is expected to lift heavy objects, weighing up to 50 lbs.

After seeing a doctor in 2019 she was given cortisone shots, which didn't help much. She was put on a wait list for knee surgery, which she finally got in August 2022. Since then she has not had significant improvement and still has severe mobility issues: she can't stand for more than 30 minutes, and walking for more than 30 minutes causes her extreme pain that lasts for hours.

### **Severe Mental Impairment**

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

In the Assessor Report, the Doctor says the Appellant's writing, speaking, reading, and hearing abilities are good, but she has "*developed anxiety due to the physical pain. Has family challenges, financial difficulties*".

In the Assessor Report, the Doctor also says the Appellant's mental impairment has no major or moderate impacts, and a minor impact on her emotional functioning. The Doctor says there are no impacts in any other areas.

In assessing the Appellant's social functioning abilities, the Doctor says the Appellant is independent in all listed areas. The Doctor also says the Appellant has good functioning with both her immediate and extended social networks.

In the Reconsideration Request, the Appellant says that her physical impairments have given her severe anxiety and depression. She also says that the Doctor prescribed

antidepressants which helped her some. But she says she still has difficulty *"functioning on a daily basis"*, and she is not physically or emotionally able to return to work yet.

### **Restrictions in the Ability to Perform DLA**

In the Medical Report, the Doctor says the Appellant has not been prescribed any medications that interfere with her ability to do DLA. The Doctors also says that the Appellant requires continuous assistance with the DLA of meal preparation, basic housework, daily shopping, and mobility outside the home.

In the Assessor Report, the Doctor says that the Appellant has the following abilities with DLA:

- **Perform personal hygiene and self care** – Independent (no assistance required)
- **Perform housework to maintain the person's place of residence in acceptable sanitary condition** - Requires periodic assistance with laundry, and continuous assistance from another person or is unable to do basic housekeeping;
- **Shop for personal needs** - Requires continuous assistance from another person or is unable to go to and from stores or carry purchases home;
- **Prepare own meals** - Requires periodic assistance with food preparation and cooking;
- **Use public or personal transportation facilities** – Requires periodic assistance with getting in and out of a vehicle, using public transit, using transit schedules, and arranging transportation;
- **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 (no assistance required);
- **Relate to, communicate or interact with others effectively** - See Doctor's comments in the "Severe Mental Impairment" section above.

In the Self Report the Appellant says she finds it hard to stand for a long time when cooking dinner and doing dishes, and when she goes shopping her knees get really sore (*"pain level +25"*). She also says that getting off the bus is hard.

In the Reconsideration Request, the Appellant says her family doesn't own a car, and getting on and off the bus is very difficult.

***Need for Help***

In the Medical Report the Doctor says the Appellant might benefit from a knee brace or a cane. The Doctor also says that her husband sometimes helps with some of her DLA, adding "*No assistance at this time*".

In the Assessor Report, the Doctor says the Appellant gets help with her DLA from family and friends, and routinely uses a cane and knee brace.

***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 says that she will rely on the earlier submissions (her Self Report and Reconsideration Request, together with the Medical Report and the Assessor Report), adding "*I am still unable to work, my knees are extremely sore. Mentally unstable. Distraught*".

**Evidence Presented at the Hearing**

At the hearing, the Appellant summarized her evidence as presented in the Self Report and the Reconsideration Request. She said that she was supposed to go back to work in March 2023, but she is still unable to go back to work. The Appellant also said that she is now on the waiting list for a right knee replacement, and that she has rheumatoid arthritis in the right knee, which causes her to limp. She also said her left knee is still hurting.

The Appellant said that she fell of the bus once and now always exits the bus from the front, where there is a step that the driver can lower that makes it easier for people with disabilities. She said that she has recently bought 5 lb. weights she uses to do leg exercises. She also said that a friend now sometimes gives her a ride to the grocery store because she has difficulties taking the bus and she can't afford to take a taxi. She talked about the financial challenges her family is facing, explaining that her husband had no full time work for a while and the family is barely able to cover their living expenses now that she is unable to work.

The Appellant said she has seen a surgeon about her right knee problems and wants to arrange for him to take X-Rays of the knee so that she can send it to the Ministry so they know how bad it is and can see she isn't lying. She said that her physical impairments have made her depressed and anxious.

The Ministry asked the Appellant if her physical or mental impairments had changed since she filed her PWD application. The Appellant said that over the past few months she has developed problems with her left hand. She said she can't feel her fingers and she experiences a burning sensation in one of her hands. She also said that her right knee is worse than it was.

The Ministry also referred to the evidence about her walking abilities, noting that the Doctor said that she could only walk for 30 minutes and had to rest after walking only one block. The Ministry asked the Appellant how long she had to rest after walking a block, and the Appellant said 5 to 10 minutes. The Ministry also asked the Appellant if she now uses any aides for her physical impairments. The Appellant said that she didn't, and that she wants to get a cane but she can't afford one.

The Panel asked how often the Appellant needs help with her DLA of meal preparation, basic housekeeping, and shopping. The Appellant said that she sometimes needs help a couple of times a day. The Appellant said that sometimes when doing the dishes she has to sit down for 3 to 5 minutes at a time because it's hard to stand. She said she wants to go for walks with her husband and daughter but she can't, adding that she *"wants to be out and about but her body won't let her"*.

The Panel referred to the Ministry's suggestion in its decision that she might want to consider applying for the persons with persistent barriers (PPMB) to employment designation, and the Appellant said she hadn't applied for it. The Ministry said that she could contact the Ministry at its toll free phone number and get started on an application for that benefit. The Appellant said she had the number and would consider applying.

In response to another question from the Panel, the Appellant said that the DLA help she got from her husband was having him carry the laundry to the washing machine and dryer, carrying groceries home from shopping, and lifting and carrying other heavy objects.

At the hearing, the Ministry summarized the reasons as stated in the Decision.

### **Admissibility of New Evidence**

There was no new evidence contained in the notice of appeal. The new evidence presented at the hearing was that the Appellant now requires a right knee replacement for which she is on a waiting list. The Ministry did not object to the Panel considering the new evidence. The Panel considered the new evidence admissible because it has an impact on the Decision. However, the Panel assigns little weight to the new evidence because it has not been confirmed by a prescribed professional.

## 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 a 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 her left knee still causes her a lot of pain and she has not seen much improvement since her operation in August 2022. In addition, she now needs a replacement of her right knee, and she is unable to return to work because she still has severe mobility issues.

The Ministry's position is that, while it recognizes that the Appellant still has significant mobility issues after her knee surgery, with a need for longer rehabilitation, the limits in her functional skills and mobility as reported by the Doctor do not take her significantly longer than normal, and she does not have to use any assistance devices. The Ministry

concludes that the Appellant's physical impairments at most support a mild-to-moderate physical impairment overall. The Ministry also takes the position that employability is not a factor when assessing for the PWD designation.

### *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 three reports to measure physical impairment based on someone's ability to function physically. The reports are the Medical Report, the Assessor Report and the Self Report, which is prepared by the PWD applicant. In this case, the Medical Report and the Assessor Report 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 giving more detail, such as how any restrictions impact the applicant's physical abilities.

In the Decision, the Ministry says the Doctor has not indicated how much longer it takes the Appellant to manage the activities of walking indoors and outdoors, climbing stairs, lifting or carrying and holding. In addition, the Ministry notes that the Doctor has said the Appellant does not need to use any assistive devices. The Ministry concludes that "*being able to walk up to 30 minutes unaided, lift 5 to 15 lbs, climb 2 to 5 stairs unaided, and sit 1-2 hours is not a severe physical impairment*". As a result, the Ministry said it could not determine if the Appellant's physical impairments represent a significant restriction in her overall level of physical functioning. The Panel finds that the Ministry's conclusion is reasonable based on all the available evidence.

While the Appellant provided additional details about the impact of her physical disabilities on her physical functioning at the hearing, the Panel notes that those additional details (i.e., she feels she would benefit from the use of a cane but doesn't currently have one, she has to rest for a few minutes after walking a block, and she has to sit down for a few minutes and rest when cooking) do not reasonably suggest she has a *severe* physical impairment.

Based on all of the available evidence, the Panel finds that the Ministry reasonably determined that the Appellant does not have a severe physical impairment.



**Mental Functioning**

The Appellant's position is that she is suffering from severe anxiety and depression resulting from her physical pain and she is not emotionally able to return to work yet.

The Ministry's position is that the Doctor has not diagnosed the Appellant with any mental or cognitive impairments. As a result, the Ministry determined a severe mental impairment has not been established.

***Panel Decision***

As with a physical impairment, the legislation also says the Ministry must be satisfied that any mental 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 also 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 mental skills are affected by a mental impairment to help the Ministry assess the applicant's severity.

The Doctor, as a prescribed professional, is best qualified to assess the severity of a person's impairments. The Panel notes the absence of a diagnosis of any mental or cognitive impairments in the Medical Report or the Assessor Report, and the Doctor's comment in the Assessor Report that the Appellant has "*developed anxiety due to the physical pain. Has family challenges, financial difficulties*". This suggests that any mental impairments are a direct result of her physical impairments. In addition, the Doctor says in the Assessor Report that the Appellant is independent in all social functioning abilities, and has good functioning with both her immediate and extended social networks.

Based on all the available evidence, the Panel finds that the Ministry reasonably determined that the Appellant does not have a severe mental impairment.

**Restrictions in the Ability to Perform DLA**

The Appellant's position is that she has to rest often when walking, she finds it hard to stand for a long time when cooking dinner or doing dishes, her knees get really sore when she goes shopping, and getting off the bus is hard.

The Ministry's position is that it is unclear why the Doctor has indicated that continuous assistance is required with housekeeping and shopping DLA, given her functional skills as reported, which supports only a need for periodic assistance in these areas. The Doctor indicates minimal issues with mobility inside the home, ability to walk, and lift. In addition, employability is not a factor in determining PWD eligibility.

*Panel Decision*

After assessing the severity of an impairment, the Ministry must consider how long the severe impairment is likely to last, how much the applicant's ability to do DLA is restricted, and if they need help with DLA. DLA appears in the Act in the plural ("*daily living activities*"), so at least two of the DLA must be significantly restricted.

Regarding a direct restriction in someone's ability to do their DLA, the phrase "*directly ... restricted*" in the legislation 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.

It is reasonable for the Ministry to have to know how much longer than typical DLA activities take in order to help it determine whether the Appellant's restrictions in physical functioning are severe, as the legislation requires. The Ministry relies primarily on a prescribed professional, in this case the Doctor, for this information.

While space is provided in the Assessor Report for the Doctor to give comments or explanations, and the term "*periodic assistance*" is defined, the Panel notes that the Doctor has not provided any indication of the frequency or extent of her need for periodic assistance with laundry, food preparation, cooking, or all aspects of using transportation facilities. The Ministry would reasonably have to know this information to determine if Appellant's restrictions were for extended periods. In addition, the Panel notes that, in the Medical Report, the Doctor has said that the Appellant needs *continuous* assistance with most of these DLA, without further explanation.

At the hearing, the Appellant provided further detail about the frequency and extent of her periodic restrictions and her need for continuous assistance in her ability to perform DLA as follows:

- **Perform housework to maintain the person's place of residence in acceptable sanitary condition** – Sometimes requires assistance from her husband with laundry and basic housekeeping;
- **Shop for personal needs** – Sometimes gets assistance from a friend in getting to and from stores, and assistance from her husband in carrying purchases home;
- **Prepare own meals** – Needs to sit down for a few minutes when cooking food and is sometimes assisted with cooking and food preparation by her husband;
- **Use public or personal transportation facilities** – Now gets off at the front of the bus where the driver can lower the stairs when using public transit;
- **Move about indoors and outdoors** – Can only walk for 30 minutes and has to rest for a few minutes every block or so.

The Panel notes that the legislation required that periodic restrictions in ability to perform DLA must be both frequent and for extended periods.

Given all the available evidence, including the Appellant's explanations of frequency and duration of periodic impairments as expressed at the hearing, the Panel finds that the Ministry was reasonable in determining that it has not been demonstrated that the Appellant's impairments directly and significantly restrict DLA continuously or periodically for extended periods.

### **Help with DLA**

The Appellant's position is that she needs her husband's help with laundry and carrying heavy objects, and while she can't afford a cane, she thinks she would benefit from using one.

The Ministry's position is that the Doctor has indicated that the Appellant does not use any assistive devices and has provided conflicting information about the amount of help required from other persons. In addition, the Ministry determined it cannot be demonstrated that significant help is required from another person because the Ministry did not find that DLA are significantly restricted.

### *Panel Decision*

Help is defined in the legislation as the need for:

- An assistive device;
- 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 said in the Assessor Report that the Appellant routinely uses a cane and knee brace, but the Appellant said at the hearing that she doesn't currently use a cane.

As the Panel finds that the Appellant's impairments do not directly and significantly restrict her DLA continuously or periodically for extended periods, the Panel also finds that the Ministry reasonably determined it cannot be demonstrated that significant help is required from another person.

### **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 2023-0133

**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)

2023/06/01

Print Name

Kevin Ash

Signature of Member

Date (Year/Month/Day)

2023/06/01

Print Name

Dawn Wattie

Signature of Member

Date (Year/Month/Day)

2023/06/01